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Notes

SECONDARY EFFECTS AND POLITICAL SPEECH: INTIMATIONS OF BROADER GOVERNMENTAL REGULATORY POWER

I. INTRODUCTION

The first amendment to the United States Constitution protects the rights of citizens to engage in free speech.¹ In certain instances, however, the government may regulate the time, place or manner of the exercise of that right,² provided that the regulations "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."³

In *Boos v. Barry*,⁴ the United States Supreme Court examined a Dis-

1. The first amendment states that "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I.

2. One of the seminal cases upholding time, place or manner regulations is *Cox v. New Hampshire*, 312 U.S. 569 (1941). *Cox* applied to parades and other processions, but the Court has since applied the time, place or manner rationale in a wide variety of first amendment contexts. For a discussion of *Cox*, see *infra* notes 32-34 and accompanying text, and for a discussion of time, place or manner regulation, see *infra* notes 27-51 and accompanying text.

3. *Frisby v. Schultz*, 108 S. Ct. 2495, 2500 (1988) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). The major focus of this Note is whether a given regulation is content-neutral. For a discussion of this issue, see *infra* notes 57-64 & 71-92 and accompanying text. The Note will address only tangentially the other requirements for a time, place or manner regulation.

4. 108 S. Ct. 1157 (1988). For a discussion of *Boos*, see *infra* notes 93-128 and accompanying text.

The petitioners in *Boos* made a facial challenge to the statute. As such, petitioners did not charge that the statute vested too much discretion in public officials or that it was unconstitutionally vague. See *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (vagueness); *Cox v. Louisiana*, 379 U.S. 536 (1965) (vagueness); *Hague v. CIO*, 307 U.S. 496 (1939) (overbroad discretion); *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (overbroad discretion).

In *Boos*, Justice O'Connor proceeded under a first amendment analysis. Although some cases involving the content-neutral/content-based distinction have relied on an equal protection analysis, the Court has stated that a party "can fare no better under the Equal Protection Clause than under the First Amendment itself." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 55 n.4 (1986). See *Carey v. Brown*, 447 U.S. 455, 471-72 (1980) (Stewart, J., concurring) (where free speech is issue, first amendment analysis is proper); Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 206 (1983) ("[i]nvoication of the equal protection clause adds nothing constructive to the analysis"); Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 542-50, 560-62 (1982) (use of first amendment renders use of equal protection analysis "entirely superfluous"). But see *Police Dep't v. Mosely*, 408 U.S. 92 (1972)

(995)

trict of Columbia statute⁵ which regulated political speech⁶ in public forums.⁷ The Court found the ordinance to be content-based and eventually invalidated it.⁸ However, in the process the Court initiated a new mode of constitutional analysis. Justice O'Connor's plurality opinion raised the possibility that regulation aimed specifically at political speech could be constitutional.⁹ Although Justice Brennan concurred in

(claiming to follow equal protection analysis); Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 731-33 (1980) (when different protection afforded, equal protection analysis should be used); Karst, *Equality As a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 66-67 (1975) (four reasons for preferring equal protection analysis: (1) permits protection of free speech without denigrating justifications for regulation asserted by government; (2) emphasizes idea of equality which appeals "to the Court's constituencies, including the public"; (3) forces regulators to decide if regulation important enough to impose on everyone; and (4) requires meeting compelling interest test).

5. The District of Columbia statute states:

It shall be unlawful to display any flag, banner, placard, or device designed or adapted to intimidate, coerce, or bring into public odium any foreign government, party, or organization, or any officer or officers thereof . . . within five hundred feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representative . . . or to congregate within five hundred feet of any such building or premises

D.C. CODE ANN. § 22-1115 (1981).

In *Boos*, the Court analyzed the first clause, the "display" clause, and the second clause, the "congregation" clause, separately. This Note concentrates on the analysis of the "display" clause.

6. The Court has addressed political speech distinctly from other types of speech. For examples of "nonpolitical" speech, see *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (adult movie theatres); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (religious solicitation); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (trial commentary); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (commercial speech); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (libel); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) ("fighting words").

7. In asserting that this provision regulated speech in a public forum, Justice O'Connor invoked the classic formulation of Justice Roberts: "[T]he title of streets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for . . . communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939).

The Court's analysis in *Boos* would have been different had the provision regulated speech in a non-public forum. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 49, 55 (1983) (regulation of teachers' mailboxes). See generally Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987).

8. *Boos*, 108 S. Ct. at 1163-64. This holding followed from the Court's finding that the regulation was content-based. *Id.* at 1164. For a discussion of the Court's treatment of the regulation in *Boos*, see *infra* notes 102-16 and accompanying text.

9. *Boos*, 108 S. Ct. at 1162-64. For a discussion of Justice O'Connor's opinion, see *infra* notes 104-16 and accompanying text.

Justice O'Connor delivered the opinion of the Court in which Justices Ste-

the judgment, he hotly contested such a proposition.¹⁰

There are two tests to determine the validity of governmental regulation of speech in a public forum. If a regulation is deemed content-neutral, then the time, place or manner test¹¹ is employed.¹² If the regulation is content-based, then it must serve a compelling governmental interest, and it must be narrowly drawn to meet that interest.¹³ In *Boos*, Justice O'Connor's opinion raised the possibility that the Supreme Court might hold a regulation aimed at political speech to be content-neutral.¹⁴ This Note further explores that possibility.¹⁵

vens and Scalia joined. *Boos*, 108 S. Ct. at 1160. Justice Brennan, joined by Justice Marshall, concurred in part and concurred in the judgment. *Id.* Chief Justice Rehnquist, joined by Justices White and Blackmun, concurred in part and dissented in part. *Id.* Justice Kennedy took no part in the case. *Id.*

10. *Boos*, 108 S. Ct. at 1171-73 (Brennan, J., concurring). For a discussion of Justice Brennan's opinion, see *infra* notes 117-28 and accompanying text.

11. For the elements of the time, place or manner test, see *supra* note 3 and accompanying text.

12. See, e.g., *Frisby v. Schultz*, 108 S. Ct. 2495, 2500-01 (1988) (involving validity of ordinance which regulated picketing of residential dwellings); *United States v. Grace*, 461 U.S. 171, 177 (1983) (striking down display statute similar to one in *Boos* which applied to area surrounding Supreme Court building); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (upholding school board decision to permit use of interschool mail system by one school teachers' union but deny it to another).

13. *Frisby*, 108 S. Ct. at 2500-01; *Grace*, 461 U.S. at 177; *Perry Educ. Ass'n*, 460 U.S. at 45.

14. This possibility is significant because content-neutral regulation is tested under the time, place or manner test. For the elements of this test, see *supra* note 3 and accompanying text. The time, place or manner test requires a significant governmental interest. In contrast, a content-based regulation must meet a compelling governmental interest. *Frisby*, 108 S. Ct. at 2500-01; *Grace*, 461 U.S. at 177; *Perry Educ. Ass'n*, 460 U.S. at 45. The difference in these two tests is crucial. In practice, the Court will almost never find a compelling interest in the first amendment context. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 144 (1981) (use of compelling standard has led to erection of "standard incapable of compliance"); Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 53 (1987) (compelling interest standard "almost invariably results in invalidation of the challenged restriction"). Only in the most extreme circumstances will such a compelling interest be acknowledged. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 308 (1984) (Marshall, J., dissenting) (prevention of political assassination would be compelling); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (halting publication of specific troop locations during wartime is compelling).

It is the purpose of this Note to explore the realistic possibility of a politically content-based regulation meeting the requirements of the first amendment. Virtually no such possibility exists under the compelling interest test. Therefore, this Note will examine the possibility that a facially politically content-based regulation can be considered content-neutral and thereby be analyzed under the time, place or manner test.

15. The possibility has been suggested in other sources. See *The Supreme Court, 1985 Term—Leading Cases*, 100 HARV. L. REV. 100, 198 (1986) [hereinafter *Leading Cases*]. At least one interpretation of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), is that, given the "Court's willingness to ignore the facially content-based nature of the ordinance . . . and the [purported] im-

This Note will examine case law prior to *Boos* in order to trace the support for Justice O'Connor's suggestion that regulations aimed at political speech might be constitutional.¹⁶ This Note will then assess the likelihood that the Court will accept such a proposition,¹⁷ and will inquire into the desirability of such regulation.¹⁸ Finally, this Note will suggest an approach which will continue to protect "uninhibited, robust, and wide-open" debate in a public forum,¹⁹ while simultaneously permitting the government to effect necessary regulation.²⁰

II. BACKGROUND

Support for Justice O'Connor's suggestion that a politically content-based regulation could be constitutional stems from a synthesis of two separate strands of first amendment theory. The first strand, time, place or manner regulation,²¹ has a relatively long line of support.²² A regulation passes time, place or manner analysis if, *inter alia*, it is not based on the content of what is being regulated.²³ The second, newer strand involves regulating the secondary effects of speech.²⁴ This secondary effects strand allows a regulation based facially on content, that is, a regulation which on its face applies to specific types of speech, to be evaluated as content-neutral if it is not improperly motivated.²⁵ If a facially content-based regulation is viewed as content-neutral on the basis of the secondary effects theory, it can then be analyzed under the

proper legislative intent behind the ordinance," it may be willing to extend the secondary effects test beyond sexually explicit speech and into other areas of the first amendment. *Leading Cases, supra*, at 198. For a discussion of the secondary effects test, see *infra* notes 71-92 and accompanying text.

16. See *infra* notes 21-92 and accompanying text.

17. For a discussion of the likelihood that a regulation targeted at political speech might be constitutional, see *infra* notes 143-69 and accompanying text.

18. For a discussion of the desirability of allowing regulation which affects political speech, see *infra* notes 170-209 and accompanying text.

19. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

20. For a discussion of the need for government regulation, see *infra* notes 34-36 and accompanying text.

21. For the elements of the time, place or manner test, see *supra* note 3 and accompanying text. For a broader discussion of the test, see *infra* notes 27-51 and accompanying text.

22. For a list of cases accepting time, place or manner regulation, see *infra* note 30.

23. For a statement of this neutrality requirement, see *supra* note 3 and accompanying text.

24. For a discussion of the secondary effects theory, which advocates investigation of the government motivation behind a regulation, see *infra* notes 71-92 and accompanying text.

25. A regulation avoids improper motivation if it is truly aimed at the secondary effects and not the direct content of the speech being regulated. For a discussion of the secondary effects theory, see *infra* notes 71-92 and accompanying text.

time, place or manner test.²⁶

A. *Time, Place or Manner Regulation*

The “essence of time, place, or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals.”²⁷ The desire to provide for these legitimate goals without encroaching on the right of free speech lies at the heart of the time, place or manner standard. In essence, the standard recognizes a balance between governmental interests and free speech.²⁸

A regulation is one of time, place or manner if it is not based upon content, if it serves a significant governmental interest and if it leaves open alternative avenues of communication.²⁹ In numerous free speech

26. Analysis of a regulation under this test is desirable from the government’s perspective because the regulation has a much greater chance of being held valid than if it were deemed to be content-based. For a discussion of the ability of a regulation to pass different first amendment analyses, see *supra* note 14.

27. *Consolidated Edison v. Public Serv. Comm’n*, 447 U.S. 530, 536 (1980). For a discussion of *Consolidated Edison*, see *infra* note 64.

28. Stone, *supra* note 4, at 193. By avoiding a highly deferential approach, the Court does not abandon protection of free speech. At the same time, it recognizes the need for legitimate regulation. *Id.*

Professor Stone suggests that the Court evaluates content-neutral regulations on three general levels: (1) deferential review, which entails very little scrutiny, (2) intermediate review, in which the Court inquires into the governmental need for regulation, and (3) strict review, which is similar to compelling interest. Stone, *supra* note 14, at 50-54. The level of review corresponds to the degree to which the regulation inhibits free speech. *Id.* at 58. In contrast, review of content-based regulation has only the single standard of compelling interest. *Id.* at 72-74. By maintaining the three-level review for content-neutral regulation, the Court need not always defer to the legislature. *Id.* at 77. At the same time, the “Court’s analysis does not sacrifice legitimate governmental interests when significant first amendment rights are not at issue.” *Id.*

29. See *Frisby v. Schultz*, 108 S. Ct. 2495, 2500 (1988). There is an alternate criterion for time, place or manner regulations. Some cases have analyzed such regulations under the following test:

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

United States v. O’Brien, 391 U.S. 367, 377 (1967) (draft card burning). See also *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (posting of signs on public property prohibited).

Professor Day labels this test the “incidental regulation” test. Day, *The Incidental Regulation of Free Speech*, 42 U. MIAMI L. REV. 491, 503-05 (1988) [hereinafter Day, *Incidental Regulation*]. He differentiates the incidental regulation test from the time, place or manner test. He asserts that the time, place or manner test applies to regulations whose design and purpose was to effect speech, whereas the incidental regulation test applies to regulations whose original intent had nothing to do with regulating speech. *Id.* at 497-99.

cases, the Court has upheld this mode of analysis.³⁰

The seminal case³¹ upholding time, place or manner regulation is *Cox v. New Hampshire*.³² In *Cox*, the Supreme Court upheld a New Hampshire statute which regulated processions in a public street.³³ The Court reasoned that the government had a valid interest in safeguarding order, and that in preserving that interest, regulations which affected free expression were proper.³⁴ Time, place or manner regulation is the statutory and judicial recognition that the first amendment does not provide an individual the opportunity to do whatever he or she wants, at a time and place of his or her choosing.³⁵ Rather, government may im-

However, the Court has recognized that the "four-factor standard of *United States v. O'Brien* . . . is little, if any, different from the standard applied to time, place, or manner restrictions." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984). Professor Day also admits that the Court has recently blurred the distinction between the two tests. Day, *Incidental Regulation, supra*, at 495, 518-19, 526; see also Day, *The Hybridization of the Content-Neutral Standards for the Free Speech Clause*, 19 ARIZ. ST. L.J. 195, 211-20 (1986-1987) [hereinafter Day, *Hybridization*] (two tests have now been "hybridized").

Professor Day asserts that this hybridization is improper because both tests may not be applicable in all cases. *Id.* at 225-26. He contends that the hybridized test permits the government to face a lower standard for purposeful regulation of free speech and to do away with the need to prove the regulation was entirely unrelated to speech, so long as it is supposedly not based on content. *Id.* at 220-23.

30. Some of the more recent decisions include *Frisby*, 108 S. Ct. 2495 (regulation prohibited picketing of residential dwellings); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (ordinance regulated location of adult movie theatres); *Clark*, 468 U.S. 288 (National Park Service rule had de facto effect of regulating demonstrations in certain national parks); *United States v. Grace*, 461 U.S. 171 (1983) (statute prohibited display of signs in area surrounding Supreme Court building); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (school board decision favored ability of one teachers' union to use interschool mail system over another union).

31. State courts considered time, place or manner regulations as early as the late 1800s. Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757, 761 n.21 (1986). See, e.g., *Frazee's Case*, 63 Mich. 396, 30 N.W. 72 (1886) (court struck down parade licensing statute but suggested that regulations not concerned with sentiments of movement and based upon time and place would be acceptable); *In re Garrabad*, 84 Wis. 585, 54 N.W. 1104 (1893) (though parade ordinance was invalid for overbroad governmental discretion, under police power state may enact ordinances which regulate rights, as long as ordinances cannot be susceptible to discriminatory application).

32. 312 U.S. 569 (1941).

33. *Id.* at 570-71. In *Cox*, the Court upheld the conviction of five Jehovah's Witnesses. They had violated a state statute by marching without a parade license. *Id.* at 570-71. In all, 88 persons marched through the business district of Manchester, N.H. on a Saturday evening. Though no technical breach of the peace occurred, sidewalk travel was interrupted. *Id.* at 572-73.

34. *Id.* at 574. The Court used as an example the "familiar red traffic light." It noted that individuals would not be authorized to ignore this regulation, even in exercising their right to free speech. *Id.* The Court again conjured up the "familiar red light" in *Cox v. Louisiana*, 379 U.S. 536, 554 (1965).

35. *Poulos v. New Hampshire*, 345 U.S. 395, 405 (1953). *Accord Cox*, 379

pose nondiscriminatory regulations on free speech, so long as the regulations are designed to further "peace, order and tranquility."³⁶

There are a number of public forum cases in which regulations have passed the time, place or manner test.³⁷ Two such recent decisions are *City Council v. Taxpayers for Vincent*³⁸ and *Clark v. Community for Creative Non-Violence*.³⁹ In *Taxpayers for Vincent*, the Court upheld a Los Angeles ordinance which prohibited the posting of signs on public property.⁴⁰

U.S. at 554. In *Poulos*, petitioner ignored an ordinance which prohibited religious meetings in a public park. 345 U.S. at 396-97. Although the Court found that the ordinance had been unreasonably applied to petitioner, it found that the ordinance itself was constitutional. It reasoned that "[t]he principles of the First Amendment are not to be treated as a promise that everyone with opinions or beliefs to express may gather around him at any time a group for discussion or instruction." *Id.* at 405.

36. *Poulos*, 345 U.S. at 405. To support its contention, the *Poulos* Court relied on prior decisions. See *Cantwell v. Connecticut*, 310 U.S. 296, 306-07 (1940) (government may "regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience"); *Schneider v. State*, 308 U.S. 147, 160 (1939) ("So long as legislation . . . does not abridge the constitutional liberty . . . to impart information through speech . . . it may lawfully regulate the conduct of those using the streets."); *Hague v. CIO*, 307 U.S. 496, 516 (1939) (freedom of speech "is not absolute, but relative, and must be exercised in subordination to the general comfort").

37. See, e.g., *Frisby v. Schultz*, 108 S. Ct. 2495 (1988) (upholding ordinance which made it unlawful to picket another's residence or dwelling; Court deferred to district court's finding of content-neutrality and found protection of privacy of home to be substantial governmental concern); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (upholding regulation which permitted other types of demonstrations but prohibited sleeping as form of demonstration in certain national parks); *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (upholding ordinance requiring removal of political campaign posters from public utility poles); *Poulos*, 345 U.S. 395 (upholding statute which required license before any religious services could be held in specific park); *Cox*, 312 U.S. 569 (upholding license requirement for parade in public street).

38. 466 U.S. 789 (1984). For a further discussion of *Taxpayers for Vincent*, see Comment, Members of the City Council v. Taxpayers for Vincent: *A Step Backward for Political Campaigning*, 17 URB. LAW. 91 (1985) (emphasizing, from political scientist's point of view, importance of posters in campaign effort); Note, Members of the City Council v. Taxpayers for Vincent: *The Constitutionality of Prohibiting Temporary Sign Posting On Public Property to Advance Local Aesthetic Concerns*, 34 DE PAUL L. REV. 197 (1984) ("decision in *Vincent* demonstrates a surprising insensitivity to the first amendment's protection of free speech in the face of subjective aesthetic regulation").

39. 468 U.S. 288 (1984). For a further discussion of *Community for Creative Non-Violence*, see Note, *Camping On First Amendment Rights*, 22 LAND & WATER L. REV. 567, 574 (1987) ("Court devalued political speech to the level where something as nebulous as aesthetics could regulate it"); Case Comment, *National Park Service Regulations Prohibiting "Camping" As Applied to Demonstrators, Who Wish to Sleep in Public Parks, Does Not Violate First Amendment Rights*, 10 T. MARSHALL L.J. 677 (1985) (discussing sleep as speech and application of time, place or manner test); Note, *Regulation Prohibiting Sleeping in National Parks Upheld As a Valid Time, Place, and Manner Regulation Regardless of Whether Sleeping Is Speech*, 15 U. BALT. L. REV. 181 (1985) (discussing sleep as speech and proper standard for determining whether regulation furthers substantial governmental interest).

40. *Taxpayers for Vincent*, 466 U.S. at 803-17. Roland Vincent was running

Recognizing that "the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest,"⁴¹ the Court applied the time, place or manner test.⁴² The Court first found the ordinance to be content-neutral. It stated that nothing in the text of the ordinance suggested a bias against a particular view, and that the ordinance had been applied in an even-handed manner.⁴³ The city justified the ordinance by pointing to the deleterious effects such signs had on community aesthetics. The Court found this concern to be a legitimate interest.⁴⁴ Moreover, the Court held that the ordinance was narrowly drawn because it affected only signs which were the cause of the concern.⁴⁵ Finally, the Court asserted that ample alternative means of communication remained. Individuals could, for example, post signs on private property, verbalize their beliefs or distribute handbills.⁴⁶

Similarly, in *Community for Creative Non-Violence*, the Court upheld a time, place or manner regulation.⁴⁷ The decision sustained a National

for the Los Angeles City Council. His campaign had signs which read "Roland Vincent—City Council" placed over utility pole crosswires. *Id.* at 792-93. A city ordinance prohibited such posting and city employees removed the signs. *Id.* Vincent's supporters and the company which posted the signs brought suit in federal court to enjoin removal of the signs. *Id.* at 793.

41. *Id.* at 804.

42. The Court applied the test devised in *United States v. O'Brien*, 391 U.S. 367 (1967). *Taxpayers for Vincent*, 466 U.S. at 804-05. For a discussion of the *O'Brien* test and its similarity to the time, place or manner test, see *supra* note 29.

43. *Taxpayers for Vincent*, 466 U.S. at 804. Because the district court found that both political and non-political signs had been removed "without regard to their content," and the Court found the ordinance neutral on its face, the ordinance met the neutrality requirement of the time, place or manner test. *Id.* at 794, 804.

44. *Id.* at 805-07. Other decisions have also held that aesthetic concerns are a legitimate governmental interest. See *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). In *Metromedia*, a San Diego ordinance banned certain types of outdoor advertising billboards. *Id.* at 493-96. The ordinance was justified in part by a desire to beautify and maintain the appearance of the city. *Id.* at 493. Although the Court was deeply divided as to the constitutionality of the ordinance, at least seven of the nine Justices recognized San Diego's aesthetic concerns as legitimate. *Id.* at 507-08 (White, J., plurality opinion), 552 (Stevens, J., dissenting in part), 560 (Burger, C.J., dissenting), 570 (Rehnquist, J., dissenting). For a further discussion of *Metromedia*, see Note, *Billboard Blight: Is the Aesthetic Quality of Vermont's Landscape in Jeopardy After Metromedia?*, 9 VT. L. REV. 341 (1984).

45. *Taxpayers for Vincent*, 466 U.S. at 808-10. The Court found that "the City did no more than eliminate the exact source of the evil it sought to remedy." *Id.* at 808. Therefore, the ordinance met the narrowly tailored requirement. The Court held that if the mode of speech itself created the perceived evil, then the city could prohibit that method of communication. *Id.* at 810.

46. *Id.* at 811, 812.

47. 468 U.S. 288 (1984). The Community for Creative Non-Violence (CCNV) staged demonstrations in Lafayette Park and on the Mall in Washington, D.C. The demonstrators sought to bring attention to the plight of the homeless. *Id.* at 289. For that reason, CCNV sought permission to have the homeless actually inhabit the parks as part of the demonstration. *Id.* at 291-92.

Park Service rule which prohibited camping in certain parks.⁴⁸ The Court found that because the prohibition was not grounded in disagreement with the campers' views, it was content-neutral.⁴⁹ Further, the Court found that the government had a substantial interest in the preservation of national parks. This interest was narrowly served by a ban on camping which prevented the wear and tear attendant to such activity.⁵⁰ Moreover, individuals were not prohibited from demonstrating in the parks, only from camping in them.⁵¹ Alternative methods of communication thus remained open. As with other time, place or manner regulations, the government achieved needed regulation while free speech rights were preserved.

B. *Secondary Effects*

The second necessary strand for Justice O'Connor's opinion in *Boos* was the secondary effects doctrine. The secondary effects doctrine first received full support from the Court in *City of Renton v. Playtime Theatres, Inc.*⁵² This doctrine provides that a facially content-based regulation may be construed as content-neutral if it is targeted at the secondary effects of the regulated speech.⁵³ However, controversy exists over whether content-based regulation can ever be valid.⁵⁴ Supreme Court cases have been far from consistent. Some have purported to forbid any

When the National Park Service refused permission, CCNV filed an action in federal court.

48. *Id.* at 290-91. The rule defined camping in part as sleeping, preparing accommodations to sleep or otherwise using the park as a place in which to live. 36 C.F.R. § 50.27(a) (1983).

49. *Community for Creative Non-Violence*, 468 U.S. at 295.

50. The demonstrators noted that they were not prohibited from conducting a 24-hour vigil in the parks, but merely from sleeping in them. Therefore, they asserted that the act of sleeping would impose only marginally more strain on the parks. *Id.* at 296. The Court disagreed. *Id.* The Court reasoned that if the homeless were not permitted to inhabit the parks, fewer of them would join the demonstration, and there would be a corresponding easing of the wear and tear on the parks. *Id.* The Court also stated that if the demonstrators in the case before it were permitted to sleep in the parks, there would be nothing to stop demonstrators in future cases from claiming a right to sleep in the parks. *Id.* at 296-97.

Finally, the Court stated that simply because other methods existed to reduce wear and tear on the parks, such as limiting the size, duration or frequency of demonstrations, this did not mean that the current regulation was not narrowly tailored. *Id.* at 299. The Court pointed out that it was up to the Service and not the judiciary to determine the best method of managing the national park system. *Id.*

51. *Id.* at 295.

52. 475 U.S. 41 (1986). For a discussion of *Renton*, see *infra* notes 84-92 and accompanying text.

53. See *Renton*, 475 U.S. at 47-49.

54. For a discussion of the argument against secondary effects regulation, see *infra* notes 57-64 and accompanying text.

regulation based on content,⁵⁵ while others have upheld such regulations.⁵⁶ Therefore, any attempt to apply a secondary effects analysis must first dispense with the claim that content-based regulation is necessarily invalid.

1. Content-Based Regulation

The argument against facially content-based regulation had its genesis and maintains its roots in *Police Department v. Mosely*.⁵⁷ In *Mosely*, the defendant, a school custodian, wished to picket the local high school to

55. See, e.g., *Widmar v. Vincent*, 454 U.S. 263 (1981) (public university may not deny use of school facilities to student religious group while permitting other groups such use); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (plurality decision) (city may not permit some commercial billboard advertising but prohibit all non-commercial advertising); *Consolidated Edison v. Public Serv. Comm'n*, 447 U.S. 530 (1980) (Commission may not allow certain types of information to be mailed with customer's bill, but prohibit mailings on controversial topics); *Carey v. Brown*, 447 U.S. 455 (1980) (ordinance which prohibited picketing but contained exception for labor picketing held invalid); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (ordinance aimed at drive-in theatre showing films containing nudity held invalid).

56. Decisions which permit content-based regulation include *Renton*, 475 U.S. 41 (ordinance which treated adult motion picture theatres differently than other movie houses); *FCC v. Pacific Found.*, 438 U.S. 726 (1978) (FCC may regulate radio program containing sexually explicit speech); *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (city may discriminate between adult motion picture theatres and other movie houses); *Greer v. Spock*, 424 U.S. 828 (1976) (political speech may be banned from military base, even where other speech permitted); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (political advertising on public transportation banned, while other advertising permitted); *United States Civil Serv. Comm'n v. National Assoc. of Letter Carriers*, 413 U.S. 548 (1973) (public employers may not express opinion on public affairs if such expression is directed towards party success); *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973) (networks may sell time to commercial advertisers but decide not to sell time to public issue groups).

57. 408 U.S. 92 (1972). While *Mosely* was the first Supreme Court case to purportedly prohibit all types of content-based discrimination, *Mosely* drew heavily from Justice Black's concurring opinion in *Cox v. Louisiana*, 379 U.S. 536, 580-81 (1964) (Black, J., concurring). See Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 218-27 (1982).

In *Cox*, approximately 2000 black students involved in civil rights protesting congregated on the sidewalk near a courthouse in Baton Rouge. 379 U.S. at 538-43. One of the leaders of the protest, a Congregationalist minister, was arrested on a number of different counts, among them obstructing public passageways. *Id.* at 537-38. The majority reversed the conviction on this count, finding the statute to have been applied in a discriminatory manner. *Id.* at 555-58. Justice Black also believed the conviction should be reversed, but he rested his decision on other grounds.

Justice Black believed the statute to be facially invalid. While the statute prohibited the obstruction of public streets and sidewalks, it provided an exception for labor unions protesting unfair labor practices. *Id.* at 580 (Black, J., concurring). Justice Black maintained that distinctions based on subject matter permitted the government to "pick and choose among the views it is willing to have discussed on its streets." *Id.* at 581 (Black, J., concurring). He found such a practice to be "censorship in a most odious form." *Id.* (Black, J., concurring).

protest what he believed to be racial discrimination.⁵⁸ A city ordinance prohibited picketing in front of any school, unless the picketing involved a labor dispute with the school.⁵⁹

The Court noted the differing treatment accorded peaceful labor speech and other types of speech. Relying on Justice Black's concurring opinion in *Cox v. Louisiana*,⁶⁰ the Court found the ordinance unconstitutional.⁶¹ The Court held that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."⁶² Because the regulation before the Court had attempted to censor speech "in terms of subject matter . . . [t]he regulation 'thus slip[ped] from the neutrality of time, place, and circumstance into a concern about content.' This is

58. *Mosley*, 408 U.S. at 93. For seven months prior to the enactment of a regulation which prohibited such picketing, Earl Mosely had quietly patrolled the sidewalk in front of Jones Commercial High School carrying a sign which read "Jones High School practices black discrimination. Jones High School has a black quota." *Id.*

59. *Id.* at 92-93. The district court granted a directed verdict for the government. *Id.* at 94. The court of appeals reversed on the ground that the ordinance was overly broad. *Id.* The Supreme Court did not base its decision on this overbreadth, relying instead on the content-based nature of the ordinance. *Id.*

60. *Id.* at 97-98 (citing *Cox v. Louisiana*, 379 U.S. at 581 (Black, J., concurring)). For a discussion of Justice Black's concurrence, see *supra* note 57. Professor Stephan notes that Justice Black actually offered three reasons for invalidating the statute. First, by singling out labor-related speech for special treatment, "Louisiana had 'attempted to pick and choose among the views it [was] willing to have discussed on its streets.'" Stephan, *supra* note 57, at 220 (quoting *Cox*, 379 U.S. at 581 (Black, J., concurring)). Second, Justice Black stated that Louisiana "had employed racial criteria to select disfavored views." *Id.* Third, Justice Black found that the state had employed the regulation in a discriminatory manner because groups other than labor unions had been permitted to block public streets. *Id.*

61. *Mosley*, 408 U.S. at 94-102. The Court repeatedly stated that regulations based on content are per se invalid. *Id.* at 94, 95, 96, 99. Nonetheless, after finding that the anti-picketing ordinance was content-based, the Court analyzed the ordinance to see if it was narrowly tailored to meet a substantial governmental interest. *Id.* at 98-99, 100-01. Commentators have expressed concern with this anomaly in the Court's opinion. See Stephan, *supra* note 57, at 224 (Court's development of proper standard "unsatisfactory"). If the Court had been following its newly promulgated per se rule, there would have been no need for an investigation into the governmental interest. *Id.* *Mosely* is cited for the proposition that ordinances based on content are absolutely impermissible. Yet the *Mosely* Court's governmental interest analysis may have been an admission that its content rule was unworkable, even as that rule was being stated. Thus, an argument can be made that the Court's content-based declaration was simply dicta. For a discussion of the contention that a per se rule is unworkable, see *infra* notes 131-41 and accompanying text.

62. *Mosely*, 408 U.S. at 95. While these first two prohibitions were "well established in the caselaw and [were] wholly justifiable[,] the other [two were] entirely new and . . . indefensible." Stephan, *supra* note 57, at 203-04. In reaching its decision, the *Mosely* Court failed to reconcile its holding with prior decisions which had permitted regulations based on content. *Id.* at 227.

never permitted.”⁶³ The rationale behind *Mosely* is that “[t]o allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.”⁶⁴

Although *Mosely* stated that regulations based on content are never permitted, the Court has not consistently applied this rule.⁶⁵ Indeed, many regulations based on content have survived constitutional scrutiny.⁶⁶ Even in those decisions which struck down such regulations, the concurring and dissenting opinions continued to support the validity of content-based regulation.⁶⁷ Moreover, *Mosely* itself and cases which

63. *Mosely*, 408 U.S. at 99 (quoting Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 29). This prohibition has been fleshed out in later cases so that “[t]he First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.” *Consolidated Edison v. Public Serv. Comm’n*, 447 U.S. 530, 537 (1980). *Accord* *Boos v. Barry*, 108 S. Ct. 1157, 1163 (1988); *Carey v. Brown*, 447 U.S. 455, 462 n.6 (1980).

64. *Consolidated Edison*, 447 U.S. at 538. *Accord* *Carey*, 447 U.S. at 468 (“the desire to favor one form of speech over all others—is illegitimate”).

Both *Consolidated Edison* and *Carey* are paradigmatic *Mosely* cases. In *Consolidated Edison*, *Consolidated Edison* wished to place information in its billing envelopes praising nuclear energy. 447 U.S. at 532. The National Resources Defense Council requested permission from the New York Public Service Commission (Commission) to enclose a rebuttal in the next billing. *Id.* The Commission resolved the problem by banning any information on topics of public controversy, although it continued to permit information concerning non-controversial issues. *Id.* at 532-33. The Court held this to be a regulation based on the controversial content of the speech and invalidated the Commission’s ruling. *Id.* at 535-44. For a further discussion of *Consolidated Edison*, see Note, *Billing Inserts: A Unique Forum for Free Speech—Consolidated Edison Company v. Public Service Commission*, 30 DE PAUL L. REV. 705 (1981).

Carey is based on facts similar to *Mosely*. In *Carey*, an Illinois statute banned picketing of residential dwellings, but it granted an exception for labor disputes if the dwelling housed a business. 447 U.S. at 457. The statute was found to be content-based because the legality of picketing depended solely on the message which the picketers wished to convey. *Id.* at 459-63.

65. See Farber, *supra* note 4, at 727-28 (*Mosley*’s content-neutrality principle “has not been followed with much consistency”); Stephan, *supra* note 57, at 205 (“[d]espite its repeated invocations of a near-absolute content neutrality rule, the Court has not followed its own precept”); Stone, *supra* note 4, at 240-41 (confusion over subject-matter restrictions has led to “inconsistency in [Court’s] analysis”); Note, *Content Regulation and the Dimensions of Free Expression*, 96 HARV. L. REV. 1854, 1855 (1983) (“Court has remained deeply divided over the issue of content discrimination, and has issued a number of badly fragmented and inconsistent decisions”).

66. For a list of decisions upholding content-based regulations, see *supra* note 56.

67. *Widmar v. Vincent*, 454 U.S. 263, 278 (1981) (Stevens, J., concurring) (in their educational mission, state universities can, must and do make decisions based on content); *Carey*, 447 U.S. at 483 (Rehnquist, J., dissenting) (“[c]ontent regulation, when closely related to a permissible state purpose, is clearly permitted”); *Mosely*, 408 U.S. at 102-03 (Burger, C.J., concurring) (*Mosely* should not be read to say government can never regulate content); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 787-90 (1976)

have purported to follow its reasoning still scrutinized governmental ends and means rather than automatically invalidating content-based regulations,⁶⁸ and practical and theoretical considerations counsel against strict application of the *Mosely* rule.⁶⁹ While *Mosely* remains theoretically viable, the Court has retreated from its proclamation that all regulation facially based on content is invalid.⁷⁰

2. *Emergence of Secondary Effects Analysis*

Renton was the first case in which a majority of the Court utilized the secondary effects theory. Justice O'Connor relied heavily on *Renton* to support her secondary effects analysis in *Boos*;⁷¹ *Renton*, in turn, had relied on the plurality opinion in *Young v. American Mini Theatres*⁷² and the motivation test which it embraced.⁷³

In *American Mini Theatres*, the city of Detroit had enacted an ordinance which restricted the location of adult movie houses.⁷⁴ Because the ordinance was based on the content of material shown in such movie houses, it was facially content-based.⁷⁵ The restrictions were justified on the ground that the adult theatres adversely impacted the surrounding area.⁷⁶

(Rehnquist, J., dissenting) (arguing against protection of commercial speech under first amendment).

68. See *supra* note 61; see also *Widmar*, 454 U.S. at 276 (when dealing with ordinance which regulates based on content, Court must examine it with "most exacting scrutiny"—rather than automatically invalidating such regulation). *Accord Consolidated Edison*, 447 U.S. at 536; *Carey*, 447 U.S. at 465.

69. For a discussion of the practical and theoretical difficulties with applying the *Mosely* test, see *infra* notes 131-41 and accompanying text.

70. For a discussion regarding the viability of *Mosely*, see *infra* note 132.

71. For a discussion of Justice O'Connor's use of the *Renton* secondary effects analysis in *Boos*, see *infra* notes 104-11 and accompanying text.

72. 427 U.S. 50 (1976); see *Renton*, 475 U.S. at 46.

73. At least in *Renton*, the essence of the Court's test was governmental motivation. Note, *Motivational Analysis in Light of Renton*, 87 COLUM. L. REV. 344, 348 (1987) ("Court made its determination of content neutrality contingent on a finding of permissible government motivation"). Assessing motivation involves determining whether the government's purpose in regulating was to suppress the content of certain speech.

74. 427 U.S. at 52. Under the ordinance, adult movie houses could not operate within 1000 feet of any two other regulated uses (regulated uses included other adult theatres, bars, pawnshops and pool halls). *Id.* Also, adult movie houses could not operate within 500 feet of a residential area. *Id.*

75. *Id.* at 53. The Court stated that "[t]he classification of a theater as 'adult' is expressly predicated on the character of the motion pictures which it exhibits." *Id.*

76. *Id.* at 54 n.6, 54-55. The regulations were amendments to a Detroit "Anti-Skid Row Ordinance." *Id.* at 54. Detroit was attempting to upgrade portions of the city, and it sought to do so through regulation of certain businesses, including adult movie theatres. The city had found, with the aid of urban planning and real estate experts, that "the location of several such businesses in the same neighborhood tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially

The *American Mini Theatres* plurality began its analysis by asserting that the ordinance would be found to be a valid time, place or manner regulation if the classification of the theatres based on the content of the movies they showed was valid.⁷⁷ The plurality rejected a pure *Moseley* analysis. Instead, it found, by referring to prior case law, that a regulation was not necessarily invalid because it was based on content.⁷⁸ The plurality then explored the meaning of content-neutrality. It held that "the essence [of the rule requiring content-neutrality] is the need for absolute neutrality by the government; its regulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator."⁷⁹ In dicta, the Court indicated that this reading of the neutrality requirement might also be appropriate for regulations involving political speech in a public forum.⁸⁰

Thus the Court adopted the motivation test,⁸¹ by which a content-based regulation could be interpreted as content-neutral. Under this test the government may regulate the time, place or manner of expres-

prostitution, and encourages residents and businesses to move elsewhere." *Id.* at 55.

77. *Id.* at 62-63. In other words, the Court initially found that absent the different treatment accorded adult theatres, the regulation was a proper time, place or manner regulation. The Court then determined whether such different treatment was also proper.

78. *Id.* at 65-66. Because the ordinance was content-based, the Court was forced to decide whether *Moseley* had properly laid down an absolute prohibition against content regulation. *Id.* at 53. In order to find the ordinance constitutional the Court had to find *Moseley* overstated. It did so. *Id.* at 65-66.

To support its finding, the Court noted several cases analyzing regulations based on content. *Id.* at 66-70. See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (commercial speech receives less protection than, for example, "political commentary"); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (upholding ordinance that prohibited political advertising but permitted commercial advertising on public transportation); *Ginsberg v. New York*, 390 U.S. 629 (1968) (upheld law which prohibited selling material to minors which would be obscene to minors but not to adults); see also *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (different standard of libel required if public official is subject of expression).

79. *American Mini Theatres*, 427 U.S. at 67.

80. The Court stated:

[T]he use of streets and parks for the free expression of news on national affairs may not be conditioned upon the sovereign's agreement with what a speaker may intend to say. . . . The sovereign's agreement or disagreement with the content of what a speaker has to say may not affect the regulation of the time, place, or manner of presenting the speech.

Id. at 63-64.

Although *American Mini Theatres* did not involve a public forum, by speaking of "streets and parks" the Court in dicta extended the use of the motivation test to such public forums. Moreover, while adult theatres generally do not disseminate political speech, by extending the motivation test to "views on national affairs" the Court may have implicated political speech.

81. The terms "motivation test" and "secondary effects test" are used interchangeably throughout this Note.

sion, and may single out expression based on content, so long as it does so neutrally. The government regulates neutrally when it regulates free of any sympathy or hostility for the speaker's point of view.⁸² Because Detroit regulated in response to the deterioration of areas surrounding adult movie houses, and without regard to the content of the movies shown in them, the regulation in *American Mini Theatres* was neutral and met the time, place or manner requirements.⁸³

Renton is similar to *American Mini Theatres* in that it upheld facially content-based restrictions on adult movie houses.⁸⁴ The *Renton* ordinance prohibited such movie houses near residential zones, churches, parks and schools.⁸⁵ The ordinance stated that it was designed to "protect and preserve the quality of . . . urban life,"⁸⁶ and the district court found this was indeed the "predominant concern[]" of the ordinance.⁸⁷

The Court stated that if a regulation is targeted at the secondary effects of speech, then even if it classifies and regulates based upon content, it is not content-based.⁸⁸ The Court stated that the "fundamental principle that underlies our concern about 'content-based' speech regu-

82. *American Mini Theatres*, 427 U.S. at 63-70. The concurrence similarly suggested that as long as a message does not depend on where or how it is presented for its impact, then the regulation of place, even if it singles out speech based on its content, is permissible because it "does not interfere with content." *Id.* at 78-79 (Powell, J., concurring).

The dissent, on the other hand, relied on *Mosely* in asserting that the ordinance was unconstitutional. *Id.* at 84-85 (Stewart, J., dissenting). The dissent argued that selective restrictions based on content are unconstitutional, and concluded that it could "only interpret [the Court's] decision as an aberration." *Id.* at 87 (Stewart, J., dissenting). It was not an aberration, however, for the Court used similar analysis in *Renton* and *Boos*.

83. *Id.* at 62-71. The Court deferred to the city's claim that the separation of adult theatres would serve the "serious" government concern of preserving neighborhood character. *Id.* at 71. The Court also noted that adult theatres had not been prohibited, simply dispersed, so that opportunity for speech remained open. *Id.* at 62. Therefore, the Court concluded that if the government could properly regulate theatres based on the content of films shown in them, the regulation would be a valid time, place or manner regulation. *Id.* at 63. The Court determined that because the government's singling out of adult movie theatres was not predicated on dislike for the content of movies shown in them, such classification was permissible. *Id.* at 63-70. As a result, the regulations were held to be valid.

84. *Renton*, 475 U.S. at 43, 44, 45.

85. *Id.* at 43.

86. *Id.* at 48. Although no adult theatres existed in *Renton* at the time the regulation was proposed, within a year of the regulation's enactment, two such theatres attempted to locate in the town. *Id.* at 44-45. The Court found that the town's interest in controlling these establishments was a substantial governmental interest. *Id.* at 50.

87. *Id.* at 47 (emphasis in Supreme Court's opinion). The Court held that as long as the predominate concern of the legislative body was properly motivated, the ordinance could be constitutional. *Id.* at 47-48.

88. *Id.* at 47-49.

lations" is that the government not be motivated by disagreement with the speaker.⁸⁹ The Renton ordinance was justified by reference to secondary effects⁹⁰ and was therefore effectively content-neutral. The Court stated that this analysis was "completely consistent with [its] definition of 'content-neutral' speech regulations as those that 'are justified without reference to the content of the regulated speech.'" ⁹¹ As a result, ordinances which strike at "undesirable secondary effects . . . are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations."⁹²

C. *The Case: Boos v. Barry*

In *Boos v. Barry*, the petitioner wished to display signs in front of the Soviet and Nicaraguan embassies which were critical of the governments of those two countries.⁹³ Such speech was political in nature, as it related to the conduct of governments. A District of Columbia statute

89. *Id.* at 48-49. The Court traced this reasoning back to *Mosely*, which stated in part that the "'government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.'" *Id.* at 48-49 (quoting *Mosely*, 408 U.S. at 96).

90. "The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protect[] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views." *Id.* at 48 (quoting App. to Juris. statement 90a).

One test for secondary effects regulation as found in *Renton* is as follows: [W]hether the harm that the state is seeking to avert is one that grows out of the fact that the defendant is communicating, and more particularly out of the way people can be expected to react to his message, or rather would arise even if the defendant's conduct had no communicative significance whatever.

Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1497 (1975).

91. *Renton*, 475 U.S. at 48 (emphasis added) (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976)). The dissenting opinion rejected this definition of neutrality. *Id.* at 55-56 (Brennan, J., dissenting). It reasoned that when speech was restricted on the basis of content, the regulation was content-based and should be invalidated under *Consolidated Edison v. Public Service Comm'n*, 447 U.S. 530 (1980), and *Mosely. Renton*, 475 U.S. at 56 (Brennan, J., dissenting).

92. *Renton*, 475 U.S. at 49. The Court found the Renton ordinance to be content-neutral. *Id.* at 48. The Court then applied the time, place or manner test. It found that the preservation of the "quality of urban life" was a substantial government interest, and that alternative avenues of communication remained, for 520 acres, or over five percent of the land in Renton, was unaffected by the ordinance. *Id.* at 50-54.

93. *Boos*, 108 S. Ct. at 1161. Father R. David Finzer and several other members of the Young Conservative Alliance of America wished to carry signs critical of the Soviet and Nicaraguan governments in front of their embassies. *Finzer v. Barry*, 798 F.2d 1450, 1453 (D.C. Cir. 1986), *aff'd in part, rev'd in part sub nom. Boos v. Barry*, 108 S. Ct. 1157 (1988). The signs in front of the Soviet embassy would read "RELEASE SAKHAROV" and "SOLIDARITY," and the sign in

prohibited petitioners from displaying their signs within five hundred feet of the targeted embassies. The statute barred the display of any sign within the proscribed area which might bring that foreign government into "public odium" or "public disrepute."⁹⁴

The district court granted the District of Columbia's motion for summary judgment.⁹⁵ The court of appeals affirmed.⁹⁶ The court of appeals ruled that because the statute was content-based it had to meet the compelling state interest test.⁹⁷ The court then found such a compelling interest. It held that the United States' obligations under international law and concern for American diplomats abroad were interests so compelling that they justified the interference with free speech.⁹⁸ In addition, the court found the statute to be narrowly drawn because it prohibited offensive demonstrations only within a very limited area.⁹⁹ The court also intimated that the statute might be recognized as content-neutral under the secondary effects test. The court observed that the statute was "justified by reference to content-neutral values—the need to adhere to principles of international law and to provide sufficient protection to foreign embassies," not by any desire to stifle the content of the speech.¹⁰⁰ Although the court eventually based its hold-

front of the Nicaraguan embassy would read "STOP THE KILLING." *Boos*, 108 S. Ct. at 1161.

94. *Boos*, 108 S. Ct. at 1160. For the text of this statute, see *supra* note 5. The statute also outlawed the congregation of three or more people within 500 feet of a foreign embassy. *Boos*, 108 S. Ct. at 1160. The Court found the congregation clause to be constitutional. For a discussion of the Court's treatment of the congregation clause, see *infra* note 116.

95. *Boos*, 108 S. Ct. at 1161.

96. *Finzer*, 798 F.2d at 1453.

97. *Id.* at 1468. In finding the compelling interest test proper, the court rejected petitioners' claim that *Mosely* placed an absolute ban on any content-based regulation. *Id.*

98. *Id.* at 1455-58, 1460-61. The court stated that under international law, "security for the persons and respect for the dignity and peace of foreign emissaries[] has been regarded as a fundamental and compelling national interest." *Id.* at 1458. The court found this interest in documents such as the 1961 Vienna Convention on Diplomatic Relations, which states that "[t]he receiving State is under a special duty to take all appropriate steps to protect the premises of the mission . . . and to prevent any disturbance of the peace of the mission or impairment of its dignity." *Id.* at 1457 (quoting the Vienna Convention on Diplomatic Relations, April 18, 1961, art. 22, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95) (emphasis added by the court).

The court of appeals found further support for a compelling interest in the "existence of a direct relationship between the perception held by other governments of the strength of security provided their diplomats here and the extent of protection they choose to provide ours." *Id.* at 1460.

For a further discussion of the compelling interests derived from international law concerns, see Recent Developments, 27 VA. J. INT'L L. 399, 412-28 (1987) (finding statute in *Boos* unconstitutional because dignity interest of foreign diplomats unconvincing).

99. *Finzer*, 798 F.2d at 1462-63.

100. *Id.* at 1469 n.15. The court thus alluded to the secondary effects anal-

ing on what it perceived to be the firmer ground of a compelling state interest,¹⁰¹ it had at least suggested that the statute might be content-neutral.

The Supreme Court reversed the decision below which had upheld the display clause.¹⁰² The Court also found the clause to be content-based regulation.¹⁰³ Significantly, however, Justice O'Connor's finding that the regulation was content-based did not rest on the conclusion that it was targeted solely at speech critical of foreign governments.¹⁰⁴ Rather, Justice O'Connor chose to apply the *Renton* secondary effects analysis.¹⁰⁵

Justice O'Connor stated that regulations which "are justified without reference to the content of the regulated speech" are content-neutral.¹⁰⁶ She then examined the government's motivation for restricting the politically critical speech. The inquiry under the secondary effects test was whether the government was concerned with stopping the substantive content of the speech or merely the secondary effects which would follow from such speech.¹⁰⁷ Justice O'Connor held that the justification for the *Boos* regulation did not fit within the meaning of "secondary effects" as defined in *Renton*.¹⁰⁸

Justice O'Connor stated that "[r]egulations that focus on the direct impact of speech on its audience . . . are not the type of 'secondary effects' [regulations] we referred to in *Renton*."¹⁰⁹ The District of Colum-

ysis used in *Renton* and *American Mini Theatres*. For a discussion of this analysis, see *supra* notes 71-92 and accompanying text.

101. *Finzer*, 798 F.2d at 1469 n.15. The court was not certain that the *Renton* test would apply to the statute before it, so it relied instead on its finding of a compelling state interest to affirm the regulation. *Id.*

102. *Boos*, 108 S. Ct. at 1162.

103. *Id.* at 1162-64.

104. This approach would have mirrored the *Mosely* approach, for as soon as the regulation focused on a particular type of speech, it would have been found to be content-based. See *Police Dept. v. Mosely*, 408 U.S. 92, 96 (1972). Under *Mosely*, such content-based regulations are supposedly per se invalid.

105. *Boos*, 108 S. Ct. at 1163-64. Significantly, there was no need to use the *Renton* analysis to find the regulation content-based if Justice O'Connor had desired to invoke the per se approach of *Mosely*. See *id.* at 1173 (Brennan, J., concurring).

106. *Id.* at 1163 (emphasis in original) (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976)). Justice O'Connor further stated that "[s]o long as the justifications for regulation have nothing to do with content . . . we conclude[] that the regulation [is] properly analyzed as content-neutral." *Id.*

107. *Id.* at 1163-64.

108. *Id.* at 1163.

109. *Id.* For example, if instead of targeting the increased crime, loss of property values and deterioration of the residential character of neighborhoods associated with adult movie theatres, *Renton* had focused on the psychological effect of adult films on those who watched them, that regulation would have been content-based. *Id.* For a discussion of *Renton*, see *supra* notes 84-92 and accompanying text.

bia defended the display clause solely on the need to protect the dignity of foreign officials by screening them from speech critical of their governments.¹¹⁰ Therefore, the clause was aimed at the “direct impact” of the speech. As a result, it was “justified *only* by reference to the content of speech,” and was therefore content-based.¹¹¹

Because the regulation was content-based, Justice O'Connor applied the compelling state interest test.¹¹² Although the Court acquiesced in assuming, though not deciding, that the protection of foreign diplomats was a compelling interest, it found the regulation was “not narrowly tailored to serve that interest.”¹¹³ It found that a similar federal statute with identical goals, which applied everywhere outside the District of Columbia, effectively employed less restrictive means to protect foreign diplomats.¹¹⁴

In addition, after the court of appeals had handed down its decision the District of Columbia repealed the statute in *Boos*, contingent upon the extension of the less restrictive federal statute to the District.¹¹⁵ Therefore, because the display clause was content-based regulation which was not narrowly tailored to meet the government's putative interest, the Court invalidated the clause.¹¹⁶

Justice Brennan wrote separately to express his concern with the *Renton* motivation test.¹¹⁷ Justice Brennan was concerned not only that a content-based restriction might be held to be content-neutral, but also

110. *Boos*, 108 S. Ct. 1164.

111. *Id.* (emphasis in original).

112. For the elements of the compelling state interest test, see *supra* note 13 and accompanying text.

113. *Boos*, 108 S. Ct. at 1165.

114. *Id.* at 1165-67. The more narrow statute prohibited willful attempts to intimidate or harass foreign officials. However, it did not necessarily ban picketing or the display of signs, nor was it directed specifically at the content of speech. *Id.* at 1166.

115. *Id.* at 1167-68. It appeared to the Court that because the government now considered the more narrow regulation adequate to protect foreign diplomats, the claim that the display clause was narrowly tailored was untenable. *Id.* at 1168.

116. *Id.* at 1162. The Court, however, affirmed the constitutionality of the congregation clause as construed by the court of appeals. *Id.* at 1168-69. The Court upheld the court of appeals' narrowing construction which limited the congregation clause's reach to those demonstrations directed specifically at an embassy and posing a physical security threat to it. *Id.* Moreover, the Court found that the statute as a whole did not present an equal protection problem, even though it provided an exception for labor picketing. *Id.* at 1170. Because the Court had already invalidated the display clause, it posed no further constitutional problem to the rest of the statute. The congregation clause as narrowed protected only peaceful labor picketing. *Id.* The Court thought it unreasonable to suggest that the labor exception could protect violent labor picketing. *Id.*

117. *Id.* at 1171-73 (Brennan, J., concurring). While Justice Brennan agreed that the display clause should be invalidated, he objected to Justice O'Connor's reasoning.

that the *Renton* test might be held to apply even to political speech.¹¹⁸

Justice Brennan stated that a practical flaw in applying the *Renton* test was the difficulty of determining legislative motive.¹¹⁹ His primary concern, however, was the government's apparent ability under the motivation test to censor political speech whenever it could "concoct 'secondary' rationalizations for regulating the content of [such] speech."¹²⁰ Although the statute in *Boos* was found to be content-based because it was justified by a dignity concern, Justice Brennan asserted that in the future, the government was not likely "to be so bold or so forthright" as to assert a similar content-based interest.¹²¹ Rather, he asserted, the government could be expected to provide some secondary effects rationalization for its speech restriction.¹²² Justice Brennan stated that the secondary effects test therefore "offer[s] countless excuses for content-based suppression of political speech."¹²³ At bottom the most troublesome point for Justice Brennan was that he found it difficult to believe that a regulation content-based on its face was not also content-based at heart.¹²⁴

What made the *Boos* regulation all the more worrisome to Justice Brennan was that it applied to political speech. Even if the Court could determine that a legislature was motivated by a concern with secondary effects, Justice Brennan asserted that a facially content-based regulation was still problematic. He claimed that such regulation would subvert the right of speakers to unfettered speech and the right of listeners to undistorted debate.¹²⁵ He stated that "[t]hese rights are all the more precious when the speech subject to unequal treatment is political speech and the debate being distorted is political debate."¹²⁶ Justice

118. *Id.* at 1171 (Brennan, J., concurring). Justice Brennan lamented "[u]ntil today, the *Renton* analysis, however unwise, had at least never been applied to political speech." *Id.* at 1172 (Brennan, J., concurring).

119. *Id.* (Brennan, J., concurring). Justice Brennan agreed that an examination of legislative motive is sometimes useful. *Id.* (Brennan, J., concurring). However, he concluded that it is a safer policy, where the government may be "attempt[ing] to squelch opposition," to require absolute neutrality. *Id.* (Brennan, J., concurring).

120. *Id.* at 1171 (Brennan, J., concurring).

121. *Id.* (Brennan, J., concurring).

122. *Id.* (Brennan, J., concurring). *Accord* Ely, *supra* note 90, at 1496 ("[r]estrictions on free speech are rarely defended on the ground that the state simply didn't like what the defendant was saying; reference will generally be made to some danger beyond the message, such as a danger of riot, unlawful action or violent overthrow of the government"). Indeed, Justice O'Connor's opinion appeared to allow such action by the government. *Boos*, 108 S. Ct. at 1164 (noting that government did "not point to congestion, . . . visual clutter, or . . . security" to justify restriction).

123. *Boos*, 108 S. Ct. at 1171 (Brennan, J., concurring).

124. *See id.* at 1172 (Brennan, J., concurring).

125. *Id.* (Brennan, J., concurring).

126. *Id.* (Brennan, J., concurring). Even though a regulation may restrict some speech, that regulation is not necessarily invalid. For a list of several cases

Brennan noted that the use of the motivation test was dictum. Nonetheless, he concluded that it was "ominous dictum,"¹²⁷ for it supported the proposition that even a politically content-based regulation might be accepted as content-neutral.¹²⁸

III. ANALYSIS

In order to achieve valid regulation of political speech, this Note submits that a synthesis of the time, place or manner analysis¹²⁹ and the motivation test¹³⁰ is necessary. The ability to achieve such regulation rests upon the validity of applying the motivation test to political speech, and subsequently upon the advisability of utilizing motivation to test political speech restraints.

A. *Validity of Motivational Analysis for Political Speech*

1. *Mosely Concerns*

Although strict adherence to *Mosely* would negate an attempt to facially regulate political speech,¹³¹ the Court has not felt constrained to follow the literal command of *Mosely*.¹³² In addition, as the Court stated in *American Mini Theatres*, "broad statements of principle," such as *Mosely*'s flat prohibition against any facially content-based regulation,

and commentaries which support this claim, see *infra* note 173. For a discussion of whether the Court will countenance restrictions on political speech through content-based regulations, see *infra* notes 150-69 and accompanying text.

127. *Boos*, 108 S. Ct. at 1173 (Brennan, J., concurring). Justice Brennan claimed that the motivation test analysis was dictum because the statute could have been found to be invalid under either *Renton* or the traditional *Mosely* content-based analysis. *Id.*

128. *Id.* Chief Justice Rehnquist, joined by Justices White and Blackmun, dissented regarding the display clause. *Id.* (Rehnquist, C.J., dissenting in part). He found that the statute passed the compelling interest test for the reasons stated by the court of appeals. *Id.* (Rehnquist, C.J., dissenting in part). However, he agreed with the Court that the congregation clause was constitutional and that the exception for labor picketing did not violate the equal protection clause. *Id.* (Rehnquist, C.J., dissenting in part) For a discussion of the court of appeals' holding regarding the display clause, see *supra* notes 97-99 and accompanying text.

129. For a discussion of the time, place or manner analysis, see *supra* notes 27-51 and accompanying text.

130. For a discussion of the development of the motivation test, see *supra* notes 74-92 and accompanying text. For a discussion of Justice O'Connor's use of the motivation test in *Boos*, see *supra* notes 104-11 and accompanying text, and *infra* notes 160-62 and accompanying text.

131. In *Mosely*, the Court purported to ban all regulation which had a basis in content. *Mosely*, 408 U.S. at 95-98. For a further discussion of the *Mosely* holding and its ramifications, see *supra* notes 57-64 and accompanying text.

132. For lists of cases and commentaries which do not adhere to *Mosely*, see *supra* notes 56, 65 & 78. For a discussion of reasons behind this lack of adherence, namely the impracticality of *Mosely*, see *infra* notes 134-41 and accompanying text.

are subject to qualification before they reach their logical extreme.¹³³ Taken to its logical extreme, *Mosely* is simply impractical. The mere physical act of speech is not necessarily protected.¹³⁴ Therefore, the content of the speech must be examined to determine if it deserves first amendment protection.¹³⁵

Moreover, commentators have suggested that a hierarchy of values exists within first amendment jurisprudence.¹³⁶ This hierarchy affords

133. *American Mini Theatres*, 427 U.S. at 65 (Court "learned long ago that broad statements of principle, no matter how correct in the context in which they are made, are sometimes qualified by contrary decisions before the absolute limit of the stated principle is reached"). The Court then found Supreme Court decisions contrary to *Mosely*. *Id.* at 66-70. For a discussion of the Court's findings, see *supra* note 78.

134. Stephan, *supra* note 57, at 211 ("Such a claim [would] extend[] defense of individual autonomy to the point of total solipsism and seems preposterous on its face.").

135. *Id.* at 211-12. Professor Stephan uses the example of defamation to illustrate this point. In such lawsuits the Court must look at the content of the expression, for speech relating to facts is actionable, while speech relating to ideas is not. *Id.* at 212-13 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)). The difficulty with *Mosely* is that to determine if expression is "communicative" and therefore protected under the first amendment, one must examine the content of the expression, but *Mosely* forbids such an examination. See Note, *supra* note 65, at 1859.

136. Stephan, *supra* note 57, at 206. "The approach reflected in the Court's free speech opinions, and in almost every scholarly discussion of the first amendment, posits some hierarchy of values entitled to constitutional protection." *Id.* The hierarchy "implies a similar ranking of particular categories of expression, according to the degree the expression implicates the underlying values" of the first amendment. *Id.*

A myriad of values has been claimed for the first amendment. Some commentators suggest that protection of political speech is the sole value served by the amendment. BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). Others suggest that the first amendment was meant to promote the goals of individual self-fulfillment, attainment of truth and ability to participate in decision-making. T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 3-13 (1966); Karst, *supra* note 4, at 23-26. Professor Emerson adds that the first amendment was also designed to facilitate stable change. T. EMERSON, *supra*, at 13-15.

Another commentator suggests that free speech promotes what is known as the checking value of the first amendment. Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521. Professor Blasi claims that, in the recent past, "the First Amendment has had at least as much impact on American life by facilitating a process by which countervailing forces check the misuse of official power as by protecting the dignity of the individual, . . . promoting the quest for . . . philosophic truth, or fostering a regime of 'self-government.'" *Id.* at 527. Professor Blasi cites as examples the effect of the peace protests on de-escalating the Vietnam War, and the role of the free press in uncovering the Watergate scandal. *Id.*

Another suggestion is that the "constitutional guarantee of free speech ultimately serves only one true value, . . . 'individual self-realization.'" Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982). Professor Redish defines this term so broadly as to almost preclude the possibility of necessarily finding a particular type of speech unprotected by the first amendment. *Id.* He views the

different types of speech different levels of protection. The hierarchical value of a particular type of speech depends upon the degree to which that expression implicates first amendment values.¹³⁷ A conceivable hierarchy is, in descending order, political speech, intellectual speech and commercial speech.¹³⁸

Intuitively, if a court could not operate invoking such a hierarchy, a more restrictive free speech environment would develop.¹³⁹ Highly valued speech would receive protection, but speech perceived to be low in value would simply receive no protection at all. Alternatively, if the low value speech were protected, without hierarchy that low value speech would command the same protection as that granted highly valued speech. In such a situation, courts might well diminish protection of highly valued speech to avoid having to extend excessive protection to speech having little first amendment value. Hierarchy offers a more flexible mode of analysis. It permits protection of a broad range of speech along a continuum, rather than requiring an all or nothing approach. Though there have been arguments against such a hierarchy,¹⁴⁰ it is

host of first amendment values propounded by other commentators as subsets of the broad self-realization value. *Id.* at 594.

Professor Redish discerns self-realization as the greatest value of the first amendment because "moral norms inherent in the choice of our specific form of democracy logically imply the broader value, self-realization." *Id.* He reasons that "our nation's adoption of a democratic system reveals an implicit belief in the worth of the individual." *Id.* at 601. Therefore, contends Professor Redish, speech is protected not only to serve the political process, but to advance the self-realization principle inherent in our democratic structure.

137. Stephan, *supra* note 57, at 210-12. Thus "the independent variable is the content of the speech, and the dependent variable is the degree of constitutional protection." *Id.* at 212.

Akin to a hierarchy is "low value" speech. Stone, *supra* note 4, at 194-95. Low value speech does little to further the purposes of the first amendment. *Id.* at 194. Examples include express incitement, false statements of fact, obscenity, commercial speech, fighting words and child pornography. *Id.* at 194-95. Such speech receives little protection. *Id.* at 195. *But see* Kalven, *The New York Times Case: A Note on "the Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 217-18 ("[n]o category of speech is any longer beneath the protection of the First Amendment"). Although Professor Stone contends that low value speech is not inconsistent with *Mosely*, it does appear at odds with *Mosely's* total blindness to content. Stone, *supra* note 4, at 196 n.27.

138. *See* Stephan, *supra* note 57, at 232. This is not to say that the hierarchy is static, for as societal values change, the hierarchy may change with them. Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 522-23 (1979). Because Professor Scanlon's hierarchy depends upon a societal consensus on the relative values of different concerns, when this consensus shifts, the hierarchy also shifts. *Id.* at 522. For example, Professor Scanlon asserts that as there has been a movement toward viewing religious interests on the same level as other interests, religious concerns have slipped from the pre-eminent position they had traditionally held. *Id.* at 523.

139. Stephan, *supra* note 57, at 213-14. *Cf. infra* notes 213-14 and accompanying text (use of hierarchy avoids need to overregulate in attempt to assure regulation affects all speech equally).

140. *American Mini Theatres*, 427 U.S. at 73 n.1 (Powell, J., concurring); *id.* at

submitted that the hierarchical scheme is rather firmly entrenched.¹⁴¹ A hierarchical analysis necessarily promotes regulation based on content, for it determines the degree of protection speech should receive by inquiring into the content of the speech.

Even beyond the somewhat theoretical claim that a hierarchy exists, the Court has in fact upheld facially content-based regulations.¹⁴² Along with the practical difficulties of *Mosely*, these decisions support the claim that the *Mosely* rule, standing alone, is insufficient to invalidate a facially politically content-based regulation.

2. Motivational Analysis Generally

There is no direct precedent for analyzing a facially politically content-based regulation under the motivation test. Under this test, a law is improperly motivated if it is directed at restricting speech *qua* speech, rather than at secondary effects and only incidentally affecting expression.¹⁴³ Improper government motivation is clearly undesirable.¹⁴⁴

86 (Stewart, J., dissenting) (employment of hierarchy leads to protection of only those values favored by majority); Redish, *supra* note 136, at 594-95, 625-40 (any claim that type of speech is per se deserving of less protection violates self-realization principle that one may attain self-realization on unique individual basis); *Leading Cases*, *supra* note 15, at 199 (permitting differing protection of speech based on differing values attached to that speech "eviscerates the first amendment by allowing only for protection of speech approved by a majority of the citizenry"); Comment, *When Speech Is Not Speech: A Perspective on Categorization in First Amendment Adjudication*, 19 WAKE FOREST L. REV. 33, 33-37 (1983) (right of free speech was viewed by framers as natural right, independent of social utility; speech thus should not be categorized according to such utility).

141. *American Mini Theatres*, 427 U.S. at 70-71 (plurality opinion of Stevens, J.) ("it is manifest that society's interest in protecting [erotic material] is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate. . . . [F]ew of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities'"); T. EMERSON, *supra* note 136, at 3-15 (most important speech is that which advances self-fulfillment, attainment of truth, self-governance and stable change); Stephan, *supra* note 57, at 206 ("No sensible approach to first amendment questions can dispense with such a hierarchy."); Note, *supra* note 65, at 1862 (speech which "promote[s] the realization of 'man's spiritual nature'" should receive greatest protection).

142. For a discussion of decisions upholding facially content-based regulations, see *supra* notes 56, 78 & 135.

143. For a discussion of the development of the motivation rule, see *supra* notes 74-92 and accompanying text. On the other hand, a law is not improperly motivated simply because a legislator may attach some "secret aspiration" to it. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 820 (2d ed. 1988). Professor Tribe gives as an example a legislator hoping that a tax cut for which he voted will result in greater contributions to his political party. *Id.* Moreover, a law is not improperly motivated simply because a legislator believes its passage will benefit him personally. *Id.* Rather, the determination that a law is improperly motivated should be based upon its societal impact. *Id.*

144. Improper motivation occurs where the government desires to restrict speech due to its content. According to Professor Stone, this desire is objectionable for three principal reasons. Stone, *Restrictions of Speech Because of its Content:*

However, there are those who doubt the efficacy of basing first amendment analysis on scrutiny of the government's motives.¹⁴⁵

Despite such doubt, the Court has shown confidence in its ability to apply such a test, and has been willing to do so.¹⁴⁶ Indeed, in several recent cases the Court has found an investigation into government motivation to be dispositive of the neutrality issue.¹⁴⁷ Commentators also support, albeit under some objection, employment of a motivation test.¹⁴⁸ It is submitted that it is proper to utilize the government moti-

The Peculiar Case of Subject-Matter Restrictions, 46 U. CHI. L. REV. 80, 103-04 (1978). First, free expression aids the search for truth. Individuals are more likely to discover this truth if allowed to view all ideas for themselves and decide what is correct, rather than have the government decide for them. *Id.* Second, free speech plays an important role in self-governance. An informed populace is indispensable to that self-governance. *Id.* at 104. Finally, free expression enhances the personal growth of the individual. Any attempt by the government to control that expression necessarily stunts that growth. *Id.*

Some believe courts should be more active in policing improper legislative motivation. See Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95. Professor Brest argues that government is constitutionally prohibited from attaining certain discriminatory objectives. *Id.* at 116. Yet, to the extent that a decision maker is improperly motivated, he or she aims to achieve that illicit objective. The more a legislator is improperly motivated, the greater the chance that he or she will enact a discriminatory law. *Id.* Generally, an individual adversely affected by a legislative decision cannot challenge the decision if it was the result of a "fair" decision-making process. However, where the decision would not have been reached but for the improper motivation, the individual has legitimate grounds for grievance. *Id.* If a court finds that a legislator considered an improper objective, the court should presume that the improper objective was embodied in the law. *Id.* at 117. In the absence of strong evidence rebutting this presumption, Professor Brest states that the court should then invalidate the legislation. *Id.*

145. *Boos*, 108 S. Ct. at 1171-73 (Brennan, J., concurring); *Renton*, 475 U.S. at 57-62 (Brennan, J., dissenting); Redish, *supra* note 14, at 132 (court will have difficult time determining true government motivation, and emphasis on motivation simply informs government that it must provide paper trail of proper motivation).

146. As Justice O'Connor stated, "our courts are capable of distinguishing a sham . . . purpose from a sincere one." *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring). The Court has held that "[r]egulation and suppression are not the same . . . and courts of justice can tell the difference." *Poulos v. New Hampshire*, 345 U.S. 395, 408 (1953). Moreover, the fact that the Court has adhered to a motivational test implies that it believes it can properly administer it.

147. See *Boos*, 108 S. Ct. 1157; *Renton*, 475 U.S. 41; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *American Mini Theatres*, 427 U.S. 50; see also Stone, *supra* note 4, at 227 (Court "has tended increasingly to emphasize motivation as a paramount constitutional concern").

148. See L. TRIBE, *supra* note 143, at 821. Professor Tribe recognized three major objections to scrutinizing legislative motive: (1) a law may be proper even if it is the result of improper motivation; (2) it is a waste of time to invalidate a law which will simply be reenacted sporting a paper trail of purer justifications; and (3) it is simply too difficult to determine the motivation of a legislative body. *Id.*

vation test, thereby permitting a facially content-based regulation to be analyzed as content-neutral. Use of this test in turn permits the content-based regulation to be evaluated as a time, place or manner regulation.¹⁴⁹ Still, it is unclear whether the motivation test, and thereby the time, place or manner test, are applicable to ordinances facially regulating political speech.

3. *Precedent*

The *Boos* Court's use of the motivation test seems to present the potential for greater governmental regulation of political speech. However, the Court did not uphold such regulation in that case.¹⁵⁰ If one

Professor Tribe found the first objection to be untenable because a court will in fact look at the process of enactment and will uphold a law only if that process is proper. *Id.* at 821-22.

He countered the second objection by asserting that the mere possibility of reenactment does not mean that the initial invalidation is useless. First, a court should not uphold an improper law simply to save time. Such an action is inherently wrong, and would have a demoralizing effect on the faith of the citizenry in the judiciary. *Id.* at 822-23. Second, "so undisciplined and disparate an institution as a legislative body" will not necessarily be able to hide an illegitimate motive from the courts. *Id.* at 822.

Finally, while agreeing that discerning legislative purpose may be a difficult task, Professor Tribe states that it could be simplified. He suggests a standard to invalidate a law that would require showing that "the legislature was motivated in substantial part by an illicit purpose." *Id.* at 823 (emphasis in original). Thus, the court need inquire into legislative motive no more so than it does when construing a statute. *Id.*

Professor Brest finds an additional argument against motivation analysis to be the impropriety of a court investigating the motives of legislators and executive officials. "A finding of illicit motivation often is tantamount to an accusation that the decisionmaker violated his constitutional oath of office. . . . [A] judicial determination of illicit motivation carries an element of insult; it is an attack on the decisionmaker's honesty." Brest, *supra* note 144, at 129-30. At the same time, however, Professor Brest defends motivation analysis by noting that "legislators sometimes do act out of illicit motivations." *Id.* at 130. Therefore, Professor Brest advocates investigation into legislative and administrative motive to protect both the person adversely affected by an improperly motivated law and the integrity of the system itself. *Id.*

The motivation test has been found to be preferable to the traditional approach of deciding whether a regulation is content-neutral or content-based on its face. The traditional approach does not deal adequately with regulations which are based on content, but those which regulate only the time, place or manner of speech. Note, *supra* note 73, at 351-55. Nonetheless, some assert that by making the Court's primary focus neutrality, regulations may be validated regardless of their disastrous effects on free speech or the insignificance of asserted government interests. Gottlieb, *The Speech Clause and the Limits of Neutrality*, 51 ALB. L. REV. 19, 34-36 (1986). It is submitted that these fears can be alleviated by applying the other elements of the time, place or manner test. For a discussion of these elements, see *supra* note 3 and accompanying text.

149. For the factors considered in evaluating a time, place, or manner regulation, see *supra* note 3 and accompanying text.

150. The Court struck down the regulation of political speech after it found the regulation to be content-based. *Boos*, 108 S. Ct. at 1164-68.

accepts the idea of a hierarchy of free speech values, political speech is at or near the top of that hierarchy.¹⁵¹ Yet it is unclear whether this preeminent position excludes political speech from the motivation test.¹⁵² No court has yet used the *Renton* secondary effects test to uphold a facially content-based regulation of political speech.¹⁵³ Nonetheless, there are hints that political speech may eventually be subject to facially content-based regulations.

Prior to *Boos*, the Court had never applied the secondary effects analysis to political speech. Moreover, there was strong evidence that the Court would reject the *Renton* analysis in that context.¹⁵⁴ Authority for this proposition came directly from the two cases which developed the secondary effects analysis. In *American Mini Theatres* the Court stated that "it is manifest that society's interest in protecting [erotic and sexually-oriented material] is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate."¹⁵⁵ In *Renton* the Court echoed *American Mini Theatres*, limiting its holding to "businesses that purvey sexually explicit materials,"¹⁵⁶ and noting increased concern for "untrammelled political debate."¹⁵⁷

These statements are dicta, for neither *American Mini Theatres* nor *Renton* involved political speech. However, the fact that the Court took special care to exempt political speech from its newly-developed analysis

151. *Carey v. Brown*, 447 U.S. 455, 466-67 (1980) (expression of views on public issues "has always rested on the highest rung of the hierarchy of First Amendment values"); BeVier, *supra* note 136, at 300-22 ("[first] amendment in principle protects only political speech"); Bloustein, *The Origin, Validity, and Interrelationships of the Political Values Served By Freedom of Expression*, 33 RUTGERS L. REV. 372, 381 (1981) (Declaration of Independence states that governments "[derive] their just powers from the consent of the governed" and populace cannot consent to being governed without being informed about the government); Bork, *supra* note 136, at 20-26 ("constitutional protection should be accorded only to speech that is explicitly political"); Gottlieb, *supra* note 148, at 32 ("political speech ranks as the most sacrosanct of speech protected under the first amendment"); Kalven, *supra* note 137, at 204-10 (protection of political speech is "at the center" of the first amendment, for without that protection democracy could not operate); Stephan, *supra* note 57, at 207-09 ("the leading theme in the Supreme Court's cases is the primacy of political speech").

152. One rationale which militates against restricting speech is that freedom of speech promotes political stability by permitting disaffected groups to "let off steam." See T. EMERSON, *supra* note 136, at 13. Accord Bloustein, *supra* note 151, at 377-78.

153. In fact, the Court developed the secondary effects test in the context of sexual speech. In those cases the low hierarchical value of the speech was one factor in applying the test. For a discussion of the Court's treatment of this issue, see *infra* notes 155-57 and accompanying text.

154. *Boos*, 108 S. Ct. at 1172 (Brennan, J., concurring). Justice Brennan noted that the *Renton* analysis had not formerly been applied to political speech, but instead had been limited to situations involving sexual speech. *Id.* (Brennan, J., concurring).

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

156. *Renton*, 475 U.S. at 49.

157. *Id.* at 49 n.2.

underscores its desire to protect such speech. The heightened respect accorded political speech kept it beyond the reach of the secondary effects test.

Nonetheless, there are recent cases in which, although the regulation itself did not uniquely target political speech, the Court utilized the motivation test where the practical effect of the regulation was to limit such speech.¹⁵⁸ Although these cases may presage an eventual endorsement of politically content-based regulation, the dicta in *American Mini Theatres* and *Renton* at least suggests that such regulation is improper.¹⁵⁹ Still, a reexamination of *Boos* may indicate a shift toward acceptance of politically content-based regulation.

Precedent supports the invalidation of the display clause, because the clause regulated speech due to its content.¹⁶⁰ Yet, Justice O'Connor

158. In *Frisby v. Schultz*, 108 S. Ct. 2495 (1988), the Court upheld an ordinance which banned picketing of private residences. The government claimed that the purpose of the ordinance was to protect the occupants of the house from the mental pain and anguish which would accompany such picketing. *Id.* at 2498. The Court found the ordinance to be content-neutral. *Id.* at 2500-01. However, it is submitted that it was content-based to the extent that it prohibited only those demonstrations which cast the occupants of the house in a negative light. In fact, the ordinance was aimed at the "emotional distress and disturbance" caused by picketing, and its stated purpose was to permit homeowners to "enjoy in their homes and dwellings a feeling of well-being, tranquility and privacy." *Id.* at 2498 (quoting App. to Juris. Statement A-26). *But see id.* at 2508-10 (Stevens, J., dissenting) (though ordinance will likely not be applied to friendly or harmless picketing, such picketing falls within statute's sweep). For example, a crowd of supporters outside a home would not cause the same mental suffering at which the ordinance was directed. Moreover, even though the ordinance was not directed at any particular type of speech, it produced a political effect in *Frisby* because it stifled the speech of anti-abortion protesters. *Id.* at 2498. In upholding the ordinance, the Court placed great stress on the important governmental interest in protecting the home. *Id.* at 2502-04. For a discussion of the substantial governmental interest in residential privacy, see Arnolds and Seng, *Picketing and Privacy: Can I Patrol on the Street Where You Live?*, 1982 S. ILL. U.L.J. 463, 474-79.

Both *City Council v. Taxpayers for Vincent* and *Clark v. Community for Creative Non-Violence* also involved use of the motivation test to uphold ordinances which had the effect of regulating political speech. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295 (1984); *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). However, both ordinances applied equally to all speech, and therefore neither was politically facially content-based. *Community for Creative Non-Violence*, 468 U.S. at 290-91 (regulations prohibited any camping, not just camping which carried political message); *Taxpayers for Vincent*, 466 U.S. at 794 ("both political and nonpolitical signs . . . [were] removed 'without regard to their content'").

159. At least prior to *Boos* the Court had never extended the *Renton* analysis to facially politically content-based regulation. For a discussion of this possible limitation on *Renton*, see *supra* notes 155-57 and accompanying text.

160. The Court has consistently held that a regulation may not restrict speech simply because the government dislikes the content of that speech. *See, e.g., Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (Court struck down ordinance designed to protect unwitting viewers by prohibiting drive-in theatres from showing films containing nudity); *Brandenburg v. Ohio*, 395 U.S. 444

noted that there was no attempt to vindicate the regulation by pointing to "congestion, to interference with ingress or egress, to visual clutter, or to the need to protect the security of embassies."¹⁶¹ The implication of Justice O'Connor's statement and her motivation test approach is that the Court may find regulation of political speech content-neutral as long as such regulation is motivated by recognized secondary effects concerns.¹⁶²

4. *The Effect of Boos*

The use of the motivation test in a political speech setting, albeit by only a plurality of the Court, suggests movement toward more regular use of that test for facially politically content-based regulations. This implication is perhaps the most significant aspect of *Boos*. Moreover, Justice Stevens, who wrote the opinion in *American Mini Theatres* which cautioned against application of the motivation test to political speech,¹⁶³ joined Justice O'Connor in applying that very test to the political speech in *Boos*.¹⁶⁴ As a consequence, the sentiment against using the motivation test to evaluate political speech regulations may be diminishing.

Chief Justice Rehnquist and Justice White, both of whom joined in *American Mini Theatres* and *Renton* in suggesting that secondary effects analysis was inappropriate for political speech regulation,¹⁶⁵ declined to join Justice O'Connor's opinion extending secondary effects analysis to political speech. Both Justices instead failed to reach the secondary effects question because they agreed with the court of appeals that the statute satisfied the compelling state interest test.¹⁶⁶ Significantly, however, neither joined Justice Brennan's concurrence which condemned such an extension of the motivation test.¹⁶⁷ Chief Justice Rehnquist's

(1969) (Court struck down statute which made it crime to advocate use of violence); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (Court struck down state tax designed to punish newspapers which had opposed state's governor).

161. *Boos*, 108 S. Ct. at 1164. These justifications are secondary effects concerns, for the need for regulation is a product of the speech regulated, but is not aimed at the speech itself. *See id.* at 1163; *Renton*, 475 U.S. at 48-49.

162. Justice O'Connor did apply the secondary effects test to the political speech in *Boos*. 108 S. Ct. at 1163-64. The Court found the regulation to be content-based because it was leveled at the direct impact of the speech. *Id.* at 1164.

163. *American Mini Theatres*, 427 U.S. at 52, 70.

164. *Boos*, 108 S. Ct. at 1160.

165. *Renton*, 475 U.S. at 42; *American Mini Theatres*, 427 U.S. at 52. In fact, Chief Justice Rehnquist wrote the majority opinion in *Renton*. 475 U.S. at 43.

166. *Boos*, 108 S. Ct. at 1173 (Rehnquist, C.J., dissenting in part). Justice Blackmun joined in this opinion as well. Justice Blackmun concurred in the result in *Renton* without indicating his position on the secondary effects test. *Renton*, 475 U.S. at 55. He dissented in *American Mini Theatres*. 427 U.S. at 84, 88.

167. *Boos*, 108 S. Ct. at 1173 (Brennan, J., concurring). Justice Brennan

opinion was simply silent on the applicability of the secondary effects test.

In sum, the Court has not yet used the secondary effects test to hold that a politically content-based regulation is content-neutral. Nonetheless, it is submitted that the groundwork has been laid for such a holding. In *Boos*, Justices O'Connor, Stevens and Scalia accepted the motivation test in a political speech context.¹⁶⁸ Chief Justice Rehnquist and Justice White have previously expressed approval of the secondary effects test.¹⁶⁹ Their opinion in *Boos* leaves unresolved their position on the political speech question. In the future, they may be willing to apply *Renton* to such speech. Finally, it is unknown what stance Justice Kennedy, who took no part in *Boos*, will take on this issue. Therefore, at least six Justices have or conceivably could embrace the *Renton* analysis for political speech. Given the possibility of an extension of *Renton*, it is important to consider whether such an extension is advisable.

B. *The Desirability of Motivational Analysis for Political Speech*

1. *The "Hard Look" Motivation Test*

While free speech can be expected to cause a degree of unrest,¹⁷⁰ individuals need not be permitted to engage in utterly unrestrained speech.¹⁷¹ The Court has recognized and accepted the need for governmental regulation.¹⁷² The Court has also accepted the fact that such regulation may incidentally restrict free speech.¹⁷³ Thus, it is submitted that objections to the use of the motivation test to analyze regulation of political speech cannot properly be based on a desire to leave such speech untouched.¹⁷⁴

disagreed with the reasoning of the Court, but still concurred in its judgment concerning the display clause. *Id.* at 1171-73.

168. *Id.* at 1160, 1163-64 (plurality opinion).

169. *Renton*, 475 U.S. at 42; *American Mini Theatres*, 427 U.S. at 52, 62-63.

170. *Cox v. Louisiana*, 379 U.S. 536, 551-52 (1965) ("a 'function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'") (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949)).

171. Indeed, to so hold would be to permit chaos. For a discussion of the ability of government to rightfully limit speech, see *supra* notes 34-36 and accompanying text.

172. For a discussion of time, place or manner regulation, see *supra* notes 27-51 and accompanying text.

173. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984) ("reasonable time, place, or manner regulations normally have the purpose and direct effect of limiting expression but are nevertheless valid"). *Accord City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808 (1984). See Redish, *supra* note 14, at 128-30 (admitting that content-neutral restrictions serve to limit free speech, yet have been upheld by Court).

174. It may be, however, that the Court failed to extend the motivation analysis to political speech because it did not want to restrict such speech. For a

It has been suggested, instead, that the concern with protecting political speech over other categories of speech is due not so much to its societal value as to the inherent distrust of the government's motive for such regulation.¹⁷⁵ The government is distrusted in the area of political speech regulation because it is believed to have a greater interest in suppressing criticism of itself than in stifling other types of speech.¹⁷⁶ As a result, the courts should subject political speech regulations to close scrutiny not because such speech is necessarily better, but because the government is to be less trusted in regulating it. This Note proffers a solution designed to meet this concern. Rather than automatically invalidating a content-based regulation of political speech, courts should look closely at such a regulation to ensure that improper governmental motivation is not present. If, after such a "hard look" the government's motivation proves permissible, and the remainder of the time, place or manner test is met, then the regulation should be upheld.

A "hard look" would involve courts carefully scrutinizing government motivation. Such scrutiny is necessary because once the motivation is deemed proper, the regulation undergoes a lower standard of review.¹⁷⁷ Therefore, before using this lower standard, a court should be sure that the government does not seek merely to circumscribe speech due to its content.

When the government attempts to justify facial political speech restrictions on secondary effects grounds, a court should not simply defer to this justification. It should actively consider whether these secondary effects concerns exist and whether these concerns were the true catalyst for the regulation. The burden need not be placed on the government to prove proper motivation.¹⁷⁸ However, once a court finds that a "reasonably well informed observer" would view the governmental action as designed to suppress speech, a compelling state interest should be required.¹⁷⁹ A court might test a reasonably well informed observer's opinion by inquiring whether the government would have adopted the

discussion of the Court's failure to extend the *Renton* analysis, see *supra* notes 155-57 and accompanying text. Nonetheless, the Court has upheld regulations that have had an incidental though appreciable effect on political speech. See *supra* note 158.

175. Scanlon, *supra* note 138, at 541-42.

176. *Id.* For example, "the government [is] much less partisan in the competition between commercial firms than in the struggle between . . . political views." *Id.* at 541.

177. This lower standard of review is the time, place or manner test. For a discussion of this standard of review, see *supra* note 3 and accompanying text.

178. *But cf.* Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1037-39 (1979) (suggesting placing burden on government to show racial regulation not improperly motivated).

179. See L. TRIBE, *supra* note 143, at 820. This approach initially provides the government with the benefit of the doubt by providing a lower standard. However, it immediately requires a higher standard once that benefit appears unjustified.

regulation even if it disadvantaged speech which the government favored.¹⁸⁰

The "hard look" test would use a totality of the circumstances approach. A court should examine both direct and circumstantial evidence which might shed light on the government's motivation.¹⁸¹ Several sources for this evidence have been suggested, including the language of the regulation itself, the foreseeable practical effects of the regulation, the context or social environment in which the law was passed and the written legislative history.¹⁸² Equally as important may be what is not in the legislative history.¹⁸³ Thus, if secondary effects concerns are not discussed in the history, but surface only at trial, the secondary effects claim may be merely an impromptu attempt to conceal improper obstruction of speech. It is submitted that by taking a "hard look" at this evidence, courts will be sufficiently able to uncover improperly motivated regulations and invalidate them.

2. *Motivational Analysis Concerns*

a. Deferential review

Some commentators have expressed concern that once a court decides to apply a time, place or manner test, it subjects a regulation to deferential review, rather than to the close scrutiny which the "hard look" analysis espouses for political speech regulation.¹⁸⁴ Such lower scrutiny means that a court would be less likely to recognize improper governmental motivation, simply because the government's justification would face only minimal review. To avoid this problem, courts must avoid assuming that the government's motivation is proper. Fortunately, the alleged predisposition of courts to provide only limited review to time, place or manner regulation is a behavioral and not a doctrinal matter. As such, the courts need not overrule precedent to subject regulations to a discerning analysis; they need only apply themselves to the task of carefully inspecting governmental motivation. If courts resolve to closely inspect governmental motivation, the fears of overly deferential review will be largely illusory.

180. See Stone, *supra* note 4, at 232.

181. See L. TRIBE, *supra* note 143, at 824-25 (utilizing this approach to conclude that law in *United States v. O'Brien*, 391 U.S. 367 (1967), which prohibited burning of draft cards should have been subjected to compelling interest analysis).

182. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1220 (1970).

183. See L. TRIBE, *supra* note 143, at 824.

184. For a general discussion of this lower scrutiny concern, see Goldberger, *Judicial Scrutiny in Public Forum Cases: Misplaced Trust in the Judgment of Public Officials*, 32 BUFFALO L. REV. 175 (1983); Lee, *supra* note 31.

b. Sham secondary effects justifications

Perhaps an even greater fear with secondary effects analysis is that a regulation truly designed to suppress the content of speech will be masked by a secondary effects justification.¹⁸⁵ This fear is magnified by the possibility that a regulation affecting highly valued political speech may be enacted to achieve illegitimate motives.¹⁸⁶ Yet, the Court has countered this concern by expressing confidence in its ability to ferret out improper motivation.¹⁸⁷ Moreover, the fact that the Court adopted a test in *American Mini Theatres* and *Renton* which expressly required it to inquire into governmental motivation implies that the Court feels comfortable in such an exercise.¹⁸⁸

In the end, however, this concern may be well-grounded. Government may indeed attempt to suppress unpopular speech, and courts may not always be able to discern the improper motive. While Justice O'Connor did invalidate an improper motive in *Boos*,¹⁸⁹ Justice Brennan claimed that the Court erred in finding *Renton's* ordinance to be targeted at secondary effects.¹⁹⁰ In addition, the *American Mini Theatres* Court has been criticized for accepting Detroit's secondary effects justification, an acceptance alleged to have been based upon deference to the city's contention that such effects existed.¹⁹¹ This concern does not mean that the motivation test is unworkable. However, careful scrutiny of governmental secondary effects rationalizations is necessary to iden-

185. *Renton*, 475 U.S. at 57-62 (Brennan, J., dissenting) ("I simply cannot accept . . . *Renton's* claim that the ordinance was not designed to suppress the content of adult movies"); *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 821-24 (1984) (Brennan, J., dissenting) ("it is too easy for government to enact restrictions on speech for . . . illegitimate reasons and to evade effective judicial review by asserting that the restriction is aimed at some displeasing aspect of the speech that is not solely communicative"); *Adderly v. Florida*, 385 U.S. 39, 56 (1966) (Douglas, J., dissenting) (suggesting that arrest of demonstrators was motivated by hostility towards their views); *Lee*, *supra* note 31, at 777-78 ("the regulation of secondary effects that stem from a particular subject matter may mask the government's attempt to restrict or eliminate communication offensive to majoritarian tastes"); *supra* notes 120-24 and accompanying text (discussing Justice Brennan's concern in *Boos* that government might simply "concoct" secondary effects justifications to repress speech); see also *Consolidated Edison v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980) (Court appears to suggest that regulation may have stood better chance of survival if Commission had not been as frank about its motives).

186. For a discussion of this fear, see *supra* notes 120-26 and accompanying text.

187. For a discussion of the Court's belief that it can discern and control improper motivation, see *supra* note 146 and accompanying text.

188. For a discussion of the use of a motivation test in *American Mini Theatres* and *Renton*, see *supra* notes 74-92 and accompanying text.

189. *Boos*, 108 S. Ct. at 1163-64 (regulation designed to protect dignity of foreign officials invalid because based on content of speech).

190. *Renton*, 475 U.S. at 57-62 (Brennan, J., dissenting) (ordinance should have been found to be based on content of adult movies exhibited).

191. See *Lee*, *supra* note 31, at 777.

tify and invalidate sham justifications. Such scrutiny should help to expose improper motivation and discourage it in the future.

c. Significance of manner or location to content

Another problem which arises when the government attempts to regulate secondary effects is that acceptance of such regulation presupposes that the speech being regulated can be separated from the time, place or manner of its expression.¹⁹² However, the time, place or manner of expression may be inseparable from its message.¹⁹³ For example, the Federal Communications Commission regulated the airing of a monologue by comedian George Carlin entitled "Filthy Words," which attempted to convey the benign character of certain off-color words by reciting a string of those words.¹⁹⁴ Carlin's use of the words in a humorous setting, to portray their harmlessness, has been found to be "one of the best examples of form and content, or more accurately stated, form and message, totally merged."¹⁹⁵

Therefore, even when an ordinance appears to be neutrally regulating the time, place or manner of speech, it may in fact be improperly motivated. The legislature may have realized that by such regulation it could effectively stifle speech by denying it a necessary forum for or manner of expression. Courts must thus recognize that improper motivation may be cloaked in legislation which appears valid. A close look at motivation is therefore necessary to aid courts in discovering improper motivation.

d. Problems associated with disadvantaged groups

A further fear associated with permitting the government to regulate political speech is that it may allow the government to effectively bar underfinanced and minority groups from exercising their free speech rights.¹⁹⁶ These groups often lack the financial ability to communicate

192. For a discussion of the claim that it is often impossible to separate out the significance of the time, place or manner of speech from the speech itself, see Lee, *supra* note 31, at 776-81.

193. *Id.* at 801-05.

194. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). In *Pacifica*, the Court sustained a Commission ruling which prohibited the airing of Carlin's monologue during times when children might be listening. *Id.*

195. Quadres, *The Applicability of Content-Based Time, Place, and Manner Regulations to Offensive Language: The Burger Decade*, 21 SANTA CLARA L. REV. 995, 1036-37 (1981).

196. *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943) (direct-contact communication, specifically door-to-door distribution of leaflets, "is essential to the poorly financed causes of little people"). *Accord City Council v. Taxpayers for Vincent*, 466 U.S. 789, 819-20 (1984) (Brennan, J., dissenting) ("Use of [sign posting as a] medium of communication is particularly valuable . . . because it entails a relatively small expense."); Lee, *supra* note 31, at 762-67 ("Facilities like streets are especially important to minority groups; these groups lack the financial resources to communicate through direct mail or the mass media.").

via established media. As a result, they must depend upon their ability to communicate directly on the street. When the government purports to be controlling secondary effects by regulating the use of these direct contact forums, it may actually desire to restrict the content of these disadvantaged groups' speech.¹⁹⁷ In order to curb these undesirable consequences, courts should, as with speech which is intertwined with its time, place or manner of expression,¹⁹⁸ be aware of the possibility of these motivations. They should be on guard against a legislature which desires only to curtail speech. Again, a close scrutiny of governmental purpose should help to achieve this end.

e. Incentives to overregulate

A final concern ancillary to governmental regulation of political speech is that "[t]he Court makes an important error when it assumes that forum regulators make rational, balanced decisions in all cases except those in which discrimination is evident."¹⁹⁹ According to this view, deference to speech regulators is misplaced because even when they harbor no animosity toward the content of speech, regulators have strong inherent incentives to overregulate speech. Speech has the "potential to generate significant law enforcement problems and high administrative expenses" should it become unruly or otherwise disrupt the community routine.²⁰⁰ Regulators are often far more sensitive to the need for regulation of speech than they are for the need to protect it.²⁰¹

197. Professor Lee states that "[i]nexpensive media—such as leaflets, parades, street demonstrations, and picketing—are simply more important to poorly financed communicators than to the wealthy." Lee, *supra* note 31, at 765. By controlling these means of communication, the government might be able to censor groups who rely on such methods. "[A]lternative means of communication, which are always available in theory, are of little value to those who cannot afford them." *Id.* at 766.

198. For a discussion of speech whose message is interwoven with its time, place or manner of delivery, see *supra* notes 192-95 and accompanying text.

199. Goldberger, *supra* note 184, at 206. This misgiving concerning overregulation may extend all the way down to the policeman on the street. Lipez, *The Law of Demonstrations: The Demonstrators, the Police, the Courts*, 44 DEN. L.J. 499 (1967). In his study of a police civil disobedience unit, Mr. Lipez found that "[t]he police simply do not like . . . demonstrators." *Id.* at 509. While "fully aware of the paper rights of these demonstrators," most policemen "regard [them] as foolish, potentially dangerous, nuisances." *Id.* In light of the potential for problems, officers are willing to curtail free speech rights. *Id.*

200. Goldberger, *supra* note 184, at 207. If these problems arise, regulators are subject to strong criticism and perhaps even dismissal from their jobs. *Id.*

201. *Id.* at 207-08. The need for regulation is obvious to the regulator. A monstrous traffic jam or a riot which results from an exercise of free speech has an immediate and tangible effect on a large number of people. *Id.* at 207. A regulator who fails to regulate to avoid these problems faces an angry reaction from the public and from his or her superiors. *Id.*

On the other hand, the pressure to protect speech is not as strong. Free speech has intangible benefits, and therefore its loss does not produce such a visible impact. *Id.* at 208. In fact, except for those who are prevented from

Moreover, this overregulation tends to fall most heavily on speech concerning controversial issues.²⁰²

To the extent that regulators attempt to restrict speech because it is controversial, close court attention to governmental motives may force the government to regulate in a more even-handed manner. In this respect, the motivation test may successfully coopt illegitimate regulation. Yet a motivation test will not reach general, systematic overregulation, for that overregulation is not driven by improper motivation. Application of the second and third prongs of the time, place or manner test is then necessary to ensure a regulation which respects the right of free speech.²⁰³

Many of the fears raised above involve the application of the motivation test,²⁰⁴ or time, place or manner regulations, in general.²⁰⁵ If the Court applies the motivation test to politically content-based regulations, it will find that it has already addressed and accepted the drawbacks of such an application when it established both time, place or manner restrictions and secondary effects analysis.²⁰⁶ Because both time, place or manner regulations and the motivation test have been held legitimate, it is submitted that the fears associated with them should not be permitted to undermine the viability of applying the motivation test to political speech.

3. Advantages of the "Hard Look" Test

Some judges and commentators apparently believe that the only way to protect against improper governmental motivation in situations involving a facially content-based regulation is to apply the virtually im-

demonstrating, relatively few people may feel or even realize any loss at all. *Id.* Moreover, those few who are affected are usually so politically impotent that they cannot influence a regulator's decisions. *Id.*

202. *Id.* at 208-10. Controversial speech often involves strong emotions and has a greater tendency to result in civil disorder. Therefore, regulators have a particular incentive to monitor such speech, and to regulate it aggressively when it arises. *Id.* at 208-09. Rather than risk the uncontrolled and dangerous disorder which may result from underregulation, regulators overregulate to provide a large margin for error. *Id.* at 210. Those affected by the overregulation are likely to be a relatively small group with little political clout, while those "protected" by the overregulation are likely to be unaware or undisturbed by it. *Id.* at 208-13.

203. Although this Note focuses on the content-neutrality prong of the time, place or manner test, the other two prongs are equally as important. For a statement of the narrowly tailored and alternative avenue prongs of the time, place or manner test, see *supra* note 3 and accompanying text.

204. For a discussion of the motivation test, see *supra* notes 71-92 & 143-49 and accompanying text.

205. For a discussion of time, place or manner regulations, see *supra* notes 27-51 and accompanying text.

206. For a discussion of the legitimacy of the time, place or manner theory, see *supra* notes 27-30 and accompanying text. For a discussion of the legitimacy of secondary effects analysis, see *supra* notes 74-90 and accompanying text.

passable compelling interest test.²⁰⁷ It is submitted that this heavy-handed approach may yield unsatisfactory consequences. Under this dogmatic approach the government is simply not given an opportunity to implement legitimate policies. “[T]he need to guard against the mere possibility of improper motivation does not necessarily justify the invalidation of *all* viewpoint-based [let alone facially content-based] restrictions.”²⁰⁸ Indeed, “to meet this concern by testing all content-neutral restrictions under the same stringent standards of review employed to test content-based restrictions seems more drastic a step than first amendment principles require.”²⁰⁹

At the same time, courts must guard against an abdication of free speech principles to any and every governmental claim of secondary effects concerns. The “hard look” approach meets the demands of both governmental regulation and free speech protection. By accepting the secondary effects analysis as applicable to political speech, the approach provides the government with an opportunity to enact facially politically content-based regulations without requiring a compelling state interest. On the other hand, the “hard look” approach scrutinizes the government’s motives to an unprecedented degree. Therefore, the approach ensures that the regulations are not merely a pretext for suppressing unwelcome speech.

IV. CONCLUSION

While the Court has not yet allowed facial regulation of political speech, *Boos* suggests that the time when the Court will permit such regulation may not be far off. When the time comes, such regulation should be analyzed under the “hard look” motivation test. If a regulation is found to be content-neutral under this test, it should then be examined under the time, place or manner analysis. The Court need not use the compelling interest test to analyze such a regulation. Rather, it should initially make a more stringent examination of the regulation to determine whether it was properly motivated.

207. *Renton*, 475 U.S. at 62 (Brennan, J., dissenting) (refusing to find ordinance content-neutral under secondary effects analysis and asserting ordinance should be subjected to compelling interest test); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 312-15 (1984) (Marshall, J., dissenting) (minimal scrutiny provided once Court accepts apparent lack of content discrimination has led to “unfortunate diminution of First Amendment protection”); *Redish*, *supra* note 14, at 133 (“most effective means of avoiding indirect suppression of particular viewpoints . . . is closely to scrutinize *all* content-neutral regulations”) (emphasis in original).

208. *Stone*, *supra* note 4, at 231 (emphasis in original). As well, Professor Farber has pointed out that although some content-based restrictions may be intended to silence certain views, others may be “entirely innocuous.” Farber, *supra* note 4, at 736. It is submitted that those regulations that do not seek to “silence certain views” should not be summarily subjected to a compelling interest test.

209. *Stone*, *supra* note 144, at 102.

A scrupulous examination of governmental motivation should be the centerpiece of any theory which would allow facially content-based regulations on political speech. Indeed, the proposition that government should be permitted to regulate political speech rests upon the assumption that courts will assiduously engage in close scrutiny of governmental motivation.²¹⁰

While it may seem a simplistic solution to merely encourage the courts to take a "hard look" at politically-based regulation, the Supreme Court has already stated that under the *Renton* analysis it can recognize illicit motivation.²¹¹ By employing an even higher level of investigation, the courts could put a check on improperly motivated regulation while at the same time freeing government from the need to meet the virtually impassable compelling interest test.²¹²

In addition, the government would be permitted to formulate more precise rules, regulating only that speech which is the cause of legitimately undesirable secondary effects without adversely affecting speech which is entirely divorced from those effects.²¹³ The government may wish to control secondary effects which emanate from a specific type of speech, however, in order to keep the regulation content-neutral it might be forced to prohibit any speech which resembles the regulated speech.²¹⁴ If the government is instead permitted to use facially content-based controls to specifically regulate the offending speech, then unoffending speech need not be subjected to unnecessary restrictions.

While a prohibition of political speech would be anathema to first amendment values, it is also undeniable that the government has a legitimate need to regulate speech.²¹⁵ Recent emphasis on motivational analysis allows the government that opportunity without unduly threatening constitutional values.²¹⁶ While the full Court has not yet reached the point of applying motivational analysis to political speech, several Justices have moved in that direction.²¹⁷ Although some political

210. For a discussion of what the "hard look" analysis entails, see *supra* notes 178-83 and accompanying text.

211. For an examination of the roots of the Court's confidence in its ability to ferret out illicit motivation, see *supra* note 146.

212. For a discussion of the virtually insurmountable barrier which the compelling interest test poses to governmental regulation, see *supra* note 14.

213. See Stone, *supra* note 4, at 197.

214. *Id.* Professor Stone states that "the Court may [be] invit[ing the] government to 'equalize,' not by permitting more speech, but by adopting even more 'suppressive' content-neutral restrictions." *Id.* at 205. Ironically, therefore, a regulation which imposes greater restrictions on speech may stand a greater chance of being constitutional. *Id.*

215. For a discussion of the government's need to regulate, see *supra* notes 27-28 and accompanying text.

216. For a discussion of the recent emphasis on motivation analysis, see *supra* notes 73-92, 105-11, 158 & 161-62 and accompanying text.

217. In *Boos*, Justices O'Connor, Stevens and Scalia approved of a motivational analysis for political speech regulation. 108 S. Ct. at 1160, 1163-64.

speech may be incidentally affected, a closely applied time, place or manner test, including the requirements that the regulation be narrowly tailored to serve a legitimate governmental interest and leave open alternative channels of communication, should considerably lessen that possibility.²¹⁸ When a closely applied time, place or manner test is combined with an exacting look at governmental motivation, the government's recognized need to regulate can be upheld without running roughshod over first amendment free speech rights.

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Chief Justice Rehnquist and Justices White and Kennedy may join their brethren in the future. For a more thorough discussion of the alignment of the Justices, see *supra* notes 163-69 and accompanying text.

218. For a definition of the elements of the time, place or manner test, see *supra* note 3 and accompanying text. For examples of the test as put to practical use, see *supra* notes 38-51 and accompanying text.

