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Alternative Maps for Navigating the First Amendment Maze: A Review Essay Of: The First Amendment. by Daniel Farber

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Review Essays

ALTERNATIVE MAPS FOR NAVIGATING THE FIRST AMENDMENT MAZE

THE FIRST AMENDMENT. By Daniel Farber.[1] Foundation Press. New York, NY. 1998. Pp. xi, 298. $29.95.

Alan E. Brownstein[2]

Daniel Farber has written a concise, sophisticated, and probing text on First Amendment doctrine for students. It is a thoughtful work that encourages readers to try to evaluate the Court's analysis as well as to develop an adequate understanding of important case holdings. Farber's writing style is clear and direct. Most of the time, his discussion of rules and standards are appropriately illustrated with useful examples. He uses humor occasionally to entertain as well as to enlighten. I liked the book, learned quite a bit in reading it, and got some good ideas about how to present certain issues in class from it. What I'm not sure about is whether I would assign the book to my students.

The problem is that this book is Farber on the First Amendment and I teach, not surprisingly, Brownstein on the First Amendment. Law professors often create a framework for understanding legal material, of course, but in most cases there is a sufficiently agreed upon core of doctrine that one scholar's description of the law can be profitably used by the students of another teacher. Current First Amendment doctrine, however,

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may have reached such a point of incoherence and indeterminacy that this kind of common understanding no longer exists.[3] The gaps and inconsistencies in the case law permit simply far too many plausible interpretations of the cases and legitimate ways to order them.

Thus, scholars writing books of modest size for students about the First Amendment may be forced to choose between two less than desirable alternatives. One can simplify, but essentially regurgitate, the reasoning of the various Justices in important cases. Consensus is possible under this approach. We might all agree that Justice Kennedy said "XXX" in a particular opinion. But this kind of a largely descriptive work is ultimately unsatisfying to the serious scholar and student. The goal of legal analysis is to go beyond what the Court says in specific cases and to try to find, or create, a more intelligible doctrinal picture than the bare reasoning and holdings of individual cases provide. A concise description of cases will not evaluate the Court's decisions or try to synthesize and interpret ostensibly divergent holdings. It isn't going to support the creation of new paradigms, it isn't going to be helpful in resolving problems where there is no case directly on point, and it isn't going to be much fun to write or read. Farber is far too smart and too interested in free speech issues to write a book like this. And *The First Amendment* isn't such a book.

The other approach is to write a book self-consciously imposing one's personal understanding of free speech doctrine on to the raw material of the Court's decisions. This is exciting and interesting work, but it can hardly be passed off to students as accepted wisdom. Much of this kind of an analysis will be controversial; it will be persuasive to some readers and completely unconvincing to others. Quite a lot of it will never be endorsed in a judicial opinion. It is clearly possible for someone who has thought about free speech doctrine as much as Farber has to write this kind of a book, but *The First Amendment* isn't that kind of a book either.

It is something in between. There may be more creative doctrinal development and discussion in the book, more of Farber's own sense of how the First Amendment works, than even

3. See, e.g., Steven H. Shiffren, *The First Amendment, Democracy, and Romance* 3 (Harvard U. Press, 1990) (comparing current First Amendment doctrine to the Internal Revenue Code); Robert Post, *Recuperating First Amendment Doctrine*, 47 Stan. L. Rev. 1249, 1249-50 (1995) (noting "internal incoherence" of free speech doctrine).

the author realizes.[4] This is hardly a weakness in conventional terms. Indeed, it is what makes the book a valuable resource. But it is also in a sense what makes the book incomplete. The problem with a book of this length—that goes substantially beyond a recitation of the content of judicial opinions in order to impose order and meaning on the case law—is that it leaves out, necessarily, too many of the legitimate ways to understand the free speech issues the Court has been confronting. In blunt terms, it simply may not be possible any longer to write the kind of book that Farber has attempted to write in *The First Amendment*. It may not be possible to write a probing, critical discussion of free speech doctrine that is generally useful for teaching purposes today unless one allocates far more pages to the enterprise than either Farber or Foundation Press thought was appropriate.

In this review, I am going to focus on two sections of his book where Farber's analysis and selectivity in including arguments creates too much dissonance with the way that I understand the cases and issues for his work to be useful to me in teaching my classes. Instead of noting various disagreements that I may have with his analysis, as book reviewers typically do, however, I thought it might be more useful to provide comparative frameworks to help illustrate the differences between Farber's approach and my own. Accordingly, after summarizing the way Farber discusses the issues in these sections, I will describe the way I would present the same material. That comparison, hopefully, will demonstrate why it might be difficult for students to shift from one perspective to the other. Then, after juxtaposing alternative discussions of two free speech areas at some length, I will briefly sketch similar problems in a few other sections of Farber's work.

Of course, other readers might have less of a problem with the areas of *The First Amendment* that bother me, but would identify different sections of this work, sections that I found to be thorough and persuasive, as incomplete or off center from their perspective. The point isn't that any of these competing understandings of free speech cases and principles is necessarily more accurate and convincing than Farber's analysis. Rather, it is that under the current state of free speech case law we do not

4. Professor Farber suggested to me in an e-mail message that his purpose in writing this book was to describe current doctrine rather than to present his own views on the meaning of the First Amendment. Electronic Mail from Daniel Farber to Alan Brownstein (July 23, 1998) (on file with author ("*Electronic Mail*")).

have an adequate, agreed-upon foundation on which we can stand and evaluate alternative doctrinal interpretations. Because of the seemingly systemic indeterminacy in so many free speech cases, we are left in a doctrinal world in which I seriously dispute very little of what Farber writes in this book, but I sometimes see things very differently or emphasize very different aspects of an issue in my classes.

I. CONTENT DISCRIMINATORY AND CONTENT NEUTRAL SPEECH REGULATIONS

A. CONTENT AND VIEWPOINT DISCRIMINATION

Farber raises an extraordinarily large number of issues in his discussion of content-neutral, content-discriminatory, and viewpoint-discriminatory regulations in a very few pages.[5] He describes the relevant standards of review for each category, examines the difficulty of determining in which category a particular regulation belongs, and, perhaps most importantly, evaluates the utility of, and justifications for, the framework the Court has adopted. Much of his writing is extremely concise in light of the richness of the ideas he is expressing. For example, in discussing the difficulty in distinguishing content-discriminatory from content-neutral regulations, Farber explains that "[l]ooking at the face of the statute seems both too broad and too narrow—too broad, because . . . there may be non-suspect reasons for keying the regulation to content,[6] and too narrow, because it allows clever drafters to target disfavored speech, so long as they do so covertly."[7] I would not assign too many pages of this book to students for any one setting. This is material that needs to be

5. Farber acknowledges how heavily condensed his analysis is near the end of his book when he reminds the reader that "[t]he topic of almost every chapter in this book is complex enough to warrant a book in its own right." Daniel Farber, *The First Amendment* 243 (Foundation Press, 1998). If anything he understates the complexity of the material. There are sentences in this book that might be the subject of long law review articles. See, notes 5-6 and accompanying text.

6. Id. at 29. A discussion of this issue might include both secondary effects cases, see, notes 24-25 and accompanying text, and an explanation of many of the exceptions to the rule requiring strict scrutiny review of content-discriminatory restrictions within a category of unprotected speech that Justice Scalia describes in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

7. Farber, *First Amendment* at 29 (cited in note 5). The issue here is the perplexing problem of how to deal with facially neutral, but invidiously motivated, regulations that are designed to disproportionately burden particular viewpoints of expression.

chewed on thoroughly if it is going to be digested without discomfort.

In discussing what constitutes prohibited viewpoint-discrimination, Farber effectively zeroes in on what I take to be the critical issue. Determining whether what a regulation prohibits "counts as an *opposing* viewpoint," he explains, is inherently ambiguous "because this depends on how we conceptualize the relevant debate."[8] Thus, part of the disagreement between the concurring justices and the majority in *City of St. Paul v. R.A.V.* reflected differing views of the kinds of disputes at which the hate speech law challenged in the case might be directed.[9] To Justice Stevens, the law applied equally to both sides in a dispute between the members of different racial groups. To Justice Scalia, the law discriminated against racists engaged in a debate with opponents of racism.[10]

I might have gone further than Farber does and suggested that the difficulty the Court experiences in identifying the relevant debate in *R.A.V.* carries the seeds within it of undermining the essential idea that there is something distinctive about viewpoint-discrimination. After all, it is hard to identify a content-discriminatory regulation that does not restrict the expression of a viewpoint in some hypothetical debate.[11] Even an ostensibly innocuous, subject matter regulation that prohibits speech about dogs, for example, may directly restrict at least one of the viewpoints that might be expressed in a debate about what constitutes the best household pet.[12] Certainly, Farber's analysis goes more than far enough on this issue for a student text, however.

B. CONTENT-NEUTRAL REGULATIONS

1. The Meaning of Content-Neutrality

Where I part company from *The First Amendment* most significantly is in its discussion of content-neutral regulations. For

8. Id. at 31.
9. *R.A.V.*, 505 U.S. at 391-92.
10. Id.
11. See, e.g., *Air Line Pilots Ass'n, Int'l v. Department of Aviation*, 45 F.3d 1144, 1159-60 (7th Cir. 1995) (suggesting that a ban on a general category of speech, such as political speech, may still be viewpoint discriminatory because some speech on a specific subject might not be considered "political" and would be permitted while a "political" message expressing the contrary view would be suppressed).
12. These ideas developed out of a series of e-mail conversations with Eugene Volokh.

the purposes of his analysis, Farber chooses to collapse three kinds of laws together: laws that directly regulate a time, place or conventional manner of expression, e.g., a law prohibiting leafleting; laws directed at conduct that is generally not engaged in for expressive purposes, but which in a given case is engaged in to communicate a message, e.g., sleeping in a park to demonstrate the plight of the homeless; and laws directed at conduct that is not generally engaged for expressive purposes and is not intended to communicate a message in the case at hand.[13]

Apparently, Farber elects to structure his discussion this way for two reasons. First, the Court appears to have concluded that the standards of review for the first two types of regulation are roughly equivalent.[14] At least, the Court claims that this is so in several decisions.[15] Second, Farber suggests that the standard of review for content-neutral regulations is so deferential today that it is extremely unlikely that any laws will be struck down under it. To Farber, virtually all content-neutral laws will be upheld unless they "entirely foreclose a traditional channel of communication such as lawn signs" and they will sometimes be upheld even in that circumstance.[16] It is the Court's lack of rigor in reviewing all content-neutral laws, even those that are clearly directed at speech, that leads Farber to conclude that the only variable that really matters in practical terms under current doctrine is whether a regulation is content-based or not. That is why he argues it is hardly worth a court or a student's time to even determine whether the conduct being regulated by a law "is classified as speech or not."[17]

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13. See generally Farber, *First Amendment* at 27-41 (cited in note 5).

14. Id. at 25-27.

15. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984); *Ward v. Rock Against Racism*, 491 U.S. 781, 797-98 (1989). These opinions both suggest that there is very little difference, if any, between the multi-factor test applied to time, place, and manner regulations and the standard for reviewing regulations of symbolic speech set forth in *United States v. O'Brien*, 391 U.S. 367 (1968).

16. Farber, *First Amendment* at 2 (cited in note 5) (comparing *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (upholding law banning signs on utility poles) with *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (striking down law prohibiting use of lawn signs)).

17. Id. at 41. In an e-mail message, Professor Farber indicated that he recognizes that a neutral statute regulating conventionally nonexpressive conduct that is not being engaged in for expressive purposes would be subject to a rational basis standard of review. This would be "quite different" than the review applied to either time, place, and manner regulations or restrictions on symbolic speech. *Electronic Mail* (cited in note 4). Farber's discussion on this point in *The First Amendment* blurs this distinction, however. See Farber, *First Amendment* at 41 (cited in note 5) (explaining that "since the *O'Brien* test is applied so favorably to the government, it makes very little difference in most cases whether conduct is classified as speech or not, so long as the government's regula-

Having conceptualized the issue in these terms, Farber spends very little time explaining or evaluating the standard of review that the Court applies to content-neutral laws. He says almost nothing about the requirement that regulations must leave open "ample channels for communication" of the speaker's message. With regard to the narrow tailoring requirement, he recites the Court's conclusions in *Ward v. Rock Against Racism*[18] that a regulation need not employ the least restrictive alternative available to the government as long as it does not "burden substantially more speech than is necessary to further the government's legitimate interests."[19] This means, to Farber, that a law will only be struck down as inadequately tailored "if it could achieve the government's purposes effectively while covering substantially less speech."[20]

What Farber does focus on, not surprisingly, is how the Court determines whether a law is content-neutral or not. The primary cases he addresses in exploring this question are *United States v. O'Brien*,[21] the draft card burning case, *United States v. Eichman*,[22] the flag burning case, and *Barnes v. Glen Theatre, Inc.*,[23] the nude dancing case. He concludes that the justices are hopelessly fragmented in identifying a test for defining content neutrality as the myriad approaches applied in *Barnes* demonstrate. Thus, a law might be content-neutral because (1) "the law would equally apply if no message at all [is] being communicated by the conduct," (2) "the persuasive effect of the message" expressed by the regulated conduct is not "a necessary part of the government's justification for regulating [it]," (3) the government's purpose in enacting the law is not to suppress or condemn the message communicated by the regulated conduct, or (4) the law on its face does not draw a distinction based on content. Farber explains how each of these approaches is problematic in at least some respects.[24]

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tion is content-neutral").

18. 491 U.S. 781 (1989).
19. Id. See Farber, *First Amendment* at 26 (cited in note 5).
20. Id.
21. 391 U.S. 367 (1968).
22. 496 U.S. 310 (1990).
23. 501 U.S. 560 (1991).
24. Farber, *First Amendment* at 28-29 (cited in note 5).

2. Distinguishing Among "Neutral" Regulations that Directly Burden Speech

None of this analysis is wrong. All of it is useful. Most of it is very different from the way I would discuss this topic. To begin with, I would focus my discussion initially on content-neutral regulations of speech; time, place, and manner regulations that restrict conventionally expressive activities such as leafleting, residential picketing, soliciting, using loud speakers and the like. For the most part, no one seriously disputes that these laws are content-neutral on their face. Before addressing the regulation of other kinds of conduct such as draft card burning or nude dancing, I would develop in some depth the Court's understanding of content-neutrality in cases involving the regulation of what everyone recognizes to be speech all the time.

Moreover, I think that examining the facial content of the law is clearly the first step in such an analysis. Presumptively, a law that is content-neutral on its face is a content-neutral regulation of speech for the purposes of First Amendment review and a law that is content- discriminatory on its face is a content-discriminatory regulation of speech. There are exceptions, of course, but they vary as to their scope in free speech cases, and, more importantly, as to whether they reflect broader, boundary crossing concerns that apply to a wide range of constitutional interests.

a. Secondary Effects

The primary exception suggesting that a law may be content-discriminatory on its face, but should still be reviewed as if it were a content-neutral regulation, relates to laws that are directed at the secondary effects of speech. There is only one case, however, *City of Renton v. Playtime Theatres, Inc.*,[25] where a majority of the Court actually applied the secondary effects doctrine to uphold a law. Further, all the other circumstances in which the doctrine is discussed favorably in dicta or by individual justices involve indecent or otherwise unprotected or lesser protected speech.[26] Until the secondary effects analysis is used more

25. 475 U.S. 41 (1986).

26. *Renton* itself involves the constitutionality of a dispersal zoning ordinance restricting the location of adult bookstores and movie theaters. Id. Other Supreme Court cases which discuss secondary effects, but do not ground their holdings on this doctrine, include: *Reno v. ACLU*, 117 S. Ct. 2329, 2342 (1997) (construing statute regulating indecent speech on the Internet to be directed at the "primary" effect of indecent speech); *Barnes v. Glen Theatre*, 501 U.S. at 582 (Souter, J., concurring) (arguing that statute pro-

expansively, it is more appropriately recognized as an exception to the general rule (and a dubious, result-oriented one at that) rather than as an aspect of content-neutrality that influences the definition of the concept.

b. The Problems of Generality and Motive

In addition to the exception of laws directed at secondary effects, there are two related problems that complicate the application of any test that relies on the content of the regulation as a basis for determining its neutrality. First, there is the question of generality. How should we evaluate a law that sweeps so broadly that it restricts both speech and non-speech related activities? A ban on loud speakers only restricts speech. A noise ordinance restricts non-communicative equipment such as leaf blowers, faulty mufflers, and air conditioners as well as expressive activities.[27] At a minimum, general laws of this kind are content-neutral. The harder question here would be whether we should review the noise ordinance as a content-neutral regulation of speech because of the burden it imposes on expressive activities (even though the law is not directed exclusively at speech) or whether we should review it as a law outside the coverage of the First Amendment under a rational basis test.

This issue transcends freedom of speech doctrine. Under the Free Exercise Clause, it was resolved against the rigorous review of general laws that substantially burden both religious

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hibiting public nudity can be constitutionally employed to prohibit nude dancing at a sexually oriented business because of secondary effects associated with such establishments): *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223 (1990) (failing to reach issue of whether ordinance regulating sexually oriented business is aimed at secondary effects because city's licensing scheme lacks procedural safeguards required by First Amendment); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 708 (1986) (O'Connor, J., concurring) (mentioning "perceived secondary effects" as a possible basis for closing down a store selling indecent books); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 n.34 (1976) (discussing the zoning of adult movie theaters).

The only case in which the Court considered secondary effects doctrine in reviewing a regulation that was not directed at sexually oriented expression, such as the inventory of an adult business, was *Boos v. Barry*, 485 U.S. 312, 321 (1988). In *Boos*, a three justice plurality opinion refused to apply a secondary effects analysis to the review of a statute prohibiting anyone from displaying within 500 feet of a foreign embassy any banners or signs intended to bring a foreign government into public odium or disrepute. The Court construed the challenged regulation to "focus on the direct impact of speech on its audience," not on secondary effects.

27. In my home community of Davis, California, a resident was cited for violating the city's noise ordinance because she allegedly snored too loudly. The citation was later dismissed. The cited resident successfully sued the city and recovered $13,500. Howard Beck, *Settlement Silences Snoring Story,* Davis Enterprise A1 (March 26, 1995). By all accounts the snoring was not expressive in nature.

practices and non-religiously motivated activities in *Employment Division v. Smith*.[28] Justice Scalia has also suggested that it is relevant to Takings Clause decisions.[29] The issue has also arisen in abortion cases where the state, for example, attempts to regulate all out-patient surgical clinics, not only those that provide abortion services.[30] Instead of discussing this controversy in isolation as a problem with defining content-neutrality for First Amendment purposes, I would locate it more centrally in fundamental rights jurisprudence first and then go on to consider it in the context of free speech cases.

Second, and more directly related to the issue of neutrality, is the problem of disproportionate impact and invidious motive. A time, place, and manner regulation may be facially neutral but predictably more burdensome to a particular point of view and, perhaps, deliberately so. No one believes that speakers who oppose abortion rights and speakers who support abortion rights are equally burdened by an ordinance prohibiting picketing within 20 feet of the entrance to a medical clinic.[31] Should we evaluate such a law as a content-neutral regulation of speech, because the law is neutral on its face, even if plaintiffs submit convincing evidence that the ordinance was enacted for the specific purpose of silencing anti-abortion protestors? Or, instead,

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28. 494 U.S. 872 (1990).

29. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 n.14 (1992).

30. Compare *Bossier City Medical Suite, Inc. v. City of Bossier City*, 483 F. Supp. 633 (W.D. La. 1980) (upholding under deferential review zoning decision preventing clinic providing abortion services from locating in an area limited to medical clinics that do not provide inpatient care or operating rooms for major surgery); *Abortion Coalition of Mich. v. Michigan Dept. of Pub. Health*, 426 F. Supp. 471 (E.D. Mich. 1977) (sustaining statutes providing for the licensing and regulation of "freestanding surgical outpatient facilities" on the grounds that challenged laws do not specifically burden the right to have an abortion); *Hodgson v. Lawson*, 542 F.2d 1350, 1358 (8th Cir. 1976) (holding that "[a] state can impose the same regulations on a clinic specifically built to perform abortions during the first trimester, that are imposed on other clinics that perform surgical procedures requiring approximately the same degree of skill and care as the performance of first trimester abortions"), with *Ragsdale v. Turnock*, 625 F. Supp. 1212, 1229-30 (N.D. Ill. 1985) (requiring that "any regulation, even a general regulation, which burdens a woman's right to choose to terminate her pregnancy during the first trimester [must further a] compelling governmental interest"); *Friendship Med. Ctr., Ltd. v. Chicago Bd. of Health*, 505 F.2d 1141 (7th Cir. 1974) (recognizing that even regulations universally applied to all medical procedures must further a compelling state interest if they burden the right to have an abortion); *Indiana Hospital Licensing Council v. Woman's Pavilion of S. Bend, Inc.*, 420 N.E. 2d 1301, 1315 (1981) (explaining that under due process analysis state enacting neutral regulations "must nevertheless provide compelling reasons for *any* regulation of a fundamental right").

31. See *Edwards v. City of Santa Barbara*, 150 F.3d 1213, 1216 n.3 (9th Cir. 1998) (explaining that the fact that the majority of those prosecuted under ordinance restricting demonstrations outside of health care facilities are protesting abortion services does not undermine content-neutral status of challenged law).

should such a law be more properly reviewed as a content or viewpoint discriminatory restriction of speech?[32]

Again, this is not an issue that is unique to free speech jurisprudence. It applies across the spectrum of many fundamental rights. We often confront laws that are facially neutral, but which disproportionately burden one of two or more classes that the Constitution requires to be treated equally. Typically, to resolve the case it is necessary to determine the propriety of direct inquiries into the legislature's motives.[33] Addressing this issue exclusively as a problem in defining content-neutral speech regulations suggests that the problem results from the way that the Court has structured free speech doctrine. In fact, it is a problem intrinsic to the protection of any constitutionally protected interest and one that applies with particular force to those interests containing an equality dimension.

c. Political Process Analysis

Both of these problems raise questions about the constitutional significance of generalizing the scope of a law in a way that broadens its impact. And in both cases, there is at least one common response. Under a political process model of constitutional interpretation, we trust the results of the political process more when the costs and burdens of regulation are spread widely so that the majority pays a price for obtaining whatever public benefits allegedly result from the regulation of speech.[34] This argument may not provide a terribly persuasive basis for reviewing a law directed at speech, such as a loudspeaker ban, more rigorously than a broader regulation, such as a noise ordinance. It is not obvious that the social interests burdened by the broader law, people who use leaf blowers or other loud but noncommunicative equipment, for example, represent the kind of constituency whose burdening by a law will materially help to establish that the results of the political process deserve respect. A more powerful political process argument applies to content-neutral speech regulations that disproportionately burden some points of view more than others. While a ban on picketing in

32. There is a general consensus on the Supreme Court that disproportionate impact alone without proof of invidious motive will not justify more rigorous review of a facially content-neutral law. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

33. See Alan E. Brownstein, *Illicit Legislative Motive in the Municipal Land Use Regulation Process*, 57 U. Cin. L. Rev. 1 (1988).

34. See Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. Chi. L. Rev. 81, 111 (1978).

front of medical clinics, or a ban on residential picketing, may disproportionately burden opponents of abortion, such a law will also restrict the expressive activities of labor unions and other politically powerful groups for whom site specific speech is of recognized value. The increased difficulty of adopting a law that burdens a host of possible speakers provides some justification for trusting the political system's conclusion that the benefits of the law justify its costs.[35]

3. Content-Neutrality and Symbolic Speech

After establishing this foundation by examining time, place, and manner speech regulations, I think it is easier to talk about the more complicated issue of identifying content neutrality in the context of symbolic speech, the cases with which Farber begins his discussion. Once again, we confront the same two related problems. A law prohibiting public nudity or draft card burning restricts both non-expressive and expressive conduct just like the noise ordinance mentioned above. And again, as was true with the noise ordinance, it is necessary to determine whether the law should be reviewed as a regulation of speech at all.[36] But there are special characteristics of symbolic speech cases that distinguish them from those involving generic ordinances that regulate both conventionally expressive and non-expressive activities.

The primary problem is that many kinds of symbolic speech are directly associated with particular messages. For these kinds of speech, there really is nothing analogous to the conventional time, place, and manner regulation. In essence, the law is really either a content, or, perhaps, even a viewpoint, discriminatory

35. Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-abortion Protests*, 29 U.C. Davis L. Rev. 553, 608-09 (1996). Farber seldom mentions political process arguments in *The First Amendment*. His reluctance to do so may be explained, reasonably enough, by the current Court's lack of interest in such analysis. Still, the Supreme Court that developed the free speech framework under discussion was heavily influenced by political process reasoning. The fact that the current Court has abandoned at least part of the intellectual foundation on which the framework rests raises legitimate questions about its long term viability.

36. There is one formal sense in which a law prohibiting sleeping in the park, for example, is different than the noise ordinance. The noise ordinance prohibits different activities, some of which are engaged in for expressive purposes, e.g. loudspeakers, and others which do not serve communicative goals, e.g. leaf blowers. The law prohibiting sleeping in the park restricts only one activity, sleeping in the park. The law generalizes and extends beyond speech because many people sleep in parks for non-expressive reasons. I do not think anything substantive turns on this distinction.

regulation or it is not a regulation of speech at all. For example, I would argue that a law prohibiting the burning of draft cards only when the card is burned for communicative purposes is a content discriminatory law. Unlike leafleting and other conventional means of expression which are used to express any of a wide variety of messages, burning draft cards, like burning flags, has a far more limited communicative range. For this kind of speech, a law prohibiting the burning of a draft card to communicate a message and a law prohibiting the burning of a draft card to deliver a dissident political message may be indistinguishable for First Amendment purposes.

This association does not always exist. I think that *Clark v. Community for Creative Non-Violence*[37] was a relatively easy symbolic speech case because the conduct of sleeping in parks is not associated with any particular message. Draft card burning, flag burning and nude dancing, however, are all associated with a very limited range of messages. And the narrower the range of meaning attributed to conduct engaged in for expressive purposes, the greater the likelihood that the law regulating the conduct is content or viewpoint discriminatory if it is determined to be a law directed at the regulation of speech at all. That is why in the flag burning cases, once the majority determines that the flag burning prohibition is directed at flag burning for expressive purposes, the Court also concludes that the law is content-discriminatory.[38]

Perhaps the best analogy to the symbolic speech cases might be a noise ordinance restricting the level of sounds of any kind greater than a certain decibel outside of a medical clinic. Here, as is true of the tough symbolic speech cases, judicial review of the law necessarily collapses the question of whether the regulation should be evaluated as a regulation of speech into the question of whether the regulation is content-neutral or content-discriminatory. Since the justification for avoiding loud noises outside of medical clinics seems so obvious and so devoid of any message suppressing intent, absent direct proof of an invidious motive, this law should certainly be upheld. The open question is whether it should receive the same very deferential review provided to the law prohibiting sleeping in the park in *Clark* or whether the Court should evaluate it as a content-neutral but di-

37. 468 U.S. 288 (1984).

38. *United States v. Eichman*, 496 U.S. 310, 315 (1990); *Texas v. Johnson*, 491 U.S. 397, 411-412 (1989).

rect regulation of speech because of its more obvious implications for conventional expressive activity.[39]

One might argue that a law restricting the level of sounds of any kind greater than a certain decibel outside of only those medical clinics that provide abortion services, however, should receive much more rigorous review. It is, after all, difficult to explain why only noises outside of medical clinics providing abortion services serve the neutral goal of avoiding the disruption of medical treatment. A noise ordinance protecting only clinics providing abortion services, like the flag burning law, might be construed to have only one possible purpose, a content-discriminatory one.[40]

If there is no direct proof of invidious motive, these latter cases may be extremely difficult to resolve, but I am not certain that this difficulty has all that much to do with the nature of content neutrality. Sometimes a law may be ostensibly neutral on its face, but its application is such that it can not reasonably be understood as serving anything other than an invidious purpose, or at least one that requires rigorous constitutional review. In the symbolic speech cases involving nude dancing or flag burning, those justices who argued that the challenged laws were content-discriminatory believed that no purpose other than a content-discriminatory one could explain the enactment and enforcement of these laws.[41] But it is obviously difficult to establish that a law can serve only one purpose and it is not surprising that different justices may not agree that such a conclusion is justified in a given case.[42] Still other justices may argue with some justification that such an inference should never be permitted, for reasons associated with their understanding of the proper role of constitutional judges.[43]

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39. See *Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972) (upholding antinoise ordinance governing area around public schools because law "is narrowly tailored to further [city's] compelling interest in having an undisrupted school session conducive to the student's learning, and does not unnecessarily interfere with First Amendment rights.")

40. One might argue that the city enacted an ordinance solely limiting noise outside of abortion clinics because these are the only medical facilities at which loud demonstrations occur. Why should the city adopt a law that is broader than necessary to solve the problem at which it is directed? Not all noise that might interfere with the operation of a medical facility is caused by demonstrations, however, and labor demonstrations, rallies directed against managed care, as well as other protests might occur at a wide range of clinics and hospitals.

41. *Barnes v. Glen Theatre, Inc.* 501 U.S. 560, 591-94 (1991) (White, J., dissenting); *Eichman*, 496 U.S. at 317-18; *Johnson*, 491 U.S. at 412, 416-17.

42. *Barnes*, 501 U.S. at 570-71; *Eichman*, 496 U.S. at 320-21 (Stevens, J., dissenting); *Johnson*, 491 U.S. at 438-39 (Stevens, J., dissenting)

43. *Barnes*, 501 U.S. at 579-80 (Scalia, J., concurring).

4. The Standard of Review for Content-Neutral Laws

a. Evaluating the Rigor of Review

I am not sure whether Dan Farber would agree with the above analysis. Most of it is superfluous to the analysis presented in *The First Amendment* because Farber concludes that the standard of review applied to content-neutral regulations of conventional expressive activities, symbolic speech, or non-expressive conduct is so low that it is hardly worth the effort to differentiate among these regulations.[44] Even if this conclusion is correct, I think it is important for the sake of conceptual clarity to distinguish these regulations and the review they receive from each other. But in point of fact I am not sure his conclusion is accurate at least as it applies to content-neutral laws that directly regulate speech. I think there may be more bite to this standard of review than Farber suggests.[45]

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44. Farber, *First Amendment* at 26, 41 (cited in note 5).

45. It is true that the United States Supreme Court has seldom found a content-neutral regulation of speech to be invalid on First Amendment grounds during the last 10 to 15 years. There have been a few exceptions. See, e.g., *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) (striking down law that prohibits federal employees from accepting any compensation for making speeches or writing articles even though regulation does not discriminate on the basis of content or viewpoint); *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (invalidating content-neutral ordinance banning all residential signs); *Meyer v. Grant*, 486 U.S. 414 (1988) (invalidating law prohibiting payment to those who collect signatures on initiative petitions); *United States v. Grace*, 461 U.S. 171 (1983) (striking down content-neutral ban on the display of banners, flags, or other expressive devises in the Supreme Court building and its adjoining grounds and sidewalk). And the Supreme Court has struck down certain provisions of content-neutral injunctions restricting speech although it has applied a more rigorous standard of review in doing so. See, e.g., *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997) (invalidating specific provisions of content-neutral injunction limiting expressive activity outside of medical clinics providing abortion services); *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994) (same). Still, the Court's track record has hardly been inspiring on this issue.

The decisions of lower federal courts tell a different story, however. Here, content-neutral regulations of speech will often be held unconstitutional under relatively careful review. See, e.g., *NMI Perry v. Los Angeles Police Dept.*, 121 F.3d 1365 (9th Cir. 1997) (striking down content-neutral law prohibiting the sale of goods or solicitation of funds on sidewalks and boardwalks adjoining the Pacific Ocean at Venice Beach); *Bery v. City of N.Y.*, 97 F.3d 689 (2d Cir. 1996) (invalidating ordinance prohibiting visual artists from exhibiting or selling their work at public places without vendor's license of limited availability); *Cleveland Area Bd. of Realtors v. City of Euclid*, 88 F.3d 382 (6th Cir. 1996) (striking down ordinance restricting placement of signs in residential areas to window signs); *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949 (D.C. Cir. 1995) (striking down application of park regulation prohibiting solicitation of donations to solicitors operating within small permit area reserved by the group seeking donations for a special event on National Mall); *Vittitow v. City of Upper Arlington*, 43 F.3d 1100 (6th Cir. 1995) (invalidating ordinance prohibiting residential picketing even if it does not occur directly in front of house that is the target of protest); *Grossman v. City of Portland*, 33 F.3d 1200

Farber is certainly correct that the Court has stated on occasion that as long as the state's goal is unrelated to the suppression of speech, regulations of the time, place, and manner of speech, and regulations of symbolic speech receive essentially the same standard of review.[46] And there is no doubt that the standard of review applied to regulations that incidentally burden symbolic speech is extremely weak. But this may be one of those situations in which it is more important to look at what the Court does than what it says.

In *Clark v. Community for Creative Non-Violence*,[47] for example, the Court upheld a ban on camping (for the purposes of the case, sleeping) in Lafayette Park across from the White House—even when the sleeping is engaged in for expressive purposes as part of a demonstration to draw attention to the plight of the homeless.[48] In reaching this conclusion, the Court repeatedly affirmed the functional equivalence of the *O'Brien* test applied to the regulation of symbolic speech and the multifactor balancing test applied to content-neutral regulations that limit the time, place, and manner of speech. But it is fair to ask

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(9th Cir. 1994) (holding that content-neutral ordinance requiring advance permit to engage in organized expressive activity in public park could not be constitutionally applied to small protest of only eight people); *Gerritsen v. City of L.A.*, 994 F.2d 570 (9th Cir. 1993) (striking down regulation prohibiting distribution of leaflets in area of park adjacent to Mexican consulate and shopping and dining areas and invalidating permit policy governing handbill distributions in other areas of park); *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319 (1st Cir. 1993) (invalidating guidelines prohibiting leafleting and solicitation in designated areas of subway stations); *Arlington County Republican Comm. v. Arlington County, Va.*, 983 F.2d 587 (4th Cir. 1993) (striking down ordinance limiting property owners to two temporary signs in residential districts); *Hays County Guardian v. Supple*, 969 F.2d 111, 118-20 (5th Cir. 1992) (concluding that University regulation prohibiting students from handing out a free newspaper with advertising on campus unless the students belong to a registered student group that agrees to sponsor the paper violates First Amendment even if it is content-neutral); *Gaudiya Vaishnava Society v. City of S.F.*, 952 F.2d 1059 (9th Cir. 1990) (holding that ordinance requiring non-profit groups selling T-shirts, stuffed animals, and jewelry with expressive messages to obtain peddler's license violates First Amendment); *Dorman v. Satti*, 862 F.2d 432 (2d Cir. 1988) (declaring state statute prohibiting the harassment of persons engaged in hunting or preparing to hunt to be content-neutral but unconstitutional); *United Food and Commercial Workers Int'l Union v. IBP, Inc.*, 857 F.2d 422 (8th Cir. 1988) (striking down law prohibiting more than two pickets standing within 50 feet of entrance to premises being picketed).

Notwithstanding the Supreme Court's apparent leniency in recent cases, the persistence of lower federal courts in taking the review of content-neutral speech regulations seriously suggests that identifying a law as a content-neutral regulation of speech may have more than enough doctrinal significance to warrant the attention of professors, law students, and free speech litigators.

46. See notes 13-14 and accompanying text.

47. 468 U.S. 288 (1984).

48. Id.

whether the actual reasoning applied in this case would be utilized to justify a similar regulation directed at conventionally expressive activities such as leafleting.

As I read the *Clark* decision, there is no narrow tailoring requirement applied at all in the Court's analysis. The Court recognizes that the state has a legitimate interest in protecting the environment of the Park, and that permitting people to sleep in the park creates some risk that the environment would be adversely impacted. Surprisingly, however, it suggests that nothing more is necessary to support the Park Services' regulation. The arguments by lower courts that the Park Services could satisfactorily further their goals by prohibiting only certain activities associated with camping while allowing demonstrators to sleep in the park is rejected out of hand as inappropriate meddling by the courts in administrative decisions. In a critical sentence in the majority opinion, the Court states that

> [I]f the Government has a legitimate interest in ensuring that the National Parks are adequately protected, which we think it has, and if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment as a reasonable regulation of the manner in which a demonstration may be carried out.[49]

It seems clear that a similar argument could be applied to prohibit leafleting (or all demonstrations for that matter) in Lafayette Park. It is true that not every leaflet distributed will end up as litter on the ground, but some of them will. And it seems reasonable to suppose that there will be less litter if leafleting is prohibited whether or not littering is independently prohibited just as it is reasonable to assume that there will be less of an environmental impact on the park if sleeping is prohibited whether or not other activities associated with camping that are likely to cause more of a problem than the simple act of sleeping are independently prohibited.

I do not believe that a ban on leafleting in Lafayette Park would be as cavalierly upheld by the Court as the ban on camping, however. Farber might disagree, but I am not sure about this. Farber does acknowledge that content-neutral "statutes that entirely foreclose a traditional channel of communication"

49. Id. at 297.

may be struck down.[50] Leafleting is obviously a traditional channel of communication, but I am not clear whether a ban on leafleting in a single park entirely forecloses a medium of expression. A ban on leafleting from 9:00 a.m. to 5:00 p.m. seems even less like the complete foreclosure of a medium of expression, but I would think that even this more limited restriction on speech would receive far more serious consideration than the ban on sleeping in the park did in *Clark*.

It is possible, of course, that the Court would apply the same standard of review to a ban on leafleting and a ban on sleeping in a park with equivalent rigor. The application of the standard might produce different results because of significant differences between the activities being regulated for First Amendment purposes. Perhaps the Court believes that there are virtually always ample alternative avenues of communication available when a person is prohibited from engaging in conduct that is not conventionally expressive. After all, the people who are prevented from sleeping in the park to address the plight of the homeless may still distribute leaflets and engage in the full range of conventionally expressive mediums to communicate their message. In this sense, there will always be more alternative avenues of expression available to a speaker when a challenged law that only restricts conduct that is not conventionally expressive is compared to a law that restricts the use of a traditional expressive medium since no normal means of getting one's message across has been impaired by the former regulation.

The problem with this argument, however, is that it is entirely relative. It does not require a court to reach a different result and strike down the challenged law when the regulation of leafleting in a park as opposed to sleeping in a park is subject to review. While there may be more functional, alternative avenues of communication available to speakers protesting the plight of the homeless when a ban on sleeping in parks is enforced than is the case when a ban on leafleting is enforced, the fact remains that there are a host of alternative ways to communicate a message about the homeless to the national government even if leafleting in Lafayette Park is prohibited. If regulations sharply restricting a means of communication like leafleting raise serious First Amendment problems, and I hope and believe that they do, we have to be able to explain how the standard of re-

50. Farber, *First Amendment* at 26 (cited in note 5).

view the Court applies to content-neutral regulations justifies such a conclusion.

b. *Evaluating the Substance of Review: Ample Alternative Avenues of Communication and Narrow Tailoring*

Unfortunately, Farber devotes very little attention to this issue. He says almost nothing about the "ample alternative channels of communication" prong of the standard of review. While I agree that this factor often seems to be taken lightly by the Court, there are some cases where it is treated seriously.[51] Those cases are worth mentioning because they help students to understand not only where the Court is today, but also what we may have lost over time as the analysis in this area has changed. Even when the doctrinal battle seems over for the moment, it is important to understand what an earlier conflict was all about because shifts in interpretation that seem permanent may sometimes be open to reconsideration.

Farber is more descriptive in his discussion of the narrow tailoring part of the test. Focusing on *Ward v. Rock Against Racism*,[52] he explains that the Court seems to focus on two criteria. First, the Court suggests that a law will be upheld as long as the government demonstrates that its regulatory interest "would be achieved less effectively absent the regulation."[53] Second, the Court states that a law will be struck down if it burdens "substantially more speech than is necessary to further the government's legitimate interests."[54]

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51. In *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), the Court carefully noted the cost and utility of the means of expression being regulated in striking down an ordinance prohibiting residential signs. "Residential signs are an unusually cheap and convenient form of communication," the Court explained. "Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute." Id. at 57. In contrast, the Court was openly dismissive of similar arguments in *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789 (1984), when it upheld an ordinance prohibiting the posting of signs on city owned utility poles. Here, the Court maintained that "[n]otwithstanding appellees' general assertions in their brief concerning the utility of political posters, nothing in the findings indicates that the posting of political posters on public property is a uniquely valuable or important mode of communication, or that appellees' ability to communicate effectively is threatened by ever-increasing restrictions on expression." Id. at 812.

Earlier cases apply an analysis that is far closer to *Gilleo* than *Taxpayers for Vincent*. See, e.g., *Martin v. City of Struthers*, 319 U.S. 141, 145-46 (1943) (noting the importance of door to door soliciting and leafleting, especially "to the poorly financed causes of little people").

52. 491 U.S. 781 (1989).

53. Id. at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 89 (1985)).

54. Id.

Farber puts these two ideas together and concludes that "a regulation is too broad if it could achieve the government's purpose effectively while covering substantially less speech."[55] That's certainly what the Court says, but it is hardly clear as to what the Court means. It is an easy case if the challenged regulation is more effective in furthering the government's interest, but no more burdensome to speech, than alternative approaches. Obviously, this law is upheld.[56] It is also clear that a law will be struck down if an alternative approach would be equally effective as the government's choice, but would burden speech far less substantially. Neither of these situations are particularly common, however. Most often, the challenged law will be more effective than the alternatives and it will burden speech more as well. In that circumstance, should the courts second guess the legislature or executive branch and choose a less effective and less burdensome regulatory approach?

This problem will almost always arise when the expressive activity risks causing some kind of preventable harm, but it will not do so on every occasion. As was noted earlier, leafleting contributes to increased litter, but not every leaflet ends up on the ground. If a ban on leafleting and littering results in substantially less litter than a ban on littering alone, should the ban be upheld or struck down under the *Ward* standard? Interestingly, the Court considers this exact issue in a footnote in *Ward* and concludes that a ban on leafleting is unconstitutional because many leaflets do not cause the harm that the government is trying to prevent.[57]

There may be a valid distinction here, but if there is, it is certainly a difficult one to apply. If we take the Court's explanation for distinguishing a ban on leafleting seriously, one would think that in order to be upheld, a content-neutral law must always focus on the harm that the expressive activity causes (here litter) and not on the expressive activity itself (here leafleting) whenever a substantial amount of the expressive activity being regulated may not result in the harm the government seeks to avoid. But the Court has upheld complete bans on solicitation without any apparent concern that not all solicitation is disrup-

55. Farber, *First Amendment* at 26 (cited in note 5).

56. That is how the Court understood the situation in *Ward*, 491 U.S. at 801-02 (holding that the challenged regulation did not burden plaintiffs' speech in any significant way other than that which was necessary to further the city's legitimate interests).

57. Id. at 800 n.7.

tive or causes congestion all of the time.[58] And under this reasoning, it is hard to understand why the ban on sleeping in Lafayette Park was upheld when a narrower regulation might have more precisely prohibited those activities associated with camping, such as campfires, that caused the kind of harm the Park Service sought to prevent.

The above discussion is considerably longer than Farber's section on content-neutral regulations. I have never written out what I think a constitutional law class needs to understand about this subject before. I probably could be more concise than I have been if I worked at it, but my presentation would still be longer than the pages that *The First Amendment* allocates to this topic. More important than its increased length, my discussion starts at a different location than Farber's and travels along a different doctrinal route to get to its destination. My guess is that many other constitutional law professors will view my canvass of the law here as idiosyncratic and distinct—pretty much the same way that I view Dan Farber's summary. It is that reality that makes it so difficult to write the kind of book that Farber has attempted to produce.

II. TRADITIONAL AND NON-TRADITIONAL PUBLIC FORUMS, CUSTODIAL INSTITUTIONS, AND GOVERNMENT FUNDING

A. PUBLIC AND NON-PUBLIC FORUMS

Given the internal inconsistency of the Court's forum cases, Farber does a very good job in trying to untangle the maze of cases in this area. Unlike his discussion of content-neutral regulations, where in my judgment he jumped too quickly into the morass of symbolic speech regulations without laying a conceptual foundation with the more conventional time, place and manner regulations, in this section Farber starts at the beginning and moves more slowly into the material. He addresses the basic question of how the regulation of speech on public property should be reviewed, evaluates the basic idea of a traditional public forum, and then briefly documents the Court's early struggles in developing coherent doctrine in this area.[59]

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58. See, e.g., *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992); *United States v. Kokinda*, 497 U.S. 720 (1990).

59. Farber, *First Amendment* at 167-71 (cited in note 5).

With this background established, Farber identifies the basic conflict in this area between two competing doctrinal models: an ad hoc functional approach under which government must demonstrate that expressive activity is incompatible with the use to which public property is being put in order to justify restrictions on speech, and a more deferential approach that provides government administrators considerable discretion in regulating expression on public property as long as their restrictions are viewpoint neutral and generally reasonable.[60] He concludes that the Court "split the difference" between these approaches[61] and catalogues the three types of forums the Court currently recognizes in achieving this doctrinal compromise. Then, Farber defines traditional public forums, limited public forums, and nonpublic forums and describes how different types of speech regulations will be reviewed under each rubric.[62]

To his credit, Farber critically evaluates the framework the Court has adopted. His analysis includes a helpful discussion of the difficulty the Court has experienced in classifying property as one type of forum or another.[63] The decision to limit traditional public forums to only historically recognized locations, essentially streets and parks, is challenged.[64] Farber also describes how easily a state may manipulate its regulation of property under the Court's definition of limited and non-public forums to restrict expression and avoid serious review.[65] He ultimately concludes, however, that the primary principle underlying the different standards of review among current forum categories does no more than recognize the state's power to enact reasonable subject matter regulations of speech on public property other than streets and parks (unless the state deliberately waives its authority to do so). Both for functional and manageability reasons, Farber accepts the soundness of this approach.[66]

After discussing the public forum cases, Farber turns his attention to speech in the public sector, the title of the next chapter in his book. He breaks down this analysis into three categories: Speech regulations in custodial institutions such as schools, prisons, and the military, speech regulations governing public

60. Id. at 172.
61. Id.
62. Id. at 172-84.
63. Id. at 181-84.
64. Id. at 184.
65. Id.
66. Id. at 185-86.

employees, and government funding of speech.[67] Cases such as *Tinker v. Des Moines,*[68] and *Hazelwood School District*[69] are included in the school section of the first category. *Pickering v. Board of Education,*[70] *Connick v. Myers,*[71] and the patronage cases (*Elrod v. Burns,*[72] *Rutan v. Republican Party,*[73] and *Branti v. Finkel*[74]) are discussed in the government employment section. *Rust v. Sullivan,*[75] *Rosenberger v. Rector and Visitors of University of Virginia*[76] and unconstitutional condition issues are reserved for the last section, which Farber frankly and correctly describes as an intractable puzzle at the present time.[77]

B. AN ALTERNATIVE PERSPECTIVE ON LIMITED AND NON-PUBLIC FORUMS

While one could point out a variety of nit-picking omissions and arguable errors in this section of *The First Amendment*[78] my problem with assigning these pages to my students, once again, relates to different starting places and a different perspective on broader issues. While I find much more common ground here than I did in the content-neutral materials, the way I approach these issues differs from Farber's in two important and related respects. First, I view the non-public forum cases through a far more jaundiced eye than Farber does. I think the framework provided by the Court is less conceptually coherent than Farber's overall analysis suggests. Further, far from "splitting the difference," the current doctrinal model, to my mind, is virtually

67. Id. at 187-205.
68. 393 U.S. 503 (1969).
69. 484 U.S. 260 (1988).
70. 391 U.S. 563 (1968).
71. 461 U.S. 138 (1983).
72. 427 U.S. 347 (1976).
73. 497 U.S. 62 (1990).
74. 445 U.S. 507 (1980).
75. 500 U.S. 173 (1991).
76. 515 U.S. 819 (1995).
77. Farber, *First Amendment* at 202 (cited in note 5).
78. For example, Farber neither uses nor explains the term designated public forum in his discussion. He refers only and explicitly to limited public forums. Courts often use one or the other of these terms, and sometimes both, however, and students need to understand whether the terms limited and designated public forums can be used interchangeably or whether there is a substantive difference between the two.

In my judgment, the term "designated public forum" is most accurately applied when government elects to regulate property other than streets or parks as if the property was a traditional public forum. See, e.g., *Widmar v. Vincent*, 454 U.S. 263 (1981). The term "limited public forum" is more appropriately applied to the state's decision to open property to a more limited class of speakers. The Supreme Court does not always follow this usage, however. See notes 108-111 and accompanying text.

a complete repudiation of the functional compatibility standard endorsed by more speech-protective justices in earlier cases in favor of a far more deferential approach.

Second, I would not always define the scope of the categories that Farber employs in exactly the same way that he does. As I will explain shortly, I would be far more circumscribed about the category that Farber identifies as custodial institutions, particularly with regard to its application to schools. Further, I would spend far more time wrestling with the problem of classification. Thus, from my perspective, an important part of the problem with government speech and government subsidy cases is differentiating them from those situations where public forum analysis applies. Yet Farber spends very little time clarifying the boundary lines of these categories.

1. The Conflicting Doctrinal Models: Rigorous Functional Compatibility or Deferential Respect to Property Administrators

I would begin as Farber does in discussing traditional public forum doctrine. Our approaches diverge when we move beyond this foundation. To my mind, the review of speech regulations governing public property other than streets and parks represented a fairly stark conflict for the Court. While there were certainly disagreements among individual justices in particular cases dealing with traditional public forums, a clear consensus developed as to the appropriate standard of review for these areas. With regard to the review of restrictions of speech on other public property, the Court split into two camps. To the more speech-protective group, speech on public property was permitted as long as it was functionally compatible with the use to which the property was being put. As the Court proclaimed in *Tinker v. Des Moines,*[79] students do not leave their First Amendment rights at the school house door. Indeed, citizens do not necessarily leave their freedom to speak outside of any public buildings or property.[80] The state's ownership of the property where speech occurred was of little significance. The only proper justification for restricting speech in a public building was

79. 393 U.S. 503, 506 (1969).

80. See, e.g., *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 813-22 (1985) (Blackmun and Brennan, JJ., dissenting); *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 142-152 (1981) (Marshall, J., dissenting); *Greer v. Spock*, 424 U.S. 828, 857-864 (1976) (Brennan and Marshall, JJ., dissenting).

that it interfered with the government's ability to conduct its business there.[81]

Not only was there a clear presumption in favor of speech, but the government's practice of allowing certain speakers access to property while denying it to others constituted damning evidence that undermined the state's claims that the speech of excluded speakers was incompatible with the property's functions.[82] If it did not substantially interfere with the functioning of the internal mail system of a school to allow one union access to teacher mail boxes, the state would bear a substantial burden in trying to explain why a competing union could be prohibited from using the same forum.[83] Selectivity in access by the State in allowing only certain speakers to use public property for expressive purposes was held against the State. Most public property under this analysis would be some form of limited public forum.

The alternative perspective reversed the presumption. Under this approach, as long as speech regulations did not discriminate on the basis of viewpoint, the courts must defer to the judgement of the property's administrator. Even content-discriminatory regulations would be leniently reviewed. In the most dramatic change in perspective, selectivity in access was turned on its head. Now the state's decision to keep certain groups and speakers out of the forum was self-justifying in that it fortified the state's assertion that it did not intend to permit such speakers general access to the forum.[84] Since the scope of traditional public forums was narrowly defined under this model and effectively limited to streets and parks, all other public property could now be closed to most if not all expressive activity. Unless the state deliberately chooses to open such property to expressive activity, public property is a non-public forum.[85]

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81. See, e.g., *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 711 (1992) (Souter, Blackmun, and Stevens, JJ., dissenting); *United States v. Kokinda*, 497 U.S. 720, 743 (1990) (Brennan, Marshall, Stevens, Blackmun, JJ., dissenting); *Cornelius*, 473 U.S. at 816 (Blackmun and Brennan, JJ., dissenting); *Greenburgh Civic Ass'ns*, 453 U.S. at 149-50 (Marshall, J., dissenting); *Greer v. Spock*, 424 U.S. at 859-62 (Brennan and Marshall, JJ., dissenting).

82. *Kokinda*, 497 U.S. at 749-52 (Brennan, Marshall, Stevens, Blackmun, JJ., dissenting); *Cornelius*, 473 U.S. at 817, 819-20 (Blackmun, Brennan, JJ., dissenting).

83. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 66-71 (1983) (Brennan, Marshall, Powell, Stevens, JJ., dissenting).

84. *Kokinda*, 497 U.S. at 751 (Brennan, Marshall, Stevens, Blackmun, JJ., dissenting) (citing *Cornelius*, 473 U.S. at 825 (Blackmun and Brennan, JJ., dissenting)); *Cornelius*, 473 U.S. at 804-05.

85. *Kokinda*, 497 U.S. at 730; *Cornelius*, 473 U.S. at 805.

When restrictions on speech in a non-public forum are challenged, viewpoint discriminatory regulations receive rigorous review, but content-discriminatory regulations will be upheld as long as they are reasonable. The standard of review for content-neutral regulations is less clear. The Court seems to consider the same three factors it evaluates when it reviews a content-neutral regulation in a traditional public forum, but it applies that standard with far less rigor. Solicitation in a large metropolitan airport and on interior sidewalks in front of a post office, for example, can be entirely prohibited to avoid congestion and to protect travelers from being confronted by requests for support,[86] and four justices were willing to uphold a ban on all leafleting in the airport case.[87] Unless one believes that the Court would uphold similar restrictions on expressive activity in a busy, downtown street, the fact that the airport and the interior sidewalk were classified as non-public forums must carry some of the weight in explaining these opinions.[88]

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86. *Society for Krishna Consciousness*, 505 U.S. 672, 683-84 (1992); *Kokinda*, 497 U.S. at 732-37.

87. *Lee v. International Soc'y for Krishna Consciousness*, 505 U.S. 830, 831-32 (1992) (Rehnquist, White, Scalia, Thomas, JJ., dissenting)

88. A recent 7th Circuit opinion demonstrates the stark contrast between the range of expressive activities that *must* be permitted in a traditional public forum and the far more silent and restricted world of the non-public forum. Plaintiffs in *Chicago Acorn, SEIU Local No. 880 v. Metropolitan Pier & Exposition Auth.*, 150 F.3d 695 (7th Cir. 1998) wanted to engage in a wide variety of expressive activities including leafleting, soliciting signatures on petitions, chanting, demonstrating and carrying signs and banners on the Navy Pier in downtown Chicago, an area described by the court as "part park, part meeting and exhibition facility, part shopping emporium [and] part amusement park." Id. at 698. The state authority that manages the pier denied them permission to do so.

In denying most of plaintiffs' first amendment claims, Judge Posner determined that the pier was a non-public forum. As such, plaintiffs could not be prevented from distributing leaflets in open areas on the Pier, but in all other respects their expressive activity could be restricted far more severely than would be the case if plaintiffs sought access to a traditional public forum. In Judge Posner's words, the Court's conclusion that the Pier is a non-public forum effectively rejected

> any suggestion that the plaintiffs have a right to picket, stage marches, hold demonstrations, wave posters, shout through bullhorns or public-address systems, solicit passersby for money or signatures, or harangue them from soapboxes, as they could do (subject of course to reasonable restrictions) on Michigan Avenue, on the plaza outside the Daley Center, on the sidewalks outside the federal courthouse on Dearborn Avenue or at the other familiar Chicago sites for political expression.

Id. at 702. See also *ISKON of Potomac, Inc. v. Kennedy*, 61 F.3d 949, 955-56 (D.C. Cir. 1995) (distinguishing review of content-neutral regulations restricting soliciting in a non-public forum from review of content-neutral regulations restricting soliciting in a public forum). But see *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319, 1323 (1st Cir. 1993) (suggesting that common standard of review is applied to content-neutral regulations in public and non-public forums).

In practical terms, the impact of the current approach could not be more one-sided. If the property is classified as a non-public forum, the speech regulation is virtually always upheld. Only a complete ban on leafleting has been found to be an unreasonable time, place, and manner rule,[89] all challenged content-discriminatory regulations have been upheld,[90] and only prohibitions against religious speech have been found to be viewpoint discriminatory.[91]

The lack of intellectual coherence in the Court's decisions is almost as troubling as the effect of its decisions on speech opportunities. While the line between content-neutral and content-discriminatory regulations has its ambiguities, it seems far more solidly grounded than the distinction between content and viewpoint discrimination in recent cases. Yet it is the latter distinction on which the rigor of review depends for speech regulations on virtually all public property. We might actually have more clarity if the Court changed the level of review for both content and viewpoint discriminatory regulations of speech on public property other than streets and parks to some form of serious scrutiny, analogous to the "substantially connected to an important interest" standard used in gender discrimination cases. The prohibition of one point of view in a politically salient debate is difficult to justify, after all, under any standard of review with some bite to it.

Not only is the current standard hard to apply, it is also difficult to understand how it can be reconciled with other recent First Amendment decisions. The current Court, for example, finds content-discrimination to be so troubling and so commonly indicative of an intent to suppress ideas than even content-discriminatory regulations within a category of unprotected

89. *Lee*, 505 U.S. at 831. All other content-neutral regulations of speech in a non-public forum were upheld. See, e.g., *Society for Krishna Consciousness*, 505 U.S. at 683-85 (upholding ban on solicitation in airport); *Kokinda*, 497 U.S. at 731-37 (upholding ban on solicitation on interior sidewalk in front of post office); *Greenburgh Civic Ass'ns*, 453 U.S. at 128-34 (upholding ban on placement of unstamped material in letter boxes); *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (upholding ordinance prohibiting posting of signs on public utility poles).

90. *Cornelius*, 473 U.S. at 806-11 (upholding exclusion of advocacy groups from federal charity drive); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 50-55 (upholding decision allowing union chosen to be bargaining representative of teachers, but no other competing unions, access to interschool mail system).

91. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995). There is some lack of clarity as to whether the forums in these cases were non-public forums or limited public forums. The rule prohibiting viewpoint discriminatory regulations would apply in either case.

speech must receive strict scrutiny.[92] Yet content-discriminatory regulations of fully protected speech including debate on public policy issues can be prohibited on any property owned by the government, other than streets and parks, as long as it is "reasonable" to do so.

2. Public Schools and Forum Doctrine

a. Conceptualizing Schools as Forums

With regard to the second set of issues, the scope of categories and problems of classification, Farber and I part company initially on the way we approach important public school speech cases, specifically *Tinker* and *Hazelwood*. For Farber, these are custodial institution cases that are properly analyzed along with cases dealing with regulations that limit the speech of military personnel or prisoners. Because of the custodial relationship between students and school authorities, Farber suggests that student speech at least in elementary and high schools receives far less protection than speech in other locations. In light of the greater maturity of the student body and the tradition of academic freedom, however, the First Amendment protects student speech at public colleges and universities "with its normal vigor."[93]

From my perspective, it is a mistake to treat the public schools as a unique institution for First Amendment purposes. Indeed, I think it is generally problematic to construe cases involving any particular context in which speech regulations occur as a separate category or line of authority that is somehow distinct from the general doctrinal rules governing the review of speech regulations.[94] Thus, I think the lessons of cases decided in public school contexts are more universal than their setting, and reflect broader free speech principles.

To my mind, *Tinker* is an important limited public forum case. Indeed, it is a quintessential example of the functional compatibility approach to reviewing speech regulations in a limited public forum. *Hazelwood*, on the other hand, is a govern-

92. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

93. Farber, *First Amendment* at 190 (cited in note 5).

94. I think the military and prisons are special circumstances, not so much because they are custodial institutions, but because of the security concerns, legitimation of violence, consensual loss of liberty or loss of liberty as punishment, and other factors that distinguish these government operations from normal life.

ment speech case, or at least a government sponsorship case, that helps courts identify the important but narrow line that separates the application of public forum and government speech doctrine. These cases play a role both in understanding the evolution of public forum and government speech doctrine and in illustrating the ambiguity and indeterminacy of the current Court's approach to these issues. A great deal is lost, I think, if these cases are set aside as unique, custodial cases.

Indeed, it is not clear to me that either of these cases can be doctrinally isolated in the way that Farber suggests. While Farber is certainly correct that in one sense student speech receives greater protection at colleges and universities than at a high school, I am not sure that the standard of review applied in college cases is formally any different than the functional compatibility analysis applied in *Tinker*. All of the early free speech on university campus cases, *Healy v. James*,[95] *Papish v. Board of Curators of the University of Missouri*,[96] and *Widmar v. Vincent*[97] cite *Tinker* with approval. All but *Widmar* seem to apply a functional compatibility analysis, and *Widmar* is distinct only because the University in that case designated a wider and better protected forum for student speech than a *Tinker* type analysis would require.

Nor is it clear to me that the censorship of a college newspaper by a campus media board would receive any more rigorous review than the Court applied to the restrictions on a high school newspaper at issue in *Hazelwood*. While the Court left this issue open,[98] it is hard to understand why the Constitution prohibits a public university from publishing a bland, rigorously censored periodical with student staff. Publishing such a paper might not be sound educational policy, but the Constitution provides little basis for telling college administrators that they have only two choices: (1) they can subsidize a generally uncontrolled student paper at taxpayer expense with administrative oversight subject to rigorous judicial review; or (2) they can decline to publish a student paper altogether. At a minimum, the issue is an open and interesting one—but the fact that *Hazelwood* might very well apply to a college newspaper certainly casts some doubt on the suggestion that its holding is predicated on the custodial nature of the public schools.

95. 408 U.S. 169 (1972).
96. 410 U.S. 667 (1973).
97. 454 U.S. 263 (1981).
98. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 n.7 (1988).

b. Distinguishing the Administration of Limited and Non-Public Forums from Government Speech and Government Sponsored Speech

Construed as a limited public forum case, *Tinker* is important not only because it recognizes that a rigorous, functional compatibility standard of review may apply to property that is not a traditional public forum (although in this regard it is an excellent case to juxtapose next to the Court's more recent cases applying a "reasonableness" standard of review to illustrate just how much more protection speech received under this earlier approach). *Tinker* and *Hazelwood* taken together are significant cases because they raise difficult questions that require an analysis of the limits of the Court's forum doctrine. Even in a non-public forum, speech regulations are subject to some important First Amendment constraints. Viewpoint discrimination in a non-public forum will be subject to strict scrutiny, and content-discriminatory and content-neutral regulations must at least be reasonable. A ban on all expression would be subject to some level of review and for some forums, such as the public schools, would be clearly unconstitutional.[99] Certainly, all speech regulations governing a non-public forum are subject to judicial review.

Surely, however, there is public property on which speech occurs that is not subject to these constraints. For some property, even *viewpoint* discrimination is permissible and the property can be generally closed to all expression at the discretion of the administrator. Indeed, it is unlikely that the courts should be called on to review speech restrictions on such property at all. The only proper decision for a court would be to decide whether or not the property in question should be construed to be a forum of any kind. To use an obvious example, it is hard to imagine a federal court evaluating the President's decisions as to who gets access to the Oval Office to speak with him. In a less location-specific context, *Hazelwood* certainly suggests that the federal courts are not the appropriate institution to second guess the editorial judgements of a high school newspaper faculty adviser or principal. And from a related perspective, it is argued that government may discriminate on the basis of viewpoint in at least some circumstances when it decides whether or not to subsidize speech. What criteria, however, distinguishes a non-public

99. The holding of *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969), that private student speech at a public school can only be restricted if it is functionally incompatible with the school's educational program remains good law.

forum subject to the constitutional prohibition against viewpoint discrimination from the kind of property described above that isn't a forum at all? And in what sense, if any, does the distinction between forums and non-forums control the way that the courts evaluate government spending decisions that subsidize expression?

While the Court has struggled with the problem of government supported speech in schools, both in the context of the censorship of a high school newspaper in *Hazelwood* and in response to a school boards decision to remove books from the school library because of their content in *Board of Education v. Pico,*[100] *Rosenberger v. Rectors and Visitors of the University of Virginia*[101] is the school case that links spending decisions and public forum doctrine inextricably together. In *Rosenberger,* the Court concluded that the funding system by which the University of Virginia allocated subsidies among students groups engaged in expressive activity constituted a limited public forum because the University provided financial support to all student groups as a matter of course. Having created a limited public forum by adopting this funding framework, the University could not then discriminate on the basis of viewpoint in distributing subsidies. Accordingly, the University's decision not to fund a student religious periodical was struck down as unconstitutional viewpoint discrimination.[102] Analogizing public forum cases, such as *Widmar,* where student groups were granted access to university classrooms to hold meetings, to more direct financial subsidies, the Court flatly rejected the University's argument that subsidy decisions must be distinguished from forum access decisions.[103]

The Court carefully distinguished the subsidies for student organizations in *Rosenberger* from government speech cases, however. The holding in *Rosenberger* was not intended to jeopardize government discretion in designing the University's educational curriculum. The subsidy scheme at issue in *Rosenberger* could be sharply distinguished from curriculum decisions because the University officially and explicitly disclaimed any control over, or responsibility for, the student speech it supported

100. 457 U.S. 853 (1982).
101. 515 U.S. 819 (1995).
102. Id. at 819-37.
103. Id. at 832-36.

and denied any suggestion that the student groups were speaking as the University's agents.[104]

This distinction may hold as far as it goes, but that may be a relatively short distance. Left unanswered in *Rosenberger* was the question of how the Court would evaluate a funding scheme in which the University *selectively* chose to subsidize only those student groups whose activities best furthered the University's educational objectives. Suppose the University funded only those particular student activities that contributed most effectively to its educational enterprise and varied its support depending on the quality of the student groups' programs. Would a funding scheme of this kind be evaluated as a government speech decision which may involve viewpoint discrimination in at least some circumstances or would this funding framework constitute a kind of limited or non-public forum where viewpoint discrimination is prohibited? There is even the possibility that such decisions should be reviewed under some new doctrinal category.[105]

The Court's decisions last term in *Arkansas Educational Television Commission v. Forbes*[106] and *National Endowment of the Arts v. Finley*[107] shed some light on this issue.[108] In *Forbes,* the Court clarified the distinction between limited or designated public forums and non-public forums. In both cases, the government may permit only certain categories of speakers to use public property for expressive purposes. What divides the two kinds of fora is whether the government intends to provide "general access" or "selective access" within the class of speakers permitted to use the property at all:

> On the one hand, the government creates a designated public forum when it makes its property generally available to a certain class of speakers.... On the other hand, the government does not create a designated public forum when it

104. Id. at 834-35.

105. See *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2192 (1998) (Souter J., dissenting) (arguing that "[i]f the student activities fund at issue in *Rosenberger* had awarded competitive, merit-based grants to only 50%, or even 5%, of the applicants, on the basis of 'journalistic merit taking into consideration the message of the newspaper,' it is obvious beyond peradventure that the Court would not have come out differently, leaving the University free to refuse funding after considering a publications's Christian perspective").

106. 118 S. Ct. 1633 (1998).

107. 118 S. Ct. 2168.

108. Farber, of course, can not be faulted for not considering these opinions in his book. On the other hand, there is little sense in my ignoring the Court's reasoning in these cases.

> does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission' to use it.[109]

While *Forbes* clarifies the difference between a designated public forum and a non-public forum by identifying the latter as public property where the government only permits "selective access," this distinction complicates the Court's attempt to differentiate a non-public forum from property that is not a forum at all. For doctrinal purposes, there is a critical difference between a non-public forum and a non-forum because viewpoint discrimination is only prohibited in the former context. Indeed, Justice Kennedy argues with considerable persuasiveness in *Forbes* that when the administration of public property and governmental functions requires the regular exercise of "editorial discretion," it should not be subject to judicial review to determine if it involves viewpoint discrimination.[110] Examples of decisions that might be classified as the administration of non-forums include public television broadcasting judgements, "a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, or a public school prescribing its curriculum."[111]

What the Court fails to explain in *Forbes*, however, is how we are to distinguish "selective access" in permitting speakers to use public property or resources—the hallmark of the non-public forum—from the "editorial discretion" that identifies the administration of a non-forum. This doctrinal chicken comes home to roost in *National Endowment of the Arts v. Finley*.[112] In *Finley*, the Court rejects a facial challenge to legislation requiring the NEA to take general standards of decency into account in awarding government grants to artists. While Justice O'Connor's majority opinion in *Finley* construes the statutory provision at issue not to require viewpoint discrimination in the award of grants,[113] Justice Scalia concurring and Justice Souter in

109. *Forbes*, 118 S. Ct. at 1642 (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 804).

110. Id. at 1639-40.

111. Id. at 1639.

112. 118 S. Ct. 2168.

113. In reauthorizing the National Endowment of the Arts, Congress provided that no grant should be awarded under the program except "in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that . . . artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."

dissent go head to head on the issue that the majority avoids. Souter argues that viewpoint discrimination in the award of artistic grants clearly violates the First Amendment[114] while Scalia, in turn, contends that the decision not to fund indecent art is so obviously constitutional that it would be preposterous to suggest otherwise.[115]

The problem for Scalia, of course, is how to distinguish *Rosenberger*. He does so with a single sentence. "*Rosenberger*, as the Court explains . . . found the [university's] viewpoint discrimination unconstitutional, not because funding of 'private' speech was involved, but because the government had established a limited public forum—to which the NEA's granting of highly *selective* (if not highly discriminating) awards bears no resemblance."[116] That *Rosenberger* involved the creation of a limited public forum is true enough, but it is also entirely irrelevant to the question of whether viewpoint discrimination in the award of subsidies violates the First Amendment. The prohibition against viewpoint discrimination is just as applicable to non-public forums as it is to limited public forums. More importantly, the NEA's *selectivity* in awarding grants, the exclusive factor that Scalia identifies as distinguishing *Rosenberger* from *Finley*, seems to be the very factor that Justice Kennedy identified in *Forbes* as the basis for distinguishing a limited public forum from a non-public forum. Scalia entirely ducks the question of why he believes that NEA selectivity in providing subsidies to works of artistic excellence is the kind of selectivity that creates a non-forum where viewpoint discrimination is tolerated and not the kind of selectivity that creates a non-public forum where viewpoint discrimination is prohibited.[117]

Id. at 2173 n.*. To implement this provision the NEA adopted a resolution to ensure that members of advisory panels reviewing grant applications reflected geographic, aesthetic, and ethnic diversity. Id. at 2173.

In reviewing the constitutionality of this provision, Justice O'Connor concluded that this legislative requirement did not constitute viewpoint discrimination because (1) it merely suggested that the NEA take decency and respect for American values into account as additional criteria to consider—not as the dispositive basis for rejecting specific grant applications for art that expressed a particular viewpoint, (2) it was directed at "reforming procedures rather than precluding speech," and (3) it suggested a standard, decency and respect for American values, that is so subjective and indeterminate that it can not be understood to apply to any particular viewpoint. Id. at 2175-78.

114. Id. at 2185 (Souter, J., dissenting).

115. Id. at 2183 (Scalia and Thomas, J.J., dissenting).

116. Id. at 2184 (emphasis added).

117. O'Connor's majority opinion distinguishes Rosenberger in more detail but on essentially the same grounds as Scalia. Id. at 2178. She also fails to explain why the competitive process by which NEA grants are awarded should not be construed to be a

Part of the answer, I think, comes from the *Forbes* decision and the rest may be suggested by the Court's reasoning in *Tinker* and *Hazelwood*, the cases with which I began this discussion. Justice Kennedy's description of non-forums in *Forbes* is focused on one important identifying criteria. Forum doctrine and its prohibition against viewpoint discrimination is inappropriate in those circumstances when government administrators must exercise editorial discretion.[118] The idea of editorial discretion expression connotes a function that is expressive in nature, and all the examples Kennedy cites confirm this understanding.[119] This suggests that when the government property, program, or subsidy system at issue serves some expressive purpose, government selectivity in employing private speech to further that purpose should not be understood to create a forum for First Amendment purposes.

This distinction between property that serves expressive and non-expressive purposes tracks Kennedy's argument against judicial review of editorial choices in administrating a non-forum. When the state regulates speech on government property that serves a non-expressive purpose, as it does when it restricts rallies in the parking lot in front of the county jail, for example, the state will often be able to further its legitimate objectives without taking the message of the regulated speakers into account. In those few circumstances when the state must take the communicative impact of the message into account, courts will typically have a clear understanding of the nature of the state's interest and can meaningfully test the functional compatibility of the restricted message with the use to which the property is being put. When government property serves an expressive purpose—the pages of a law review at a public law school, for example—virtually every decision of the administrator of the property, the law review editors, may involve content and viewpoint discrimination. Furthermore, the reviewing Court has no firm basis for determining whether any editorial decision is consistent with the purpose to which the property is being put. Nothing in the Constitution provides a basis for evaluating the appropriate goals of academic periodicals and, as anyone who has marketed articles to law reviews understands all too well,

non-public forum to which selective access is provided to only those speakers who are individually granted permission to participate in the government's subsidy program.

118. *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1639-40 (1998).

119. Id. at 1639. See note 110 and accompanying text.

there is little consensus on what constitutes a sensible editorial decision.[120]

The distinction between *Tinker* and *Hazelwood* is consistent with this analysis. The high school newspaper censored in *Hazelwood* primarily served an expressive purpose. Editorial decisions about the articles included in an issue are inherently content-based. Private student speech in the halls and classrooms before and after class, the kind of student speech that was at issue in *Tinker,* however, was not part of the high school's program. Rules governing such expressive activity primarily served order and efficiency interests. Accordingly, it made a great deal of practical sense to immunize the former but not the latter class of decisions from serious judicial review.[121]

The opinion in *Hazelwood* identifies another important factor to consider in identifying non-forums. Unlike the regulation of private student speech, the censorship of the high school newspaper involved the "educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[122] Unlike the black armbands worn by students in *Tinker*, the content of the school newspaper might be reasonably "attributed to the school."[123] Because government has a greater need to regulate speech in circumstances when such associations are highly likely to be perceived, even when the private speaker is not actually speaking for the government, there is a more le-

120. *Constitutional Commentary*, of course, is a notable and welcome exception to the rule in this regard.

121. Judge Posner comes close to making this exact point in *Chicago Acorn, SEIU Local No. 880 v. Metropolitan Pier & Exposition Auth.*, 150 F.3d 695 (7th Cir. 1998). The state authority (MPEA) controlling access to meeting rooms located at the Navy Pier allowed the Democratic Party to rent facilities at a heavily discounted rate because of the "enormous . . . favorable publicity" that the Democratic Party's event was expected to generate for the pier. Id. at 699. The MPEA conceded that comparably favorable rental rates would not be offered to less popular political groups. When this discriminatory policy was challenged on First Amendment grounds, the MPEA, citing *Arkansas Educational Television Comm'n v. Forbes*, 118 S. Ct. 1633 (1988), argued that it should be granted the "editorial discretion" to provide popular political groups superior access to its facilities than groups with less public support. In rejecting this argument, Judge Posner distinguished the public television station in *Forbes* from the MPEA. "Whenever the government is in the business of speech," Posner explained, "the exercise of editorial judgment is inescapable . . . . But Navy Pier is not a producer of speech; it is a renter of premises to speakers. It need not make *any* editorial judgments about the content of the speech in its meeting rooms [to fulfill its function]." Id. at 701.

122. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

123. Id.

gitimate basis for identifying such property as a non-forum rather than a non-public forum.[124]

III. HATE SPEECH, INDECENT SPEECH, AND THE TENSION BETWEEN THE RELIGION CLAUSES OF THE FIRST AMENDMENT

As a general rule, book reviews should not be longer than the books they discuss. The two previous sections compare at considerable length the different approaches to free speech issues that I would take with those of Professor Farber. They should be sufficient to illustrate the primary thesis of this review. In this section, I will simply suggest some additional areas where our approaches would differ substantially.

A. REGULATING HATE SPEECH AND HATE CRIMES

Farber devotes a long chapter in his book to offensive language and hate speech with a clear emphasis on the latter topic. I want to comment briefly on only one part of this section,[125] Farber's analysis of *R.A.V. v. City of St. Paul*,[126] a case in which the Court struck down an ordinance prohibiting the expression of hate speech, and *Wisconsin v. Mitchell*,[127] a case in which the Court upheld an enhanced sentence for perpetrators of hate crimes. I find these cases to be inordinately difficult ones to discuss and to teach and I concur completely with Farber's decision to allocate substantial pages to them. Once again, however, I find us aligned on different approaches to the problem.

In *R.A.V.*, the Court strictly scrutinized and invalidated a municipal ordinance prohibiting expressive activity "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion

124. This analysis suggests that government might transform a non-forum into a non-public forum or even a limited public forum through the effective use of disclaimers. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834-35 (1995). The analysis does not apply as easily, however, to property that constitutes a traditional public forum. See *Capital Square Review and Advisory Bd. v. Pinette*, 115 S. Ct. 2440 (1995). While disclaimers might be relevant to an Establishment Clause challenge to speech in a traditional public forum, the lack of disclaimers does not alter the nature of a traditional public forum even if it is in a location where association with governments are likely.

125. Farber, *First Amendment* at 109-17 (cited in note 5).

126. 505 U.S. 377 (1992).

127. 508 U.S. 476 (1993).

or gender."[128] The Minnesota Supreme Court construed the statute to apply only to unprotected "fighting words."[129]

Farber describes Justice Scalia's reasoning in *R.A.V.* with considerable care and carefully identifies many of the fault lines that have been the basis of critical challenges to this opinion. First, Scalia argues that unprotected speech is still speech for constitutional purposes. It can not be analogized to non-expressive conduct that is entirely outside the scope of First Amendment protection. Accordingly, laws that discriminate on the basis of content or viewpoint within a category of unprotected speech must receive the same level of scrutiny applied to content and viewpoint discriminatory regulations of fully protected speech.[130]

Farber agrees with the first part of Scalia's analysis. Unprotected speech is speech.[131] The harder question is whether content discriminatory regulations of unprotected speech should receive rigorous scrutiny and be struck down. Farber recognizes that this is a tough question because some content-based regulations of unprotected speech seem to be permissible while others much more clearly deserve to be invalidated. Somewhat charitably, he notes that even "Justice Scalia had some difficulty in explaining when content based regulation of fighting words is or is not allowed."[132]

The dividing line for Scalia is whether a content discriminatory regulation of unprotected speech serves the purpose of suppressing ideas. And he concludes that laws prohibiting racist fighting words are enacted for just such a purpose—to combat and discourage the expression of racist ideas. There are other reasons for prohibiting the expression of racist fighting words, of course. A community might reasonably want to protect individuals from the injurious effects of such language. Speakers who hurl racist epithets at their targets cause their victims significant emotional harm. But this kind of an injury can be effectively prevented by a broader law that prohibits all fighting words. To Scalia, the deliberate limitation of the challenged regulation to only racist fighting words suggests that it is directed not at the effect of such speech, but rather at the content and

128. *R.A.V.*, 505 U.S. at 380.
129. Id. at 381.
130. Farber, *First Amendment* at 110-11 (cited in note 5).
131. Id.
132. Id. at 111.

ideas communicated by it. A law serving such a purpose violates the First Amendment.[133]

In *Wisconsin v. Mitchell*, [134] however, the Court upheld a statute enhancing the penalty for offenses, such as acts of battery, when the defendant deliberately "selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability . . . of that person."[135] To the Court, this hate crimes statute imposed a higher penalty for certain acts based on the perpetrator's invidious motives and the effect or increased harm that racially motivated assaults cause victims and society.[136] Further, for both Farber and the Court, the law's reference to the intent and effect of an individual's conduct in identifying criminal behavior raised little in the way of constitutional concerns. Criminal statutes commonly are directed at the intent and effect of behavior.[137] Accordingly, the Court distinguished its recent holding in *R.A.V.* from *Mitchell* by noting that, "whereas the ordinance struck down in *R.A.V.* was explicitly directed at expression . . ., the statute in this case is aimed at conduct unprotected by the First Amendment."[138]

Building on this foundation, Farber asks intriguing questions to probe the meaning of the different results in these two cases. If a penalty enhancement statute is constitutional when an assailant selects his victim on the basis of the victim's race, would the law still be constitutional if the assault was intended to communicate an expressive message,[139] that, for example, black people should stay out of this part of town? Farber then jumps to the question of whether the state could enhance the penalty for the use of racially motivated fighting words as a predicate for examining whether any hate speech regulation might survive constitutional scrutiny under the *R.A.V.* and *Mitchell* holdings. If a hate crimes statute focusing on the assailant's motive would be constitutional even if the assault communicated a racist message, perhaps a hate speech ordinance might also be constitutional if it was directed at the speaker's motive in choosing to express fighting words to a black person, rather than the actual content of what was said. Farber concludes that such a provision

133. Id. at 116.
134. 508 U.S. 476 (1993).
135. Id. at 480.
136. Id. at 487-88.
137. Farber, *First Amendment* at 114-15, 117 (cited in note 5).
138. *Mitchell*, 508 U.S. at 487.
139. Farber, *First Amendment* at 115 (cited in note 5).

might be constitutional if it was part of a carefully drawn statute. Certainly, as a formal matter Farber argues, "a distinction based on motivation differs from one based on content."[140] Thus, a law focusing on the intent and effect of prohibited behavior, such as a law punishing racial harassment that encompassed expressive activities involving the use of hate speech, might withstand constitutional review.[141]

There is nothing wrong with Farber deciding to focus on the distinction between motive and content in discussing these cases. Farber is clearly correct when he describes how a law directed at the defendant's motive in selecting his victim would apply in a situation where the speaker used racially neutral, abusive language to insult a black person for racist reasons while a content based law prohibiting the use of racist language would not reach such conduct. He is also technically correct that a speaker using racist language may have chosen his victim for non-racist reasons and would not have his penalty enhanced under a law directed at the defendant's racial motive in choosing a victim rather than the racist content of what was said.[142] Further, Farber's discussion of this issue is deliberately tentative. He knows there are serious questions about the use of this distinction as a filter for determining which laws should receive serious First Amendment review.[143]

Once again my primary problem with this part of *The First Amendment* lies with what Farber does not say. In my judgement, *R.A.V.* and *Mitchell* suggest at least four axes on which the decisions in these two cases might turn. These include distinctions between motive and content, speech and conduct, content-discrimination and viewpoint-discrimination and the state objectives of suppressing offensive ideas and avoiding race-based harms. I have written at length about *R.A.V.* and *Mitchell* with regard to the Court's focus on the distinction between speech and conduct and its failure to distinguish between content and viewpoint-discrimination in the context of regulating unprotected speech.[144] In my judgment, these are important and critical perspectives for understanding these cases, and Farber's account does not sufficiently address them.

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140. Id.
141. Id. at 115-16.
142. Id. at 115.
143. Id. at 116-17.
144. Brownstein, 29 U.C. Davis L. Rev. at 554-89 (cited in note 33).

I also have far more serious misgivings than Farber suggests in his book about the viability of distinguishing motive from content based speech regulations in general and as a basis for understanding *R.A.V.* and *Mitchell.* While a formal difference between regulations directed at intent and content clearly exists, it was not the ground on which the Court chose to distinguish *R.A.V.* from *Mitchell.* Rather than characterizing *R.A.V.* as a content-discrimination case and *Mitchell* as a motive case, the Court explicitly chose to explain the irrelevance of *R.A.V.* to hate crime statutes by emphasizing that the law at issue in *Mitchell* was directed at conduct, not speech.[145]

I do not think this decision was accidental. The ordinance under review in *R.A.V.* did not identify the speech it prohibited by describing its subject in conventional terms. It prohibited expression "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color. . . ."[146] In literal terms, the prohibited speech is identified by the speaker's knowledge of its effect and the cause of that effect. In some ways this definition actually straddles the line between content and intent. It is after all only a relatively short step from doing something with knowledge of its effect to doing something with the intent of bringing about that effect. Indeed, not only does the language of the ordinance skirt the distinction between content and motive, the Court itself refers to the challenged St. Paul law as "a prohibition of fighting words that contain (as the Minnesota Supreme Court repeatedly emphasized) messages of 'bias-motivated' hatred."[147] Thus, it is hardly clear that the Court believed that the different results in *R.A.V.* and *Mitchell* could be satisfactorily explained by distinguishing laws directed at the content of speech from laws directed at a person's motive in speaking.

More importantly, reducing the level of scrutiny applied to laws directed at the intent of a speaker in communicating a message would significantly undermine the protection provided expression and facilitate the suppression of ideas. In the great majority of instances, we will determine the intent of a speaker in communicating a message by looking at the content of what he or she says. If the state can escape rigorous review by directing its laws at the speaker's intent, while it enforces its laws by

145. *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993).
146. *R.A.V. v. St. Paul*, 505 U.S. 377, 380 (1992).
147. Id. at 392.

using the speaker's words as controlling evidence of the speaker's motives, many content and viewpoint discriminatory laws could be rewritten to accomplish most of their speech suppressive objective in this way without fear of judicial intervention. The new, intent-based laws might not capture every message the state would hope to suppress, but their net will stretch sufficiently wide to reach almost as many statements as a more precise content-discriminatory regulation.[148] And the chilling effect of such laws will far outdistance their actual scope. If the state's goal is to suppress unpopular speech, an intent-based law is more than good enough for government work.

Finally, it is hard to understand why Justice Scalia, the author of the *R.A.V.* decision, would be willing to accept the risks to freedom of speech that adoption of a motive and content distinction would create. Farber suggests that Scalia, as "a leading judicial advocate of formalism," might be willing to accept this admittedly formalistic distinction,[149] but I think Farber may misread *R.A.V.* in this respect. Scalia may have started his analysis in *R.A.V.* with a formalistic framework in mind, but he seems to have surrendered any commitment to such an approach by the end of the opinion. After describing one formal exception after another to his proposed rule that content-discriminatory regulations within a category of unprotected speech must receive strict scrutiny, Scalia appears to recognize the futility of the task he has assigned to himself.[150] Accordingly, at the end of the opinion he accepts the entirely non-formalistic conclusion that the state may selectively proscribe some instances of fighting words but not others "so long as the nature of

148. Few cases address the issue of whether punishing a speaker for his motive in expressing a message should receive less rigorous review than sanctions based on the content of the message itself, and none discuss it thoughtfully. The Court does say in *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995), that "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction," but it is hard to know exactly what the Court intended to convey in making this statement. On occasion lower courts have suggested, for example, that discrimination based on the religious perspective of the speaker is impermissible, but it is unclear as a formal matter whether religiously motivated expression is the equivalent of expression from a religious perspective for constitutional purposes. See, e.g., *Grossbaum v. Indianapolis-Marion County Building Authority*, 909 F. Supp. 1187, 1195 (S.D. Ind. 1995) (explaining that "a particular expression that emanates from a religious perspective is likely to be a *viewpoint* that may not be suppressed if other viewpoints on the same general topic are allowed").

149. Farber, *First Amendment* at 116 (cited in note 5).

150. Brownstein, 29 U.C. Davis L. Rev. at 626 (cited in note 33).

the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot."[151]

Notwithstanding his apparent retreat in *R.A.V.,* Scalia is still a formalist. I think his ultimate concession at the end of *R.A.V.* doesn't suggest that he loves formalism any less, but rather that he hates the suppression of ideas even more. Scalia's concern, whether justified or not, that hate speech statutes involve attempts by the state to achieve that constitutionally prohibited purpose is clearly the driving force that compels him to hack through the convoluted doctrinal thicket he confronts in *R.A.V.* instead of taking the easy way around the problem offered by the concurring justices and striking the law down on overbreadth grounds.[152] It is difficult for me to believe that Scalia, having worked so hard to prevent the suppression of ideas in the context of hate speech regulations, would accept a distinction between motive based and content based laws that permits the state to circumvent First Amendment barriers against ideological censorship so easily.

B. INDECENT SPEECH

Farber really doesn't have a chapter in his book devoted to the regulation of indecent speech. The cases dealing with this issue are dispersed throughout *The First Amendment.* He discusses *Cohen v. California*[153] and *Erznoznik v. Jacksonville*[154] in a very brief section[155] sandwiched in between a short description of fighting words and hostile audience cases and a much longer analysis of *R.A.V.* and the regulation of hate speech. He includes a thorough discussion of the dispersal zoning cases, *Young v. American Mini Theatres*[156] and *Renton v. Playtime Theatres,*[157] and an analysis of secondary effects doctrine as part of the chapter on Sexual Material.[158] Farber characterizes these cases as reflecting a "zoning approach" to the regulation of sexually graphic materials.[159] *FCC v. Pacifica Foundation*[160] is men-

151. *R.A.V.*, 505 U.S. at 390.
152. Id. at 397 (White, Blackmun, O'Connor, Stevens, J.J., concurring in judgment).
153. 403 U.S. 15 (1971).
154. 422 U.S. 205 (1975).
155. Farber, *First Amendment* at 107-09 (cited in note 5).
156. 427 U.S. 50 (1976).
157. 475 U.S. 41 (1986).
158. Farber, *First Amendment* at 136-41 (cited in note 5).
159. Id. at 136.
160. 438 U.S. 726 (1978).

tioned in passing as an example of time zoning in this section.[161] *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*[162] and *Reno v. ACLU*[163] are described briefly in this section as representing a retreat from *Pacifica*.[164] They are noted again in the chapter on the media but not with regard to the regulation of indecent speech.[165] *Sable Communications of California v. FCC*,[166] the dial-a-porn case, isn't mentioned at all.

In contrast to Farber's approach, I see a certain virtue in concentrating the discussion of the indecent speech cases in one location. The review of attempts to regulate indecent speech involves the convergence of several related First Amendment issues: the role of taste and morality as a justification for regulating speech, the relationship between language and images and the content of messages, the extent of the individual's privacy interest in not being exposed to language or images that are experienced as offensive, the viability of attempts to restrict speech in allegedly inappropriate locations (Justice Stevens' "pig in the parlor" approach to the regulation of indecent speech),[167] and the extent to which adult messages and access to expressive materials may be limited to further the state's interest in protecting minors from harmful speech. While all of these issues are distinct and may arise in regulatory contexts other than ones involving indecent speech, there may be a common core here that links these diverse questions together and gives them more coherence than would be the case if they are examined separately.

Moreover, while many serious First Amendment subjects that troubled courts and commentators in the past, such as the advocacy of illegal acts, have become matters of settled law today, a point Farber makes with considerable eloquence at the end of his book,[168] questions relating to the regulation of indecent speech do not fit within this category. This is a continuing problem that remains uncomfortably open and unresolved.[169] In

161. Farber, *First Amendment* at 141 (cited in note 5).
162. 518 U.S. 727 (1996).
163. 117 S. Ct. 2329 (1997).
164. Farber, *First Amendment* at 141 (cited in note 5).
165. Id. at 223.
166. 492 U.S. 115 (1989).
167. *FCC v. Pacifica Foundation*, 438 U.S. 426, 750 (1978) (quoting *Euclid v. Ambler Realty*, 272 U.S. 365, 388 (1926)).
168. Farber, *First Amendment* at 283-84 (cited in note 5).
169. See, e.g., *Reno v. ACLU*, 117 S. Ct. 2329, 2348 (1997) (explaining that for the purposes of its decision in this case, the Court "need neither accept nor reject the Government's submission that the First Amendment does not forbid a blanket prohibition on all 'indecent' and 'patently offensive' messages communicated to a 17-year old—no mat-

particular, I doubt we have seen the end of the battle on the question of how much of a burden on adult speech we will tolerate in order to protect our children from harmful expression. If for no other reason, the enduring quality of this question and the lack of consensus on its answer suggests that the regulation of indecent speech deserves considerable and focused attention.

C.. THE TENSION BETWEEN THE RELIGION CLAUSES OF THE FIRST AMENDMENT

Since the thesis of this review is that it may no longer be possible to write a sophisticated but concise description of free speech doctrine that reflects a general consensus, rather than an idiosyncratic perspective, on what the Court's cases mean, one would think that this same concern would apply several times over when the religion clauses are the subject of discussion. No one can put a doctrinal Humpty Dumpty this large, that has broken into so many pieces, back together again. To his credit, Farber doesn't even try to accomplish this impossible task. What he does do, and he does it extremely well, is to describe and critically examine the countervailing principles and theories reflected in the cases and commentary interpreting the Free Exercise Clause and the Establishment Clause.[170]

At the end of his discussion, he addresses what he, and I, consider the most "fundamental" problem in this area, the review of attempts to accommodate religion.[171] In this circumstance the two religion clauses seem to be pulling in very different directions in that the Free Exercise Clause prohibits the burdening of religion while the Establishment Clause "seems to be telling us not to make any special deals for religious groups."[172] This tension between the clauses causes considerable confusion in the case law. Certainly, as Farber points out, there is no accepted formula for resolving this issue.[173]

Despite this uncertainty, Farber describes three possible ways "to escape this dilemma."[174] One approach is "secular-

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ter how much value the message may contain and regardless of parental approval"); *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 742 (1996) (suggesting it is premature to determine the appropriate doctrinal approach for regulating indecent speech on cable television because "of the changes taking place in the law, the technology, and the industrial structure, related to telecommunications").

170. Farber, *First Amendment* at 243-83 (cited in note 5).

171. Id. at 280-83.

172. Id. at 281.

173. Id. at 281-82

174. Id.

ism,"[175] a framework that posits a weak Free Exercise Clause but a rigorously enforced Establishment Clause. Few accommodations of religion would be permitted under this model. Another approach, what Farber describes as "pluralism,"[176] reverses the hierarchy. Here, Free Exercise concerns about relieving religious groups and individuals from burdens trump Establishment Clause restrictions on state support for religion. Finally, there is a majoritarian model which assigns the question of religious accommodations primarily, if not exclusively, to the political branches of government.[177] Under this approach, neither the Free Exercise Clause nor the Establishment Clause is rigorously enforced. As a constitutional matter, there is nothing special about religion. It is simply another interest to be burdened or benefitted through the machinery of democratic deliberation.

This is all very clearly and concisely presented. The problem for me is that it leaves out a fourth approach under which the courts do not attempt to escape from the tension between the religion clauses but rather embrace it as the most effective way to promote religious liberty and equality. Under this framework both the Free Exercise Clause and the Establishment Clause are rigorously enforced and the courts must carefully chart their way between these two mandates. To be fair, Farber's omission of this fourth alternative may seem more troubling to me than it does to other law professors because this is the interpretation of the religion clauses that I support and which coincides with my own values.[178]

But there is a more objective basis for believing that the fourth approach deserves attention. Both of the religion clauses, but particularly the Free Exercise Clause, received renewed substantive content in the 1960's. *Engel v. Vitale*,[179] the case that struck down prayer in the public schools was decided in 1962. *Sherbert v. Verner*,[180] the seminal case for free exercise exemptions from general laws, was decided the following year by essentially the same Court. Clearly, those justices who rescued free exercise doctrine from the feeble protection it provided to religious beliefs, but not religious practices, under prior prece-

175. Id.
176. Id.
177. Id. at 282.
178. See Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 Ohio St. L.J. 89 (1990).
179. 370 U.S. 421 (1962).
180. 374 U.S. 398 (1963).

dent[181] did not think that doing so was fundamentally inconsistent with a rigorous Establishment Clause. It is important to remember that the constitutional vision that served as the source of the first meaningful protection of religion practices recognized the necessity of giving both the Establishment Clause and the Free Exercise Clause their due in deciding First Amendment cases. That vision may be more complicated than other First Amendment models. And Justice Brennan and the other members of the Court that developed this internally conflicted interpretation of the religion clauses may not have adequately explained their understanding of how the cases they decided fit together. Still, if for no other reason than its historical role in the development of religion clause doctrine, the commitment to a strong Free Exercise Clause and a strong Establishment Clause deserves to be the subject of discussion along with the other approaches Farber very ably describes.

181. *Reynolds v. United States*, 98 U.S. 145 (1878).