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Bringing Structure to the Law of Injunctions Against Expression

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ARTICLES

BRINGING STRUCTURE TO THE LAW OF INJUNCTIONS AGAINST EXPRESSION

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The Supreme Court's First Amendment jurisprudence regarding injunctions is in disarray. We know, or think we know, that the Court heavily disfavors injunctions against expression. In several high-profile cases the Court has refused to enjoin speech even though it might have resulted in significant harm.[1] Injunctions, the Court has concluded, amount to prior restraints[2] and thus involve the "most serious and least tolerable infringement on First Amendment rights."[3]

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[1] *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (holding that presumption against imposing a prior restraint had not been overcome and reversing prohibition against reporting on mass murder trial proceedings); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) (vacating injunction against peaceful distribution of information describing defendant's blockbusting real estate practices); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931) (vacating injunction under Minnesota statute that allowed injunctions against the publication of newspapers found to be malicious or scandalous).

[2] Prior restraints are "administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." Alexander v. United States, 509 U.S. 544, 550 (1993) (quoting MELVILLE NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.03, at 4-14 (1984)).

[3] *Nebraska Press*, 427 U.S. at 559; *see also* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression . . . bear[s] a heavy presumption against its constitutional validity."); Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1, 2 (1989) ("So strict is the scrutiny applied

The association between court orders against expression and prior restraints is so strong that, although the doctrine of prior restraint originally referred to official licensing schemes,[4] "today [it] is understood by many people to mean chiefly a rule of special hostility to injunctions."[5] Yet the Court's actual practice does not reveal an unyielding hostility to injunctions. Rather it has upheld some injunctions pertaining to expression with seeming ease.[6]

Nevertheless, the Court's anti-injunction rhetoric endures, both in its cases and in popular thought. The Court's dicta, for example, refer to injunctions as "classic examples of prior restraints."[7] Scholars also often equate the two.[8] Even authors of First Amendment textbooks focus almost exclusively on the Court's prior restraint decisions, thus cementing the notion that injunctions are primarily important for their role in that doctrine.[9]

This phenomenon is largely due to the Court's failure to attempt a concrete explanation or synthesis of its injunction decisions. The

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under the doctrine that the Supreme Court has never upheld a law that it has characterized as a prior restraint on pure speech.").

[4] *See* Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 650-52 (1955) (noting that the doctrine of prior restraint evolved from the historical licensing requirements and restrictions on printing in Europe and England).

[5] John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 426 (1983).

[6] *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (upholding protective order against newspaper prohibiting dissemination of discovered information before trial); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) (holding that an order prohibiting placement in sex-designated columns of advertisements for non-exempt job opportunities did not infringe the newspaper's rights); Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941) (upholding injunction prohibiting picketing near defendant's dairy and vendor's store).

[7] *Alexander*, 509 U.S. at 550.

[8] *See, e.g.*, DOUGLAS W. KMIEC & STEPHEN B. PRESSER, THE AMERICAN CONSTITUTIONAL ORDER 960 (1998) (characterizing a recent case as a prior restraint decision because it involved an injunction); Lynn D. Wardle, *The Quandary of Pro-Life Free Speech: A Lesson from the Abolitionists*, 62 ALB. L. REV. 853, 909 (1999) (describing Court's decision to uphold an injunction as a finding that "such a prior restraint [was] necessary"); Stacy R. Horth-Neubert, Note, *In the Hot Box and on the Tube: Witnesses' Interests in Televised Trials*, 66 FORDHAM L. REV. 165, 190 (1997) ("The commonly recognized illustration of a 'prior restraint' is a court injunction against the publication of information.").

[9] *See, e.g.*, ARNOLD H. LOEWY, THE FIRST AMENDMENT 625-55, 691-721 (1999) (citing prior restraint cases *Near* and the *Pentagon Papers Case*); STEVEN H. SHIFFRIN & JESSE H. CHOPER, THE FIRST AMENDMENT 335-40, 354-63, 415 (2d ed. 1996) (same); KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 252-56, 341-55 (1999) (same). Only one textbook questions the relationship between injunctions and prior restraints in depth. *See* GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT 123-29 (1999). Even this textbook, however, relegates discussion of non-prior restraint injunctions to the note materials while prominently featuring the prior restraint cases. *Compare id.* at 127-29 *with id.* at 88-98, 123-25. This is not to say that these authors do not differentiate between injunctions or that they are unaware of the non-prior restraint decisions. This survey of textbooks merely highlights the manner in which teaching materials emphasize, perhaps unwittingly, the equation of injunctions and prior restraints.

Court's prior restraint cases have little content.[10] They neither set forth nor analyze factors regarding when or why injunctions amount to prior restraints, and they simply ignore contrary decisions involving injunctions. The decisions refusing to equate injunctions with prior restraints suffer from similar failures—dismissing First Amendment objections out-of-hand or with brief and unilluminating statements that these injunctions are different. As each line of cases evolved distinctly, the relatively high-profile prior restraint cases (as compared to the mundane non-prior restraint decisions)[11] ultimately resulted in the rhetorical equation of injunctions and prior restraints.

The abortion protestor cases of the 1990s presented the Court with an opportunity to clarify its injunctions jurisprudence in yet another high-profile setting.[12] Unfortunately, the Court did not seize the opportunity. In upholding portions of an injunction restricting expressive protest activity, the majority in *Madsen v. Women's Health Center, Inc.*[13] reaffirmed the prior restraint doctrine's vitality while simultaneously rejecting the equation of injunctions and prior restraints.[14] As in past decisions, *Madsen* never explained the basis of its distinction between injunctions. To be sure, the Court placed great emphasis on content discrimination principles,[15] intimating that part of the injunction in question was acceptable as a content-neutral time,

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[10] See OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 69-74 (1978), for criticism of the Court's equation of injunctions and prior restraints. *See also* Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 14 (1981) (arguing that close identification of injunctions with licensing systems is a matter of "rhetorical flourish" rather than careful analysis); Jeffries, *supra* note 5, at 417 (arguing that the Supreme Court has failed to explain why injunctions should be presumptively unconstitutional as prior restraints); William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions Against Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 247 (1982) (arguing that only overbroad injunctions, rather than injunctions generally, should be considered part of prior restraint doctrine).

[11] Almost all of the significant scholarship regarding injunctions focuses on the prior restraint decisions. *See* sources cited *supra* note 10.

[12] *See* Christina E. Wells, *Of Communists and Anti-Abortion Protestors: The Consequences of Falling into the Theoretical Abyss*, 33 GA. L. REV. 1, 25-30 (1998) (discussing public attention toward protests).

[13] 512 U.S. 753 (1994).

[14] *See id.* at 763 n.2 (noting that not all injunctions that may incidentally affect expression are prior restraints).

[15] Content discrimination principles distinguish between laws aimed at the content of the speech ("content-based regulations") and those affecting speech but not aimed at its content ("content-neutral regulations"). These regulations are judged under different standards—strict scrutiny for content-based regulations, and a lower standard for content-neutral regulations. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994). See generally Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 173-77 (1997); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189-90 (1983), for discussions of content discrimination principles.

place and manner regulation[16] while the remainder, being content-based, was an illegitimate prior restraint.[17]

But *Madsen* did not establish whether content discrimination principles supplant or work alongside the prior restraint doctrine. The Court's failure to clarify this particular point has significant ramifications. The two doctrines are distinct, and *Madsen*'s rhetoric leaves lower courts with little guidance as to how to integrate them.[18] Subsequent Supreme Court actions suggest that the Justices themselves disagree regarding their operation.[19] Yet in its most recent pronouncement on injunctions, the Court simply reiterated *Madsen*'s standard without elaboration.[20]

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[16] *See Madsen*, 512 U.S. at 764-65.

[17] See *id.* at 763 n.2 (distinguishing cases invalidating content-based injunctions as prior restraints from *Madsen*, wherein the injunction was not based on the content of expression but was issued in response to prior unlawful conduct).

[18] Lower court decisions since *Madsen* reflect this confusion. *See infra* notes 153-55 and accompanying text.

[19] In opinions related to the denial of certiorari, for example, Justices Thomas and Scalia interpret *Madsen*'s impact on the prior restraint doctrine differently. Justice Thomas assumes that the content-based/content-neutral distinction marks the difference between a prior restraint and a non-prior restraint. *See* Avis Rent A Car Sys., Inc. v. Aguilar, 120 S. Ct. 2029, 2032 n.2 (2000) (Thomas, J., dissenting from denial of cert.). It is unclear whether he thinks prior restraints should be judged by a higher standard than the strict scrutiny used with content-based regulations. *See id.* Justice Scalia, conversely, argues that "all speech restricting injunctions are prior restraints in the literal sense." Lawson v. Murray, 515 U.S. 1110, 1113 (1995) (Scalia, J., concurring in the denial of cert.). Accordingly, content discrimination principles are not "conclusive of the validity of prior restraints," which must be judged by a higher standard. *Id.* at 1115.

[20] *See* Schenck v. Pro-Choice Network, 519 U.S. 357, 372 (1997) (citing *Madsen*'s test for content-neutral injunctions).

The Court is not alone in its failure to attempt a synthesis of its injunction decisions. Scholars discussing *Madsen* are largely indifferent to such a synthesis, instead focusing their discussion almost solely on *Madsen*'s standard. Some, for example, critique *Madsen* as simply inconsistent with the prior restraint doctrine—usually relying on the circular reasoning that injunctions are prior restraints. *See, e.g.*, Matthew D. Staver, *Injunctive Relief and the* Madsen *Test*, 14 ST. LOUIS U. PUB. L. REV. 465, 478 (1995) (noting that *Madsen* departed from precedent by finding that an injunction was not a prior restraint); Melissa Waller Baldwin, Note, *An Example of Policy Creating Law Through the First Amendment*, 21 OHIO N.U. L. REV. 1101, 1117-1119 (1995) (noting that *Madsen* creates an inconsistency regarding review of restrictions).

Other scholars accept *Madsen*'s test without questioning it, instead focusing their discussion on its appropriateness, workability, or necessity. *See, e.g.*, Deborah A. Ellis & Yolanda S. Wu, *Of Buffer Zones and Broken Bones: Balancing Access to Abortion and Anti-Abortion Protestors' First Amendment Rights in* Schenck v. Pro-Choice Network, 62 BROOK. L. REV. 547, 583 (1996) (emphasizing the workability of injunctions to safeguard access to abortion clinics); James Weinstein, *Free Speech, Abortion Access, and the Problem of Judicial Viewpoint Discrimination*, 29 U.C. DAVIS L. REV. 471, 508-515 (1996) (advocating *Madsen*'s refusal to apply strict scrutiny to injunctions and noting that injunctions are a useful tool for protecting property, privacy, and safety); Tara K. Kelly, Note, *Silencing the Lambs: Restricting the First Amendment Rights of Abortion Clinic Protestors in* Madsen v. Women's Health Center, 68 S. CAL. L. REV. 427, 456-58 (1995) (noting Chief Justice Rehnquist's recognition that injunctions protect citizens' rights against First Amendment overstepping).

It is time to bring structure to this area of the law. To that end, an obvious solution is to discard prior restraint principles and do clearly what *Madsen* unclearly alluded to—apply content discrimination principles to injunctions. Such application would provide a uniform framework for analyzing injunctions and is consistent with the prominent position that content discrimination principles hold in the Court's jurisprudence.[21] A close examination of their purpose, however, reveals that such principles are not appropriate with injunctions. The content-based/content-neutral distinction is essentially a proxy by which the Court ferrets out illegitimate government motives underlying speech regulations. The Court subjects content-based laws, which are more likely to have illegitimate motives, to strict scrutiny; it examines less suspicious content-neutral regulations using less rigorous intermediate scrutiny. This roundabout scrutiny of motives is useful when dealing with far-reaching, inflexible legislative enactments, the actual motives of which are difficult to determine. But content discrimination principles are not an adequate proxy for illegitimate motives with injunctive relief. A content-neutral injunction, for example, does not have the safeguards against illegitimate motive associated with a content-neutral statute. Conversely, a context-specific, content-based injunction may not pose the same dangers of illegitimate motive as a content-based statute.

Because content discrimination principles are inadequate indicators of government motive, this Article proposes that the Court discard those principles in favor of a more direct purpose inquiry. Specifically, courts reviewing injunctions should initially identify their objective justifications (i.e., the reasons for their issuance found in the court order or evidentiary record). Once identified, courts can determine whether such justifications fall into one of three general categories of purpose—illegitimate, disfavored, and legitimate. Depending upon the category into which an injunction falls, the reviewing court can then scrutinize the injunction using more particularized tests specifically gauged to determine its validity. This approach guards against potential illegitimate motives while avoiding the pitfalls associated with the broad and ill-fitting content-based/content-neutral labels. Moreover, when applied to past injunction decisions, this approach does remarkably well in explaining case outcomes.

Part I of this Article reviews the Court's cases regarding injunctions against speech, focusing first on the increasing elevation of

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[21] *See* Paul B. Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 204 (1982) ("Since its announcement, the constitutional principle limiting the power of government to distinguish speech according to its content has played a significant role in the Supreme Court's decisions.").

rhetoric (as opposed to analysis) in the Court's prior restraint decisions. Part I also reviews the Court's other decisions involving injunctions and demonstrates that they too contain little, if any, analysis concerning the appropriateness of injunctive relief against expression. Part II examines *Madsen*'s interaction with the Court's previous decisions and discusses how *Madsen* furthers the incoherence of the Court's previous cases. Part III explains that content discrimination principles, although superficially attractive, are inappropriate with injunctive relief because the content-based/content-neutral distinction's function as a proxy for illegitimate motive does not hold with injunctions as it does with statutes. Part IV suggests that a more direct search for illegitimate motives might be appropriate in the context of injunctions. It further explicates the manner in which courts can accomplish this. Finally, Part V discusses whether certain miscellaneous issues particular to injunctive relief, such as the contempt power, the collateral bar rule, and interim relief, still justify a rule of special antipathy toward all or some injunctions.

I. A BRIEF HISTORY OF INJUNCTIONS AGAINST EXPRESSION

A. Near v. Minnesota *and Its Progeny: The Elevation of Prior Restraint Rhetoric*

The term "prior restraint" originally referred to the licensing schemes of sixteenth- and seventeenth-century England that prohibited the publication of printed material without prior submission to licensing boards run by the Crown.[22] Under such schemes, the Crown could deny a license to any publication deemed dangerous to its interests, thus preventing dissemination altogether.[23] Licensing schemes eventually fell out of favor,[24] and English common law evolved to protect against prior censorship, although it still allowed subsequent punishment of expression.[25] The drafters of the First Amendment

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[22] *See* LEONARD W. LEVY, LEGACY OF SUPPRESSION 8-9 (1960); *see generally* FREDERICK S. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND, 1476-1776 (1952).

[23] *See* LEVY, *supra* note 22, at 8.

[24] *See* Emerson, *supra* note 4, at 651 (noting that licensing schemes fell out of favor because they proved unwieldy, not because of opposition to the general censorship principle).

[25] Sir William Blackstone set forth the common understanding regarding licensing schemes as the common law evolved:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.

4 WILLIAM BLACKSTONE, COMMENTARIES *151-52.

clearly meant to adopt the English common law's protection against prior censorship.[26] It is less clear whether they meant the First Amendment to extend beyond protection against prior restraints. Many early scholars argued that the First Amendment anticipated such an extension,[27] while the Supreme Court initially pronounced that it did not.[28] The Court has since ruled that the First Amendment applies to laws punishing speech after its occurrence,[29] but the distinction between subsequent punishment and prior restraint remains in modern jurisprudence. Thus, there is a sense that the Court's current hostility to laws punishing speech after the fact, while strong, nevertheless does not rise to the level of its special hostility toward prior restraints.[30] *Near v. Minnesota ex. rel Olsen*,[31] the Court's seminal prior restraint decision, reflects this bifurcation in the context of injunctions.[32]

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[26] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-34, at 1039 (2d ed. 1988) (asserting that the First Amendment was "undoubtedly intended to prevent government's imposition of any system of prior restraints similar to the English licensing system").

[27] *See* ZECHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES 18-20 (1941) (arguing that the Framers intended to guarantee the right of unrestricted discussion of public affairs, thus eliminating seditious libel); THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 528-31 (Boston, Little, Brown 1883) (arguing that the United States never adopted the English common law rule that made libel against the constitution or government indictable); HENRY SCHOFIELD, *Freedom of the Press in the United States*, *in* 2 ESSAYS ON CONSTITUTIONAL LAW AND EQUITY 75-85 (1921) (arguing that the Constitution did not adopt the English common law prohibiting previous restraint but created a more expansive right); THEODORE SCHROEDER, "OBSCENE" LITERATURE AND CONSTITUTIONAL LAW 208 (1911) (arguing that the Constitution was designed to provide an unabridged, and unabridgeable, liberty of discussion, by dropping the English "bad tendency" test to determine the seditious character of a publication). *See also* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 193-200 (1997) (citing earlier scholars' arguments that American constitutional protection of free speech limited the "bad tendency" test of English common law).

[28] *See* Patterson v. Colorado, 205 U.S. 454, 462 (1907) (holding that First Amendment prevents only prior restraints on publication, not subsequent punishment for publications deemed contrary to the public welfare).

[29] *See* Schenck v. United States, 249 U.S. 47, 51-52 (1919) (holding that the prohibition of laws abridging the freedom of speech is not confined to prior restraints).

[30] *See* Jeffries, *supra* note 5, at 410 ("The doctrine imposes a special disability on official attempts to suppress speech in advance of publication—a disability that is independent of the scope of constitutional protection against punishment subsequent to publication."); Martin Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 53 (1984) (arguing that the prior restraint doctrine "assumes that prior restraints are more harmful to free speech interests than other forms of regulation"); Scordato, *supra* note 3, at 5 ("[P]rior restraints are to be strongly disfavored relative to subsequent sanctions for the purpose of determining the constitutional validity of such laws.").

[31] 283 U.S. 697 (1931).

[32] In addition to injunctions, the Court has applied its prior restraint analysis to other regulations, including licensing schemes, *see* Kunz v. New York, 340 U.S. 290, 295 (1951), taxes imposed upon certain newspapers, *see* Grosjean v. American Press Co., 297 U.S. 233, 250-51 (1936); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 592-93 (1983), and a municipality's refusal to allow a play to be shown in its theaters, *see* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 564 (1975). Because of the specific nature of injunctive relief, however, this Article examines the Court's prior restraint doctrine

Near involved a statute allowing the State of Minnesota to seek injunctive relief against anyone regularly publishing "'malicious, scandalous, and defamatory newspaper[s], magazine[s], or other periodical[s],'" on the theory that such materials constituted a public nuisance.[33] Violation of the injunction was punishable as contempt and entailed a fine or potential jail sentence.[34] In *Near*, a local county attorney invoked the statute against the publishers of a weekly newspaper that claimed "a Jewish gangster was in control of gambling, bootlegging and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties."[35] The trial court, agreeing that the newspaper constituted a nuisance under the statute, perpetually enjoined the publishers from distributing "any publication . . . containing malicious, scandalous and defamatory matter."[36]

A bare majority of the Supreme Court struck down the statute. Admitting that subsequent punishment of the expression via criminal or civil laws might have been appropriate,[37] the Court nevertheless found that the statute's purpose was "not punishment, in the ordinary sense, but suppression of the offending newspaper."[38] The operation of the statute "put the publisher under an effective censorship" because it enjoined the offending publication and all similar, future publications unless the publisher could convince a judge of the future publications' good purpose.[39] Moreover, the statute did so based upon a standard—malicious, scandalous, and defamatory—that was

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only in that context. See generally TRIBE, *supra* note 26, at 1039-61, for a discussion of the prior restraint doctrine.

[33] *Near*, 283 U.S. at 702 (quoting 1925 Minn. Laws 358). The statute provided a defense of truth where the accused could prove that "the truth was published with good motives and justifiable ends." *Id.*

[34] *See id.* at 703.

[35] *Id.* at 704. As Professor Emerson noted, the Supreme Court described the articles in question "with some understatement." Emerson, *supra* note 4, at 653. The articles were caustic and virulently anti-Semitic. *See Near*, 283 U.S. at 724 n.1 (Butler, J., dissenting) (setting forth the content of the articles). At least one scholar characterized the publication in question, the *Saturday Press*, as "a vituperative scandal sheet if ever there was one." Blasi, *supra* note 10, at 15-16. Despite their tone, the articles contained kernels of truth, evidenced by the subsequent grand jury probe into the police chief's relationship with organized crime. *See* FRED W. FRIENDLY, MINNESOTA RAG 55-59 (1981). Moreover, at that time, scandal sheets, such as the *Saturday Press*, were often the only publishers willing to criticize public officials. *See id.* at 31.

[36] *Near*, 283 U.S. at 705.

[37] *See id.* at 715 ("For whatever wrong the appellant has committed or may commit, by his publications, the State appropriately affords both public and private redress by its libel laws.").

[38] *Id.* at 711. The Court specifically noted that the statute did not "aim[] at the redress of individual or private wrongs" but at "distribution of scandalous matter as detrimental to public morals and to the general welfare." *Id.* at 708 (citations omitted).

[39] *Id.* at 712.

not susceptible to precise definition.[40] Likening the statutory scheme to English licensing systems, the majority struck it down as an unconstitutional prior restraint.[41] Although *Near* did not hold all prior restraints to be unconstitutional, it emphasized that they were available only in the most exceptional circumstances,[42] none of which were present in *Near*.

Notably, nothing in *Near* suggests a general condemnation of injunctions as prior restraints. Rather, the *Near* Court was concerned with a statutory scheme allowing perpetual censorship of speech by a single judge based upon a vaguely defined nuisance finding. The majority was similarly concerned with the injunction's use to punish criticism of the government. Even those portions of the opinion focusing on prior restraint are hopelessly entangled with language regarding seditious libel:

> [T]he operation and effect of the statute in substance is that public authorities may bring the . . . publisher of a newspaper . . . before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter—*in particular that the matter consists of charges against public officers of official dereliction*—and unless the . . . publisher is able and disposed to bring competent evidence to satisfy the judge[,] . . . his newspaper . . . is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship.[43]

Because of this entanglement, it is never clear whether "the essence of censorship" derives from the procedural aspects of the relief granted, the nature of the speech punished, or, most likely, both.[44]

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[40] *See id.* at 712-13.

[41] *See id.* at 713-23.

[42] The majority listed the following exceptions: when a nation is at war, when words "have all the effect of force," when obscenity is involved, and when publications invade "private rights." *Id.* at 716.

[43] *Id.* at 713 (emphasis added). *See also* Blasi, *supra* note 10, at 17 (describing the *Near* injunction as "analogous to a prosecution for seditious libel"); Jeffries, *supra* note 5, at 416 ("In truth, *Near v. Minnesota* involved nothing more or less than a repackaged version of the law of seditious libel . . . ."). The *Saturday Press*'s history surely raised concerns of government retaliation. Because of the publisher's past denunciation of public officials, the police chief ordered his men to prevent the first edition of the newspaper from getting to the news stands. This episode prompted one scholar to observe "[t]he ill-fated *Saturday Press* [was] the only paper on record ever banned in the United States before a single issue had been published." FRIENDLY, *supra* note 35, at 37.

[44] Professor Blasi lists several issues contributing to the *Near* decision: (1) the content of the speech enjoined; (2) the Minnesota nuisance law's allowance of perpetual censorship of future expression; (3) the nuisance standard's vagueness; (4) the placement of key burdens of proof on the publisher; and (5) the use of "public policy" as a justification rather than the need to redress private wrongs. *See* Blasi, *supra* note 10, at 19. Given this complexity, he notes that

Near's failure "to explain the functional basis of the prior restraint doctrine"[45] compounds this lack of clarity. The majority opinion recounted the historical roots of the doctrine and its adoption in the United States—its discussion is replete with cites to English and colonial American documents.[46] But it never explained why prior restraints were more disfavored than other forms of regulation or even what forms of regulation were prior restraints.[47] The Court's opaque reasoning combined with its reliance on prior restraint rhetoric rather than analysis laid the foundation for the current state of affairs. Later courts, left to analyze the constitutionality of injunctive relief without clearly identified standards, latched on to the most readily identifiable aspect of *Near*—that the injunction was a prior restraint. Several Burger Court decisions reveal this evolution away from *Near*'s complexity and toward the equation of injunctions and prior restraints.

In *Organization for a Better Austin v. Keefe*,[48] the petitioner, an organization devoted to racial stabilization in a particular Chicago suburb, distributed leaflets accusing the respondent real estate broker of deliberately arousing racial fears in order to sell houses.[49] The trial court, believing that petitioner had invaded respondent's right to privacy, permanently enjoined petitioners "from passing out pamphlets, leaflets or literature of any kind, and from picketing, anywhere in the city of Westchester, Illinois."[50] The Supreme Court found the injunction unconstitutional, proclaiming that "[u]nder [*Near*], the injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights."[51]

Keefe did not involve a statutory scheme like that in *Near*; nor was the issue of seditious libel present since all criticism was directed

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"[t]o conclude that such a regulatory scheme, 'tested by its operation and effect,' amounts to a prior restraint is by no means to establish the proposition that all injunctions against speech deserve the same fateful characterization." *Id.* (footnote omitted).

[45] THOMAS EMERSON, THE SYSTEM OF FREE EXPRESSION 506 (1970); *see also* Paul L. Murphy, Near v. Minnesota *in the Context of Historical Developments*, 66 MINN. L. REV. 95, 152 (1981) (noting that the *Near* Court's "argument concerning prior restraint was far more historical than analytical").

[46] *See Near*, 283 U.S. at 713-15.

[47] The *Near* dissenters were never convinced that the statutory scheme amounted to a prior restraint. According to Justice Butler:

> [the statute did] not authorize administrative control in advance such as was formerly exercised by . . . licensors and censors . . . . The restraint authorized is only in respect of continuing to do what has been duly adjudged to constitute a nuisance. . . . There is nothing in the statute purporting to prohibit publications that have not been adjudged to constitute a nuisance.

Id. at 735-36 (Butler, J., dissenting) (footnote omitted).

[48] 402 U.S. 415 (1971).

[49] *See id.* at 416-17.

[50] *Id.* at 417.

[51] *Id.* at 418.

at a private citizen. Nevertheless, the Court found the injunction unconstitutional because it "operate[d], not to redress alleged private wrongs, but to suppress, on the basis of previous publications," distribution of any literature within the city.[52] Moreover, the mere presence of injunctive relief apparently troubled the Court, which noted that "the interest of an individual in being free from public criticism of his business practices . . . [does not] warrant[] use of *the injunctive power of a court.*"[53] To be sure, the *Keefe* Court had reason to be concerned. The complete suppression of the petitioner's viewpoint and the perpetual nature of the injunction raised issues similar to the statutory scheme in *Near.* But the Court's concentration on only some of *Near's* concerns and its emphasis on injunctive relief as the culprit subtly shifted the focus of the prior restraint issue.

Just a month after *Keefe*, the Court decided the *Pentagon Papers Case*,[54] which involved the constitutionality of an injunction barring the *New York Times* from publishing the Pentagon Papers.[55] Even more so than *Keefe*, the facts of the *Pentagon Papers Case* did not fit neatly within the *Near* framework:

> What bothered the Court in *Near* was the effort to enjoin as yet unwritten issues of the newspaper, in effect placing the paper under the personal censorship of the judge. The *Times* case, however, involved an effort to enjoin the publication of existing, readily identifiable material and did not present the special flaw that had triggered the response in *Near.*[56]

Moreover, a prohibition on publication of the Pentagon Papers arguably fell within one of the exceptions to *Near*'s antipathy toward prior restraints.[57] Thus, one might expect that the Court's opinion striking

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[52] *Id.* at 418-19.

[53] *Id.* at 419 (emphasis added); *see also id.* at 420 (noting that petitioner's conduct was "not sufficient *to support an injunction* against peaceful distribution of informational literature") (emphasis added).

[54] New York Times Co. v. United States, 403 U.S. 713 (1971).

[55] The Pentagon Papers contained a classified study of government decision-making before and during the Vietnam War. The *New York Times* and *Washington Post* decided to publish the study, which they obtained from Daniel Ellsberg, a former government employee. The Court granted certiorari in large part due to the split decisions of the Second and District of Columbia Circuits regarding whether an injunction should issue. The former court barred publication by the *New York Times* but the latter court left the *Washington Post* free to publish the information. *See id.* at 714 (per curiam).

[56] Harry Kalven, Jr., *The Supreme Court Term, 1970 Term—Foreword: Even When a Nation Is at War*, 85 HARV. L. REV. 3, 33 (1971) (footnote omitted).

[57] The United States maintained that publication would jeopardize its effort in Vietnam as well as national security generally, although it is unlikely that the government could have proved its claim. *See generally* John Cary Sims, *Triangulating the Boundaries of Pentagon Papers*, 2 WM. & MARY BILL RTS. J. 341 (1993). Nevertheless, given *Near*'s war-time exception, the allegation deserved some discussion in the per curiam opinion.

down the injunction would explain the relationship between the *Pentagon Papers Case* and *Near*. Instead, the Court issued a brief per curiam opinion, simply stating:

> We granted certiorari in these cases in which the United States seeks to enjoin the New York Times and the Washington Post from publishing the contents of a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy."
>
> Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. The Government "thus carries a heavy burden of showing justification for the imposition of such a restraint." The [district courts] held that the Government had not met that burden. We agree.[58]

The opinion contained no discussion addressing the reason these particular injunctions amounted to prior restraints.[59] It never even explicitly stated that an injunction *was* a prior restraint, leaving one with the impression that this fact is so obvious as to go without saying.[60] The Court's assumptions, coupled with its failure to relate the particular instance to the *Near* framework, furthered the impression begun in *Keefe* that injunctive relief is the *sine qua non* of prior restraints.[61]

Nebraska Press Ass'n v. Stuart[62] completed the Burger Court's equation of injunctions and prior restraints.[63] That Court held uncon-

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[58] *New York Times*, 403 U.S. at 714 (per curiam) (citations omitted).

[59] *See* Peter D. Junger, *Down Memory Lane: The Case of the Pentagon Papers*, 23 CASE W. RES. L. REV. 3, 10-11 (1971) (describing the per curiam opinion as "unrevealing enough to be relegated to a footnote"); *see also* Hans A. Linde, *Courts and Censorship*, 66 MINN. L. REV. 171, 194 (1981) (describing the per curiam as "announc[ing] a result, not an analysis").

[60] At least one scholar has credited the *Pentagon Papers Case* with raising to special prominence the injunctions-as-prior-restraints equation. *See* Owen M. Fiss, *The Unruly Character of Politics*, 29 MCGEORGE L. REV. 1, 7 (1997).

[61] As in *Keefe*, the Court had legitimate fears regarding this injunction. The executive branch essentially asked the lower court to issue an injunction based on its inherent powers, possessing no statutory or other legal authorization, and in the name of "national security" interests, which the government asserted with little evidence. One can understand why the Court might balk at issuing an order prohibiting speech based upon such amorphous criteria. *See New York Times*, 403 U.S. at 730 (Stewart, J., concurring) ("[I]n the cases before us we are asked neither to construe specific regulations nor to apply specific laws. We are asked, instead, to perform a function that the Constitution gave to the Executive, not the Judiciary."). No Justice discussed these facts in the context of a finding that the injunction was a prior restraint. Most simply presumed that the injunction was a prior restraint and started the analysis from there. Moreover, some Justices explicitly equated all injunctions with prior restraints, further cementing their relationship in popular thought. *See, e.g., id.* at 731 n.1 (White, J., concurring) (discussing congressional authorization of the issuance of "prior restraints" by numerous government agencies).

[62] 427 U.S. 539 (1976).

stitutional a temporary gag order forbidding the press from printing inculpatory information or "other facts 'strongly implicative'" of the defendant in a highly publicized murder trial.[64] Though recognizing that the criminal defendant's right to a fair trial was at stake,[65] Chief Justice Burger, writing for the majority, argued that pervasive pretrial publicity did not inevitably lead to an unfair trial.[66] Rather, the real issue was whether the means employed to protect the criminal defendant's rights could survive First Amendment scrutiny. After briefly reviewing *Near*, *Keefe*, and the *Pentagon Papers Case*, Chief Justice Burger determined that "[t]he thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."[67] Chief Justice Burger acknowledged the "marked differences" between the gag order in *Nebraska Press* and the injunctions in the previous cases.[68] Nevertheless, he maintained that "as to the underlying is-

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[63] *Nebraska Press* was not the Court's last decision classifying an injunction as a prior restraint, but it was the last decision directly to raise the issue. Other decisions, often cited as prior restraint cases, involved somewhat tangential issues or were decided in emergency situations with little discussion. *See* CBS, Inc. v. Davis, 510 U.S. 1315 (1994) (Blackmun, Circuit Justice) (granting emergency stay of injunction prohibiting television network from displaying illegally obtained footage of meatpacking plant); National Socialist Party v. Skokie, 432 U.S. 43 (1977) (reversing lower court's refusal to stay an injunction pending appeal because immediate appellate review was unavailable to enjoined parties); Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175 (1968) (ruling that an ex parte order banning protest activities unconstitutionally deprived speakers of notice and opportunity to participate in an adversarial proceeding).

In *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980), the Court directly confronted the prior restraint issue raised by a Texas statute allowing injunctions against distribution of future obscene literature based upon a judicial finding that obscene speech was previously distributed. In this sense, the case raised one of the concerns central to *Near* and added very little to the cases discussed in the text. Moreover, *Vance* took place in the context of an obscenity trial—an area in which the Court has taken a particularly unique approach to prior restraints.

[64] *Nebraska Press*, 427 U.S. at 545 (quoting the state district court order as modified by the Nebraska Supreme Court).

[65] *See id.* at 555 ("[T]he measures a judge takes or fails to take to mitigate the effects of pretrial publicity . . . may well determine whether the defendant receives a trial consistent with the requirements of due process.").

[66] *See id.* at 554.

[67] *Id.* at 559. The Court noted that "[t]he principles enunciated in *Near* were so universally accepted that the precise issue did not come before us again" until nearly 40 years later. *Id.* at 557.

[68] *See id.* at 561. There were substantial differences between *Nebraska Press* and *Near*. In the former case, there existed no complex statutory scheme imposing a "perpetual" censorship on all future publication. In fact, the *Nebraska Press* injunction was obviously temporary; by its terms, it expired once the jury was empanelled. *See id.* at 546. Moreover, one could argue that a narrow order designed to protect the defendant's right to a fair trial fell within *Near*'s exception regarding protection of "private rights." *See* Linde, *supra* note 59, at 189 (describing tension between justifying gag orders as necessary for preservation of the right to a fair trial and the undesirability of imposing ignorance on all for the sake of preserving it in a few); *see also* Stephen R. Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 547-48 (1977) (explaining why a sufficiently narrow gag order is not a prior restraint).

sue—the right of the press to be free from prior restraints on publication—those cases form the backdrop against which we must decide this case."[69] Having found the gag order to be a prior restraint and finding no facts to overcome the traditional antipathy toward them, the Court held the injunction unconstitutional.[70]

Keefe, the *Pentagon Papers Case*, and *Nebraska Press* thus reflect a considerable shift away from *Near*'s concern with perpetual censorship and seditious libel. Although some aspects of *Near* were present in those cases, they were not identical to *Near*, nor to each other, and their sole unifying characteristic appeared to be the issuance of an injunction. In effect, the rhetoric of later prior restraint cases began to focus on the form of the relief granted (i.e., that an injunction was granted at all) rather than its effect (i.e., imposition of a perpetual censorship via injunction).

B. The Court's Other Injunction Decisions

The Court's language in the above cases suggests an equation of injunctions and prior restraints, but the Court's practice during this same period included several cases in which it upheld injunctions against expression. In *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*,[71] for example, the Court upheld an order barring peaceful union picketing outside of certain milk vendors' businesses. The Court acknowledged that the First Amendment generally protected picketing, which it described as "the workingman's means of communication."[72] The majority found, however, that these particular pickets were "enmeshed with contemporaneously violent conduct."[73] Because "utterance[s] in [the] context of violence can lose [their] significance as . . . appeal[s] to reason and become part of an instrument of force," they enjoyed no First Amendment protection.[74] The Court emphasized, however, that picketing absent contemporaneous violence would not have been sufficient to justify an injunction; nor

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[69] *Nebraska Press*, 427 U.S. at 561-62.

[70] Chief Justice Burger acknowledged that gag orders could survive judicial scrutiny. Such a finding required a determination regarding "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger." *Id.* at 562. While noting that the trial court's fears regarding pretrial publicity were likely justified, Chief Justice Burger argued that they were necessarily speculative. *See id.* at 562-63. He also ruled that the lower court failed adequately to examine alternative remedies and that the order's jurisdictional limitations rendered it ineffective to deal with the potential dangers of publicity. *See id.* at 563-66.

[71] 312 U.S. 287 (1941).

[72] *Id.* at 293.

[73] *Id.* at 292.

[74] *Id.* at 293.

would peaceful picketing that might cause violence by others.[75] In support of its reasoning, *Milk Wagon Drivers* easily could have cited to *Near*—the distinction between peaceful attempts at communication and speech that "has the effect of force" parallels one of *Near*'s exceptions.[76] The majority made no reference to *Near*, however, other than a brief citation to support the proposition that potential violence by others did not warrant an injunction.[77]

The Court in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*[78] similarly upheld an order prohibiting a newspaper from running job advertisements segregated by gender in violation of an anti-discrimination ordinance. Unlike *Milk Wagon Drivers*, *Pittsburgh Press* acknowledged the prior restraint issue. Nevertheless, the Court refused to strike down the order, reasoning that it had "never held that all injunctions are impermissible."[79] Rather, the majority opined that "[t]he special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment."[80] Because the *Pittsburgh Press* order was "based on a continuing course of repetitive conduct," it did not require "speculat[ion] as to the effect of the publication" as did the injunction in the *Pentagon Papers Case*.[81] The order's clarity, its narrowly drawn terms, and its issuance only after a final determination on the merits further added to its constitutionality.[82]

Finally, *Seattle Times Co. v. Rhinehart*[83] upheld a protective order prohibiting dissemination of information gained during the litigation process. The *Seattle Times* published several articles implying that the respondent, leader of a religious group, was a crackpot and a fraud.[84] As a result, the respondent filed a lawsuit alleging libel and invasion of privacy. During the litigation, the *Seattle Times* sought confidential information about the respondent through the discovery process, admitting that it intended to use the information in subse-

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[75] *See id.* at 296.

[76] *See supra* note 42.

[77] *See Milk Wagon Drivers*, 312 U.S. at 296.

[78] 413 U.S. 376 (1973).

[79] *Id.* at 390.

[80] *Id.*

[81] *Id.* at 390. Chief Justice Burger took issue with the majority's determination, noting that "the Commission's order appears to be in effect an outstanding *injunction* against certain publications—the essence of prior restraint." *Id.* at 395 (Burger, C.J., dissenting). *See also id.* at 400 (Stewart, J., dissenting) (arguing the Commission's order was unconstitutional because no "government agency . . . can tell a newspaper in advance what it can print and what it cannot").

[82] *See id.* at 390.

[83] 467 U.S. 20 (1984).

[84] *See id.* at 23.

quent articles.[85] At the respondent's request, the trial court issued a protective order prohibiting the *Seattle Times* from publishing any information about respondent gained through the discovery process.[86]

The Supreme Court admitted that most of the information gained during discovery would normally have been protected speech.[87] Arguing that the *Seattle Times*'s access to the information was solely a result of the discovery process, however, the Court rejected the notion that the protective order "raise[d] the same specter of government censorship that such control might suggest in other situations."[88] The Court further dismissed the newspaper's prior restraint argument, noting that the protective order left the *Seattle Times* free to publish the same information if gained outside of the discovery process.[89] The opinion never discussed the prior restraint decisions. Its only reference to them came in an ironic citation to *Nebraska Press* for the proposition that a trial court could impose restrictions on communications by trial participants if necessary to ensure a fair trial.[90]

C. The Incoherence of the Court's Injunction Decisions

While *Milk Wagon Drivers*, *Pittsburgh Press*, and *Rhinehart* belie an equation of injunctions and prior restraints, they do not clarify the Court's doctrine regarding injunctions regulating expression.[91] If anything, they exacerbate the problems reflected in the Court's prior restraint decisions. Neither set of cases reflects any real analysis. In

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[85] *See id.* at 24.

[86] The protective order prohibited the newspaper from disseminating any information pertaining to respondent's financial affairs, the names and addresses of members of respondent's organization, or the names and addresses of contributors to respondent's organization that was "gained through discovery, other than such use as is necessary in order for the discovering party to prepare and try the case. . . . [I]nformation gained by a defendant through the discovery process may not be published by any of the defendants or made available to any news media for publication or dissemination." *Id.* at 27 n.8.

[87] *See id.* at 31 ("[I]nformation obtained through civil discovery authorized by modern rules of civil procedure would rarely, if ever, fall within the classes of unprotected speech identified by decisions of this Court.").

[88] *Id.* at 32.

[89] *See id.* at 33-34.

[90] *See id.* at 32 n.18.

[91] In addition to *Milk Wagon Drivers*, *Pittsburgh Press*, and *Rhinehart*, which directly addressed First Amendment issues, the Court has upheld some injunctions regulating expression with little or no discussion of First Amendment issues. *See, e.g.*, Aaron v. SEC, 446 U.S. 680 (1980) (upholding injunction prohibiting false and misleading statements during securities sales campaign); National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978) (upholding injunction preventing professional society from adopting a policy stating that competitive bidding was unethical); FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1964) (upholding a cease and desist order prohibiting company from running deceptive advertisements). The Court's reasoning in such cases appears to be that the expression enjoined is part and parcel of an illegal business activity. Accordingly, it upholds such relief if it "represents a reasonable method of eliminating the consequences of the illegal conduct." *Professional Eng'rs*, 435 U.S. at 698.

the prior restraint context, although Justices occasionally refer to various tests with which to judge prior restraint injunctions,[92] they never discuss why the injunctions in those cases were prior restraints. As numerous scholars have noted, the Court's "analysis" rarely amounts to anything more than catch phrases and buzz words.[93] Too often its antipathy toward an injunction was grounded in the empty phrase that "'any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'"[94] As a result, "*Near* [has come] to stand for a sort of syllogism about injunctive relief: Prior restraint of speech is presumptively unconstitutional .... An injunction is a prior restraint. Therefore, an injunction against speech is presumptively unconstitutional."[95]

The prior restraint cases' reliance on rhetoric would be less problematic if the non-prior restraint decisions illuminated the void. But those cases either ignored the prior restraint issue (*Milk Wagon Drivers*) or dismissed it with a brief statement that the injunction at issue did not raise the same censorship concerns as did a "classic" prior restraint (*Rhinehart* and *Pittsburgh Press*). Discussion of the relationship between prior restraint and non-prior restraint injunctions is practically non-existent. Although the Court may have believed the differences were obvious enough to make explanation unnecessary, others evidently disagreed. Prior to *Rhinehart,* for example, some scholars assumed that protective orders were analogous to prior restraints.[96] Commentators similarly questioned *Pittsburgh Press*'s dismissal of the prior restraint issue[97] as did the dissenting Justices.[98]

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[92] Chief Justice Burger in *Nebraska Press*, for example, subjected the gag order to a version of the Court's clear and present danger test. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976). *See also* New York Times Co. v. United States, 403 U.S. 713, 726 (1971) (Brennan, J., concurring) (judging injunction under a strict version of the clear and present danger test); *id.* at 730 (Stewart, J., concurring) (same).

[93] *See* TRIBE, *supra* note 26, § 12-34, at 1040 ("[T]he Court has often used the cry of 'prior restraint' not as an independent analytical framework but rather to signal conclusions that it has reached on other grounds."); Blasi, *supra* note 10, at 14 ("[T]here has been too much reliance in recent times on the rhetoric of prior restraint as a substitute for more discriminating analysis."); Jeffries, *supra* note 5, at 417 ("[T]he Court has yet to explain (at least in terms that I understand) what it is about an injunction that justifies this independent rule of constitutional disfavor."); Mayton, *supra* note 10, at 247 ("[T]he easy *ipse dixit* has been to include [injunctions] among the repressions of speech that the English experience teaches us to abhor."); Scordato, *supra* note 3, at 10 (arguing that the doctrine of prior restraint is "little more than a label attached to a legal conclusion already reached").

[94] *E.g., New York Times*, 403 U.S. at 714 (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).

[95] Jeffries, *supra* note 5, at 417. *See also* Scordato, *supra* note 3, at 10-11 ("[J]udicial injunctions prospectively prohibiting speech . . . have been cited so frequently as illustrative examples that they have become virtual paradigms of prior restraint.").

[96] *See* Arthur Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 437 (1991) (arguing that some commentators believed protective or-

To be sure, the Court occasionally fashioned an explanation regarding its characterization of an injunction. In *Nebraska Press*, Chief Justice Burger argued that prior restraints were worse than subsequent punishment of speech because

> [a] criminal penalty or [civil] judgment . . . is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative.
>
> A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time.[99]

Unfortunately, the Chief Justice never explained *how* injunctions have a heightened chilling effect over subsequent punishment. Possibly, he believed that persons subject to a court order are more likely to forego speech out of respect for judicial authority than are those subject to potential criminal penalties.[100] Or perhaps he had in mind the collateral bar rule, which prevents one who violates an injunction from raising its unconstitutionality in later criminal contempt proceedings.[101] Regardless, numerous scholars have debunked Chief Justice Burger's explanation, noting that subsequent punishments have an equal, if not greater, tendency to chill expression.[102]

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ders should be subject to the more exacting constitutional scrutiny for imposing prior restraint, rather than the mere "good cause" standard set out in Federal Rule of Civil Procedure 26(c)).

[97] *See The Supreme Court, 1972 Term—Leading Cases*, 87 HARV. L. REV. 153, 156-58 (1973) (arguing that the Court's analysis in *Pittsburgh Press* failed to adequately address the First Amendment problems connected with orders directed at publishers rather than advertisers).

[98] *See supra* note 81.

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

[100] Several scholars acknowledge this possible interpretation of *Nebraska Press*. *See* Barnett, *supra* note 68, at 55; Jeffries, *supra* note 5, at 428-29; Scordato, *supra* note 3, at 11-12.

[101] *See* Walker v. City of Birmingham, 388 U.S. 307 (1967) (upholding contempt convictions for violating an injunction prohibiting expressive activity without a permit even though law upon which injunction was based was later found unconstitutional).

[102] *See* Barnett, *supra* note 68, at 551-53; Blasi, *supra* note 10, at 35-43; Jeffries, *supra* note 5, at 428-30; Junger, *supra* note 59, at 17; Mayton, *supra* note 10, at 275; Scordato, *supra* note 3, at 14-16; Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the Chilling Effect*, 58 B.U. L. REV. 685, 725-30 (1978). *See also* CHAFEE, *supra* note 27, at 10 ("A death penalty for writing about socialism would be as effective a suppression as a censorship.").

Scholars acknowledge that the collateral bar rule may justify the Court's antipathy toward injunctions against speech. *See, e.g.*, ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 61 (1975); Barnett, *supra* note 68, at 553; Blasi, *supra* note 10, at 20-21. But scholars also question the rule's continuing vitality in the free speech arena. *See e.g.*, Barnett, *supra* note 68, at 553-58; Blasi, *supra* note 10, at 21-22; Jeffries, *supra* note 5, at 431-32. Some scholars simply deny that the rule has a heightened chilling effect. *See* FISS, *supra* note 10, at 72-73. See *infra* Part V.A for more on the collateral bar rule.

More importantly, Chief Justice Burger never adequately explained why the chilling effect supported condemnation of some injunctions but not others. *Pittsburgh Press* may have attempted such a distinction. The majority noted that the injunction therein was based on a "continuing course of conduct" that did not require speculation as to the expression's effect.[103] But it is not obvious that an injunction aimed at conduct but incidentally affecting speech *necessarily* inhibits expression less than an order aimed directly at suppressing speech. An order controlling editorial decisions regarding advertising format, for example, might affect advertising revenue and, ultimately, a newspaper's circulation.[104] Moreover, *Pittsburgh Press* did not satisfactorily explain why an injunction based on continuous conduct poses no prior restraint problem. The *Near* injunction issued because of the publisher's continuing publication of certain material.[105] Such publication amounted to a "course of conduct" likely to continue, yet *Near* found the injunction to be a prior restraint. There is a distinction between the expressive conduct in *Near* and *Pittsburgh Press*—the former involved an act of publication amounting to a "nuisance," while the latter publication amounted to sex discrimination. One can understand why the Court might view the vagueness of *Near*'s nuisance standard with greater concern. Nevertheless, the Court never explicitly established such parameters with its "course of conduct" exception.[106]

None of this is to say that the Court's intuitive assessments of the injunctions before it were incorrect. But its reliance on rhetoric and its habit of throwing out casual justifications without further explanation has had a substantial impact on the interpretation of its jurisprudence. Because there were no real principles upon which to rely, the Court simply cited to whichever past precedents support its desired outcome. In *Nebraska Press*, for example, the Court reviewed all past prior restraint decisions but discussed neither *Milk Wagon Drivers* nor *Pittsburgh Press*[107]—oversight of the latter being especially significant given *Pittsburgh Press*'s reference to the "chilling effect" so integral to *Nebraska Press*'s reasoning.[108] Thus, the prior restraint

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[103] *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 390 (1973).

[104] *See The Supreme Court, 1972 Term*, *supra* note 97, at 156-57.

[105] *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 706-8 (1931).

[106] *See Pittsburgh Press*, 413 U.S. at 395-96 (Burger, C.J., dissenting) (arguing that the "continuous conduct" rationale did not satisfactorily distinguish the order from other prior restraints); *The Supreme Court, 1972 Term*, *supra* note 97, at 158 (noting that *Pittsburgh Press*'s reasoning may not adequately distinguish it from expressive conduct in *Near*).

[107] *See supra* notes 62-70 and accompanying text.

[108] *Milk Wagon Drivers* also did not discuss its relationship to the Court's prior restraint doctrine even though it post-dated *Near* by a decade. One can explain the Court's failure in this

and non-prior restraint cases evolved along parallel, yet separate, lines. In addition, the prior restraint decisions involved "sexy" issues—secret government documents, infamous criminal trials, retaliation against newspapers—generating much contemporary public attention.[109] Scholarly attention has similarly focused on the prior restraint cases, in stark contrast to writings regarding the other decisions.[110] Such one-sided attention to cases utterly devoid of analysis inevitably led to popularization of the injunctions/prior restraint equation.

Several scholars may take issue with this Article's underlying premise that the Court's distinction between prior restraint and non-prior restraint injunctions lacks internal substance. Some scholars argue that the Court's decisions establish the principle that injunctions amount to disfavored prior restraints only when they suppress communication "'before an adequate determination that it is unprotected by the First Amendment.'"[111] In reaching this conclusion, they point to the Court's decisions upholding injunctions against distribution of obscene materials as long as the material has already been judged to be obscene,[112] a principle they argue applies in all injunction cases.[113] Despite the attractive simplicity of this argument and its potential explanatory power, it is only partly persuasive.

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regard: The *Milk Wagon Drivers* injunction bore little resemblance to the complex statutory scheme in *Near* and the Court's jurisprudence had yet to evolve down its current path focusing mainly on injunctive relief as the culprit; as a consequence, the Court did not see it as a potential prior restraint issue. Nevertheless, that lack of discussion allowed later courts equating injunctions and prior restraints to overlook the decision even where it might seem relevant. For example, the ban on peaceful protest in *Milk Wagon Drivers* bears some resemblance to the *Keefe* injunction banning picketing and leafleting that was found to be a prior restraint. The violence involved in the former case may have been an essential difference, but that fact deserved some discussion, especially since the *Keefe* Court emphasized that "peaceful distribution of informational literature" was a critical aspect of its decision. *See* Organization for a Better Austin v. Keefe, 402 U.S. 415, 420 (1971).

[109] *New York Times*, for example, generated almost daily national attention. *See* David Rudenstine, *The Pentagon Papers Case: Recovering Its Meaning Twenty Years Later*, 12 CARDOZO L. REV. 1869, 1870 (1991) ("The Pentagon Papers Case . . . was the subject of considerable commentary in the daily press and weekly news magazines during the litigation and immediately afterwards."). Similarly, *Nebraska Press* involved a high profile criminal trial which "immediately attracted widespread news coverage, by local, regional, and national newspapers, radio and television stations." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 542 (1976).

[110] In addition to a wealth of individual articles devoted to the prior restraint issue, *see supra* note 10, entire symposia were devoted to individual prior restraint cases. *See, e.g.*, Symposium, *The Day the Presses Stopped: A History of the Pentagon Papers Case*, 19 CARDOZO L. REV. 1283 (1998); Symposium, Near v. Minnesota, *50th Anniversary*, 66 MINN. L. REV. 1 (1981).

[111] Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 170 (1998) (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 390 (1973) (emphasis added)).

[112] *See, e.g.*, Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957).

[113] *See* Lemley & Volokh, *supra* note 111, at 170.

First, while the principle set forth above is integral to the Court's obscenity jurisprudence, it is unclear that the Court meant it to apply to all of its injunction decisions—certainly none of the classic prior restraint decisions allude to it.[114] Even *Pittsburgh Press*'s use of similar reasoning[115] never found its way into later prior restraint decisions involving injunctions outside of the obscenity context.[116] No matter how obvious the principle seems to scholars, it cannot bring coherence to the Court's jurisprudence if the Court refuses explicitly to incorporate it.

Second, it is not clear that the principle should be extended beyond the limited context of obscenity.[117] The notion that an injunction is acceptable once speech has been "judicially determined to be unprotected" implies a finding that the speech falls into a category of expression deemed to have no or only low First Amendment value.[118] But many of the Court's injunctions decisions did not involve low-value speech. *Nebraska Press*, for example, involved whether an injunction should issue against obviously high-value speech (information pertaining to a criminal trial) because of the potential danger caused by that speech. Such an injunction requires a far more complex weighing of factors than simply whether the speech is "unprotected" and rightfully deserves an approach recognizing that fact.[119]

Finally, even if the "judicially determined to be unprotected" standard is used to mark the difference between prior restraint and non-prior restraint injunctions, that standard still gives us no substantive guideposts with which to make the determination that speech is "unprotected." It merely provides that once certain legal proceedings have occurred, an injunction generally is not objectionable as a prior restraint. The Court's failure to establish substantive standards with which to judge the validity of injunctions is as much a fault of its ju-

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[114] *See* Kalven, *supra* note 56, at 33.

[115] *See* text accompanying note 80 *supra*.

[116] Notably, *Madsen* and *Schenck*, the Court's latest pronouncements on injunctions, did not refer to this timing issue at all. See *infra* Part II for a discussion of *Madsen*'s reasoning.

[117] This principle could be extended to any speech that, like obscenity, is considered low-value. *See infra* Part IV.B.3.b.

[118] The Court routinely distinguishes between speech that contributes to public discourse—"high-value" speech—and speech which makes little or no contribution to such discourse—"low-value" speech. *See infra* Part IV.B.3. The Court allows substantial regulation of the latter but is far more protective of the former. *See id.*

[119] *See* New York Times Co. v. United States, 403 U.S. 713, 726 n* (1971) (Brennan, J., concurring) (arguing that obscenity cases were not relevant to decision whether to enjoin high-value speech); Diane F. Orentlicher, Comment, Snepp v. United States*: The CIA Secrecy Agreement and the First Amendment*, 81 COLUM. L. REV. 662, 673-74 (1981) (arguing that *Kingsley*'s reasoning should be confined to the obscenity context where the issue of particular expression's value "can usually be determined with as much certainty prior to communication as afterwards").

risprudence as is its failure to adequately explain the prior restraint concept. Consequently, the above-referenced standard is only partly useful in assessing the Court's injunctions jurisprudence.

The ensuing sections tackle the issue of the appropriate substantive standards in the context of injunctive relief. They first review the Court's recent but unsuccessful attempt to provide such standards and then propose more workable alternatives.

II. *MADSEN V. WOMEN'S HEALTH CENTER, INC.* —THE FUTURE OF INJUNCTIONS PERTAINING TO EXPRESSION?

A. The Decision

In 1994, *Madsen v. Women's Health Center, Inc.*[120] presented the Court with an opportunity to remedy the effects of its past jurisprudence. *Madsen* arose from Operation Rescue's blockade of a Florida clinic providing abortions.[121] The trial court originally issued an injunction barring Operation Rescue's members from engaging in violent and intrusive conduct outside of the clinic.[122] After concluding that this injunction was insufficient "to protect the health, safety and rights of women . . . seeking access to [medical and counseling] services,"[123] the trial court expanded it to include bans on certain expression, including prohibitions on demonstrating within certain distances of clinics or clinic employees' homes ("buffer zones"), using noise amplification equipment or signs within earshot or eyesight of patients during clinic hours, and physically approaching persons near the clinic unless that person manifested consent to be approached ("no-approach zones").[124]

The Supreme Court granted the protestors' petition for certiorari after a series of split decisions regarding the injunction's con-

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[120] 512 U.S. 753 (1994).

[121] *Madsen* was one of many lawsuits resulting from a series of abortion clinic blockades in the late 1980s and early 1990s. The blockades' purpose was to "clos[e] down abortion clinics throughout the country to save unborn children." Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664, 666 n.2 (Fla. 1993), *aff'd in part, rev'd in part sub nom.* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994). See Wells, *supra* note 12, at 24-29, for a more thorough history of abortion protests.

[122] The Florida trial court enjoined Operation Rescue members from blocking access to the clinic, physically abusing persons entering, leaving or otherwise connected with the clinic, or inciting such actions by others. *See Operation Rescue,* 626 So. 2d at 667 n.4.

[123] *Id.* at 667 (alteration in original). Specifically, the court found that the protestors continued to block access to the clinic, jammed its telephone system, provided literature identifying the staff of the clinic as "baby killers," followed doctors, pretending to shoot them from adjacent vehicles, stalked clinic staff, and forced those seeking the services of the clinic to "run a gauntlet" of protestors shouting epithets and personal abuse. *See id.* at 667-69.

[124] *See id.* at 669. The amended injunction's buffer zone provisions prohibited protests within 36 feet of clinic property and 300 feet of employees' homes. *See id.*

stitutionality.[125] The protestors' primary challenges to the injunction were that it was impermissibly content-based and a prior restraint.[126] The *Madsen* majority quickly dismissed the prior restraint argument—devoting only a single footnote to its refutation. According to the majority,

> [p]rior restraints do often take the form of injunctions . . . . Not all injunctions that may incidentally affect expression, however, are "prior restraints" . . . . Here petitioners are not prevented from expressing their message in any one of several different ways; they are simply prohibited from expressing it within the 36-foot buffer zone. Moreover, the injunction was issued not because of the content of petitioners' expression . . . but because of their prior unlawful conduct.[127]

With the prior restraint argument summarily disposed of, the majority devoted its attention to analyzing the injunction under content discrimination principles, which distinguish between content-neutral and content-based regulations.[128] While acknowledging that the injunction affected only anti-abortion protestors, the *Madsen* majority rejected the petitioners' argument that it was *necessarily* content-based and thus subject to strict scrutiny.[129] Rather, it found that the lower court issued the injunction as a result of "the group's past actions in the context of a specific dispute between real parties."[130] Satisfied that the lower court's purpose was not to suppress a particular message, the majority found the injunction to be content-neutral.[131] Recognizing, however, that content-neutral injunctions

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[125] The Supreme Court of Florida upheld the lower court's decision against the petitioner's First Amendment challenge, finding the injunction content-neutral, necessary, and reasonably tailored. *See id.* at 671-75. While the case was pending in Florida's highest court, one of the protestors sought an injunction in federal district court blocking enforcement of the trial court's order. The federal district court refused to stay the state court's injunction, but the federal court of appeals vacated the order, intimating that it violated the protestors' First Amendment rights. *See* Cheffer v. McGregor, 6 F.3d 705, 710-12 (11th Cir. 1993).

[126] Brief for Petitioners at 8-20, 37-43, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994) (No. 93-880). The protestors also presented vagueness and freedom of association arguments, *see id.* at 30-37, 44-49, which the Court dismissed briefly at the end of its opinion. *See Madsen*, 512 U.S. at 775-76.

[127] *Id.* at 763 n.2. (citations omitted).

[128] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641-42 (1994) (noting that content-based regulations are subject to the most exacting scrutiny while content-neutral regulations are subject to an intermediate level of scrutiny).

[129] Strict scrutiny requires that a regulation be necessary to meet a compelling state interest. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (noting that content-based regulations are presumptively invalid); Police Dep't v. Mosely, 408 U.S. 92, 98 (1972) (noting that picketing regulations must be necessary to further significant governmental interests in order to be valid).

[130] *Madsen*, 512 U.S. at 762.

[131] *See id.* at 763.

"carry greater risks of censorship and discriminatory application than do general ordinances,"[132] the majority applied a new, and slightly higher, standard of review than the "intermediate scrutiny" typically used for content-neutral statutes.[133]

The injunction enjoyed mixed results under this new standard.[134] The majority upheld the buffer zone around the clinic because it was necessary to protect clinic access and the privacy interests of unwilling listeners who were captive in the medical facility.[135] It struck down the provision creating a buffer zone around the residences of clinic staff, however, because the zone's sheer size—300 feet—precluded any notion that it was necessary to those interests.[136] The Court also found the 300-foot no-approach zone to be unconstitutional. Although the provision aimed at preventing stalking and harassment, it swept within its purview "all uninvited approaches . . . regardless of how peaceful."[137] Such a prohibition violated the Court's longstanding principle that "'in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.'"[138]

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[132] *Id.* at 764.

[133] Intermediate scrutiny requires an inquiry into whether a regulation is "justified without reference to the content of the regulated speech . . . [is] narrowly tailored to serve a significant governmental interest, and . . . leave[s] open ample alternative channels for communication of the information." Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). *Madsen*'s heightened intermediate scrutiny test required that content-neutral injunctions "burden no more speech than necessary to serve a significant government interest." *Madsen*, 512 U.S. at 765.

[134] The Court had little trouble finding that the government interests in protecting access to clinics, medical privacy, and patient's health and safety were "significant." It thus focused on whether the injunctive provisions burdened "no more speech than necessary" to meet those interests. *Madsen*, 512 U.S. at 767-68.

[135] *See id.* at 769-70 (citing Frisby v. Shultz, 487 U.S. 474 (1988) (upholding ordinance banning focused picketing of residences based upon the strong interest in residential privacy)). The majority also relied on the privacy interests of patients in upholding the injunctive provision prohibiting high noise levels near the clinic. *See id.* at 772-73. The Court struck down the "images observable" provision, however, noting that the images were less an invasion of privacy because the clinic could simply pull its curtains to keep them out. *See id.* at 773.

[136] *See id.* at 775 (stating that limiting the time, duration, and number of picketers in a smaller zone would adequately protect privacy interests).

[137] *Id.* at 774.

[138] *Id.* (quoting Boos v. Barry, 485 U.S. 312, 322 (1988)). The majority noted, however, that had the speech within the no-approach zone been "independently proscribable (i.e., 'fighting words' or threats), or . . . so infused with violence as to be indistinguishable from a threat of physical harm," the injunction might have withstood scrutiny. *Id.* at 774.

B. Madsen*'s Place in the Supreme Court's Injunctions Jurisprudence*

As the most significant injunction decision in recent years,[139] *Madsen* presented the Court with an opportunity to clarify its injunctions jurisprudence. Unfortunately, the majority opinion instead continued the Court's tendency to categorize injunctions as "prior restraints" or "not prior restraints" with little elaboration or principled reasoning. *Madsen*'s references to the *Pentagon Papers Case* and *Vance v. Universal Amusement Co.*[140] for example, do not elucidate principles distinguishing between prior restraint and acceptable injunctions. The *Pentagon Papers Case* reference could not since the brief per curiam opinion in that case was devoid of legal reasoning. Similarly, *Vance* involved an injunction banning distribution of obscenity, an area in which the Court's treatment of injunctions has been unique.[141] It is not clear that *Vance* informs non-obscenity cases such as *Madsen* or, for that matter, the *Pentagon Papers Case*. The regulatory scheme in *Vance* strongly resembled the perpetual censorship scheme in *Near*,[142] which might explain *Madsen*'s reference. But that still does not clarify when injunctions amount to prior restraints. The *Madsen* injunction may have looked nothing like those in *Near* or *Vance*, but neither have a number of injunctions that the Court has struck down as prior restraints.[143] Thus, *Madsen*'s reference to the *Pentagon Papers Case* and *Vance* as somehow "different" looks suspiciously like previous injunction decisions declining to elaborate on their reasoning.[144]

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[139] Of the injunction decisions discussed above, the most recent one prior to *Madsen* was decided in 1984. *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (upholding protective order which prohibited newspaper from publishing names of religious group donors obtained during discovery).

[140] 445 U.S. 308 (1980).

[141] *See supra* notes 58-60 and accompanying text; *supra* note 63.

[142] *Compare Vance*, 445 U.S. 308 (involving Texas statute allowing court to enter an order perpetually enjoining distribution of future obscene literature based upon a judicial finding that obscene literature was previously distributed) *with* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931) (involving Minnesota statute which allowed imposition of perpetual injunction of future "malicious, scandalous or defamatory" material based upon judicial finding that such material was published in the past).

[143] *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (involving injunction prohibiting media from publishing or airing murder defendant's confessions and other incriminatory facts); New York Times Co. v. United States, 403 U.S. 713 (1971) (upholding vacation of injunction prohibiting newspaper from publishing the Pentagon Papers).

[144] Justice Scalia argued that "an injunction against speech is the very prototype of the greatest threat to First Amendment values, the prior restraint" and castigated the majority for ignoring the numerous cases striking down such injunctions. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 797-98 (1994) (Scalia, J., concurring in part, dissenting in part). Although Justice Scalia ignored the non-prior restraint decisions, the majority's blithe dismissal of the prior restraint issue lent credibility to his claim that the decision was a result of abortion politics. *See id.* at 784-85.

The *Madsen* majority did refer to two distinguishing factors regarding the legitimacy of injunctions: whether they regulate speech based upon its content and whether they completely suppress speech. But the precise relevance of those factors remains unclear. The obvious inference from the reference to content is that regulation of a particular expression because of what it says is a critical characteristic of prior restraints. But that does not account for cases such as *Rhinehart* and *Pittsburgh Press*, both of which involved content-based injunctions that the Court upheld.[145] The Court may be right that these content-based injunctions pose fewer problems,[146] but it needs to account for its cases more rigorously. Similarly, the relevance of the *Madsen* injunction's limited nature is unclear. That an injunction does not suppress information is important, as the *Rhinehart* court noted.[147] Nevertheless, how does one distinguish between the *Madsen* limitation and an order *temporarily* restraining publication of certain inculpatory evidence, such as that in *Nebraska Press*? Neither entirely suppresses information, but the former survives while the latter does not. Again, there may be ample reason to distinguish between the two,[148] but *Madsen* never adequately explains the distinction.

Finally, the relationship between *Madsen*'s reliance on content discrimination principles and the prior restraint doctrine is unclear. The Court's reference to the content-based nature of prior restraint injunctions suggests that content discrimination principles inform the prior restraint doctrine. Traditionally, however, the Court has viewed the two doctrines as quite distinct. The prior restraint doctrine is concerned with the form of regulation—i.e., an injunction or a licensing scheme. It involves a "question of process, not substance."[149] Content discrimination principles, on the other hand, are substantive principles judging the constitutionality of speech regulations based upon the nature of the speech regulated. A blithe statement that past injunctions amounting to prior restraints were content-based is not helpful to understanding which doctrine to apply or how to apply them in tandem. Should courts presume injunctions are prior restraints if they are content-based, or are only some content-based injunctions prior

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[145] *See supra* notes 78-90 and accompanying text.

[146] *See infra* Part IV.B.3.a.

[147] *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33-34 (1984) (noting that protective orders which prohibit dissemination before trial of information obtained during the discovery process are not subject to exacting First Amendment scrutiny because the party may disseminate the protected information if it is gained independently of court processes).

[148] *See infra* Part IV.B.3.a.

[149] Redish, *supra* note 30, at 89; *see also* Jeffries, *supra* note 5, at 411 (stating that the prior restraint doctrine is justified in terms of form, not substance).

restraints? If content-based injunctions amount to prior restraints, are they, as the Court's prior restraint rhetoric suggests,[150] subject to an even greater presumption against their constitutionality than that associated with strict scrutiny, or does the content-based/strict scrutiny approach effectively satisfy the Court's concerns?[151] Does *Madsen*'s focus on the content-based/content-neutral distinction[152] mean that those principles supplant prior restraint doctrine, or does the latter retain viability on some level? The answers to these questions are not obvious, and *Madsen*'s lack of clarity is reflected in lower court decisions. Some courts have applied prior restraint doctrine while ignoring content discrimination principles.[153] Others have applied the content-based/content-neutral distinction with no mention of the prior restraint doctrine.[154] Still others attempt to synthesize the doctrines,

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[150] *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) (stating that prior restraints involve "the most serious and the least tolerable infringement on First Amendment rights").

[151] Realistically, there may be little difference between the two standards. The Court refers to content-based regulations as "presumptively invalid," a description similar to its rhetoric regarding injunctions. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992). In addition, strict scrutiny has been described as "'strict' in theory and fatal in fact." Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). Nevertheless, the Court's prior restraint rhetoric suggests an even greater antipathy, which some may point to in support of more stringent treatment. Justice Scalia, for example, has argued that injunctions are especially disfavored. Although he intimated in *Madsen* that application of the Court's content discrimination principles was appropriate for injunctions, *see* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 798 (1994) (Scalia, J., concurring in part, dissenting in part), in a later opinion he indicated that such principles "determine [only] the validity of *subsequent* restraints, and to make them conclusive of the validity of prior restraints as well would destroy the doctrine that prior restraints are specially disfavored." Lawson v. Murray, 515 U.S. 1110, 1115 (1995) (Scalia, J., concurring in the denial of cert.) (citations omitted).

[152] *Madsen*'s discussion of the injunction's content neutrality spanned approximately six pages of the majority opinion, *see Madsen*, 512 U.S. at 762-67, with an additional eight pages devoted to application of heightened intermediate scrutiny, *see id.* at 767-75. In contrast, the prior restraint argument ended up in a single footnote of fewer than ten textual sentences. *See id.* at 763 n.2.

[153] *See, e.g.*, San Antonio Community Hosp. v. Southern Cal. Dist. Council of Carpenters, 137 F.3d 1090, 1092 (9th Cir. 1998) (Reinhardt, J., dissenting from denial of petition to rehear en banc) (intimating injunction banning display of banner in labor dispute was prior restraint); Berger v. Hanlon, 129 F.3d 505, 518 (9th Cir. 1997), *rev'd on other grounds*, 526 U.S. 808 (1999) (characterizing an injunction barring use of videotape as a prior restraint); Proctor & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 224-25 (6th Cir. 1995) (applying prior restraint principles to injunction prohibiting publication of certain documents); Woodall v. Reno, 47 F.3d 656, 658 (4th Cir. 1995) (discussing injunction against abortion protestors with reference to prior restraint principles); Globe Int'l, Inc. v. National Enquirer, Inc., No. 98-10613, slip op. at 4-5 (C.D. Cal. Jan. 25, 1999) (characterizing request for preliminary injunction prohibiting publication of certain information as a prior restraint).

[154] *See, e.g.*, St. David's Episcopal Church v. Westboro Baptist Church, Inc., 921 P.2d 821, 829-30 (Kan. Ct. App. 1996) (citing *Madsen* to support application of content-discrimination principles to injunction prohibiting focused picketing near church); Wheeling Park Comm'n v. Hotel and Restaurant Employees Union, 479 S.E.2d 876, 884-85 (W. Va. 1996) (citing *Madsen* while applying content-discrimination principles to determine validity of injunction regulating labor protest activity).

explaining one in terms of the other.[155] Clearly, something more needs to be done.

III. BRINGING COHERENCE TO INJUNCTIONS AGAINST EXPRESSION—THE ARGUMENT AGAINST CONTENT DISCRIMINATION PRINCIPLES

An obvious solution to the lack of structure in this area is to clarify *Madsen* and hold that content discrimination principles govern injunctions just as they do other aspects of the Court's jurisprudence. There is much logic to this approach. First, it would finally put to rest the Court's meaningless prior restraint rhetoric. Second, since their inception, content discrimination principles have become increasingly important in the Court's jurisprudence.[156] They effectively supersede previous standards such as the clear and present danger test[157] and find application in fields as disparate as access to public fora[158] and

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[155] *See, e.g.*, NBA v. Sports Team Analysis and Tracking Sys., 939 F. Supp. 1071, 1087 (S.D.N.Y. 1996) (arguing that *Madsen* "highlighted the distinction between injunctions which constitute merely literal prior restraints (in that they have incidental prospective effects on protected speech or conduct) and those which constitute unconstitutional prior restraints"); San Diego Unified Port Dist. v. U.S. Citizens Patrol, 74 Cal. Rptr. 2d 364, 368 & n.6 (Cal. Ct. App. 1998) (striking down injunction as failing to meet *Madsen*'s intermediate scrutiny while noting that "we need not decide whether [the injunction] constitute[s] a prior restraint or other content-based restriction").

[156] Several scholars agree that the Court's content discrimination analysis is one if its most significant organizing principles. *See* Stephan, *supra* note 21, at 204 (emphasizing the significance of content discrimination analysis); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47 (1987) (stating that the content discrimination analysis "plays a central role in contemporary first amendment jurisprudence"); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 616 (1991) (arguing that the Court has not employed the analysis broadly enough).

[157] The Court originally used several variations of the clear and present danger test to determine the validity of speech restrictions. *See, e.g.*, Dennis v. United States, 341 U.S. 494, 510 (1951) (using a test that weighs the magnitude of the "evil" against the probability of its occurring); Bridges v. California, 314 U.S. 252, 263 (1941) (stating that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished"). Since the Court's announcement of its content discrimination principles, *see* Police Dep't v. Mosely, 408 U.S. 92, 95-96 (1972), the Court has used the clear and present danger test only in limited circumstances, such as incitement of illegal activity. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (applying clear and present danger test to review law prohibiting advocacy of criminal activity). *See generally* David R. Dow & R. Scott Shieldes, *Rethinking the Clear and Present Danger Test*, 73 IND. L.J. 1217, 1219-34 (1998).

[158] *See* United States v. Grace, 461 U.S. 171 (1983) (using content-based/content-neutral distinction and related tests to determine validity of speech regulations in traditional public fora such as streets, parks and sidewalks). The Court's content discrimination principles are less relevant to public property that does not amount to public fora, such as libraries, government employee mailboxes, and prisons. In such situations, the Court allows subordination of speech to the government's managerial needs unless the government engages in viewpoint discrimination. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

regulation of low-value speech.[159] Application to injunctions is thus a natural extension of the Court's current approach.

Finally, although an imperfect explanation of the Court's past injunctions cases,[160] content discrimination principles have some explanatory power. The prior restraint cases involved government suppression of speech based upon hostility toward its message or fear of the expression's persuasive effect.[161] Such purposes are generally associated with content-based regulations.[162] Moreover, the strict scrutiny applicable to content-based regulations is a stringent standard which parallels, or very nearly so, the Court's disfavor of prior restraints. Thus, use of strict scrutiny with content-based injunctions would generally provide the same result as in the prior restraint cases. There is a similar relationship between content-neutral and non-prior restraint injunctions. The non-prior restraint injunctions were issued to avoid harms unrelated to the speaker's message, such as maintenance of the litigation process or prevention of protestor violence; they also never suppressed speech.[163] Ergo, they resemble the Court's requirements with respect to content-neutral regulations, which must be justified by reasons unrelated to content and leave open ample alternatives of communication. The Court's willingness to uphold the non-prior restraint injunctions based upon a weighing of factors also resembles the balancing involved in intermediate scrutiny, the standard associated with content-neutral regulations.[164] Use of content discrimination principles thus provides, at least superficially, a rational framework for analyzing injunctions.

The Court should nonetheless refrain from using content discrimination principles when reviewing injunctions because application in that context does not fulfill those principles' primary function.

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[159] The Court acknowledges that a few categories of speech are so low in value that they generally are subject to standards other than content discrimination principles. *See, e.g.*, Roth v. United States, 354 U.S. 476 (1957) (acknowledging obscenity as low-value speech); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (acknowledging fighting words as low-value speech). Even here, however, the government cannot engage in gratuitous content-based distinctions in a category of low-value speech. The Court will apply strict scrutiny to such regulations. *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (striking down regulation of racially hateful fighting words because the statute only prohibited fighting words of a specific content).

[160] *See supra* notes 150-51 and accompanying text.

[161] *See supra* Part I.A.

[162] *See* Wells, *supra* note 15, at 174-75 (discussing purposes often underlying content-based regulations); *see also infra* notes 223-57 and accompanying text.

[163] *See supra* Part I.B.

[164] *Rhinehart*, for example, espoused a balancing test similar to that used with content-neutral injunctions. *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 (1984) (asking whether the protective order furthered "'an important or substantial governmental interest unrelated to the suppression of expression' and whether 'the limitation of First Amendment freedoms [was] no greater than is necessary or essential to the protection of the particular governmental interest involved'") (quoting Procunier v. Martinez, 416 U.S. 396, 413 (1974)).

The Court's content discrimination jurisprudence is largely concerned with guarding against potentially illegitimate government purposes underlying regulations of speech, such as hostility toward the speaker's message or fear that it will persuade citizens to act in an undesirable manner.[165] Many scholars recognize that the content-based/content-neutral distinction serves primarily as a method for ferreting out such purposes.[166] Specifically, the Court strictly scrutinizes content-based regulations because they are more likely to have an illegitimate government motive.[167] In contrast, its use of more lenient intermediate scrutiny to review content-neutral regulations reflects that they are less likely to have such motives.[168] Because injunctions operate differently from legislation, however, content discrimination principles do not provide an adequate proxy for illegitimate government motives in that context—as an examination of the *Madsen* injunction aptly demonstrates.

A. Is a Content-Neutral Injunction Really Like a Content-Neutral Statute?

Madsen classified the injunction regulating protestors as content-neutral because it was facially neutral (its terms did not restrict speech of a particular content) and because it issued as a result of past pro-

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[165] *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 503 (1996) (plurality opinion) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."); Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988) ("'[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it.'") (quoting FCC v. Pacifica Foundation, 438 U.S. 726 (1978)); City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (noting that a desire "to suppress certain ideas that the [government] finds distasteful" would be illegitimate).

[166] *See, e.g.*, Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 329 (1997) (stating that the purpose behind the examination of content is to discover the government's motive); Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 96 (1997) (considering strict scrutiny as a way to prevent inappropriate motives with respect to affirmative action); Leslie Gielow Jacobs, *Pledges, Parades, and Mandatory Payments*, 52 RUTGERS L. REV. 123, 126-27 (1999) (noting that the main issue is whether the government action was motivated by the content of the regulated speech); Elena Kagan, *Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 451-56 (1996) (comparing treatment by courts of content-neutral, viewpoint-based, and other content-based laws); Stone, *supra* note 15, at 227 (noting that one of the reasons for examining content is to discover motive).

[167] *See, e.g.*, Wells, *supra* note 15, at 174-75 (examining a number of improper motives and the courts' reactions to them).

[168] *See* Stone, *supra* note 15, at 230 ("[I]n the content-neutral context the risk of improper motivation is quite low, for such restrictions necessarily apply to all ideas, viewpoints and items of information . . . ."); Wells, *supra* note 15, at 175-76 ("[M]uch of the times, the government's neutral justifications are legitimate efforts to balance expression with other important concerns, such as order or privacy.").

testor disruption rather than the protestors' message.[169] In this sense, *Madsen*'s determination of content-neutrality is unremarkable. When determining whether a statute is content-neutral, the Court looks both to the face of the statute and to its objective justifications, that is, the objectively identifiable reasons for the law's enactment.[170] If both are unrelated to the content of the expression, the statute is deemed content-neutral.[171]

While the *Madsen* injunction technically satisfies this content-neutrality inquiry, the similarities between it and a content-neutral statute end there. A content-neutral statute sweeps within its rubric a limitless number of viewpoints. For example, a statute prohibiting use of sound trucks within residential areas affects any person desiring to use such trucks to express themselves.[172] In contrast, the *Madsen* injunction, although not aimed at suppressing a particular viewpoint, clearly affected only a single viewpoint. This is necessarily so given the nature of injunctions as a remedy. Injunctions issue in the context of private disputes between parties; they resolve only that dispute and apply only to the parties to the lawsuit.[173] In a lawsuit

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[169] *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 762-63 (1994) (setting forth terms of the injunction).

[170] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642-43 (1994); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294-95 (1984). One can find these objective justifications in various places, including statements in the preamble of a statute, reasons put forth by the government during a lawsuit challenging the regulation's constitutionality, and possibly, legislative history such as official committee reports. In determining that the Cable Television Consumer Protection Act of 1992 was content-neutral, *Turner* focused on the objective "findings" in Section 2 of the Act. *See id.* at 647.

This Article uses the term "objective justification" to refer to the objective "reasons that can be adduced for [a law's] passage." Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1268 (1995). In contrast, it uses the term "motive" to refer to "the actual psychological intentions" of legislators. *Id.* The Court has never been entirely clear as to whether motive and justification are different things, frequently using the term "purpose" to refer to both. *See id.* The justification/motive distinction, however, explains most of the Court's practice, as discussed below. Moreover, because justifications and motives can conflict, they are identified separately in this Article.

[171] A neutral statute may be deemed content-based if its justifications relate to content. *See Turner*, 512 U.S. at 645. For example, the Court would find a facially neutral law prohibiting destruction of the United States flag to be content-based if its objective justification was to suppress anti-American protestors' desecration of the flag. *See* United States v. Eichman, 496 U.S. 310 (1990).

[172] Such statutes may occasionally burden one viewpoint more than others. A statute prohibiting destruction of draft cards, for example, is more likely to affect anti-war protestors because burning one's draft card is often done as part of such a protest while few pro-war protestors would engage in such expression. *See* United States v. O'Brien, 391 U.S. 367 (1968). Nevertheless, by definition content-neutral laws cannot apply to only one viewpoint.

[173] *See* Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 292 (1941) (noting that injunctive relief "aris[es] out of a particular controversy and [is] adjusted to it"). Professor Fiss writes that an injunction has a unique

> individuated quality . . . aris[ing] from the fact, first, that it is *addressed* to some clearly identified individual, not just the general citizenry; second, the *act* prohibited or required is described with a degree of specificity not found in a liability rule or

alleging various transgressions of anti-abortion protestors, the injunction aiming to solve the problem will affect only those protestors. Content-neutral injunctive relief is thus missing the general applicability fundamental to content-neutral statutes.

This difference between injunctive and statutory relief is no small matter. The broad applicability of content-neutral statutes is critical to the Court's more lenient treatment of them, primarily because it assures the Court that an illegitimate motive (the actual subjective reason inspiring the legislature to act) does not underlie the law. The Court has long eschewed direct inquiries into legislative motive, arguing that they are "a hazardous matter."[174] Its reticence does not stem from a lack of concern regarding illegitimate motive. As noted above, the Court's jurisprudence is rife with statements indicating disapproval of certain governmental purposes.[175] Rather, the Court's reluctance reflects instrumental concerns that it is (1) too difficult to ascertain a single legislative motive,[176] and (2) insulting or, possibly, an over-extension of judicial powers.[177] The content-neutral label in the statutory context allows the Court to do indirectly what it cannot do directly—satisfy itself as to the absence of illegitimate legislative motive. A facially-neutral statute with objective justifications unrelated to the speaker's message raises fewer worries regarding illegitimate motive precisely because it potentially applies to so many different viewpoints. That statutes result from political wrangling between numerous political interests reinforces this point; presumably, opposing legislators will at least cry foul if they believe a content-neutral law is motivated by a desire to suppress a specific viewpoint.

A content-neutral injunction is neither generally applicable nor the product of political wrangling. As the product of a single, often-unelected member of the bench, such injunctions raise censorship concerns beyond those normally associated with content-neutral stat-

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criminal prohibition; and third, the *beneficiaries* of the decree are also more specifically delineated.

FISS, *supra* note 10, at 12.

[174] *O'Brien*, 391 U.S. at 383.

[175] *See supra* note 165.

[176] *See O'Brien*, 391 U.S. at 384 ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."); *see also* Kagan, *supra* note 166, at 438-39 (emphasizing differences in legislators' motivations); Post, *supra* note 170, at 1269 (explaining difficulty of assessing blameworthiness of governmental purposes).

[177] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962) (arguing that "judicial review is a counter-majoritarian force in our system"); Fallon, *supra* note 166, at 95 (explaining that a determination that the government acted for a forbidden reason may be insulting).

utes.[178] Even if a judge's order is technically content-neutral, there exists the possibility that the neutrality is pretextual. Of course, judges are no more likely to act with an illicit motive than are legislators. Many scholars would say that judges are less likely to do so.[179] But the fact remains that judges are human and, unlike legislatures, there are few checks on their censorial impulses.

In his defense, Chief Justice Rehnquist, writing for the *Madsen* majority, recognized the increased risk of illicit judicial motive posed by content-neutral injunctions.[180] But his response to that risk—using an elevated form of intermediate scrutiny[181]—does not adequately protect against it. As applied to content-neutral regulations, intermediate scrutiny is a classic balancing test[182] requiring a court to determine that a regulation is "narrowly tailored" to serve a "significant" government interest while leaving open "ample alternatives of communication."[183] Chief Justice Rehnquist's heightened intermediate scrutiny, in contrast, requires that the injunction "burden no more speech than necessary" to serve a "significant" state interest.[184] How,

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[178] *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 793 (1994) (Scalia, J., concurring in part, dissenting in part) ("[Injunctions] are the product of individual judges rather than of legislatures. . . . The right to free speech should not lightly be placed within the control of a single man or woman."); Lawson v. Murray, 515 U.S. 1110, 1114 (1995) (Scalia, J., concurring in the denial of cert.) (arguing that *Madsen*-like injunctions allow speech to "be quashed, or not quashed, in the discretion of a single official").

[179] Scholars have engaged in lively debate regarding the trustworthiness of judges to issue injunctions. *See, e.g.*, Blasi, *supra* note 10, at 52-53 (arguing that subsequent punishment is a preferable scheme to injunctive relief because judges are risk averse in dealing with claims of harms resulting from speech); Jeffries, *supra* note 5, at 426-27 (arguing that "the judiciary is peculiarly well suited—in personnel, training, ideology, and institutional structure" to make determinations regarding injunctions against expression); Mayton, *supra* note 10, at 250-51 (arguing that the "propensity for over-censorship is not so likely to be shared by . . . [t]he judiciary, [which] is accustomed to dealing with a range of societal interests").

Generally, those scholars who argue that the judiciary is more suited than others to make sensitive decisions regarding the regulation of speech have the better of the argument. Nevertheless, the lack of immediate checks on judicial action warrants a degree of concern that one must take into account when crafting a standard of review. *See* Weinstein, *supra* note 20, at 473 (discussing need to guard against judicial viewpoint discrimination in cases involving "hotly contested" issues).

[180] *See Madsen*, 512 U.S. at 764 ("Injunctions . . . carry greater risks of censorship . . . than do general ordinances. '[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.'") (quoting Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112-13 (1949)).

[181] *See id.* at 764-65.

[182] *See* Ashutosh Bhagwat, *Of Markets and Media: The First Amendment, The New Mass Media, and the Political Components of Culture*, 74 N.C. L. REV. 141, 169 (1995) (arguing that intermediate scrutiny "seeks to balance governmental interests . . . with burdens on free expression"); Kathleen Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 61 (1992) (describing intermediate scrutiny as a balancing test located somewhere between strict scrutiny and rationality review).

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

[184] *Madsen*, 512 U.S. at 765.

exactly, does one tell the difference between these two formulas? Both apply to "significant" interests, but the Court has never defined what those interests are. In addition, the distinction between a regulation that "burdens no more speech than necessary" and a "narrowly tailored" regulation is elusive at best.[185] Both tests reflect the Court's tendency to devise formulas for balancing that purport to give guidance, even certainty, to judicial scrutiny, but which actually distance us from concrete facts with which to do the balancing.[186] The odds that courts will apply these rather antiseptic tests in an appreciably different manner are slim.

In effect, Chief Justice Rehnquist's standard of review for injunctions leaves lower courts to balance in much the same way as they do with content-neutral statutes. When judges review statutes, that balancing is already much criticized:

> [T]he test is by its nature *ad hoc* . . . . Because there is no obvious way to compare such disparate values, this analysis leads to an extremely subjective, and somewhat arbitrary and unpredictable doctrine. Furthermore, the difficulty of the analysis required by [intermediate scrutiny] has inevitably pushed the Court to increase the deference the government receives during judicial review . . . .[187]

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[185] *See id.* at 791 (Scalia, J., concurring in part, dissenting in part) (terming the majority's standard "intermediate-intermediate" scrutiny and commenting that the "difference between it and intermediate scrutiny . . . is frankly too subtle for me to describe").

[186] *See* Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 992-93 (1987) (noting that the Court's tiers of scrutiny "distanc[e] us from the discourse. . . . The weighing mechanism remains a mystery, and the result is simply read off the machine. Scientific balancing decisions are neither opinions nor arguments that can engage us; they are demonstrations"); *see also* Laurent B. Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 CAL. L. REV. 729, 748 (1963) (critiquing balancing tests and how they are employed by judges); Hans A. Linde, *Who Must Know What, When, and How: The Systemic Incoherence of "Interest" Scrutiny*, *in* PUBLIC VALUES IN CONSTITUTIONAL LAW 219, 220-21 (Stephen E. Gottlieb ed., 1993) [hereinafter PUBLIC VALUES] ("Does the choice of words matter? It matters when the words become talismans that obscure rather than clarify the institutional process involved."); Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 196-97, 200-02 (1985) (arguing that the use of formal balancing tests is too mechanical).

[187] Bhagwat, *supra* note 182, at 169-70 (footnote omitted). For other criticisms of intermediate scrutiny as allowing ad hoc judicial activism, see Deborah L. Brake, *Sex as a Suspect Class: An Argument for Applying Strict Scrutiny to Gender Discrimination*, 6 SETON HALL CONST. L.J. 953, 958-62 (1996); George C. Hlavac, *Equal Protection Chapter, Interpretation of the Equal Protection Clause: A Constitutional Shell Game*, 61 GEO. WASH. L. REV. 1349, 1378 (1993); *The Supreme Court, 1995 Term—Leading Cases*, 110 HARV. L. REV. 135, 185 (1996); *but see* Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298 (1998) (defending intermediate scrutiny as an indispensable tool of the Court).

Nevertheless, the risks associated with balancing may be acceptable in the context of legislation.[188] The built-in safeguards stemming from the breadth and political nature of neutral legislation may provide some assurance of legitimate motivation even if courts apply overly deferential or inconsistent review. But requiring a court to balance slightly more carefully in the context of injunctions cannot provide adequate protection against potential illegitimate motive. The real problem with such injunctions is that their attributes make them not content-neutral, at least not in the same sense as statutes. No form of balancing can avoid that problem.[189] A different approach is required to adequately protect against illegitimate motives in the context of such injunctions.

B. Are All Injunctions Like Content-Based Statutes?

If content-neutral injunctions cannot be considered content-neutral in the same sense as statutes, the obvious response under content discrimination principles is to conclude that they are content-based.[190] In practical effect, treating all injunctions as content-based makes them presumptively unconstitutional. Such an approach may be consistent with the Court's rhetoric disfavoring injunctions as prior restraints, but it ignores the Court's actual practice upholding some content-based injunctions. More importantly, injunctions, even some that are content-based, do not necessarily raise the same problems with illegitimate motive as do content-based statutes, making a presumption of unconstitutionality neither necessary nor desirable. In order to see how this is so, the operation of the "content-based" designation in the context of statutes must first be understood.

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[188] The efficacy of a balancing standard in the context of statutes is beyond the scope of this Article and has already been the subject of much debate. *See, e.g.*, Symposium, *When is a Line as Long as a Rock Is Heavy?: Reconciling Public Value and Individual Rights in Constitutional Adjudication*, 45 HASTINGS L.J. 711 (1994). The argument here is simply that, to the extent the Court uses a balancing standard with content-neutral statutes, it does so partly because the nature of legislative enactments in that context makes illegitimate motives less likely.

[189] Additionally, the ad hoc nature of balancing may exacerbate fears that a court acts in a result-oriented manner. In *Craig v. Boren*, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting), for example, then-Justice Rehnquist described intermediate scrutiny as "so diaphanous and elastic as to invite subjective judicial preferences or prejudices" in weighing the constitutionality of regulations. It is no small irony, then, that after so vehemently criticizing intermediate scrutiny, he used a "heightened" form of it to judge the *Madsen* injunction. This willingness to use an admittedly manipulable test may be what prompted Justice Scalia to accuse the majority of reaching its decision for political rather than jurisprudential reasons. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 785 (1994) (Scalia, J., concurring in part, dissenting in part).

[190] Justice Scalia took this position in *Madsen*. *See id.* at 792-93.

Once the Court finds a statute to be facially content-based, it is subject to strict scrutiny.[191] Ostensibly that test provides for some balancing of interests—speech rights may suffer when regulation is necessary to meet compelling interests. Unlike intermediate scrutiny, however, no significant balancing occurs with this standard. Instead, application of strict scrutiny almost always results in the regulation's demise.[192] Thus, the designation of a statute as content-based is the single most important factor in determining whether it will be upheld.[193]

Why does the Court take such a hard line against content-based laws? While some content-based statutes are enacted for illegitimate reasons, the Court acknowledges that not all such statutes are motivated by a desire to suppress speech.[194] Many aim at unobjectionable state interests such as a desire to compensate crime victims[195] or a desire to protect against labor-related violence.[196] Moreover, in defending their "compelling" need for the challenged law, the government must proffer objective justifications which, presumably, ought to have some evidentiary support. If the existence of objective, non-content related justifications assuages concerns regarding illegitimate motive with content-neutral statutes, the existence of such justifications arguably should also assuage concerns with content-based statutes. Nevertheless, the Court does not consider such justifications,

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[191] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642-43 (1993); *see also* Bhagwat, *supra* note 182, at 162 (noting that facially content-based statute will be found content-based and struck down).

[192] *See* Kathleen M. Sullivan, *Post Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 296 (1992) ("If strict scrutiny is applied, the challenged law is never supposed to survive").

Professor Bhagwat has argued that the Court increasingly uses strict scrutiny as a true balancing test rather than as "fatal in fact." *See* Ashutosh Bhagwat, *Hard Cases and the (D)evolution of Constitutional Doctrine*, 30 CONN. L. REV. 961, 964-65 (1998). A few cases in the First Amendment context bear this out. *See, e.g.*, Denver Area Educ. Telecomm. Consortium, Inc., v. FCC, 518 U.S. 727, 736-53 (1996); Burson v. Freeman, 504 U.S. 191, 211 (1992). Moreover, some of the Justices, most prominently Justice Breyer, explicitly call for more nuanced balancing regarding content-based regulations. *See, e.g.*, Nixon v. Shrink Missouri Govt. PAC, -- U.S. --, 120 S. Ct. 897, 911 (2000) (Breyer, J., concurring); *Denver Area*, 518 U.S. at 741. For the moment, however, the Court still largely views the content-based/strict scrutiny formula as a nearly insurmountable barrier. *See* United States v. Playboy Entertainment Group, Inc., -- U.S. --, 120 S. Ct. 1878, 1888 (2000) (reiterating that "'[c]ontent-based regulations are presumptively invalid'") (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992)).

[193] *See* Bhagwat, *supra* note 182, at 162 ("[E]ven the most seemingly innocuous regulation . . . found content based . . . will be struck down.").

[194] *See* Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 117 (1991) (striking down a content-based regulation even though illegitimate motive was unlikely).

[195] *See id.* at 108.

[196] *See* Police Dep't v. Mosely, 408 U.S. 92 (1972).

instead striking down content-based laws almost as a matter of course.[197]

The Court's practice in this regard reflects its distrust of the objective justifications underlying such statutes. That is, with content-based statutes it is more likely that the objective justifications are pretextual. Some of this is due to the statute's regulation of content, but that does not entirely explain the situation. Assume, for example, that a city enacts a law limiting anti-abortion protests outside of all hospitals based upon past disruptive and violent protests near one hospital. Assume further that the city's justifications are clear and that it has substantial proof of such problems in the past. Accordingly, while the statute is content-based, it is so because of a specific relationship to a valid and reasonably credible state interest, the protection of medical facilities from violence and disruption. The mere fact that the statue is content-based does not explain the Court's suspicion of illegitimate motive. The fact that the regulation is a content-based *legislative enactment*, however, does explain the Court's suspicion.

Legislative enactments are broad rules of prohibition designed to prevent future harms.[198] They operate at a relatively abstract level, as with the abortion protestor statute, which bans all protests on the theory that disruption is more likely to occur with anti-abortion protestors than with other protestors. The speculative nature of the harm, combined with the statute's regulation of specific content, raises suspicion regarding the possibility of ulterior motives despite the existence of a legitimate objective justification.[199] The legislature's role in responding to political constituencies further exacerbates this problem. Statutes applying to a single, unpopular group almost always raise the specter of illegitimate motivation.[200] The breadth of a statute's application also plays a role. It applies to all anti-abortion

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[197] *See* Turner Broad. Sys., Inc., v. FCC, 512 U.S. 622, 642-43 (1993) ("[T]he mere assertion of a content-neutral purpose [will not] be enough to save a law which, on its face, discriminates based on content.").

[198] *See In re* Oliver, 452 F.2d 111, 114 (7th Cir. 1972) (declaring that the legislative function is to "adopt[] broad rules, perhaps having their greatest effect on parties not before it, based on facts largely anticipated").

[199] In *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Court upheld a facially content-based law with ostensibly legitimate justifications ("secondary effects" of speech). Critics of the Court's willingness to uphold the regulation voiced the fear that the neutral justifications were merely pretexts for the city's distaste for the materials shown at such theaters. *See* Boos v. Barry, 485 U.S. 312, 335 (1988) (Brennan, J., concurring) (explaining the dangers of the *Renton* analysis); TRIBE, *supra* note 26, § 12-19 at 952 (critiquing *Renton*).

[200] *See, e.g.*, Wells, *supra* note 12, at 24-28 (discussing the possibility that legislative enactments restricting abortion protest activities resulted from political considerations regarding their unpopularity); *id.* at 13-14 (discussing same with respect to members of the Communist Party).

protestors regardless of past participation in protests and protects all hospitals regardless of their history as a target of such activity, increasing the possibility that the city seeks to chill disfavored expression rather than to avoid a specific harm caused by particular individuals. Thus, the very aspects of legislation that provided some assurances against illegitimate motive with content-neutral statutes—general application, breadth of coverage, and political wrangling—actually raise suspicion regarding illegitimate motive when the statute is content-based. The strong presumption of unconstitutionality with content-based statutes is the result.[201]

It does not necessarily follow, however, that an injunction regulating only abortion protestors poses the same problem of illegitimate motive. Injunctions are not political in nature. They are individuated remedies "arising out of a particular controversy and adjusted to it."[202] The party seeking relief, whether governmental or private, must allege a specific cause of action and particularized harm that rises to the level of "irreparable injury."[203] Thus, a hospital seeking an injunction must prove that its interests will be substantially impaired before it can obtain an order barring anti-abortion protests near its premises. Moreover, traditional remedial principles require that injunctions be "ripe." They cannot issue without the "exist[ence of] some cognizable danger of recurrent violation, something more than the mere possibility" of harm.[204] In order to meet this requirement, the hospital must show a substantial certainty of violent and disruptive protests on its premises by the defendants. Such concrete evidence of a cognizable injury goes far to legitimate its motive in seeking the injunction.

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[201] *See* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 202 (1988) (noting that if there were a "foolproof fact-finding mechanism that enabled a court to determine whether the government was influenced by hostility or favoritism toward certain kinds of speech[,] [s]urely we would use that mechanism, at least in some cases, instead of automatically invalidating a classification" based upon its content).

[202] Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 292 (1941).

[203] *See, e.g.*, Doe v. Bellin Mem'l Hosp., 479 F.2d 756, 759 (7th Cir. 1973); Tully v. Mott Supermarkets, Inc., 337 F. Supp. 834, 850 (D.N.J. 1972). *See also* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 8 (1991) (explaining that the primary purpose of the irreparable injury requirement is to ensure that an injunction issues only if a plaintiff cannot be adequately compensated by damages). While this standard is not overwhelmingly difficult to meet, *see id.* at 4-5, it at least forces the plaintiff to put on proof of harm. In this way the legitimacy of the harm as a justification for regulating speech may be more reliable than the more abstract harms at which statutes aim.

[204] United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953). *See also* City of Los Angeles v. Lyons, 461 U.S. 95 (1983); Humble Oil & Ref. Co. v. Harang, 262 F. Supp. 39, 42 (E.D. La. 1966); Paraco, Inc. v. Owens, 333 P.2d 360, 363 (Cal. Ct. App. 1959). The ripeness requirement stems from jurisdictional and equitable considerations. *See generally* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 249-51 (2d ed. 1994).

Likewise, injunctions apply only to parties before the court[205] and aim at remedying the conflict in the narrowest manner possible.[206] An injunction preventing particular protestors from engaging in activity before particular hospitals more likely aims at eradicating the stated harm than does an "abstract statute [which has] an overhanging and undefined threat to free utterance."[207]

This is not to say that a reviewing court can guarantee the trustworthiness of the stated reasons for an injunction. As discussed in the next section, there are surely instances counseling skepticism of some objective reasons. The context specificity associated with injunctions, however, carries with it some safeguards regarding potential illegitimate motive that do not exist with content-based statutes. Consequently, the Court's fear that content-based statutes reflect illicit purposes should not necessarily translate into a similar fear regarding facially content-neutral injunctions which admittedly have content-based overtones.

This is true even with some facially content-based injunctions. *Seattle Times Co. v. Rhinehart*,[208] for example, involved a court order prohibiting one party from publishing specific information regarding the opposing party. Although content-based, the order originated because the *Seattle Times* acknowledged that it would use information otherwise unavailable to it to further its publications regarding the plaintiff.[209] In effect, the newspaper used its role as defendant in a lawsuit to abuse the litigation process for its own ends. The court's order forbidding the newspaper from publishing private information gained through discovery stemmed from a desire to protect the discovery process rather than to suppress speech. The context specificity of the protective order—its narrow application to a specific dispute between two parties, the acknowledged and concrete threat of publication by the *Seattle Times*, and the fact that the order prohibited only publication of information gained through discovery rather than other means—allayed concerns regarding illegitimate motive. Thus, this

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[205] *See, e.g.*, FED. R. CIV. P. 65(d) (limiting the application of injunctions to parties to the lawsuit, their agents, or those who act in concert with them); *see also* Weinstein, *supra* note 20, at 512 ("[I]njunctions must be addressed to particular individuals or groups.").

[206] Although courts sitting in equity generally have great discretion in fashioning appropriate remedies, the Court's recent cases make clear that the scope of injunctive relief in constitutional cases must be carefully tailored to meet only the actual needs of the case. *See* Lewis v. Casey, 518 U.S. 343 (1996) (holding that findings of fact did not support system-wide injunction ordering changes in prison legal assistance program); Missouri v. Jenkins, 515 U.S. 70 (1995) (holding that the district court exceeded its authority in mandating across-the-board salary increases for Kansas City teachers).

[207] *Milk Wagon Drivers Union*, 312 U.S. at 292.

[208] 467 U.S. 20 (1984).

[209] *See id.* at 24-25.

content-based injunction did not pose the same danger of illicit motive as do content-based statutes.[210]

Under traditional content discrimination principles and the nearly impenetrable barrier posed by strict scrutiny, however, this injunction should have been struck down. Such an outcome seems to defy common sense and, moreover, does not reflect what the Court actually did in *Rhinehart*. A court constrained by these principles, however, has little choice unless it manipulates the content-based/strict scrutiny standard to reach a different outcome. This manipulation could occur in two ways. First, a court wishing to uphold the injunction could acknowledge that the injunction is content-based but find that it satisfies strict scrutiny. Such an application significantly departs from past practice; almost no content-based regulation has been found sufficient under this standard.[211] Given this history, actual application of strict scrutiny as a balancing test could lead to accusations of bias and politicking. Second, a court could find the *Rhinehart* order content-neutral because its purpose was not to regulate content but to protect the discovery process. This, of course, turns the Court's approach to content-based distinctions on its head and, even more so than the first alternative, suggests an ulterior motive. In fact, the one case in which the Court obviously used such reasoning has been almost uniformly criticized.[212] Content discrimi-

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[210] To be sure, many content-based injunctions will raise concerns regarding dubious motives. For example, although the government sought the injunction in the *Pentagon Papers Case* because it feared harm to national security, some Justices feared that it was actually trying to avoid embarrassment or to keep its citizens ignorant of the true causes of the Vietnam War. *See* New York Times Co. v. United States, 403 U.S. 713, 723-24 (1971) (Douglas, J., concurring); Sims, *supra* note 57, at 412-415 (analyzing the government's arguments and the Supreme Court's reaction to injunctive relief). Even here, though, the regulation of content was not the sole basis for skepticism. Had the government proffered anything remotely resembling evidence of a concrete harm, its motives might have looked legitimate despite the injunction's regulation of content. Thus, the government's request for a broad, suppressive injunction based upon a speculative and remote harm looked suspiciously like a broad statutory prohibition. *See, e.g.*, Fiss, *supra* note 60, at 8; Doug Rendleman, *Irreparability Irreparably Damaged*, 90 MICH. L. REV. 1642, 1665 (1992) (reviewing DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE (1991)).

[211] *See* Burson v. Freeman, 504 U.S. 191, 211 (1992) (upholding a content-based regulation under strict scrutiny analysis while commenting that it was an extremely rare situation); *see also supra* notes 192-97. Professor Weinstein has noted that courts forced to use strict scrutiny with injunctions where such scrutiny seems unwarranted are likely to manipulate strict scrutiny in ways inconsistent with our current understanding of that test. *See* Weinstein, *supra* note 20, at 511-13.

[212] *See* Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), in which the Court described a facially content-based law regulating adult theaters as content-neutral because it had ostensibly legitimate, "secondary effects" justifications. This decision generated much scholarly and judicial criticism. *See* Wells, *supra* note 12, at 55 n.259, 56 n.260 (citing *Renton*'s critics); *see also* sources cited *supra* note 199.

Although still good law in the context of zoning regulations of sexually explicit movie theaters, *Renton* has not gained acceptance in other areas of the Court's jurisprudence. *See* Wells, *supra* note 12, at 56 n.263 (citing cases refusing to use *Renton* analysis); Keith Werhan,

nation principles, then, are not helpful in assessing this particular injunction.

In sum, the content-based/content-neutral distinction serves as a useful, even necessary,[213] proxy for the existence of improper government motive in the context of statutory relief. This proxy function, however, is less relevant with injunctive relief. The presumption of legitimate motive with content-neutral statutes does not hold with content-neutral injunctions. Furthermore, applying a heightened form of intermediate scrutiny provides insufficient protection against possible illegitimate motive. Similarly, the presumption that illegitimate motive underlies content-based statutes is not altogether necessary with injunctions. Application of the content-based/strict scrutiny formula to facially content-based injunctions gives courts too little flexibility and risks manipulation of that formula to reach a desired outcome. In the injunctive context, the content-based/content-neutral designation loses its meaning and becomes a jurisprudence of words rather than of things.[214]

IV. INJUNCTIONS REGULATING EXPRESSION—THE ARGUMENT FOR A MORE DIRECT INQUIRY INTO GOVERNMENTAL MOTIVES

Rather than rely on content discrimination principles as a proxy for motive scrutiny, this section argues that, because of the contextual nature of injunctive relief, the Court can and should inquire more directly into governmental purposes regarding injunctions. Two issues arise with respect to such purpose scrutiny. First, can we avoid the institutional problems identified by the Court with respect to motive inquiries simply because injunctions are involved? Second, what is the relevant universe of governmental purposes and how should we treat them?

The Liberalization of Freedom of Speech on a Conservative Court, 80 IOWA L. REV. 51, 73-76 (1994) (recounting Court's effort to "reduce the scope of the 'secondary effects' doctrine of *Renton*").

[213] Not everyone agrees that content discrimination principles are a useful proxy for illegitimate government motive with statutes. Some scholars argue for discarding such principles in favor of a direct inquiry into government purposes in all situations. *See* TRIBE, *supra* note 26, § 12-6 at 823-825; Bhagwhat, *supra* note 166, at 321-23. While provocative and illuminating, lengthy discussion of this proposition is beyond the scope of this Article. It is sufficient to note that, because of the nature of legislative remedies, content discrimination principles serve as better proxies for illegitimate motives with statutes than with injunctions.

[214] *See* OLIVER WENDELL HOLMES, JR., *Law in Science—Science in Law*, *in* COLLECTED LEGAL PAPERS 210, 238 (1920) (counseling lawyers to "think things not words").

A. Institutional Concerns with Motive Inquiries in the Context of Injunctions

The Court avoids motive inquiries in reviewing statutes because of difficulties in attributing a single motive to a large legislative body and because such inquiries may amount to judicial overreaching.[215] Can a reviewing court[216] inquire directly into judicial motive without encountering these problems? To the extent that a single judge issues an injunction, the possibility of multiple, conflicting motives lessens.[217] If motive, however, is the "actual subjective reason" inspiring action, the inclusion of a judge rather than a legislature changes nothing. Judges, like legislatures, can hide their motives, making attempts to ferret them out directly almost impossible.[218] In addition, while appellate court scrutiny of an inferior court's subjective motive may not involve separation of powers issues, it is no less insulting to the lower court. Judges are as reluctant to accuse their own colleagues of bad faith as they are legislatures. This may be especially true with injunctive relief, an area in which reviewing courts typically defer to trial courts' equitable discretion.[219] Thus, the Court's institutional concerns regarding direct inquiries into legislative motive may also argue against direct inquiry into judicial motives.

One can, however, use a far more direct proxy for scrutiny of judicial motive than the content-based/content-neutral distinction. Specifically, a reviewing court can ferret out judicial motive using an injunction's objective justification as the starting point. As the product of a lawsuit alleging specific harms, an injunction should issue for readily identifiable reasons. In fact, most jurisdictions' rules of civil procedure require that courts set forth the reasons for the injunction in

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[215] *See supra* notes 174, 176-77 and accompanying text.

[216] This section is structured in terms of how reviewing courts should assess the constitutionality of an injunction, but the same justifications and related tests could also guide an issuing court.

[217] A judge's motives, of course, might conflict with the party seeking the injunction. The true source of illegitimate motive, for example, might arise from the party while the judge has no feeling one way or another. Because a court order may give effect to a party's motive, even if unwittingly, this Article treats the term "judicial motive" as encompassing both.

[218] *See* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1496 (1975) ("Restrictions on free expression are rarely defended on the ground that the state simply didn't like what the defendant was saying; reference will generally be made to some danger beyond the message, such as a danger of riot, unlawful action or overthrow of the government.").

[219] *See, e.g.*, Virginian Ry. Co. v. System Fed'n No. 40, 300 U.S. 515, 551 (1937) (noting that the decision to issue an injunction is within the "sound discretion of the [trial] court").

Noting that inquiry into judicial motive is insulting does not lead to absolute deference by reviewing courts to lower court decisions. Especially when First Amendment issues are involved, there is ample reason for a reviewing court to aggressively review evidence and application of legal standards. *See infra* note 249. An inquiry into actual subjective motivation, however, is insulting on a personal level and is unwarranted given its difficulties.

the order itself.[220] It is a relatively simple matter for an appellate court to review the order to determine the reasons for its issuance. To be sure, injunctions differ. Some are extremely lengthy and specific while others are only a few sentences.[221] Such disparities may make identification of objective justifications difficult.[222] In such cases, however, a reviewing court can resort to the appellate record to ascertain those justifications. At some point in the proceedings, the plaintiff will have identified the harm to be remedied, thus giving a reviewing court ample material from which to discern the reasons for the injunction's issuance. Moreover, to ensure the existence of identifiable justifications, the Court could simply impose more stringent drafting requirements on injunctions involving First Amendment issues.

Identification of an injunction's objective justification is merely the first step in this inquiry. Because motives are easily hidden, it would be foolish to accept such justifications as the final evidence of motive. Accordingly, a method must be devised to determine which objective justifications pose illegitimate motive problems and to guard against the justifications that pose such problems. The next section examines these issues in depth.

B. Identifying Justifications and Ensuring They Are Not Pretextual

To make scrutiny of objective justifications meaningful, a finite framework of purposes must be devised to provide reviewing courts with guidance. Otherwise, unrestrained and rigorous purpose scrutiny "could easily slip into *Lochner*-esque overreaching. . . . giv[ing] the judiciary a blank check to review . . . purposes based on a particular judge's notions of rationality or legitimacy."[223] The Court's past jurisprudence helps in this regard. Three categories of government purposes emerge from past decisions as relevant to a regulation's constitutionality. They are (1) regulations of speech because of hostility

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[220] *See, e.g.*, FED. R. CIV. P. 65(d) (requiring that a court issuing an injunction "set forth the reasons for its issuance; . . . be specific in [its] terms; [and] . . . describe in reasonable detail . . . the act or acts sought to be restrained").

[221] *Compare* Planned Parenthood v. American Coalition of Life Activists, 41 F. Supp. 2d 1130 (D. Or. 1999) (issuing permanent injunction of 26 pages and containing detailed findings of fact and conclusions of law) *with* Meyer v. Brown & Root Constr. Co., 661 F.2d 369 (5th Cir. 1981) (injunction of a few sentences in length).

[222] Arguably, an injunction insufficiently specific as to its terms or bases can, and should, be overturned under traditional remedial requirements aside from First Amendment issues. For example, a defendant can challenge, as violating a rule of procedure, an order failing to adequately describe the defendant's violation or the acts prohibited. *See* FED. R. CIV. P. 65(d). A defendant subject to contempt sanctions may also challenge a poorly drafted injunction as giving insufficient notice of the prohibited conduct. *See, e.g.*, United States v. Joyce, 498 F.2d 592 (7th Cir. 1974).

[223] Bhagwat, *supra* note 166, at 320.

toward the speaker's message (illegitimate purposes), (2) regulation of speech based upon its communicative effect (disfavored purposes), and (3) non-hostile and non-communicative impact-related concerns such as traffic safety or protection of privacy (legitimate purposes). A court should initially review an injunction's objective justifications to identify into which of these three categories it falls. After the objective justifications have been appropriately classified, a court can determine an injunction's constitutionality by applying principles specifically tailored to each category. The subsections below discuss this general framework in more detail. While this framework cannot be exhaustive, it does provide a working outline upon which courts can rely in handling individual cases.

1. Injunctions Based on Hostility Toward the Speaker's Message (Illegitimate Justifications)

The Court has long expressed antipathy toward governmental purposes grounded in hostility toward the message expressed. Thus, government officials cannot "suppress certain ideas that [they] find[] distasteful."[224] Nor can they protect citizens from expression they find offensive.[225] In effect, the Court has held such motives to be per se illegitimate.[226] Courts should similarly treat an injunction with objectively identified justifications as falling into this category.

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[224] City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984); *see also* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980) (stating that government cannot prohibit speech "merely because public officials disapprove the speaker's views"); Stromberg v. California, 283 U.S. 359, 369 (1931) (holding that a statute, so broad and vague that it interferes with free political discussion, conflicts with the Constitution). As Professors Kagan and Williams note, the government can view a speaker's message with distaste for several reasons—e.g., because the expression criticizes government action, because it believes that the expression is false, because it sees the speech as threatening an official's own self-interest, or because it believes citizens are better-off ignorant. *See* Kagan, *supra* note 166, at 428-29; Williams, *supra* note 156, at 697. Although these reasons differ somewhat, one can still place them within the more general notion of government disagreement with speech. *See* Stone, *supra* note 15, at 227-28.

[225] *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988) ("'The fact that society may find speech offensive is not a sufficient reason for suppressing it.'") (quoting FCC v. Pacifica Found., 438 U.S. 726 (1978)). *See also* Cohen v. California, 403 U.S. 15, 21 (1971) ("The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.").

[226] *See* Stone, *supra* note 15, at 229 (delineating between improper motives (hostility toward the message) and paternalistic justifications ("concern over the consequences that might result if others accept the speaker's message")). Under content discrimination principles, the Court subjects regulations grounded in such justifications to strict scrutiny, which suggests that even these regulations could be upheld if they met that test's requirements. In practice, however, once the Court perceives a regulation to be grounded in impermissible motive, "the possibility that it [will] be upheld [is] essentially nil" and the application of strict scrutiny pro forma. Bhagwat, *supra* note 166, at 328.

In fact, one can attribute several of the Court's decisions striking down injunctions to the operation of improper purposes. In *Near*, for example, the lower court enjoined certain newspaper publications as a public nuisance, largely because of their scathing criticism of local government officials.[227] Although disagreement with the publication originated with those local officials, the nuisance standard's vagueness allowed the trial court to give effect to that disagreement.[228] Thus, *Near* involved a rare case of open judicial disagreement with speech—an aspect of the case that clearly concerned the Supreme Court.[229] Other decisions have also involved injunctions suppressing "offensive" speech. In *Keefe*, the lower court enjoined distribution of leaflets potentially embarrassing the respondent real estate broker.[230] Similarly, *Madsen*'s no-approach provision prohibited peaceful speech at least in part because women might have found it upsetting.[231] The Supreme Court struck down both of these injunctive provisions. Although it relied heavily on prior restraint or content discrimination rhetoric to support its action, the core of the Court's reasoning came in the notion that protecting people from offense is simply an insufficient reason to sustain an injunction.[232]

2. *Injunctions Based on the Communicative Impact of Speech (Disfavored Justifications)*

Some regulations of speech stem not from hostility toward the expression but from fear that it will persuade or otherwise cause citizens to engage in undesirable behavior. Laws punishing advocacy of illegal activity, for example, were enacted because officials feared that the expression would persuade people to engage in that activity.[233] Laws punishing expression potentially causing an audience to

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[227] *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 705 (1931).

[228] The *Near* statute's allowance of an injunction against all future, similar speech is also problematic as it allowed a court to censor in the absence of any identifiable harm. Such a scheme should be considered as per se evidence of improper motive.

[229] *See Near*, 283 U.S. at 713.

[230] *See* Organization for a Better Austin v. Keefe, 402 U.S. 415, 418-19 (1971). Since the injunction prohibited public criticism of the respondent's actions rather than publication of confidential information, it protected against offense rather than invasion of privacy. *See id.*

[231] *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 774 (1994). Although the Court acknowledged that the provision aimed at persons who stalked and harassed clinic patients and personnel, to the extent the injunction also prohibited peaceful speech, it essentially aimed at protecting women from offense. *See id.*

[232] *See Madsen*, 512 U.S. at 774 (noting that the prohibition of peaceful "uninvited approaches" violated the idea that "'in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment'") (quoting Boos v. Barry, 485 U.S. 312, 322 (1988)); *Keefe*, 402 U.S. at 419 ("[T]he interest of an individual in being free from public criticism of his business practices . . . [does not] warrant[] use of the injunctive power of a court.").

[233] *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (involving Ohio statute prohibiting advocacy of the use of violence or terrorism as a form of political reform); Abrams v. United

become hostile, unrestful, and riotous were motivated by a similar fear.[234] In essence, the government regulated speech because of its "communicative impact"[235] rather than because of disagreement with the message. Such regulations are not per se illegitimate, but the Court disfavors them, subjecting them to rigorous scrutiny and striking them down "'unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest.'"[236] The Court's communicative impact cases thus provide a second category of potential objective justifications underlying injunctions.

There is a potential objection to using "communicative impact" as a classification. Such regulations present a significant risk of pretexuality; that is, the government's ostensible aim at preventing violence or overthrow of the government may mask hostility toward the speaker's message.[237] In most of the seditious advocacy and hostile audience cases, for example, the feared harm was so intangible or unlikely that the Court ultimately characterized the government's purpose as suppression of unpopular speech.[238] Given how closely

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States, 250 U.S. 616 (1919) (involving federal statute prohibiting persons from provoking or encouraging resistance to the war effort).

[234] *See, e.g.*, Edwards v. South Carolina, 372 U.S. 229, 234 (1963) (involving civil rights protestors arrested for violating statute prohibiting "a violation of public order, [or] a disturbance of the public tranquility, by any act or conduct inciting to violence"); Feiner v. New York, 340 U.S. 315 (1951) (charging defendant with disorderly conduct for engaging in a speech that attracted a hostile crowd).

[235] *See* TRIBE, *supra* note 26, § 12-2, at 789-90 ("[G]overnment cannot justify restrictions on free expression by reference to the adverse consequences of allowing certain ideas or information to enter the realm of discussion and awareness."); Ely, *supra* note 218, at 1497 (describing regulations based on communicative effect as those where "the harm that the state is seeking to avert is one that grows out of the fact that the defendant is communicating, and more particularly out of the way people can be expected to react to his message").

[236] *Edwards*, 372 U.S. at 237 (quoting Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949)). *See also* Gregory v. City of Chicago, 394 U.S. 111, 117-18 (1969) (stating that governments cannot "regulate conduct connected with these [First Amendment] freedoms through use of sweeping, dragnet statutes that may, because of vagueness, jeopardize these freedoms"); Cox v. Louisiana, 379 U.S. 536, 551 (1965) (overturning a statute allowing "persons to be punished merely for peacefully expressing unpopular views"); Williams, *supra* note 156, at 700 (arguing for application of a form of strict scrutiny whenever a government regulation targets the communicative impact of speech).

[237] In addition to pretextuality, some might argue that there simply is no difference between regulation based on hostility and regulation based on harm stemming from a message. As Professor Kagan notes, "[w]hat is it, after all, to hate a message if not, and other than, to think the message causes injury?" Kagan, *supra* note 166, at 433. As she further points out, however, sheer dislike of an idea in the abstract and fear that a message will cause people to do something that is acknowledged as undesirable have distinct characteristics. *See id.* at 433-34.

[238] In *Edwards*, the Court reversed the conviction of civil rights protestors under a South Carolina disorderly conduct law because it rested "upon evidence which showed no more than that [their] opinions . . . were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection." *Edwards*, 372 U.S. at 237. *See also Cox*, 379 U.S. at 551 (reversing breach of the peace convictions because they were based on evidence supporting only that the student protestors' views were unpopular); Dennis v. United States, 341 U.S. 494, 585 (1951) (Douglas, J., dissenting) (implying that the seditious advocacy convictions

entwined "illegitimate" and "disfavored" purposes are, attempts to distinguish them may be fruitless. Indeed, the Court arguably turned to content discrimination principles for this reason. Regulations based upon hostility to a message or communicative impact are generally content-based and subject to strict scrutiny. Given the strong presumption of unconstitutionality with content-based regulations, laws based in either justification are unlikely to survive, making distinctions between them irrelevant.

Suspicions regarding an injunction aimed at communicative impact, though legitimate, nevertheless do not justify an irrebuttable presumption of improper motive. Sometimes the government seeking to enjoin speech really does, and ought to, fear that it will cause a riot. There are also occasions when a criminal defendant's rights or national security are substantially endangered by publication of information. In such cases, the harm sought to be avoided is compelling even if it directly results from the content of expression. Rather than presume improper motive, a court should try to ensure the veracity of a justification based in communicative impact by using a test designed to ascertain that the harm is concrete.

The Court's approach in *Brandenburg v. Ohio*[239] does just that. *Brandenburg* established that government attempts to regulate advocacy of violent lawless activity are constitutional only if advocacy is "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action."[240] *Brandenburg* acknowledged that protection against violent, lawless activity was a legitimate purpose. It also recognized that in previous cases such purposes often were used pretextually to suppress speech with which the government disagreed. It thus raised the bar with regulations aimed at communicative impact, requiring that the alleged harm be concrete, likely, and imminent in order to ensure that speech regulations were actually aimed at eradicating the state harm.[241] Applying a *Brandenburg* standard to injunctions aimed at communicative impact can similarly protect against the possibility of illegitimate motive.

That said, the *Brandenburg* standard is a balancing test requiring the Court to weigh the likelihood and magnitude of harm against the right to free expression. Some commentators argue that courts, unable to compare imponderables, will act out of excessive caution and suppress speech when it is unwarranted.[242] This certainly was the

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of Communist Party leaders were based not in a tangible threat to the government but in "passionate opposition against [their] speech, [and] a revolted dislike for its contents").

[239] 395 U.S. 444 (1969).

[240] *Id.* at 447.

[241] *See* Wells, *supra* note 15, at 179-80 (discussing *Brandenburg*'s protection against illegitimate motive).

[242] *See* Blasi, *supra* note 10, at 49-50; Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CAL. L. REV. 422, 458 (1980).

case with some versions of *Brandenburg*'s precursor—the clear and present danger test.[243] But *Brandenburg* does not involve the ad hoc balancing of those earlier cases; rather, it is a "weighted" balancing, one that heavily favors speech in the absence of concrete evidence of intentional and likely imminent harm.[244] Moreover, the earlier cases occurred when speech protection was still evolving. Balancing in that context was inevitably unreliable. *Brandenburg* is a product of a modern, speech-protective Court. Its already strict test read in this context signals the need for courts to carefully assess restrictions on speech.[245]

Two additional requirements may further allay concerns regarding this standard. First, the Court can require that injunctions issue only to avoid "serious" harms. Although it has never identified a universe of such harms,[246] a suitable definition requires that there exist some threat to democratic government, either through significant violent activity or damage to other constitutional interests such as another constitutional right.[247] Such a definition finds support in the Court's cases[248] and, taken with the basic requirements of *Brandenburg*, ensures that injunctive relief issues to protect against imminent invasion of only the most compelling interests. Second, an appellate

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[243] *See, e.g.*, Dennis v. United States, 341 U.S. 494, 516 (1951) (holding that defendant's attempts to organize Communist Party created a clear and present danger to the United States government); Debs v. United States, 249 U.S. 211, 215 (1919) (finding that probable effect of defendant's speech was to obstruct recruiting for the draft and therefore the speech was not protected).

[244] *See* Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 754-55 (1975). *See also* Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1177 (1982) (noting that there can be "weighted" versions of such a test).

[245] *See* Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 410-42 (1995) (noting that judicial doctrine is based upon shared societal assumptions regarding what actions are appropriate). The weighted balancing of *Brandenburg*, read in light of the current strong protection of speech, should result in speech-protective applications of the test.

[246] *See* Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 932-37 (1988) (noting that courts rarely identify interests they choose to protect).

[247] *See* Stephen E. Gottlieb, *Introduction*, *in* PUBLIC VALUES, *supra* note 186, at 1, 7-8 (arguing for an interpretation of compelling interests as those that can be linked to the Constitution).

[248] *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 726-27 (1971) (Brennan, J., concurring) ("[O]nly governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance [of an injunction]."); Edwards v. South Carolina, 372 U.S. 229, 237 (1964) (requiring that speech be "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest" before the speech can be suppressed); Bridges v. California, 314 U.S. 252, 263 (1941) ("What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.").

court should engage in independent review of the trial court's findings in order to ensure that the *Brandenburg* standard is both appropriately applied and supported by the evidence. The Court already engages in such review in other areas of First Amendment jurisprudence,[249] and its extension here provides further protection against illegitimate motive.

A final comment regarding reliance on a *Brandenburg*-like standard is in order. *Brandenburg* involved incitement of illegal activity, a specific setting with specific dynamics. Other communicative impact situations may not involve such dynamics. Consequently, application of *Brandenburg*'s precise test may prove inappropriate. *Nebraska Press* and the *Pentagon Papers Case*, two of the Court's prominent prior restraint cases, illustrate this phenomenon. Both cases involved regulation of speech based upon communicative impact. In the former, the trial court enjoined publication of certain confidential information that it feared would persuade potential jurors as to the defendant's guilt. In the latter, the government also sought an injunction prohibiting publication of confidential information[250] that it thought could be misused. Neither defendant publishing the information intended these harms. Rather, as news organizations, they were simply reporting on topical matters of interest. In this sense, the defendants lacked the critical *Brandenburg* requirement that the speaker intentionally cause harm. As such, a court applying that standard would be unable to enjoin such speech, no matter how real the potential harm.

Such a result is troublesome because it ignores the true source of harm in confidential information situations, which results not from a speaker's advocacy of illegal activity but from the provision of information. Application of a pure *Brandenburg* standard thus prevents

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[249] In cases involving regulations of "low-value" speech, the Court routinely examines evidence to ensure that the lower court's "low-value" determination was correct. The Court explains:

> [T]he limits of the unprotected category, as well as the unprotected character of particular communications, have been determined by the judicial evaluation of special facts that have been deemed to have constitutional significance.... [T]he Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited.

Bose Corp. v. Consumer's Union of United States, Inc., 466 U.S. 485, 505 (1984). See Steven Alan Childress, *Constitutional Fact and Process: A First Amendment Model of Censorial Discretion*, 70 TUL. L. REV. 1229 (1996), for a discussion of the Court's "constitutional fact" doctrine in First Amendment cases.

[250] The Court's cases support a governmental right to keep information confidential. *See* Landmark Communications v. Virginia, 435 U.S. 829, 835 (1978) ("[C]onfidentiality is perceived as tending to insure the ultimate effectiveness of the judicial review commissions."). The Court assumed in *Nebraska Press* and the *Pentagon Papers Case* that the information published therein fell within this category. Obviously, whether information is legitimately the subject of a confidentiality designation involves an entirely separate determination.

protection of important non-speech interests in situations where intent is essentially irrelevant. To remedy this flaw, *Brandenburg* must be altered so that injunctions issue after a showing that publication will likely result in direct, imminent[251] and irreparable damage to defendant's Sixth Amendment rights or national security.

Some may object to deleting the intent requirement as underprotecting speech.[252] With incitement of illegal activity, that may be true—punishing one who advocates the propriety of illegal activity absent the intent to cause that activity would chill expression in unacceptable ways and raises motive concerns. A strict causation requirement, however, can adequately protect against suppression in the confidential information cases, as the *Pentagon Papers Case* and *Nebraska Press* reflect. In the *Pentagon Papers Case*, the government's claimed harm to national security interests fell far short of even a meager causation analysis. The government initially refused to put on any evidence of harm, instead asserting that it was within the executive branch's discretion to determine whether national security interests warranted suppression.[253] Although it eventually identified specific national security concerns, the government's evidence never supported a finding that publication would cause the "direct, immediate, and irreparable damage"[254] required by several Justices prior to issuance of an injunction.[255] The *Nebraska Press* gag order suffered from similar problems as evidenced by Chief Justice Burger's pointed

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[251] Professor Greenawalt argues that "imminence" in the sense of "immediate" is not a necessary requirement in such situations because the effect of such information "is unlikely to dissipate itself like the persuasive force of [advocacy] and because possibilities of countervailing communication are much less relevant . . . ." KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 273 (1989). He instead argues in favor of a standard requiring that the harm be "reasonably likely [to occur] in the 'near future'" and indicates that this period could last up to "a few months." *Id.* This seems to be a reasonable approach to imminence in this context so long as causation requirements are very strict. Other contexts, like seditious advocacy, may require an "imminence in the sense of immediate" requirement. *See* Redish, *supra* note 244, at 1181 (arguing for a "flexible method of determining the level of immediacy needed in each case").

[252] *See, e.g.*, Dow & Shieldes, *supra* note 157, at 1218-19 (arguing that any version of the clear and present danger test should have a requirement that "the speaker's specific intent in uttering the speech is to cause an unlawful injury").

[253] *See* Sims, *supra* note 57, at 372.

[254] *Id.* at 375. The government eventually alleged eleven examples of potential national security problems. *See id.* Even with these specific allegations, it was never able to produce evidence of harm sufficient to satisfy the Court. *See id.* at 374.

[255] Justice Stewart, joined by Justice White, argued that an injunction could issue only if publication would "surely result in direct, immediate, and irreparable damage." New York Times Co. v. United States, 403 U.S. 713, 730 (1971) (Stewart, J., concurring). Justice Brennan argued that "only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support the issuance [of an injunction]." *Id.* at 726-27 (Brennan, J., concurring).

reference to the speculative nature of the harm alleged.[256] In both cases, a strict causation requirement alone provided ample protection against suppression based upon improper motive. By stressing the causation requirement, and modifying *Brandenburg*'s other aspects when appropriate in particular situations, reviewing courts can use *Brandenburg*'s standard to effectuate the government's interest without giving effect to illegitimate motive and unduly suppressing speech.[257]

3. Legitimate Justifications

The final category of justifications relevant to purpose scrutiny involves "legitimate" justifications. Although the universe of legitimate justifications supporting speech regulation is potentially endless,[258] we can roughly define them as non-negligible[259] interests unrelated to hostility or communicative impact of speech that are within the government's power to protect. Examples include regulation of noise levels in order to preserve quiet enjoyment of the home;[260] a ban on disruptive picketing near an elementary school during school hours in order to preserve the educative process;[261] state common law rules allowing redress for damage to reputation or privacy interests;[262] and regulations prohibiting false or misleading advertising in order to prevent consumer fraud.[263] While all of these regulations affect expression—controlling its timing, manner and, sometimes, content—their

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[256] *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562-63 (1976). The *Nebraska Press* and the *Pentagon Papers Case* outcomes are not particularly unusual. According to Professor Sunstein, "three uncertainties" suggest that the necessary link between publication of confidential information and the feared harm will be difficult to draw: (1) uncertainty regarding whether information is received in a meaningful way, (2) uncertainty regarding the use to which it will be put, and (3) uncertainty as to the effect such information will have if it is put to the feared use. *See* Cass Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889, 906 (1986).

[257] Although it is not possible for this Article to list every possible scenario in which the *Brandenburg* rationale might arise, Professor Greenawalt has catalogued a number of those situations along with their appropriate tests. *See* GREENAWALT, *supra* note 251, at 260-77.

[258] *See* Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 348-51 (1993) (discussing various potential government interests in constitutional analysis).

[259] It is possible, although highly unlikely, for an injunction to be based on an ephemeral interest. Perhaps even more than legislatures, judges "do not [issue] wholly useless" orders. Ely, *supra* note 218, at 1486. The requirement that plaintiffs seeking equitable relief allege a threatened invasion of a concrete right seems adequate protection against this problem.

[260] *See* Ward v. Rock Against Racism, 491 U.S. 781 (1989) (involving law requiring use of certain approved amplification equipment during concert performances); Kovacs v. Cooper, 336 U.S. 77 (1949) (involving law prohibiting use of sound trucks in residential areas).

[261] *See* Grayned v. City of Rockford, 408 U.S. 104 (1972).

[262] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (involving common law libel); Time, Inc. v. Hill, 385 U.S. 374 (1967) (involving false light invasion of privacy tort).

[263] *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-72 n.24 (1976) (discussing validity of state regulations of false and misleading advertising).

justifications are well within governmental power to regulate. Indeed, these are interests that the government should protect.

Of course, allowing substantial regulation of speech based upon such interests runs the risk that government will act pretextually—what better way for officials to get what they want than to put forward a seemingly innocuous reason for regulation? Accordingly, a reviewing court must ensure that an injunction seeking to protect legitimate interests is what it purports to be. In doing so, it is necessary to identify the nature of the speech at which the injunction aims. Specifically, we must determine whether the injunction regulates "high-value" speech—speech made as a contribution to public discourse (as in the noise level and picketing examples above)—or "low-value" speech—speech that does not contribute to public discourse (as in the libel, invasion of privacy, and false commercial speech examples). Although regulation of both types of speech may aim at legitimate interests, the Court approaches them differently. In light of this different treatment, the following sections elaborate on the proper method for evaluating legitimate justifications.

a. High-Value Speech

In defining the parameters of high-value speech, the Court adheres to the central philosophical tenet that "the First Amendment 'embraces at the least the liberty to discuss publicly . . . all matters of public concern.'"[264] This conviction should also inform the Court's assessment of legitimate justifications for restrictions on high-value speech. Specifically, an injunction that restricts a speaker's participation in public discourse should indicate a potentially improper motive. In this sense, the term "participate" requires that the speaker be able to maintain effective communication with her intended audience. Few injunctions aimed at eradicating non-communicative harms need unduly interfere with such communication. Injunctions that do so are suspect and should be struck down.[265]

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[264] Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 534 (1980) (quoting Thornhill v. Alabama, 310 U.S. 88, 101 (1940)); *accord* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986). *See also* Robert C. Post, *Community and the First Amendment*, 29 ARIZ. ST. L.J. 473, 481 (1997) (defining public discourse as "the speech necessary for the formation of public opinion").

[265] The proposed test simply serves as a proxy for illegitimate motive. It does not indicate that illegitimate motive necessarily exists. Thus, a reviewing court should remand to the lower court. If that court can sufficiently tailor the injunction to maintain the speaker/audience relationship, no further motive inquiry is necessary and the reviewing court should uphold it. If, however, the lower court makes clear that other justifications are the basis for the injunction, the reviewing court can then judge it under the test appropriate for that category. This approach avoids a possibly insulting imputation of actual illegitimate/disfavored motive in situations where the lower court was simply careless. It also avoids the possibility that the reviewing court

Judging an injunction under this standard requires a two-pronged inquiry. A court must first identify the audience at whom the speaker aims. Much of the time, this question is relatively easy. Many speakers simply want "the public" to hear their views and have no direct constituency in mind. For example, the *New York Times* published the Pentagon Papers primarily to inform United States citizens about the actions of their government. Sometimes, however, speakers have multiple audiences. In *Madsen*, for example, the anti-abortion protestors wanted to reach the public generally, but they also specifically aimed their anti-abortion message at the targeted clinic's patients and personnel.[266] A court attempting to tailor an injunction must be aware of both audiences. Audience identification is thus largely dependent upon the context and manner of the speech and, ultimately, is a matter of common sense.[267] A reviewing court, for example, can presume that anti-abortion protestors standing near a clinic desire to reach a specific audience in addition to the general public. In contrast, anti-war protestors outside of the post office more likely have a general audience in mind since there is little relationship between the subject of their protest and its location.[268]

A reviewing court's next task is to determine whether the injunction is sufficiently tailored to allow a speaker to reach the intended audience(s). While this inquiry is also contextual, depending upon circumstances unique to each case, it need not be ad hoc. In assessing the legitimacy of an injunction restricting high-value speech, courts should operate on the principle that an injunction should allow the speaker to reach "roughly the same audience . . . in size and character" without distorting the speaker's message by making it shorter, less detailed, or less effective than via the speaker's proposed means of communication.[269] This principle does not require that an injunction ensure availability of the most effective means of communication with the audience. But an injunction which interferes with or diminishes the communicative aspect of speech—the reason

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will guess wrong as to whether the actual motive is illegitimate or disfavored (no small distinction given that the tests for each are very different).

[266] *See* Brief for Petitioners at 23, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994) (No. 93-880).

[267] *See* C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 NW. U. L. REV. 937, 969-970 (1983) (arguing that an analysis of the intended audience is necessary when considering alternate methods of expression available after an injunction is issued).

[268] Hypothetical anti-postal service protestors, however, would present a situation more like *Madsen* as they would presumably want to reach postal customers and the service itself in addition to the general public.

[269] Williams, *supra* note 156, at 716. Professor Williams proposes this test in the context of the Court's current intermediate scrutiny, essentially asking the Court to "put some teeth" back into the adequate alternatives prong of its existing test. *Id.*

that the speaker substantively values this particular expressive activity—should be struck down as interfering with the speaker/audience relationship.

To build on an example from Professor Baker, assume a group of anti-fur advocates want to demonstrate at the mayor's office.[270] Their desire to do so simply to gain access to a larger media audience (because they know the press is more likely to cover their protest) is not "substantively valued communicative interaction" but merely a means to achieve greater notoriety. On the other hand, if anti-fur advocates wish to demonstrate at the mayor's office because of her policies regarding the fur trade, their desire to use that particular location becomes part of the communicative aspect of their expression. An injunction banning the latter demonstration interferes with the speech/audience relationship far more than a ban on the former, even though the injunctions might be identical.[271] In effect, the speaker's purpose in disseminating the message, which can be deduced from the context of the speech, informs the tailoring requirement. While it is not possible to list all possible permutations of this principle, an examination of the Court's injunction cases reveals some rough guideposts regarding restrictions that unreasonably interfere with the speaker/audience relationship.

1. Suppression of Communication. By definition, an injunction banning expression altogether interferes with communication between speaker and audience. Only the rarest of noise control justifications, for example, necessitates a complete ban on communication rather than a tailored injunction restricting noise levels. Such bans are far more likely to aim at communicative impact or to reflect hostility toward the ideas expressed. Several of the cases in which the Court

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[270] *See* Baker, *supra* note 267, at 971-72. The structure of this example brings up the non-public forum doctrine which, although far too complicated to deal with in-depth here, is worth special mention. By desiring to locate in the mayor's office, the demonstrators move from the realm of public fora (e.g., streets, parks, sidewalks) to non-public fora (e.g., other government property). While the Court maintains reasonably strong protection of speech in public fora, it traditionally allows the government far greater leeway in regulating non-public fora. *See supra* note 158. The proposed test does not distinguish between kinds of government property. Instead, it judges an injunction depending upon the government's interest in bringing a lawsuit and on the injunction's effect on the speaker/audience relationship. While the government often has a legitimate interest in managing its non-public fora, that interest may occasionally be subordinated to the speaker/audience relationship in certain circumstances. In this way, this test may bring about quite different results from the Court's current, deferential approach to regulations in non-public fora.

[271] *See* Baker, *supra* note 267, at 971-72. Professor Williams makes a similar distinction, contrasting the facilitative aspect of speech—"that part of the speech activity which the speaker uses to aid in the transmission or receipt of the message"—and the communicative aspect of speech—any part of speech that "play[s] a role in the representation of the message." Williams, *supra* note 156, at 660. She argues that the regulation of the former aspect of speech is less worrisome than the latter. *See id.* at 660-62.

found injunctions to be prior restraints reflect this phenomenon as they involved injunctions suppressing communication because of potential harm resulting from the speech itself or because of government dislike of the speech.[272] In contrast, none of the cases in which the Court upheld injunctions based upon legitimate justifications involved suppression of speech.[273]

2. Temporary Suppression of Speech. Temporary suppression of speech, such as a ban on communication for seven days, also amounts to unreasonable interference with the speaker/audience relationship. To be sure, a temporary ban, which allows the expression to inform public deliberation at some point, is less threatening than perpetual suppression. But timeliness is often a critical element of speech:

> [P]ublic interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. . . . Punish[ment of] utterances made during the pendency of a [lawsuit, for example, may] produce . . . restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. . . . An endless series of moratoria on public discussion, even if each were very short, could hardly be dismissed as an insignificant abridgment of freedom of expression.[274]

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[272] *See* New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (enjoining publication of the Pentagon Papers based upon fear that it would interfere with national security); Organization for a Better Austin v. Keefe, 402 U.S. 415, 417 (1971) (enjoining protestors from passing out pamphlets, leaflets, literature or engaging in protests that criticized real estate broker's business practices); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931) (enjoining publication of current and future editions of newspaper that criticized government officials).

[273] *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994) (vacating part of injunction banning protests within 30-feet of clinic entrances because of safety and access concerns but upholding part allowing protests in other areas near clinic); Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (involving court order banning disclosure of confidential information learned through the discovery process because of need to preserve integrity of legal system but allowing publication of that information if learned through other means); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) (upholding injunction banning sex-segregated advertisements based upon interest in eradicating sex-discrimination but allowing criticism of policy disallowing segregation); Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941) (upholding injunction against protests in the immediate vicinity of certain milk stores because of significant problems with violence but allowing protests in other areas).

[274] Bridges v. California, 314 U.S. 252, 268-69 (1941) (reversing contempt order for publishing material critical of the judicial process during the pendency of a criminal case). *See also* Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 182 (1968) ("The present case involves a rally and 'political' speech in which the element of timeliness may be important."); A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 224 (1964) (Harlan, J., dissenting) ("It is vital to the operation of democratic government that the citizens have facts and

Just as with complete suppression, the state's police power interests will rarely, if ever, justify such a ban. For example, a temporary ban on anti-abortion protests does not suggest that the city is merely trying to avoid traffic problems because it could achieve the same result with a much narrower injunction restricting the protestors to the sidewalk. Temporary suppression in this instance suggests that something more is behind the injunction, such as a desire to discourage the protestors or diminish public interest. The Court's past cases bear out that injunctions temporarily suppressing speech generally arise out of fear of communicative impact or hostility.[275]

3. Bans on a Medium of Communication. Rather than suppressing speech, most injunctions based upon legitimate justifications merely regulate aspects of it. Nevertheless, even limited regulation can interfere with the speaker/audience relationship, especially bans on a particular format of communication. Assume the *Madsen* trial court enjoined all mass demonstrations by anti-abortion protestors because they continuously blocked traffic. Such an injunction would leave protestors free to communicate in a variety of ways; they could still individually leaflet, purchase radio/television time or newspaper space, or communicate through telephone calls and door-to-door appeals. Despite these alternative modes of communication, the injunction still interferes with the speaker/audience relationship. The protestors chose their mode of communication for a reason. Mass demonstrations send a message of intensity and unity on a topic that other methods of communication cannot. As Professor Baker notes:

> Even if demonstrators would be happy to persuade officials merely on the basis of reason, logic, or the rightness of their position, dissidents . . . recognize that their presence is a form of power that pressures the authorities into paying attention and then into making some response. Dissidents unabashedly and properly try peaceably but forcefully to impose pressure through the intimidation produced by numbers, solidarity, and the spotlight of their mass presence.[276]

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ideas on important issues before them. A delay of even a day or two may be of crucial importance in some instances.").

[275] *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 545 (1976) (involving a temporary ban on publication of inculpatory information). As in the suppression cases, that temporary gag order aimed not at what this Article characterizes as a "legitimate" justification but as a disfavored one—i.e., fear that the information would *persuade* others of the defendant's guilt. *See also Carroll*, 393 U.S. 175 (seeking injunction because officials feared white supremacist rally would cause riots).

[276] Baker, *supra* note 267, at 1015; *see also Milk Wagon Drivers*, 312 U.S. at 293 (discussing the necessity of picketing in the labor context).

A ban on demonstrations thus inhibits effective communication by forcing the protestors to use watered-down versions of their speech to reach the public.[277] The impact upon their attempt to reach the patient/personnel audience is even more severe as the injunction prevents them from amassing anywhere near that audience. Finally, because the court could manage the legitimate concern of traffic control with a more limited ban restricting protestors from assembling in or blocking the street, its failure to do so raises the possibility that the court's true motive may be hostility toward the message.

Format bans will not always amount to unreasonable interference with communication, but the Court has recognized that such bans often have that impact. Accordingly, the Court tends to view them with suspicion.[278] This is especially true when the banned medium is relatively cheap and traditionally thought of as an essential form of communication, such as leafleting, personal solicitation, and protests.[279] *Madsen*'s refusal to uphold an injunctive provision prohibiting any personal approaches by individual protestors near an abortion clinic reflects the Court's reluctance to restrict such modes of communication. Personal solicitation is perhaps the most important means of communication for such protestors.[280] To prohibit anti-abortion advocates from personally appealing to potential abortion patients is a serious blow to their communication with that particular audience[281] and raises concerns that the motive underlying the injunction aimed at

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[277] The Court has recognized that diluting a message's intensity may violate the First Amendment. *See* Cohen v. California, 403 U.S. 15 (1971).

[278] *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43 (1994) (striking down law banning homeowners from displaying signs on their property); Martin v. City of Struthers, 319 U.S. 141, 146 (1943) (striking down municipal ban on distribution of door-to-door circulars). *See also* Stone, *supra* note 15, at 190-92 n.5 (discussing cases striking down laws severely restricting effective modes of communication).

[279] *See, e.g., Martin*, 319 U.S. at 143 (noting that distribution of door-to-door circulars was essential to poorly financed and unpopular causes).

[280] *See, e.g.*, Schneider v. State, 308 U.S. 148 (1939) (striking down ordinance prohibiting "a person rightfully on a public street from handing literature to one willing to receive it"); *see also* Darrin Alan Hostetler, Note, *Face-to-Face with the First Amendment:* Schenck v. Pro-Choice Network *and the Right to "Approach and Offer" in Abortion Clinic Protests*, 50 STAN. L. REV. 179, 192-205 (1997) (discussing the importance of personal approaches in free speech jurisprudence).

[281] In describing their goals as sidewalk counselors, anti-abortion protestors emphasized the need for personal interaction:

> Sidewalk counseling consists of personal communication with pregnant women, their companions, or passersby, typically by conversation or by the distribution of written literature. . . . The sidewalk counselor seeks not so much to broadcast a message to the world as to touch the mind, heart, and conscience of particular individuals. The goal of the sidewalk counselor is to offer information and assistance to help a woman carry her baby to term. . . . Such verbal persuasion and protest rest at the very heart of the right to free speech.

Brief for Petitioners at 19-20, Schenck v. Pro-Choice Network, 519 U.S. 357 (1997) (No. 95-1065) (citations and footnote omitted).

something other than protecting legitimate interests.[282] Thus, certain format bans may be more likely than others to pose problems.

4. Insufficiently Tailored Speech Zones. Many regulations of speech are simply straightforward attempts to impose time, place, and manner requirements without suppressing the medium or the message. Nonetheless, these too can interfere with the speaker/audience relationship if insufficiently tailored. In *Madsen*, the trial court enjoined protests within 300 feet of clinic personnel homes ostensibly to protect against targeted picketing (picketing aimed at a particular residence and specifically designed to intrude upon the privacy of the home). While protection of such privacy is a legitimate interest,[283] in this case, the size of the buffer zone—the length of a football field—was far too large to aim only at targeted picketing. As such, it interfered with the protestors' ability to communicate with other audiences, including the physicians' immediate neighbors. The lack of "fit" in such an injunction and its interference with the speaker/audience relationship thus raises suspicion that it may aim at something more than mere privacy interests.

One could argue that the proposed approach regarding legitimate justifications looks remarkably like the intermediate scrutiny associated with content-neutral statutes, which requires that regulations leave open ample alternatives for communication of information.[284] Given this Article's criticism that such balancing is insufficiently

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[282] The *Madsen* Court viewed this provision as attempting to protect women entering the clinic from offense—a purpose this Article would classify as illegitimate. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 774 (1994). In contrast, the Court upheld a similar provision in *Schenck*. The *Schenck* provision, however, required that the protestors be allowed to approach women within the buffer zone as long as they desisted upon the women's request. *See Schenck*, 519 U.S. at 364. By allowing the protestors an opportunity to solicit the women, the *Schenck* injunction did not interfere with the speaker/audience relationship. *See* Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests—Section II*, 29 U.C. DAVIS L. REV. 1163, 1183 (1996) (discussing the "receptivity of the audience" as an important factor in evaluating the freedom of speech); Hostetler, *supra* note 280, at 191 (comparing the *Schenck* injunction to that in *Madsen*).

[283] In *Frisby v. Schultz*, the Court explained the interest underlying regulation of targeted picketing:

> Th[is] type of focused picketing prohibited . . . is fundamentally different from more generally directed means of communication that may not be completely banned in residential areas. In such cases, the "flow of information [is not] into . . . household[s], but to the public." Here, in contrast, the picketing is narrowly directed at the household, not the public. The type of picketers banned by the Brookfield ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way.

487 U.S. 474, 486 (1988) (citations omitted) (alterations in original).

[284] *See Madsen*, 512 U.S. at 764-65 (discussing the need to narrowly tailor injunctive relief that impacts upon freedom of expression); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (finding rules against sleeping overnight on Park Service grounds allowed ample alternative means of expression).

protective of speech,[285] there is a logical question as to whether this proposal is much better. The critical difference comes in the concrete nature of the proposed approach. The Court's intermediate scrutiny tests are formulaic and have little content. They tell courts to balance "significant" interests against the need for free speech, to ensure that the regulation is "narrowly tailored" or "burdens no more speech than necessary," and to leave open "ample alternatives of communication." But they do not provide courts with tangible factors needed to effectuate that balancing, instead asking them to assess restrictions in a vacuum. In contrast, the proposed approach focuses the court on the single most important question regarding the injunction—does it maintain the speaker/audience relationship? And it further gives courts specific guideposts to answer that question, such as the nature of the audience and the speaker's purpose in disseminating the message. Thus, although the proposed test involves balancing, it is a much more vital process than the formulaic current approach.[286] It is less likely that the problems arising with ad hoc balancing will arise here.

b. Low-Value Speech

Injunctions pertaining to low-value speech are a different matter. By definition, low-value speech does not contribute to public discourse.[287] Thus, the Court allows substantial regulation, even suppression, of speech falling into low-value categories, such as obscenity,[288] fighting words,[289] libel,[290] and some forms of commercial speech.[291] In the context of injunctive relief, the requirement that the speaker be able to maintain effective communication with her audience is unnecessary. Instead, injunctions suppressing low-value speech are constitutional as long as they issue in accordance with the Court's requirements for a particular category.

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[285] *See supra* notes 178-89 and accompanying text.

[286] *See* Aleinikoff, *supra* note 186, at 992-93 (discussing the "heady realism that informed early balancing opinions").

[287] The court has determined that certain categories of speech are "no essential part of any exposition of ideas, and . . . of such slight social value as a step to truth that any benefit . . . derived from them is clearly outweighed by the social interest in order and morality." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[288] *See* Miller v. California, 413 U.S. 15 (1973); Roth v. United States, 354 U.S. 476 (1957).

[289] *See Chaplinsky*, 315 U.S. 568.

[290] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Beauharnais v. Illinois, 343 U.S. 250 (1952).

[291] While the Court currently accords substantial protection to truthful, non-misleading commercial speech, *see* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996), it still allows suppression of false and misleading advertisements and advertisements proposing illegal transactions, *see* Hoffman Estates v. Flipside, 455 U.S. 489 (1982) (finding advertisement for drug

The Court currently takes such an approach in the obscenity context. Thus, an injunction satisfies the First Amendment as long as the court issuing the injunction finds that the specific expression to be enjoined meets the Court's definition of obscenity.[292] Although the Supreme Court has not explicitly extended that reasoning to other forms of low-value speech, it should be applied to these other forms, as well. A court properly finding that certain statements are libelous and satisfy the requirements of *New York Times, Inc. v. Sullivan*[293] and its progeny,[294] for example, should be able to enjoin further communication of those particular statements. In fact, numerous lower courts have issued injunctions against libelous statements relying on the reasoning in the Court's obscenity jurisprudence.[295] Similarly, a court order prohibiting false and misleading commercial speech would survive First Amendment scrutiny if issued after a sufficient determination that the speech at issue fell into that category.[296]

Requiring courts to determine the low-value nature of expression prior to issuing an injunction is critical to the injunction's legitimacy. The Court's own determination of low-value speech walks a tightrope between legitimate and illegitimate motive. The Court, for instance, finds fighting words punishable because they amount to an assault rather than communication of ideas.[297] The Court is quick to circumscribe this category, however, noting that fighting words must "have a direct tendency to cause acts of violence by the person to whom, indi-

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paraphernalia not to be protected speech); Virginia State Bd. of Pharmacy v. Virginia Citizen's Consumer Council, Inc., 425 U.S. 748 (1976) (holding that while commercial speech enjoys some protection under the First Amendment, that protection does not extend to false or misleading advertisements).

[292] *See, e.g.*, Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957) (upholding New York statute authorizing injunction against distribution of obscenity because statute required a finding of obscenity with respect to specific material prior to injunction). *See also* Vance v. Universal Amusement Co., 445 U.S. 308 (1980) (finding injunction against defendant movie theater prohibiting future exposition of films to be an impermissible prior restraint).

[293] 376 U.S. 254, 280 (1964) (requiring that public officials suing for libel prove that statements contain a false statement of fact made with actual malice).

[294] Several subsequent cases elaborate upon the requirements imposed by the First Amendment. *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

[295] *See, e.g.* Advanced Training Sys., Inc. v. Caswell Equip. Co., 352 N.W.2d 1, 11 (Minn. 1984) (upholding an injunction prohibiting the release of libelous material); O'Brien v. University Comm. Tenants Union, Inc., 327 N.E.2d 753, 755 (Ohio 1975) (comparing libelous speech with obscene speech); Retail Credit Co. v. Russell, 218 S.E.2d 54, 62 (Ga. 1975) (comparing false and defamatory speech with obscene speech in upholding a prior restraint injunction).

[296] The Supreme Court has indicated that injunctions against commercial speech are acceptable. *See Virginia State Bd.*, 425 U.S. at 772 n.24. Lower courts, however, have not consistently applied this principle. *See* Lemley & Volokh, *supra* note 111, at 223 n.331. Presumably, the Court will need to clarify this area of the law.

[297] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (characterizing fighting words as "personal abuse").

vidually, the remark is addressed."[298] Regulations aimed more broadly at speech which merely offends or angers are the result of illegitimate motives and are unconstitutional.[299] Thus, injunctions purporting to aim at low-value speech but which are insufficiently tailored should be struck down. The Court's rejection of the *Keefe* injunction illustrates this problem. Although the lower court based its injunction in a privacy rationale,[300] an arguably low-value speech category,[301] the Supreme Court noted that public criticism of public activities did not amount to an invasion of privacy and intimated that the injunction was based in impermissible purposes.[302]

V. SOME MISCELLANEOUS ISSUES REGARDING INJUNCTIONS

The preceding sections advocated substituting substantive standards in place of the Court's empty prior restraint rhetoric. While these standards cover most aspects of injunctive relief, a few issues specific to the form of injunctive relief nevertheless remain. This section first explores whether certain procedural aspects of injunctions—the collateral bar rule and the judicial contempt power—support strong antipathy to all injunctions. It then examines whether there should be special hostility to interim injunctive relief, whether that relief comes in the form of a temporary restraining order or a preliminary injunction.

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[298] Gooding v. Wilson, 405 U.S. 518, 523 (1972) (quoting State v. Chaplinsky, 18 A.2d 754, 758 (N.H. 1941)).

[299] *See* Texas v. Johnson, 491 U.S. 397, 418 (1989) (overturning conviction for flag-burning); Cohen v. California, 403 U.S. 15, 26 (1971) (holding that a state may not criminally punish the use of four-letter expletives). See Wells, *supra* note 15, at 177-86, for further discussion on the manner in which the Court's low-value speech determinations guard against illegitimate motive.

[300] *See* Organization for a Better Austin v. Keefe, 402 U.S. 415, 418 (1971).

[301] The Supreme Court has avoided deciding whether the First Amendment protects publication of truthful private facts, *see* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975), although it has intimated that there may be no such protection. *See* Florida Star v. B.J.F., 491 U.S. 524, 533 (1989). Lower courts have issued injunctions if publication squarely violates traditionally recognized privacy rights. *See, e.g.,* Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978) (issuing injunction against publication of magazine that used full-frontal nude drawing of plaintiff without his consent and for which he never posed); Commonwealth v. Wiseman, 249 N.E.2d 610 (Mass. 1969) (affirming injunction against public display of a film determined to be a significant invasion of privacy rights of inmates in institute for the criminally insane).

[302] *See Keefe*, 402 U.S. at 418-19; *see also supra* note 53 and accompanying text.

A. *The Collateral Bar Rule and the Contempt Power*

Some commentators argue that the collateral bar rule supports special disfavor of injunctions. The rule prevents a person who intentionally violates an injunction from raising its unconstitutionality in later criminal contempt proceedings.[303] A party subject to an injunction thus stands in a far different position from one who violates a similar criminal law because the latter can raise the law's unconstitutionality as a defense. As a result, some commentators argue that "[a] prior restraint . . . stops more speech more effectively. A criminal statute chills, prior restraint freezes."[304]

It is not clear, however, that the collateral bar rule causes injunctions to be a greater deterrent than subsequent punishment. There is little empirical evidence to support such a claim.[305] Moreover, the collateral bar rule does not greatly differentiate the mechanism of punishment in each situation. As Professor Fiss explains:

> [T]he sanctioning system of the classic . . . preventive injunction, can be seen to resemble that of the criminal prohibition. In issuing a preventive injunction the court promulgates a rule of conduct and also (implicitly) threatens to impose sanctions—jail or fine—for a violation. . . . [T]he aim is not simply to internalize the costs to the victim but to stop the prohibited act or to enhance the power of the court to stop acts that it might prohibit. Of course, as with criminal prohibitions, on occasion the ambition of the preventive injunction may go unfulfilled. To state the obvious, an injunction can be violated. The rule of *Walker v. City of Birmingham*—denying a criminal contemnor the right to contest the constitutional validity of the injunction—may strengthen the threat of punishment by enhancing the certainty of infliction, but it

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[303] *See* Walker v. City of Birmingham, 388 U.S. 307 (1967) (upholding contempt convictions for violating an injunction prohibiting expressive activity without a permit even though permit law upon which injunction was based was later found unconstitutional). The Court justifies the collateral bar rule with the statement that "respect for judicial process is a small price to pay for the civilizing hand of law." *Id.* at 321.

[304] BICKEL, *supra* note 102, at 61.

[305] Many point to the *New York Times*'s willingness to risk criminal prosecution but not contempt sanctions regarding the Pentagon Papers as evidence that injunctions have a greater chilling effect. The *Pentagon Papers Case* vignette, however, is far from conclusive. It is entirely possible, for example, that the *Times*'s promise to obey the injunction was not "evidence of the injunction's greater force, but . . . a bargaining ploy, a way of inducing the Attorney General not to prosecute the *Times* under the Espionage Act." Owen Fiss, *Free Speech and the Prior Restraint Doctrine: The Pentagon Papers Case*, *in* THE SUPREME COURT AND HUMAN RIGHTS 49, 63 n.9 (Burke Marshall ed., 1982). Moreover, there is some evidence that the press has ignored gag orders on publication of information. *See* James C. Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of* Nebraska Press Association v. Stuart, 29 STAN. L. REV. 497, 505-06 (1977).

> does not guarantee that the threat will be successful in preventing the proscribed conduct.[306]

In addition, the collateral bar rule's status is uncertain, with courts increasingly unwilling to apply it in First Amendment cases.[307] Even if that rule remains applicable and has a heightened chilling effect, the Court's potential exceptions to its application ought to ameliorate much of that effect.[308] Moreover, the Court has insisted upon heightened procedural safeguards with speech-restricting injunctions, such as immediate appellate review and a stay of the injunction during appeal, which further protect against chilling.[309]

Aside from the collateral bar rule, some commentators further argue that unrestrained judicial power to punish is reason enough to disfavor injunctions against expression. Judges have significant and unrestrained contempt powers allowing them to find facts, make law and rule on violations of their orders without a jury and under lower standards of evidence than in criminal trials. A speaker subject to an injunction thus has every reason to obey it even if it violates the First Amendment.[310] While true to some extent, this argument overstates the power of judges. A judge's ability to impose criminal contempt sanctions for violations is increasingly limited. A contemnor is entitled to a jury trial and substantial procedural protections in most criminal contempt proceedings.[311] The Supreme Court recently ex-

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[306] FISS, *supra* note 10, at 33-34; *see also* sources cited *infra* note 311. Arguments for elimination of the collateral bar rule, however, still have merit. The rule creates an inconsistency in the Court's jurisprudence because it treats two similarly situated speakers differently. *See* FISS, *supra* note 10, at 30. From a simple fairness perspective, eliminating the collateral bar rule in free speech cases equalizes the footing of both speakers.

[307] State courts increasingly refuse to apply the rule. *See* State v. Coe, 679 P.2d 353 (Wash. 1984) (overturning a contempt judgment against a broadcaster for broadcasting tape recording previously played in open court); Phoenix Newspapers, Inc. v. Superior Court, 418 P.2d 594 (Ariz. 1966) (allowing a reporter, who violated a contempt order, to defeat a contempt of court charge on constitutional grounds). *See also* Blasi, *supra* note 10, at 22 n.47 (listing state courts that have refused to apply the collateral bar rule); Doug Rendleman, *Free Press-Fair Trial: Review of Silence Orders*, 52 N.C. L. REV. 127, 148 (1973) (suggesting that the collateral bar rule should not be applied in silence-order contempt charges). The Supreme Court has also declined to apply the rule in subsequent decisions. *See* Blasi, *supra* note 10, at 21.

[308] *Walker* held that the collateral bar rule did not apply if an injunction was "transparently invalid" or if those subject to a court order faced "delay or frustration" while contesting its validity. 388 U.S. at 315, 318. Scholars argue that such exceptions are likely to apply in First Amendment cases, thus limiting the rule's scope. *See* Jeffries, *supra* note 5, at 432-33 (arguing that the collateral bar rule must be carefully circumscribed when applied to speech).

[309] *See, e.g.*, National Socialist Party v. Skokie, 432 U.S. 43, 44 (1977).

[310] *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 793 (1994) (Scalia, J., concurring in part, dissenting in part); Rendleman, *supra* note 210, at 1665.

[311] *See* Bloom v. Illinois, 391 U.S. 194 (1968) (holding that defendant is entitled to a jury trial if criminal contempt sentence exceeds six months); *In re* Oliver, 333 U.S. 257, 278 (1948) (holding that defendant is entitled to public trial in criminal contempt proceedings); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444 (1911) (requiring procedural safeguards such as

tended those protections to coercive civil contempt proceedings[312] when the contempt involves continuing out-of-court violations of a complex court order.[313] Given that these forms of contempt are a judge's most powerful weapon, checks on their use at least partly responds to concerns regarding abuse. Moreover, potential abuse of contempt power should not automatically translate into disfavor of injunctions against expression. A more logical approach, for example, is to fix the contempt power by requiring that contempt hearings be held before judges other than the one issuing the order.[314]

B. Interim Injunctive Relief

The proposed approach to injunctions assumes that the injunction involved (a permanent injunction) issues only after a full hearing on the merits.[315] Under the Federal Rules of Civil Procedure and most state counterparts, temporary restraining orders can issue ex parte and after a truncated hearing involving little more than affidavits as evidence.[316] While preliminary injunctions usually require an adversarial hearing held after sufficient notice,[317] the presentation of facts and law is often substantially curtailed compared to a full trial.[318] The question naturally arises as to whether these forms of relief sufficiently change the dynamics in free speech cases to warrant special hostility.

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presumption of innocence, proof beyond a reasonable doubt, and privilege against self-incrimination in criminal contempt proceedings).

[312] Coercive civil contempt sanctions (either fines or jail time) are imposed to coerce a party into complying with a court order in the future. They accumulate as the contemnor refuses to comply but can be stopped at any time by compliance. *See* Latrobe Steel Co. v. United Steelworkers, 545 F.2d 1336, 1344 (3d Cir. 1976). In contrast, criminal contempt sanctions are imposed for past violations and cannot be avoided. *See generally* LAYCOCK, *supra* note 204, at 716-24.

[313] *See* United Mine Workers v. Bagwell, 512 U.S. 821 (1994).

[314] *See* Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53, 79-80 (1993). In fact, Federal Rule of Criminal Procedure 42 provides for disqualification of the presiding judge when a contempt involves "disrespect to or criticism of a judge." *See* FED. R. CRIM. P. 42(b).

[315] The term "permanent" injunction does not imply an order that lasts in perpetuity but instead refers to an order issuing after a full trial. It serves mainly as a signal distinguishing that injunction from orders that issue before a full trial. *See* DAN DOBBS, LAW OF REMEDIES, § 2.11(1), at 184 (2d ed. 1993).

[316] *See, e.g.*, FED. R. CIV. P. 65(b) (allowing temporary restraining orders to issue ex parte).

[317] Notice is a mandatory requirement for preliminary injunctions. *See, e.g.*, FED. R. CIV. P. 65(a)(1). Practices differ from jurisdiction to jurisdiction and within states, as local courts often prescribe their own rules.

[318] Although the party against whom a preliminary injunction is sought is generally entitled to an evidentiary hearing, *see* Professional Plan Exam'rs of New Jersey, Inc. v. LeFante, 750 F.2d 282, 288 (3d Cir. 1984), those hearings can be truncated, dispensing with oral testimony and cross examination and relying instead on documents or affidavits. *See* Elliott v. Kiesewet-

Because so much of this Article's proposed approach to injunctions requires a court to make contextual assessments of likely harm and impact upon expression, complete evidentiary findings and deliberate assessment of facts are essential. The more truncated and hurried the hearing, the less likely that the injunction results from accurate application of the proposed standards and the more likely that it may reflect impermissible motive. This is most obviously true when an injunction aims at communicative impact. There is a significant danger that courts under time pressure and forced to speculate regarding potential harm based upon inadequate evidence will allow "groundless fears to figure in the rationale for suppression," thus distorting the decision-making process.[319] Even an injunction aiming at legitimate, non-communicative harms may raise this problem. The potential for illegitimate motive is less in such circumstances but it is not nonexistent and the hurried nature of the hearing exacerbates that potential. Moreover, the record resulting from hearings involving interim injunctions may be insufficient for a reviewing court to satisfy itself as to the justification for the injunction.

In light of these concerns, a special antipathy (although not a complete bar[320]) toward interim injunctions is warranted. Temporary restraining orders are especially suspect. The Supreme Court has ruled as much with ex parte temporary restraining orders because of the lack of notice to the opposing party.[321] Even absent notice problems, however, a hearing on a temporary restraining order will seldom present a sufficient opportunity to develop an evidentiary record.[322] Consequently, a reviewing court will be unable adequately to assess the materiality or legitimacy of the harm. Any such order regulating speech thus rests on dubious grounds. At the very least,

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ter, 98 F.3d 47, 53 (3d Cir. 1996); Consolidated Gold v. Minorco, 871 F.2d 252, 256 (2d Cir. 1989); *see also* FISS, *supra* note 10, at 28-29.

[319] Blasi, *supra* note 10, at 49. Professor Blasi makes this argument in the context of permanent injunctions as well, noting that all injunctions regarding communicative impact require a court to speculate regarding the harm that speech will cause. As Professor Redish points out, however, even subsequent punishment schemes aiming at communicative impact require some speculation regarding the harm speech will cause. *See* Redish, *supra* note 30, at 68-69. The Court has responded to this problem in the subsequent punishment context by requiring concrete proof of imminent and serious harm. *See supra* notes 244-49 and accompanying text. An injunction issued after a full evidentiary hearing should also be able to implement this standard.

[320] Sometimes, albeit rarely, an immediate injunction may be the only way to guard against a serious evil. The classic example involves disclosure of information that would put United States citizens in immediate peril. *See* New York Times Co. v. United States, 403 U.S. 713, 726 (1971) (Brennan, J., concurring).

[321] *See* Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 180 (1968).

[322] This is partly why most jurisdictions do not allow appeals of temporary restraining orders. *See* 28 U.S.C. § 1291 (1994) (permitting appeals of final orders and preliminary injunctions); CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 102, at 708 (4th ed. 1983) (stating that federal law does not allow appeal of temporary restraining orders).

temporary orders restraining speech should issue only in emergency situations where there exists concrete and unassailable proof that the party's interests cannot be protected by a later hearing.[323] In addition, the Court's requirement of immediate appellate review and a stay of the injunction[324] must be strictly enforced. Appellate courts should also engage in independent review of the record to ensure adequate application of the law and sufficient evidence of harm.[325]

Preliminary injunctions pose fewer problems than temporary restraining orders. Although they typically involve truncated hearings and more informal evidentiary procedures, they generally do not occur in emergency situations requiring such an approach. Consequently, a court can issue a preliminary injunction consistent with the First Amendment if it holds a reasonably thorough hearing and issues significant written findings of fact and conclusions of law.[326] For a preliminary injunction to satisfy those requirements, the court must hold an adversarial hearing that resembles, as closely as possible, a full trial, including adherence to evidentiary rules, live testimony in addition to documents and affidavits, and an opportunity for cross-examination. The procedural protections and aggressive appellate review discussed above must also be available, as well.

CONCLUSION

Bright line rules often seem like a good thing. Teachers find them easy to teach. Students, lawyers, and judges find them easy to apply. For years, the Court's nearly insurmountable presumption against injunctions appeared to be such a rule. Given the often overwhelming complexity of the Court's First Amendment jurisprudence, this readily identifiable antipathy toward prior restraints seemed like a blessing—something we could count on in a morass of changing

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[323] Professor Redish notes that equity doctrine may already allay fears regarding issuance of temporary restraining orders based upon speculative harm. *See* Redish, *supra* note 30, at 88. In order to obtain a temporary restraining order, a plaintiff must show a likelihood that significant irreparable injury will result before a preliminary injunction hearing can be held. *See, e.g.*, DOBBS, *supra* note 315, § 2.11(2), at 193-94. Nevertheless, judges have a great deal of discretion to issue injunctions and this otherwise high threshold is subject to their individual beliefs. Incorporation of the irreparable injury standard into First Amendment doctrine and independent appellate review of the record better protects First Amendment interests. *See* Redish, *supra* note 30, at 88.

[324] *See* National Socialist Party v. Skokie, 432 U.S. 43 (1977) (overturning an injunction refusing to allow plaintiffs to march in parade).

[325] *See* Redish, *supra* note 30, at 88-89 (arguing for abandonment of "abuse of discretion" standard when appellate courts review preliminary injunctions).

[326] Some courts already require an evidentiary hearing in lawsuits seeking a preliminary injunction where "essential facts" are in dispute. *See* Consolidated Gold v. Minorco, 871 F.2d 252, 256 (2d Cir. 1989). Extending this requirement to First Amendment cases is consistent with this trend.

doctrines. When the Court raises rhetoric to the level of a rule without explanation, however, its doctrine is empty and provides no framework for resolving difficult cases. That this particular bright line rule was not really a bright line rule at all further exacerbates this problem. Although the Court never disfavored all injunctions against speech, its elevation of prior restraint rhetoric has skewed our understanding of the doctrine.

The Court must establish a coherent doctrinal framework for judging injunctions affecting expression. Contrary to the *Madsen* majority's intimation, that framework should not come in the form of another bright line rule, that of content discrimination principles. To be sure, those principles arguably have the substance lacking in the Court's prior restraint cases. But the differences between injunctions and legislation render their application incoherent in the context of injunctive relief, making them as meaningless in their own way as the prior restraint label. Adequate assessment of injunctive relief's impact on expression requires the Court to depart from its traditional rules and make a "context-specific evaluation of the advantages and disadvantages" of injunctive relief.[327] Departure from the Court's current doctrine, however, need not mean departure from its general free speech principles. Rather, the Court should assess the legitimacy of individual, speech-affecting injunctions in the context of its jurisprudence regarding government purposes. Adoption of such an approach most effectively implements First Amendment principles and steers the Court away from dangerous use of "generalized propositions—couched in the obscure but colorful language of history."[328]

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[327] FISS, *supra* note 10, at 6.
[328] *Id.* at 91.