The Unnecessary Complexity of Free Speech Law and the Central Importance of Alternative Speech Channels

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I. Introduction

Free speech case law permits the government to impose a wide range of restrictions on a similarly wide variety of forms of speech. Even if we were all to agree on the precise purposes of, or functions served by the free speech clause, as well as on what constitutes speech in the first place, correctly deciding many cases involving government restriction of speech would still be unavoidably difficult. This is because no plausible approach to defining the limits on governmental power to restrict speech can avoid controversial valuations or attempts to foresee the future consequences of deciding a case in a particular way.

But the unavoidable difficulty of some free speech cases does not, by itself, explain why the legal tests or doctrines applied should be as complex and multifaceted as they are. There is no reason in principle why admittedly difficult problems are necessarily better adjudicated by relatively complex tests.[1]

Free speech doctrine tends toward excessive, unjustified complexity for several reasons. The first is the fallacy that difficult problems are necessarily best resolved judicially through complex formulas. Second, our legal culture may place such a high value on freedom of speech that a judicial standard requiring a government seeking to restrict speech to meet a series of conjunctive requirements may be adopted so as to drive additional nails into the coffin of improper government regulation of

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1. For a sense of the fallacy of assuming that difficult legal problems are invariably met optimally by highly nuanced, multifactor judicial tests, see Epstein, *The Risks of Risk/Utility*, 48 OHIO ST. L.J. 469 (1987).

private speech. Finally, the decision making dynamics of multi-member courts, in which voting coalitions must be patched together in a potentially unstable fashion, may encourage a process in which the particular concerns of various individual justices are more or less mechanically aggregated, rather than critically distilled, into a compound formula commanding the agreement of a majority. Thus, a judge will join a coalition if his own concerns are incorporated, however awkwardly, into the ultimate formulation of the legal test rather than leave the coalition on the ground that the new formulation is now unnecessarily complex, poorly focused, or unwieldy. This will result in unnecessarily complex tests with overlapping elements and no single unifying theme or rationale.

This Article documents the unnecessary complexity of the judicial formulations most frequently used in resolving the most common kinds of free speech cases. It is suggested that free speech cases are often dubiously decided because of the sheer distraction of considerations that are really tangential to justifying restrictions on speech. Therefore, this Article recommends a more concentrated judicial focus on free speech cases. The better analysis measures the gains and losses in the fulfillment of the purposes underlying the free speech clause, both from the subjective standpoint of the speaker and from the standpoint of other affected parties. These gains or losses due to governmental regulation of speech should be the central judicial concern. They should be measured in light of the purposes underlying the free speech clause, focusing particularly on the value of the options or choices available to speakers and their audiences before and after implementation of the governmental regulation in question.

One important implication of this approach is if a regulation does not impair a speaker's ability to pursue her own free speech values, because it leaves open to her some channel other than the one being regulated, then the speaker cannot cogently claim a violation of her free speech rights. This is so even if the government acted with a malicious or repressive intent, failed to substantially further any legitimate state interest, or failed to tailor its regulations so that there would be the least amount of impingement on the number, variety, or range of speech channels available to the speaker. Similarly, even if the speaker

strongly prefers, for extraneous reasons, to use her original means of speaking without the government regulation, the presence of an adequate alternative channel renders the speaker's free speech claim baseless.

Adjudicating free speech cases will admittedly remain difficult, even after all distracting considerations are set aside. This Article will consider the unavoidable difficulties of determining when speech and speech-related activity partially disserve free speech values by taking on a broadly coercive character or by abandoning the goal of persuasion altogether. This Article will also briefly address some difficult issues of burden of proof and standard of appellate review in free speech cases. To illustrate and clarify the approach recommended above, this Article will focus in particular on the troubling issues involved in restrictions on picketing in residential neighborhoods. As will be demonstrated, the simplified approach suggested in this Article generates reasonably sensitive results in a parsimonious way, while minimizing distractions and any need for recourse to futile judicial attempts to balance the right of free speech against a right to privacy.

II. The Complexity of Free Speech Test Formulations

Over the past forty years or so, free speech jurisprudence has spawned concepts and categories of varying scope and dimension. Thus, it has become common for the courts to distinguish between time, place, and manner restrictions on speech and absolute bans;[2] between content-based and content-neutral restrictions;[3] between viewpoint-based and viewpoint-neutral restrictions;[4] and between direct and incidental burdens on speech.[5] The courts have also developed tests for governmental

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2. *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46 (1986).

3. *See, e.g.*, Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 115-17 (1987).

4. *See, e.g.*, Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 197-200 (1983).

5. *See, e.g.*, Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 94 (1977). *See also* Stone, *supra* note 3, at 115 (observing that in *City of Renton*, 475 U.S. at 46-47, the Court analyzed the zoning restriction at issue as content-neutral because it was justified in terms of preventing negative secondary effects of the regulated theaters, even though the ordinance on its face was restricted only to theaters showing movies empha-

restrictions on commercial speech,[6] for symbolic conduct or mixed speech and conduct cases,[7] as well as for regulating speech in various kinds of government forums.[8] Central to many of the judicially developed tests for the legitimacy of speech regulations are concerns for the furtherance of some governmental interest, as well as for whether the governmental interest is being pursued by only narrowly tailored means or by the available means least restrictive of freedom of speech.[9] Often, but hardly invariably, the test formulation incorporates a concern for the alternative speech channels, or the remaining unimpaired means of communicating, left to the speaker burdened by the regulation. This concern, however, is at most considered to be only one of several relevant inquiries.[10]

This Article develops the thesis that an inquiry into the available channels or media of speech left open to the speaker, suitably developed and refined, should do most of the work in free speech jurisprudence. The other distinctions, tests, and factors typically do not even pull their own weight. Beyond their unavoidable doctrinal imprecision and confusion, many of these considerations lead to an improper analytical focus, introduce unnecessary arbitrariness and unpredictability, and invariably raise more subsidiary questions than they answer.

A. *Time, Place, and Manner Restrictions*

To begin to illustrate these effects, we may consider one of the most frequently encountered and logically inclusive categories — that of governmental restrictions on the time, place, or manner of speech. A governmental restriction on speech is a time, place, or manner restriction if it does not absolutely ban the restricted speech activity in question.[11] Of course, time,

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sizing sexual activity, an obviously content-based distinction).

6. *See, e.g.*, Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563-66 (1980).

7. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

8. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983).

9. *See, e.g.*, Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293-94 (1984).

10. *See, e.g.*, Frisby v. Schultz, 108 S. Ct. 2495, 2501-02 (1988).

11. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46 (1986); Tollis, Inc.

place, and manner restrictions will sometimes verge upon, if not be practically tantamount to, an absolute ban.[12] At some point along the continuum, the time, place, and manner regulations undeniably become severe enough to be equivalent in effect to a well-enforced ban on the speech activity in question.[13] Therefore, it is hardly clear why much of the consequence should turn on the distinction between time, place, and manner restrictions and absolute prohibitions, or why different legal tests should be applied to these two categories. From a practical standpoint, the more crucial distinction would be between relatively modest time, place, and manner restrictions on the one hand, and relatively severe or burdensome time, place, and manner restrictions as well as absolute bans on the other.

Of course, we may care about factors other than the degree of severity of the restriction. Under the rubric of freedom of speech, we may also be concerned with the distribution of the burden, or the differential impact, of a speech restriction. Time, place, and manner restrictions as well as absolute bans both may be based on or motivated by a desire to suppress or disadvantage one side in an ongoing debate. Put somewhat differently, the distinction between content-neutral and content-based restrictions cuts across the distinction between time, place, and manner restrictions and absolute bans.[14] Our initial feeling may be that absolute bans are generally more suspicious than time, place, and manner restrictions. Still, it is far from clear why even an absolute ban on a particular form of expression that is motivated or justified by considerations irrelevant to the content or viewpoint of the speech should be given more exacting judicial scrutiny than a time, place, and manner restriction that is plainly intended solely to muzzle opposition to a government policy.

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v. San Bernardino County, 827 F.2d 1329, 1332 (9th Cir. 1987).

12. The various time, place, and manner restrictions, in their cumulative effect, might have approached an absolute ban in the Nazi protest march case of Collin v. Smith, 578 F.2d 1197, 1199-1202 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

13. *See Collin*, 578 F.2d at 1201-02.

14. *See, e.g., City of Renton*, 475 U.S. at 46-47 (classifying the ordinance in question as a time, place, and manner restriction, but going on to consider its character as content-neutral or content-based).

1. *The Time, Place, and Manner Analysis*

The purpose of maintaining the time, place, and manner distinction has never been clarified, partly because of the continuing lack of clear guidance from the Supreme Court as to the precise standards for adjudicating these restrictions.[15] Typically, though, the courts work through a time, place, and manner restriction in the following manner. The court first determines whether the time, place, and manner restriction is content-based or content-neutral.[16] If the restriction is deemed content-neutral, the court considers whether the restriction serves,[17] or is designed to serve,[18] a significant[19] or substantial[20] governmental interest. Whether a regulation actually serves, or even is designed to serve, a given interest will often be a largely speculative inquiry inviting courts to uphold or strike down the regulation by unconsciously manipulating the level of rigor, magnitude, and concreteness with which the service of the interest must be shown. Even if a regulation serves a sufficiently weighty governmental interest, there then remains the issue of whether the regulation is sufficiently "narrowly tailored" in serving that interest, and whether the sufficiency of the tailoring is judged by relatively demanding[21] or lax[22] standards. Finally, if the regula-

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15. *See* City of Watseka v. Illinois Pub. Action Council, 796 F.2d 1547, 1551 (7th Cir. 1986), *aff'd mem.*, 107 S. Ct. 919 (1987) (noting the split in the circuits, and lack of decisive Supreme Court guidance, on the standards applicable to restrictions on residential solicitation). At the Supreme Court level, Justice White, Chief Justice Rehnquist and Justice O'Connor point to developing authority which suggests that the tailoring of content-neutral time, place, and manner restrictions for the purpose of governmental regulation has been treated stringently by some circuits and leniently by others. *See* 107 S. Ct. at 920 (White, J., dissenting).

16. *See, e.g.*, Stone, *supra* note 3, at 115-17.

17. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (referring to a test of serving the public interest or purpose, rather than merely being intended to serve it).

18. *City of Renton*, 475 U.S. at 47 (referring to design or intention behind the restriction).

19. *Clark*, 468 U.S. at 293 (characterizing the required governmental interest as "significant").

20. *City of Renton*, 475 U.S. at 47 (adopting a formulation of "substantial" governmental interest).

21. *See* City of Watseka v. Illinois Pub. Action Council, 796 F.2d 1547, 1553 (7th Cir. 1986), *aff'd mem.*, 107 S. Ct. 919 (1987) (imposing a stringent "least restrictive" governmental means test). *See also* ACORN v. City of Frontenac, 714 F.2d 813, 818-19 (8th Cir. 1983); New York City Unemployed and Welfare Council v. Brezenoff, 677 F.2d 232, 237 (2d Cir. 1982).

22. *See City of Watseka*, 107 S. Ct. at 920 (White, J., dissenting) (rejecting a least

tion has passed muster on the preceding requirements, the court often, but not invariably,[23] goes on to impose the further requirement either that the speaker be left with one or more alternative channels[24] with which to disseminate her message, or that the remaining alternative means of speaking not be unreasonably limited.[25] The courts are unfortunately divided not merely as to the verbal formulation of the inquiry into alternative speech channels. They are also substantively divided on the question of how one measures the constitutional adequacy of an alternative speech channel and on the degree to which the alternative channel must be available, either formally or realistically to the speaker.[26] Working through some of these problems, and establishing why it is important to do so, is central to this Article.

The time, place, and manner inquiry, which is of doubtful utility itself, engenders a series of derivative inquiries which are themselves of limited value. After it is determined that the speech restriction goes to time, place, and manner, the court then determines whether the restriction is content-based or content-neutral,[27] a distinction that surprisingly often sparks controversy in particular cases, and tells us very little.[28] As this dis-

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restrictive means test for narrow tailoring (citing *Clark*, 468 U.S. at 293-94)).

23. *See Brezenoff*, 677 F.2d at 236-40 (not requiring the availability of adequate alternative speech channels).

24. *See Clark*, 468 U.S. at 293; Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981) (requiring as one element the availability of alternative speech channels); *see also* Tacynec v. City of Philadelphia, 687 F.2d 793, 797 (3d Cir. 1982), *cert. denied*, 459 U.S. 1172 (1983).

25. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986). Crucially, this Article examines the limitations on alternative speech channels not in terms of their general desirability, but by their relative attractiveness in terms of widely recognized free speech purposes or values. These values are often thought to include the pursuit of (political) truth, promotion of the democratic process of self-governance, and promotion of individual self-realization. *See* J.S. MILL, ON LIBERTY 54 (D. Spitz ed. 1975); Stone, *Content Regulation and the First Amendment*, *supra* note 4, at 193. These and similar aims or functions will be referred to herein as "free speech values."

26. *See supra* notes 15-25 and accompanying text.

27. *See, e.g.*, *City of Renton*, 475 U.S. at 46-47.

28. The content-neutral versus content-based restriction distinction has been criticized on grounds compatible with, but essentially distinct from, the thesis of this Article. In Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 206 (1982), the content-neutrality rule is viewed as too broad to reflect the recognition that different kinds of speech may have greater or lesser constitutional value. Furthermore,

tinction has evolved, the courts must consider the predominant purpose of the ordinance.[29] Determining the governmental body's predominant purpose, particularly in the absence of legislative history, is of course an inquiry fraught with difficulty.[30]

2. *Restrictions on Primary Versus Secondary Effects of Speech*

Once the predominant purpose of the regulation is somehow judicially ascertained, the court then asks whether such purpose is aimed at the content of the speech in question, or instead at the "secondary effects" of the speech[31] in such a way that the regulation is justified, without reference to the content of the speech.[32] Thus, a restriction that is intended to prevent persons from considering or adopting what the legislature considers fallacious ideas is a content-based restriction; whereas, a restriction that is intended to allow, for example, residential homeowners to sleep undisturbed, or to be spared the expense of picking up mountains of leaflets discarded in the streets, is aimed at the "secondary effects" of the speech.[33] This means that we cannot know, without further investigation, whether a statute that by its express terms restricts only speech promoting, for example, conservative Republicanism, is content-neutral or not, since we do not yet know the legislature's predominant intent, or what secondary effect, if any, of conservative Republican speech it had in mind.

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and even more implacably in Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 114, 140-41 (1981) the content distinction is theoretically and practically untenable and should be abandoned.

29. *See, e.g.*, Tollis, Inc. v. San Bernardino County, 827 F.2d 1329, 1332 (9th Cir. 1987); Walnut Properties, Inc. v. City of Whittier, 808 F.2d 1331, 1334-35 (9th Cir. 1986) (interpreting the Court's language in *City of Renton*, 475 U.S. at 47-48).

30. *See, e.g.*, Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983).

31. *See City of Renton*, 475 U.S. at 47. A "secondary effect" of speech might be, for example, an alleged increase in crime attributed to the presence of "speech" of one or more porno shops in a downtown area. *Id.* at 48; *see also* Christy v. City of Ann Arbor, 824 F.2d 489, 491 (6th Cir. 1987). Another illustration is the increase in auto accidents associated with distracting highway billboards. Wheeler v. Commissioner of Highways, 822 F.2d 586, 594-95 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 702 (1988).

32. *See City of Renton*, 475 U.S. at 47-48; Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1058-59 (9th Cir. 1986). This approach to content neutrality is criticized as too speech-restrictive in Stone, *supra* note 3, at 115-17 n.5.

33. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

However the courts conceive of content-neutrality, the concept will often be difficult to apply, even if the courts satisfactorily determine the predominant legislative intent.[34] Distinguishing a primary from a secondary effect of a restriction is probably more difficult than is commonly recognized. In *Linmark Associates, Inc. v. Township of Willingboro*,[35] for example, the Court confronted the constitutionality of a ban on residential "For Sale" signs. The Court held that under the circumstances, including the community's desire to prevent "panic" home sales and maintain a racial balance in the community, the ban was content-based.[36] This may seem correct, on the Court's theory that the community "proscribed particular kinds of signs . . . because it fear[ed] their 'primary' effect — [*i.e.* seeing them] will cause those receiving the information to act upon it."[37] But on reflection, it is far from obvious why the ordinance could not be equally well described as aimed predominantly at secondary effects. The community is not attempting to keep apart willing buyers and sellers who would otherwise be brought together by the signs. There is no allegedly dangerous or controversial idea that the community seeks to suppress. The community may simply be attempting to prevent the kind of "panic" selling that may be irrational from the general standpoint of buyers, sellers, and all segments of the community. It may be that rapidly changing community demographics, attributable to "panic" selling, is regarded as undesirable by all concerned persons. If so, the community ordinance seems more aptly characterized as aimed at a secondary effect.

To take another example, forbidding the construction of temporary structures such as anti-apartheid shanties on college campuses, based upon the presumed secondary effect of preventing aesthetic injuries, constitutes another sort of apparently easy case.[38] But one might argue that if a student group constructs an

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34. *See, e.g.*, Redish, *supra* note 28, at 139-42 (discussing the application of the content distinction to Cohen v. California, 403 U.S. 15 (1971)). For the arguments raised by the opposing parties, see Wheeler v. Commissioner of Highways, 822 F.2d 586, 589 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 702 (1988).

35. 431 U.S. 85 (1977).

36. *Id.* at 94.

37. *Id.*

38. *See, e.g.*, Students Against Apartheid Coalition v. O'Neil, 838 F.2d 735 (4th Cir.

anti-apartheid shanty, it may be difficult to show that the aesthetic justification for removing the shanty is wholly independent of everyone's reactions to the merits of the view being expressed. If the community were deeply, emotionally convinced of the merits of the anti-apartheid message, would it so readily view the shanty as an aesthetic affront that befouls the landscape? Suppose a family lived in a building designed after the fashion of Thomas Jefferson's Rotunda, and a child had built a tree house in the yard — would a neutral passerby be likely to find the tree house an aesthetic affront?

One might argue, however, that anti-apartheid protesters waive such an issue because they invariably stipulate that the shanty is meant to be ugly, that it is intended to evoke an arresting contrast between the squalor of those persons disenfranchised under apartheid and the privilege and splendor surrounding the shanty. This response, even if it establishes convincingly that the regulation is content-neutral as applied, merely further illustrates the point that a content-neutral regulation may well have a disproportionate, if not devastating, effect on one side of a political debate, while leaving the opposing side essentially untouched.[39] In this context, poorer groups must resort to noisier, messier, more disruptive means of communicating than wealthier groups.[40] Content-neutrality may thus be neutral in form, but in practical effect it is predictably biased in its consequences against particular groups and their associated viewpoints.

From the standpoint of this Article, however, the overriding criticism of the content-neutrality category is not that it fails the test of general ideological neutrality, but that the concept suffers from an equal and opposite flaw of essential indeterminateness. Knowing that a particular regulation of speech is content-neutral tells us very little about the laxity or rigor by which the regulation will be judged, and gives us little ground for pre-

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1988).

39. For a balanced discussion of this criticism, see Stone, *Content Regulation and the First Amendment*, *supra* note 4, at 199.

40. Thus, it is hardly coincidental that the group barred from sleeping in public parks favored greater, rather than lesser, attention toward resource expenditure on the problem of homelessness. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).

dicting whether the regulation will be upheld or struck down.[41] Instead, the fundamental flaw of the content-neutrality inquiry is its almost complete insensitivity to what should genuinely matter in free speech adjudication. Dean Stone has provided a comprehensive taxonomy of four distinct formulations of the legal standards applicable to content-neutral restrictions on speech.[42] Each formulation can be supported by recent Supreme Court authority.[43] The four formulations emphasize the considerations of reasonableness, broad interest balancing the weight of the government's interest, and the breadth or narrowness of the regulation's incursion into otherwise protected speech, in light of the regulation's purpose.[44] Of these four formulations, only one considers the availability of alternative means of communicating for the speaker affected by the regulation.[45] On the approach taken in this Article and discussed at greater length below, this single consideration, suitably defined and elaborated, is of predominant importance.[46]

3. *Content-Based Restrictions*

The courts are generally suspicious of content-based restrictions,[47] and are inclined to include restrictions based on the sub-

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41. Contrast the broad range of content-neutral test standards, virtually as broad as the full spectrum of all speech tests, from the most lax to the most demanding, collected in Stone, *supra* note 3, at 48-50.

42. *See id.*

43. *See* Stone, *supra* note 3, at 49-50 & nn.7-13.

44. *See id.*

45. *See id.* at 49 ("[s]ome content-neutral restrictions are constitutional if 'they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication' "). Note that this test should conceivably be met by a merely "substantial" governmental interest where the speaker is, under the circumstances, left with no practically usable means of conveying her message.

46. For but a single example of the tendency to minimize or exclude altogether any consideration of the relative or absolute value of the speech channels left unimpaired by the regulation, or of the difference between the speaker's or the intended audience's position before and after the regulation, see United States v. Albertini, 472 U.S. 675, 687-88 (1985). While *Albertini* refers to "incidental" impacts on speech, presumably this is meant to cover virtually any impact on speech that stems, indirectly, from a content-neutral restriction. *See id.*; M.J.M. Exhibitors, Inc. v. Stern (*In re* G. & A. Books, Inc.), 770 F.2d 288, 296 (2d Cir. 1985). Of course, an impact on speech that is incidental in this sense could also be quite substantial, or even effectively muzzle a given speaker under particular circumstances.

47. *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986).

ject matter under discussion,[48] while often singling out restrictions based on the viewpoint of the speaker as being of central concern.[49] Even if it is assumed, however, that content-based restrictions tend to be more dangerous to free speech than content-neutral restrictions, judicial suspicion of content-based restrictions is only imperfectly focused. Put simply, there does not seem to be any particularly severe danger to free speech if an admittedly content-based restriction, whether or not it is narrowly tailored to affect its purpose, leaves fully available to the speaker the best practical means, from the speaker's standpoint, of promoting the speaker's message, without impairing the purposes or values underlying the free speech clause from the standpoint of other affected parties.

If the courts determine that because a given regulation leaves the speaker's primary free speech channels essentially unimpaired, the regulation has no significant practical effect on what we have referred to as free speech values. Thus, the courts should be extremely reluctant to strike the regulation down as unconstitutional, let alone apply a heightened, content-based test in doing so. If the regulation does not impair free speech values, it verges on an accusation of legislative incompetence and infidelity to basic governmental principles justifying the courts in applying heightened scrutiny to the regulation. The inclination of the courts to ignore this logic stems from the preoccupation, in content-based speech restriction cases, with distracting inquiries into the importance of the state interest and into the tailoring of the restriction to the state interest.[50]

Focusing on the content-based nature of the speech restriction, as opposed to the free speech value of alternative speech channels, led to an odd analysis in *Regan v. Time, Inc.*[51] *Regan* involved a challenge to federal statutes making it a crime to photograph United States currency except where certain condi-

48. *See, e.g.*, Carey v. Brown, 447 U.S. 455, 462 n.6 (1980).

49. *See City of Renton*, 475 U.S. at 48-49.

50. *See, e.g.*, Boos v. Barry, 108 S. Ct. 1157, 1164 (1988) (content-based restriction on political speech in a public forum).

51. 468 U.S. 641 (1984). The photograph at issue in this case appeared on the front cover of *Sports Illustrated* and depicted $100 bills falling through a basketball hoop. *See also* City of Watseka v. Illinois Pub. Action Council, 796 F.2d 1547, 1552 (7th Cir. 1986), *aff'd mem.*, 107 S. Ct. 919 (1987).

tions were met and where the photograph was intended for publication " 'for philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums . . . .' "[52] The Court found this "purpose" restriction unconstitutional merely because it determined that the restriction permitted the government to discriminate on the basis of content; that is, photographic reproduction of currency in connection with "newsworthy" articles would be permitted, whereas photographs not falling under this or any other exception would be prohibited.[53]

The Court thus struck down the purpose exception peremptorily as content-based. Even if this result itself is defensible, the analysis seems misfocused. Even the most controversial distinction under the statute, between newsworthiness and nonnewsworthiness, is hardly foreign to constitutional adjudication.[54] Furthermore, the Court did not pretend to detect any substantial pro government bias in the distinction itself, nor did it find that the distinction significantly correlated with particular viewpoints. In light of the purposes underlying the free speech clause, it would have been natural and appropriate for the Court to have considered whether the statutory restrictions on photographs of United States currency left the speakers with alternative modes of conveying their intended message, provided those modes were not significantly disadvantageous in promoting the recognizable free speech values of the affected persons. To oversimplify, could *Time* make whatever point it intended to make essentially as well without violating the statute? If so, as seems intuitively likely, it is far from clear why the purpose restriction should be said to violate the free speech clause.

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52. 468 U.S. at 644 (quoting 18 U.S.C. § 504(1) (1982)).

53. *Id.* at 648-49. For example, the Court did not rely on the argument that the newsworthiness distinction was too difficult to make, or that the content discrimination could somehow be related to any viewpoint-based discrimination or bias.

54. *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (relying on a distinction between matters of public concern and those not of public concern in the libel law context); Connick v. Myers, 461 U.S. 138 (1983) (relying on the same distinction, but in a public employee dismissal case).

4. *Narrow Tailoring*

To this point, the analysis has in fact understated the complexity, manipulability, uncertainty, and even arbitrary irrelevance of much contemporary free speech law. Time, place, and manner restrictions must not only serve some significant or substantial governmental interest, but they must do so with some degree of effectiveness in a way that is more or less narrowly tailored to serve that interest. To suggest that the Court has provided less than consistent guidance in this area is not a matter of descending to linguistic quibbling. There is a substantial practical difference between a narrow-tailoring rule, requiring merely that the restriction strike directly at the precise evil in question, and a rule requiring that the government employ the means of striking at the evil that is least restrictive of freedom of speech.

The Court's equivocal direction in this respect is undeniable,[55] and it has resulted in inconsistent decisions at the circuit court level.[56] Thus, while the Court "has required 'narrow tailoring' even within the area of content-neutral regulations, it is not clear what level of exactitude is appropriate."[57] At times the Court has seemed to adopt a stringent requirement that the restriction be the least speech-restrictive means of practicably[58] achieving the government purpose.[59] At other times, the narrow-

55. *See* SDJ, Inc. v. City of Houston, 837 F.2d 1268, 1275-76 (5th Cir. 1988) (discussing the Court's apparent variations in this area).

56. *See id.* at 1275 (contrasting Tacynec v. City of Philadelphia, 687 F.2d 793, 797-98 (3d Cir. 1982), *cert. denied*, 459 U.S. 1172 (1983) (narrow tailoring always met if an ample range of alternative speech channels is available) with ACORN v. City of Frontenac, 714 F.2d 813, 818 (8th Cir. 1983)(narrow tailoring requires use of least restrictive means)).

57. *SDJ, Inc.*, 837 F.2d at 1275-76.

58. The restriction on speech is not typically held defective because a conceivably less restrictive alternative exists. *See* United States v. Albertini, 472 U.S. 675, 688 (1985).

59. *See, e.g.*, Village of Schaumburg v. Citizens For a Better Env't, 444 U.S. 620, 637 (1980) (imposing requirement that the restrictions serve the state interests "without unnecessarily interfering with First Amendment freedoms" and noting the availability of "less intrusive" measures). A similarly stringent least restrictive means test may be logically implied from the language of Justice Stevens' enunciation that regulations be "necessary" to further the governmental interest. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 63 n.18 (1976) (Stevens, J., for the plurality). *See also* City of Watseka v. Illinois Pub. Action Council, 107 S. Ct. 919, 920 (1987) (White, J., dissenting). *See, e.g.*, Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051, 1054 (11th Cir. 1987), *cert.*

tailoring requirement is deemed met if the restriction aims at and directly promotes the governmental interest[60] or promotes that interest more than would be possible in the absence of the regulation,[61] or "if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy."[62]

The more exacting "least restrictive means" formulation of the narrow-tailoring requirement is sometimes criticized as being virtually impossible to meet.[63] While this fear is overstated,[64] the test does seem susceptible to judicial manipulation, conscious or unconscious, in that a court in a nondeferential mood may simply pronounce itself unconvinced by the evidence that all less restrictive means have been ruled out. A court can always point out that the government has failed to take some further issue or objection into consideration, thereby second-guessing a complex policy decision undertaken by an elected body familiar with relevant local circumstances.[65]

The less stringent formulations of the narrow-tailoring requirements are also questionable, however. Requiring only that

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denied, 108 S. Ct. 1280 (1988); M.J.M. Exhibitors, Inc. v. Stern (*In re* G. & A. Books, Inc.), 770 F.2d 288, 298 (2d Cir. 1985).

60. *See* SDJ, Inc. v. City of Houston, 837 F.2d 1268, 1276 (5th Cir. 1988); Pennsylvania Alliance for Jobs and Energy v. Council of Munhall, 743 F.2d 182, 187 (3d Cir. 1984).

61. *See* United States v. Albertini, 472 U.S. 675, 689 (1985).

62. Frisby v. Schultz, 108 S. Ct. 2495, 2502 (1988) (citing City Council v. Taxpayers for Vincent, 466 U.S. 789, 808-10 (1984)). The Supreme Court majority in *Frisby* thus reflected the distinction drawn by Judge Coffey, dissenting at the Seventh Circuit level, between a *least restrictive means* test and a *precise responsiveness to the problem* test for narrow tailoring. *See* Schultz v. Frisby, 807 F.2d 1339, 1367 (7th Cir. 1986), *vacated*, 818 F.2d 1284 (7th Cir. 1987), *dist. ct. judgment reinstated and remanded*, 822 F.2d 642 (7th Cir. 1987) (en banc) (*reaff'g* 619 F. Supp. 792 (E.D. Wis. 1985)), *rev'd*, 108 S. Ct. 2495 (1988).

63. *See City of Watseka*, 796 F.2d at 1564 (Coffey, J., dissenting).

64. *See, e.g.*, New York City Unemployed and Welfare Council v. Brezenoff, 677 F.2d 232, 238 (2d Cir. 1982) ("least restrictive efficient method" test successfully met by the government restriction).

65. For arguable instances of such judicial second-guessing, see *e.g.*, Schultz v. Frisby, 807 F.2d 1339 (7th Cir. 1986), *vacated*, 818 F.2d 1284 (7th Cir. 1987), *dist. ct. judgment reinstated and remanded*, 822 F.2d 642 (7th Cir. 1987) (en banc), (*reaff'g* 619 F. Supp. 792 (E.D. Wis. 1985)), *rev'd*, 108 S. Ct. 2495 (1988); City of Watseka v. Illinois Pub. Action Council, 796 F.2d 1547, 1555-56 (7th Cir. 1986); ACORN v. City of Frontenac, 714 F.2d 813, 818 (8th Cir. 1983). For an example of judicial disinclination to second-guess the issue of narrow tailoring, see Students Against Apartheid Coalition v. O'Neil, 838 F.2d 735, 736-37 (4th Cir. 1988) (per curiam) (anti-apartheid shanty barred on university grounds, but no consideration given to whether aesthetic interests could be served just as well by allowing the structures for a brief period of time).

the regulation promote the governmental interest more effectively than would be the case in the absence of the regulation[66] could, by itself, lead to very harsh results. Such a test, for example, could justify the government's enacting some hideously severe regulation on the ground that even a draconian regulation would promote the governmental interest better than no regulation at all. Of course, an unduly severe regulation might be struck down on some other element of the free speech test as applied.[67] The point, however, is that an unduly oppressive and needless restriction on speech, even if it qualifies under the less stringent formulation, is the very antithesis of "narrowly tailored" in any literal sense.

Requiring instead that the regulation target and eliminate no more than the precise evil in question, or its source,[68] is also problematic. This formulation fails to recognize that if one has a choice between using either a sledge hammer or a fly swatter in dispatching a group of insects, there is a sense in which the sledge hammer, because of its relatively severe effects on the flooring, is not narrowly tailored for the job, even if the hitting surface area of the hammer and the fly swatter are equal and no greater than necessary. If, for example, a government were to narrowly target the problem of campaign literature littering by imposing strict liability in the form of a mandatory ten-year prison sentence on the campaign organizers, such a criminal statute, while perhaps being aimed at the precise problem, could well be unduly burdensome on free speech rights because of its excessive repercussions on the conduct and activities of campaign organizers. The view that "an ordinance is sufficiently well tailored if it effectively promotes the government's stated interest"[69] endorses not only the unnecessary use of sledge hammers, but also the use of unnecessarily large sledge hammers as long as they are effective.

Although it should be possible to settle on a single, most

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66. *See, e.g.*, United States v. Albertini, 472 U.S. 675, 689 (1985).

67. An unduly severe regulation might, for example, be suspected of being an attempt to suppress the idea or point of view being advocated, thus engendering extremely strict judicial scrutiny. *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986).

68. *See, e.g.*, Frisby v. Schultz, 108 S. Ct. 2495, 2502 (1988).

69. SDJ, Inc. v. City of Houston, 837 F.2d 1268, 1276 (5th Cir. 1988).

popular version of the narrow tailoring requirement, this would leave the central problem untouched. No matter how it is formulated, the concept of narrow tailoring is inconsequential from the standpoint of promoting the purposes underlying the free speech clause. The breadth or narrowness of a regulation and its impact on speech activities is one thing, while the extent to which the speaker can effectively express her message, or pursue free speech values despite the regulation, is quite another.[70] It is perhaps debatable whether these two inquiries are "closely related,"[71] but it clearly goes too far to suggest that they are nearly equivalent.[72]

One way of illustrating the distinction between a narrow-tailoring requirement and an analysis focusing on available alternative speech channels is to note that a government restriction on speech might not approach being narrowly tailored on any formulation, and yet might leave open a wide range of valuable, effective alternative channels, that are superior to the channels that are regulated. A government regulation might, for example, severely burden or prohibit free speech avenues A and B, where the regulation is either ineffective, or could accomplish its purposes just as well by regulating only avenue A. The same regulation could leave free speech channels C and D entirely unimpaired which are in all respects the best options available to the speaker and to all affected parties.

A regulation, therefore, might not be narrowly tailored, but might well leave open the best free speech channels. Accordingly, if those superior channels are left unimpaired, that should normally be the end of the inquiry. Despite the lack of narrow

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70. For the distinction between these two inquiries, see *e.g.*, City of Watseka v. Illinois Pub. Action Council, 796 F.2d 1547, 1577 n.4 (7th Cir. 1986) (Coffey, J., dissenting) (citing Wisconsin Action Coalition v. City of Kenosha, 767 F.2d 1248, 1254 n.3 (7th Cir. 1985)) (least restrictive means test focuses on government's alternatives while speech channels analysis focuses on speaker's alternatives).

71. Schultz v. Frisby, 807 F.2d 1339, 1350 n.25 (7th Cir. 1986), *vacated*, 818 F.2d 1284 (7th Cir. 1987), *dist. ct. judgment reinstated and remanded*, 822 F.2d 642 (7th Cir. 1987) (en banc) (*reaff'g* 619 F. Supp. 792 (E.D. Wis. 1985)), *rev'd*, 108 S. Ct. 2495 (1988).

72. *But cf.* Clark v. Community For Creative Non-Violence, 468 U.S. 288, 298, 308 n.6 (1984) (finding little difference between the time, place, and manner restrictions as opposed to the four-factor standard used in the draft-card burning case of O'Brien v. United States, 391 U.S. 367 (1968), which notably does not incorporate any consideration of any alternative means of communicating left open to the speaker).

tailoring, there would be no cognizable harm from the standpoint of free speech values.[73] Free speech tests that concern themselves centrally with any form of narrow tailoring are thus misfocused. Free speech tests that require some form of narrow tailoring, but ignore entirely any question of available alternative speech channels left open to the speaker,[74] are even more seriously flawed for the reasons discussed above.

5. *Burden of Proof Analysis*

There are certain unresolved problems that attend not only approaches emphasizing narrow tailoring, but also those, as is argued for in this Article, that rely almost exclusively on alternative speech channel analysis. For example, to the extent that either of these approaches is less than crisply objective,[75] the legal standard of review on appeal becomes important. Currently, the standard of review to be applied to trial court findings of fact in free speech cases, in which the trial court struck down the restrictions as unconstitutional, is particularly controversial.[76] Similarly, there are difficult burden of proof issues associ-

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73. Speakers are often motivated to speak in particular formats for reasons other than to most effectively, or most cost-effectively, promote their views in a manner that also promotes the free speech values of oneself or others. As this Article will discuss below, it may well be the case that a speaker objects vehemently to a regulation that deprives her of only those means of speaking she knows to be relatively undesirable or cost-ineffective from a free speech value standpoint. One might, for example, prefer a particular kind of picketing not for any advantage in promoting free speech values from one's own perspective, but because that kind of picketing combines speaking out with a great ability to coerce unwilling, unconvinced targets to act in accordance with one's will. The test for restrictions on commercial speech, mixed speech, and symbolic conduct tend to require narrow tailoring while ignoring the presence of alternative speech channels.

74. *See, e.g.*, the test formulations in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563-66 (1980); Fox v. Board of Trustees, 841 F.2d 1207, 1213 (2d Cir. 1988); *see also* Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051, 1052 (11th Cir. 1987), *cert. denied*, 108 S. Ct. 1280 (1988) (making no reference to alternative speech channels in a commercial speech test); United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (mixed speech and conduct case which makes no reference to any greater restriction on free speech rights than is essential, with no express or implied concern for the alternative speech channels left open to the speaker); Clark v. Community For Creative Non-Violence, 468 U.S. 288, 294 (1984) (discussing *O'Brien* standard).

75. *See, e.g.*, Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1061 (9th Cir. 1986) (speculative conclusions on fulfillment of the regulatory purpose).

76. *See* Don's Porta Signs, Inc. v. City of Clearwater, 108 S. Ct. 1280-81 (1988) (White, J., dissenting from denial of certiorari). *See also* Lindsay v. City of San Antonio, 821 F.2d 1103, 1107-08 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 707 (1988); Schultz v.

ated with both the narrow tailoring and alternative speech channels inquiries. The courts have been seriously split on whether the government or the challenging speaker should bear the burden of proof on the issue of narrow tailoring. [77] Allocating the burden of proof on the issue of narrow tailoring is inherently difficult because, while the government will generally be in a better position to offer evidence on this point, courts may well be reluctant to saddle governments with the often practically impossible task of showing by a preponderance of the evidence why some slightly narrower, less speech-burdensome regulation would not have been equally effective in promoting the statutory goal. In a range of cases, such a burden on the government would be nearly impossible to meet.[78]

Allocating the burden of proof on the issue of the sufficiency of the remaining alternative speech channels is admittedly also a matter of controversy. The Court has appeared to place the practical burden of showing the constitutional adequacy of the alternative speech channels on the government.[79] Dean Stone has noted that an opposite approach, requiring speakers to show the insufficiency of the remaining alternatives, tends to result in

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Frisby, 807 F.2d 1339, 1341 n.14 (7th Cir. 1986), *rev'd*, 108 S. Ct. 2495 (1988). *But cf.* Garcia v. Gray, 507 F.2d 539, 543 (10th Cir. 1974), *cert. denied*, 421 U.S. 971 (1975) ("[t]rial court findings — including those involving constitutional rights — may not be set aside on appeal unless they are clearly erroneous"); Bering v. SHARE, 106 Wash. 2d 212, 220-21, 721 P.2d 918, 924 (1986) (en banc), *cert. denied*, 107 S. Ct. 940 (1987) (substantial evidence standard applied on appellate review of fact under state law even though trial court had imposed restrictions on freedom of speech).

77. *Compare, e.g.*, Tollis, Inc. v. San Bernardino County, 827 F.2d 1329, 1333 (9th Cir. 1987) (burden on government) *and* ACORN v. City of Frontenac, 714 F.2d 813, 818, 818 n.6 (8th Cir. 1983) (citing Schad v. Borough of Mount Ephraim, 452 U.S. 61, 74 (1981)) (same) *and* New York City Unemployed and Welfare Council v. Brezenoff, 677 F.2d 232, 240-41 (2d Cir. 1982) (same) *with* Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051, 1054 (11th Cir. 1987), *cert. denied*, 108 S. Ct. 1280 (1988) (citing Harnish v. Manatee County, 783 F.2d 1535, 1540 (11th Cir. 1986)) (placing the burden on the speaker) *and* M.J.M. Exhibitors, Inc. v. Stern (*In re* G. & A. Books, Inc.), 770 F.2d 288, 298 (2d Cir. 1985) (same).

78. *See, e.g.*, Wheeler v. Commissioner of Highways, 822 F.2d 586, 590 (6th Cir. 1987) (regulation permitting off-premises urban area signs if they are "more than 660 feet from the interstate highway").

79. *See* City Council v. Taxpayers for Vincent, 466 U.S. 789, 819-20 (1984). *See also* Pennsylvania Alliance For Jobs and Energy v. Council of Munhall, 743 F.2d 182, 193 (3d Cir. 1984) (Becker, J., dissenting) (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983)).

decisions against the speaker, at least in close cases.[80]

We, as a society, may so fear deciding free speech cases incorrectly against the speaker, that this fear alone dictates the placement of the burden of proof on this issue. Avoiding governmental inroads on free speech is important, but the similarly important goal of preventing racial discrimination by the government has not led the courts to require the government to prove its own nondiscriminatory intent.[81] On the issue of the adequacy of alternative channels, logic suggests that the burden of proof belongs at the most crucial point on the speaker. This should not be disturbing, because the reason for allocating the burden to the speaker on this issue actually reflects our sensitivity to the speaker's own free speech interests. While neither the government nor the speaker is generally in a superior position to bring forth evidence on the free speech case as a whole, the speaker will generally be in a much better position to cast light on the issue of the adequacy of the alternative speech channels. This is because the court is centrally concerned with the adequacy of the speaker's alternatives, and with their availability to the particular speaker. The court must focus on the relevant free speech values from the subjective perspective of the parties involved. It may be, for example, that an alternative of distributing leaflets is, for the particular speaker, infeasible, inherently distortive of her message, or not suited to her target audience. All of this is peculiarly within the knowledge of the speaker and a matter of conjecture for the government. While the speaker should not be required to address in turn the inadequacy of the infinite number of distinct alternative ways in which she might conceivably communicate her message, she should be required to show the inadequacy, from her own standpoint, of any plausible alternative channels affirmatively suggested by the government, with the government also being responsible for such matters as showing that the speaker's own preferred channel involves impairing the free speech values of third parties.

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80. *See* Stone, *supra* note 3, at 80.

81. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976).

III. Focusing on the Adequacy of Alternative Channels

In the contexts discussed above, as well as in others,[82] the courts improperly de-emphasize or even ignore the availability or lack of availability of alternative channels that are as advantageous to the speaker's own free speech values as the channel being restricted.[83] Unnecessary complexity and misfocused analysis results. Disencumbering free speech analysis of the distractions discussed above and focusing on alternative speech channels restores proper focus and reduces analytical complexity.

Free speech law, however, even then retains some unavoidable analytical complexity. The government cannot and should not be permitted to successfully defend its regulation merely on the ground that some sort of alternative speech channel, of whatever quality or practicality exists.[84] While the case law is clear that the government may not simply point to some technically available alternative speech channels in support of its regulation,[85] it is not clear how much this means beyond a rejection of some universal rule that an ability to exercise one's speech rights in "some other place" invariably suffices.[86] On such a

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82. In Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983), for example, the Court discussed the tests for restrictions on speech in both traditional or "quintessential" public fora and in limited purpose or "designated" public fora. It referred to the availability of ample alternatives for the speaker as only one factor among several in connection with the "quintessential" public fora, and did not refer at all to the availability of alternative channels in connection with "designated" public fora, although it confusingly suggested that the tests were meant to be the same in this regard. *Id.* at 45-46.

83. Again, the fact that a speaker chooses a speech medium or combination of mediums that is "free speech value inferior" even from her own standpoint does not imply overall irrationality on her part. *See supra* note 73.

84. *See* Meyer v. Grant, 108 S. Ct. 1886, 1893 (1988); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 541 n.10 (1980).

85. *See supra* note 84.

86. *See, e.g.*, United States v. Grace, 461 U.S. 171, 185 (1983) (Marshall, J., concurring in part and dissenting in part) (statute requiring protester to move across the street from the Supreme Court if she wished to display a sign); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 76-78 (1981) (Blackmun, J., concurring) ("Were I a resident of Mount Ephraim, I would not expect my right to attend the theater or purchase a novel to be contingent upon the availability of such opportunities in 'nearby' Philadelphia, a community in whose decisions I would have no political voice."); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 757 n.15 (1976) ("We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means such as seeking him out and asking him what it is."); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546,

broad theory, unpopular speakers could be vexatiously chased across the country from jurisdiction to jurisdiction, impairing their ability to speak effectively.

On the other hand, it is unclear why a regulation denying the use of a particular square foot of sidewalk, or requiring protesters to move an inconsequential six inches to the left, could not be so trivial in its effects on the speaker's free speech values[87] that the regulation could not be upheld without consideration of any other extraneous factors. Just as a particular book may be constitutionally protected in one urban bookstore but not in another,[88] so the Court has sensibly considered whether a speaker can speak in "another" place in passing on the constitutionality of a regulation preventing her from speaking in some designated place. In *Heffron v. International Society for Krishna Consciousness, Inc.*,[89] for example, the Court considered, among other factors, whether alternative forums were available to the speaker.[90] The Court explicitly observed that the challenged restrictions on solicitations at the state fairgrounds did not prevent the respondents from engaging in their communicative activity "anywhere outside the fairgrounds."[91] The government is thus plainly not invariably barred from the plea that the regulated party may speak in "some other place."[92]

Constitutionally adequate alternative speech channels, however, will not always be realistically available.[93] It is even possi-

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556 (1975) (apparently no equally good theater available for musical); Spence v. Washington, 418 U.S. 405, 411 n.4 (1974) (quoting the widely cited language from Schneider v. State, 308 U.S. 147, 163 (1939) that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."). *See also* ACORN v. City of Frontenac, 714 F.2d 813, 819 (8th Cir. 1983).

87. For reference to the most commonly accepted free speech values, see *supra* note 25. *See also* Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878-79 (1963) and, for a slightly different perspective, Blasi, *The Checking Value in the First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

88. *See, e.g.*, Smith v. United States, 431 U.S. 291, 301 (1977) (patent offensiveness of an allegedly obscene work must be measured by contemporary community standards).

89. 452 U.S. 640 (1981).

90. *Id.* at 654-55.

91. *Id.* at 655.

92. Note the tension between this result and the broad language in Schneider v. State, 308 U.S. 147, 163 (1939) ("one is not to have . . . his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.").

93. The Court has rightly focused on the realistic, as opposed to the merely formalistic, availability of alternative channels. *See, e.g.*, Meyer v. Grant, 108 S. Ct. 1886, 1893

ble for a government regulation to be narrowly tailored, or to be the least restrictive means for attaining the legislative goal, without ensuring that a speaker is left with any adequate alternative speech channels. The least restrictive means test, therefore, cannot be generally described as a "more stringent"[94] test than the alternative speech channels test.

A. *Evaluating the Adequacy of Alternative Speech Channels*

Evaluating the constitutional adequacy of an alternative speech channel would take the following form. Just as each speaker may have "a variety of speech interests"[95] that may require consideration, so reasonable speakers may wish to consider more than one dimension of the adequacy or inadequacy of potential alternative speech channels, insofar as each dimension bears on each speech interest. These dimensions might include the size of the actual or potential audience,[96] the prestige of an alternative channel,[97] the "quality" or likely appreciativeness of the audience reachable through an alternative channel,[98] financial cost,[99] flexibility of the alternative channels,[100] immediacy or personalization of impact,[101] and certainly the degree to which the alternative permits greater articulation or detail of presentation.[102] Thus, the courts should consider qualitative as well as

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(1988); Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 93 (1977).

94. Pennsylvania Alliance For Jobs and Energy v. Council of Munhall, 743 F.2d 182, 185 (3d Cir. 1984).

95. Village of Schaumburg v. Citizens For A Better Env't, 444 U.S. 620, 632 (1980). For reference to broader categories of speech interests, formulated as free speech values, see *supra* note 25.

96. *See* Meyer v. Grant, 108 S. Ct. 1886, 1892 (1988); Tacynec v. City of Philadelphia, 687 F.2d 793, 798 (3d Cir. 1982), *cert. denied*, 459 U.S. 1172 (1983).

97. *Tacynec*, 687 F.2d at 798.

98. *See id. But see* Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 93 (1977) (perceived advantage in using "For Sale" signs to reach persons not actively seeking sales information).

99. *See, e.g., Linmark*, 431 U.S. at 93; Lindsay v. City of San Antonio, 821 F.2d 1103, 1111 n.14 (5th Cir. 1987).

100. *See Lindsay*, 821 F.2d at 1111.

101. This factor should often be relevant in cases involving conscience-based residential picketing, as in Frisby v. Schultz, 108 S. Ct. 2495 (1988). *See* Stone, *supra* note 3, at 79. *But cf.* City Council v. Taxpayers for Vincent, 466 U.S. 789, 820 (1984) (Brennan, J., dissenting) (some advantages of signs over more articulate handbills from a free speech value standpoint).

102. Thus, a government regulation that prevents physicists from discussing, for ex-

quantitative aspects of the available alternatives[103] against the backdrop, or baseline standard, of the relative free speech values otherwise available in the absence of the government regulation.

The basic free speech values that will be involved, such as the pursuit of truth, participation in the process of democratic self-government, and self-realization, should be examined from the subjective standpoint of the actors involved. It may go too far, however, to give independent weight to the speaker's own choice of means of speaking, merely because it is her own choice. Although there will doubtless be some tendency for speakers to choose effective rather than ineffective means of speaking,[104] courts should also consider the possibility that the speaker may prefer one means of speaking rather than another for reasons unrelated to, or which actually disserve, free speech values. A speaker may seek a greater potential for sheer annoyance or coercion of a captive, disfavored audience, or some other target of her speech.[105]

Similarly, the courts should not give independent weight to the speaker's choice of means merely on the ground that as the speaker's own choice, that channel embodies and reflects the speaker's interest in her own self-fulfillment or self-realization.[106] The courts should, where necessary, consider which of two mediums better promotes self-realization in and through its use, from the standpoint of the affected parties. They should not

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ample, the feasibility of the Strategic Defense Initiative (SDI), or Star Wars defense system, in technical articles, but permits them to use bumper stickers, buttons, placards, and sandwich boards to express their skepticism, even at taxpayer expense, would be a dramatic infringement on their free speech rights.

103. *See, e.g.*, City Council v. Taxpayers for Vincent, 466 U.S. 789, 803 n.23 (1984)(quantitative analysis); City of Watseka v. Illinois Pub. Action Council, 796 F.2d at 1547, 1553 (7th Cir. 1986) (qualitative analysis). It is clearly impossible as a general rule to suppose that every significant restriction on speech will result in a lower quantity of speech. Speakers may opt instead for the same or greater quantities of speech of poorer "quality," or less precisely targeted speech. These possibilities are largely set aside in *Taxpayers for Vincent*, 466 U.S. at 803 n.23. One occasionally relevant "second-order" consideration would be the alternative's relative vulnerability to particularly subtle, practically undetectable government censorship. *See* City of Lakewood v. Plain Dealer Pub. Co., 108 S. Ct. 2138, 2145-46 (1988) (newsracks versus pamphleteers).

104. *See* Stone, *supra* note 3, at 78.

105. *See supra* note 73.

106. *See* Stone, *supra* note 3, at 78 n.134 (citing various authorities); Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 93 (1977) (vague reference to "autonomy").

assume, however, that free speech values are enhanced simply by allowing persons to choose their own means of expression or act as they please. This would amount to a dubious claim that respect for free speech implies a broad conduct libertarianism.[107] Free speech does not necessarily imply laissez faire. On such a libertarian view, respecting someone's decision to drive to work rather than take a bus, would become a free speech matter because failing to respect that autonomous choice would impair the value of self-realization or self-fulfillment.[108] This line of argument is not to deny, of course, that certain means of speaking may, under the circumstances, be more conducive to self-realization than others in the course of use.[109] Presumably, prayer and fasting at a tyrant's doorstep, for example, may tend to promote self-realization more than sticking an obscene bumper sticker on one's vehicle.

Once the relevant considerations are clarified, alternative speech channel analysis becomes a matter of proper application. At this stage, a number of problems appear. One problem involves the proper analysis of alternatives that are allegedly not commercially viable. Although the financial cost or practical affordability of an alternative will normally be considered in assessing its adequacy,[110] the mere fact that, for example, the alternative sites must be bid for by the speaker, or are already occupied by tenants, does not render the sites necessarily inadequate.[111] Speakers must presumably be prepared to compete in the economic marketplace on the same terms as anyone else. It goes too far, however, to suggest that the "economic impact" of the restriction on the speaker is never a relevant issue.[112] There will inevitably be difficult cases falling between the two ex-

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107. *See* Wright, *A Rationale From J.S. Mill for the Free Speech Clause*, 1985 SUP. CT. REV. 149, 160-61 n.41.

108. The appropriateness of confining free speech principles, short of a broad conduct libertarianism, is a recurring theme of F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY (1982).

109. Thus, researching and writing a treatise on American government may be more self-fulfilling than wearing a campaign button.

110. *See supra* note 99.

111. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 53-54 (1986); SDJ, Inc. v. City of Houston, 837 F.2d 1268, 1276-77 (5th Cir. 1988).

112. *But see City of Renton*, 475 U.S. at 54 (citing Young v. American Mini Theatres, Inc., 427 U.S. 50, 78 (1976) (Powell, J., concurring)).

tremes. While it will obviously be inadequate to inform a welfare rights group that its sole alternative option is buying network television time, it is not necessarily a speech restriction attributable to the government if a particular group's message is so distasteful that it cannot profitably sell its literature from any commercially zoned property. Governments do not necessarily inhibit speech by failing to guarantee responsive markets.[113] The cases between these two extremes are unavoidably fact-sensitive. The touchstone must be an overall sense of whether, taking concerns for free speech of all the affected parties into account (including any ways in which the government regulation may actually enhance the free speech value of some affected person), there has been a significant[114] net diminution[115] in free speech values on the whole. Significantly, the burden of proof rests with the speaker at the most crucial points.[116] In close cases, this will of course be a complex, difficult call. But it is useful to remember that this sort of judgment will amount to only a fraction of the complexity and difficulty encountered with the currently entrenched free speech tests.

B. *Adequate Alternatives and the Problem of Residential Picketing*

To illustrate this inquiry, it may be useful to discuss the role of free speech value analysis and the analysis of available alternative speech channels in the context of the conscientious picketing of home residences by the use of public sidewalks or public streets. In attempting to resolve such cases, the courts apply the sort of unnecessarily multifaceted tests discussed above,

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113. Thus, the government does not necessarily violate the free speech clause by not subsidizing, for example, pornography or fascist literature. There are, however, sufficient consumers of each to enable the purveyors of both to pay their rent.

114. Presumably, insubstantial restrictions on freedom of speech, however burdensome or objectionable they may be in other respects, are generally not actionable. *See* Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1061 (9th Cir. 1986) (slight diminution in effectiveness of erotic message, due to ten-foot separation requirement between dancers and patrons, does not constitute significant impairment).

115. Of course, the diminution in free speech or in free speech values need not be reduced to zero in order to be actionable. *See, e.g.*, Christy v. City of Ann Arbor, 824 F.2d 489, 492 (6th Cir. 1987) (city may not set proportional limits on the percentage of non-obscene erotic materials sold at bookstore).

116. *See supra* note 75 and accompanying text.

but now are additionally encumbered by the complication of public forum analysis.[117] The public forum doctrine, which is controversial in this context,[118] begins by at least implicitly assuming that all public streets in all settings are presumptively alike for free speech purposes, and that they are quintessential public forums in the same category as public parks and public sidewalks.[119]

Perhaps some of the reluctance to categorize sidewalks in front of downtown public buildings as public forums, but not to categorize bucolic residential neighborhood lanes without sidewalks as such, stems from the fear that such a distinction "would represent a radical departure from the general direction of first amendment jurisprudence. Such a holding would effectively place vast areas of this country out of the reach of the protection of the first amendment."[120] Of course, holding residential streets to be public forums does not guarantee protection for all peaceable speech activity.[121] It would not matter, however, from the standpoint of free speech values, whether a certain percentage of turf fell into a less protected category if all speakers had perfectly adequate alternative speech forums readily available to them. The genuine issue then, is whether re-

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117. Criticism of the utility and focus of public forum analysis is found in Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1223-24 (1984) (public forum doctrine often irrelevant, confusing, or crude); Stone, *supra* note 3, at 93. Occasionally, public forum analysis can be simply bypassed. *See, e.g.*, Board of Airport Comm'rs v. Jews for Jesus, 107 S. Ct. 2568, 2571 (1987).

118. *See, e.g.*, the obvious ambivalence of the court in Pursley v. City of Fayetteville, 820 F.2d 951, 955 n.5 (8th Cir. 1987); Schultz v. Frisby, 807 F.2d 1339, 1361-66 (7th Cir. 1986) (Coffey, J., dissenting) (noting the interests in residential privacy and repose and suggesting that the particular street in question was intended for vehicular traffic rather than congregation and communication), *rev'd*, 108 S. Ct. 2495 (1988). It is possible to read such criticisms as suggesting that public forum analysis is either not useful or that the street in question was either a limited-purpose public forum or a non-public forum. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-47 (1983).

119. *See, e.g.*, Frisby v. Schultz, 108 S. Ct. 2495, 2500 (1988); Boos v. Barry, 108 S. Ct. 1157, 1162 (1988); United States v. Grace, 461 U.S. 171, 177 (1983); Heffron v. International Soc'y For Krishna Consciousness, Inc., 452 U.S. 640, 651 (1981) (streets viewed as places "where people may enjoy the open air or the company of friends and neighbors in a relaxed environment."); Bering v. SHARE, 106 Wash. 2d 212, 249, 721 P.2d 918, 939 (1986) (en banc) (Dore, J., dissenting), *cert. dismissed*, 107 S. Ct. 940 (1987).

120. *Schultz v. Frisby*, 807 F.2d at 1347, *rev'd*, 108 S. Ct. 2495 (1988).

121. *See, e.g., Frisby v. Schultz*, 108 S. Ct. at 2504.

stricting someone's speech on a street or sidewalk leaves that speaker with adequate alternative means, from the speaker's own perspective, to convey her message.

In cases of residential picketing, however, the legal issue is ordinarily stated as a matter of balancing the constitutional right of speech or communication against a more amorphous, but undoubtedly important, right of privacy.[122] The approach advocated herein, while treating some of the same considerations, focuses a bit more manageably on the furtherance or nonfurtherance of free speech values, and on the conflicts between these values. The analytical overlap of these approaches stems in part from recognizing that while the private home may be considered to be the locus of privacy or a safe haven,[123] it may also, relatedly, provide a crucial environment for reflection,[124] which is in itself a vehicle for the exercise of free speech values.[125]

An approach to the problems inherent in residential neighborhood picketing requires both a sensitivity to the particular free speech values involved, especially from the distinctive standpoint of the protester, and a recognition that perhaps not every aspect of the protester's activity, or even of the protester's speech, can be said to unequivocally promote free speech values. A sensitivity to the free speech values embodied in the protester may lead us to recognize that the alternatives of picketing at a downtown business location,[126] communicating through "direct mail, radio, television, newspapers or telephone,"[127] or even

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122. *See, e.g.*, Haiman, *Speech v. Privacy: Is There a Right Not To Be Spoken To?*, 67 NW. U.L. REV. 153, 154 (1972); *Schultz v. Frisby*, 807 F.2d at 1351, *rev'd*, 108 S. Ct. 2495; Garcia v. Gray, 507 F.2d 539, 544 (10th Cir. 1974), *cert. denied*, 421 U.S. 971 (1975). For an intriguing case discussing the mailing list exclusion, see Rowan v. United States Post Office Dep't, 397 U.S. 728, 736 (1970) and Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 750-52 (1980).

123. *See, e.g.*, Carey v. Brown, 447 U.S. 455, 471 (1980).

124. *See id.* at 489 (Rehnquist, J., dissenting) (quoting Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Frankfurter, J., concurring)).

125. John Stuart Mill emphasizes, for example, the indispensability of reflection and deliberation in connection with his classic defense of freedom of speech. *See* ON LIBERTY, *supra* note 25, at 41.

126. *See, e.g.*, Pursley v. City of Fayetteville, 820 F.2d 951, 953 (8th Cir. 1987) (referring to district court opinion).

127. *See* Schultz v. Frisby, 807 F.2d 1339, 1356 (7th Cir. 1986) (Coffey, J., dissenting), *rev'd*, 108 S. Ct. 2495 (1988).

picketing in a less focused and concentrated manner in front of the target's own residence[128] could conceivably represent a significant impairment in free speech values of the protester. For example, a pro-life picketer may, as a matter of conscience or tactics, prefer not to reach large numbers of people with her message,[129] but instead to confront personally a physician who performs abortions. Not all pro-life picketing, of course, will be carried on this way, but doing so, rather than, for example, communicating through radio advertisements, is potentially fully legitimate and may well be preferable from the point of view of the protester's own free speech values.

On the other hand, certain aspects of a residential picketer's tactics, even though they are preferred by the picketer, either may not detectably advance free speech values, or may be positively inconsistent with free speech values, at least from the standpoint of a target or victim. This concern would include not just the familiar "captive audience" problem,[130] but all attempts to embarrass, inflict suffering, coerce, intimidate, or bully an unconsenting[131] target, directly or through adult or child[132] third

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128. *See* Frisby v. Schultz, 108 S. Ct. 2495, 2501 (1988).

129. *But cf. Schultz v. Frisby*, 807 F.2d at 1371 (Coffey, J., dissenting) (focusing in this context on size of audience), *rev'd*, 108 S. Ct. 2495 (1988).

130. *See, e.g.*, Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) and Haiman, *supra* note 122, at 193-94. The "captive audience" problem pits the free speech values of a willing speaker against those members of the audience who would prefer not to listen, but have no means of physically leaving, such as a speaker at a bus depot.

131. While the target of picketers may generally be presumed to prefer that the picketers leave, the issue of consent may perhaps be somewhat more problematic in the case of residential picketing of high public officials. For a discussion of similar facts, see Garcia v. Gray, 507 F.2d 539 (10th Cir. 1974), *cert. denied*, 421 U.S. 971 (1975) and Gregory v. City of Chicago, 394 U.S. 111 (1969). *Gregory* is discussed in Kamin, *Residential Picketing and the First Amendment*, 61 NW. U.L. REV. 177 (1966). In his article, Professor Kamin simply finds privacy rights to outweigh free speech rights in the context of residential picketing of high officials, even if the "target" is the Mayor of Chicago. *See id.* at 182-83. If the Court were to insist on this broad intuitive balancing, however, it would have to take due account of the view, familiar from libel law cases, that public officials voluntarily undertake the risk of exposure to certain sorts of abusive unpleasantness. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-45 (1974).

132. As a rule, speech or picketing involving complex emotional subjects aimed at young children should be scrutinized for the possibility that the children are being used simply as a means to coerce or intimidate the children's parents. *See Schultz v. Frisby*, 807 F.2d at 1366 & n.6 (Coffey, J., dissenting), *rev'd*, 108 S. Ct. 2495 (1988). Such speech could be, on balance, alien to or destructive of recognizable free speech values. *See generally* Wright, *Free Speech Values, Public Schools, and the Role of Judicial Deference*,

parties, in ways that essentially "bypass" or ignore the process of reasoned persuasion that appeals to the unencumbered judgment of the target.

C. *The Limited Utility of the Concept of Coercion*

It may be tempting to suppose that the Court's concern for free speech values requires that the residential picketer's "speech" or other activity be classified as itself impairing free speech values if and only if the picketer's speech or other activity can be characterized as "coercive."[133] The concept of coercion, however, turns out to be both too amorphous and too controversial to serve this role. While coercion as a concept is helpful in free speech analysis because it can be generally distinguished from the process of reasoned persuasion[134] that is central to free speech,[135] the question of whether coercion is itself morally neutral has been left unclear by the literature.[136] This is a matter of some importance. If residential picketers contend that their picketing is aimed at preventing moral evil or the violation of moral rights of others by their target, then on a moralized conception of what coercion means, the picketers cannot be said to be engaging in coercion, regardless of how extreme their

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22 NEW ENG. L. REV. 59 (1987).

133. As this section establishes, no neutral, uncontroversial, consensual account of what constitutes "coercion" is presently possible.

134. *See, e.g.*, Gert, *Coercion and Freedom*, XIV NOMOS: COERCION 30, 44-45 (J. Pennock & J. Chapman eds. 1972).

135. *See generally* J.S. MILL, *supra* note 25.

136. For what seems to be a well-grounded, familiar approach, see Wolff, *Is Coercion Ethically Neutral?*, XIV NOMOS: COERCION 144, 146 (J. Pennock & J. Chapman eds. 1972) ("[C]oercion is degrading. To coerce a man rather than persuade him is to treat him as a thing governed by causes rather than a person guided by reasons."). However, the philosophical literature is sharply divided on the extent to which the concept of coercion has built into it a negative moral evaluation or a sense of prima facie unjustifiability. *Compare, e.g.*, Ryan, *The Normative Concept of Coercion*, 89 MIND 481, 483-84 (1980) (no coercion if no violation of one's obligations or the rights of those acted upon) *and* Carr, *Coercion and Freedom*, 25 AM. PHIL. Q. 59, 63 (1988) (a justifying moral convention can render what would otherwise be coercive into noncoercive activity) *with* A. WERTHEIMER, COERCION 188 (1987) (rejecting Ryan's approach in this regard) *and* Lyons, *Welcome Threats and Coercive Offers*, 50 PHIL. 425, 427 (1975) (arguing that a person might be coerced into acting fairly). Robert Nozick leaves open the degree to which the concept of coercion necessarily refers to some moral baseline in NOZICK, COERCION, PHILOSOPHY, SCIENCE, AND METHOD 447 (S. Morganbesser, P. Suppes, & M. White eds. 1969).

tactics are.[137]

Without presuming to resolve this issue of the status of coercion, it seems clear that coercion in the context of residential picketing will often involve the subversion and impairment of the free speech values of the direct or indirect target of the coercion, whether the attempted coercion is successful or not.[138] Even unsuccessful attempts at coercion could impair free speech values from the standpoint of the target if, for example, the target is so tormented and distracted by the incessant din of the picketing that she is unable to reflect on or reason about the merits of the underlying issue raised by the picketers. The opportunity to reflect on and consider the merits of public or moral issues is plainly central to various free speech values.[139]

The recognition that coercive speech can substantially impair the free speech values of a target, or that speech can be "persuasion bypassing," casts serious doubt on the Supreme Court's repeated claim that speech that is coercive does not lose its constitutionally protected character.[140] It is perfectly possible to protect coercive speech in a given case on the ground that the degree to which it impairs free speech values is minimal compared with the degree to which it is expressive of other free speech values, particularly those of the speaker. But this would, if pushed too far, run contrary to our skepticism about permitting a speaker unilaterally to redistribute free speech values in his own favor, by analogy, that one's fist-swinging freedom should end at a victim's nose. While public debate should doubtless be "uninhibited, robust, and wide-open,"[141] and while per-

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137. *See, e.g.*, Ryan, *supra* note 136, at 483-84; Carr, *supra* note 136, at 63.

138. It is often argued that there is, in effect, no such thing as attempted but unsuccessful coercion; that if the target does not comply with the would-be coercer's threat or demand, then he has not been coerced, or even made subject to coercion. *See, e.g.*, Bayles, *A Concept of Coercion*, XIV NOMOS: COERCION 16, 17 (J. Pennock & J. Chapman eds. 1972); Gunderson, *Threats and Coercion*, 9 CAN. J. PHIL. 247, 256 (1979) and other authorities cited in Westen, *"Freedom" and "Coercion" — Virtue Words and Vice Words*, 1985 DUKE L.J. 541, 562 & n.79. Professor Westen himself thinks this approach is inaccurate. *See id.* at 562. Attempted, but unsuccessful, coercion is in any event often blameworthy. *See* Bayles, *supra*, at 19.

139. *See supra* note 25.

140. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 909-11 (1982); Organization For a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

141. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

suasive, emotional, and even offensive[142] speech, as well as purely descriptive[143] speech, are important to public debate, these and similar considerations certainly do not support a broad immunization of coercive speech.[144]

The crucial problem with focusing on the concept of coercion, in this context, is its sufficiently inclusive character. A residential picketer might, for example, impair free speech values by means other than coercion in any narrow sense of the term.[145] One might manipulate, or condition, or even socially pressure a target into compliance, in a way that does not involve persuasion and, in fact, impairs free speech values, without exercising coercion as that term is normally understood.[146] If a residential picketer, by means other than coercion, can intentionally or unintentionally undermine free speech values or the purposes underlying the legal institution of freedom of speech, then an analytical focus on coercion by speakers is necessarily too narrow. Thus, an analytical focus on alternative speech values, while simple by comparison with established approaches to government regulation of speech, must not be oversimplified.

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142. *See, e.g.*, *Claiborne Hardware Co.*, 458 U.S. at 911. *See also* VanDeveer, *Coercive Restraint of Offensive Actions*, 8 PHIL. & PUB. AFFAIR 175, 188 (1979).

143. *See, e.g.*, Bering v. SHARE, 106 Wash. 2d 212, 226, 721 P.2d 918, 927 (1986) (en banc), *cert. dismissed*, 107 S. Ct. 940 (1987).

144. *See Bering*, 106 Wash. 2d at 258, 721 P.2d at 944 (Anderson, J., dissenting in part) (persuasive speech as losing constitutional protection when it becomes coercive). *But cf.* Kamin, *supra* note 131, at 212 (raising the possibility that simple distribution of leaflets could be coercive if the leaflets were accepted because of the imposing bulk of the person distributing them).

145. *See, e.g.*, Carr, *supra* note 136, at 59 ("not all interferences with one's freedom involve coercion"). *Cf. Bering*, 106 Wash. 2d at 219, 721 P.2d at 923 (picketing that causes physicians and patients emotional distress and a substantial risk of physical and mental harm is coercive).

146. *See, e.g.*, McCloskey, *Coercion: Its Nature and Significance*, 18 S. J. PHIL. 335 (1980). *But cf.* Day, *Threats, Officers, Law, Opinion and Liberty*, 14 AM. PHIL. Q. 257, 265 (1977) (including, *i.e.*, threats and intimidation as coercive modes of influence, but excluding punishment or deterrence from the category of coercion). The question of whether there are circumstances in which making someone an "offer" could impair free speech values is as intriguing as, but probably no more easily resolved than, the related question of whether an "offer" could ever be coercive. *See, e.g.*, Benditt, *Threats and Offers*, 58 PERSONALIST 382, 383-84 (1977) (yes); Day, 14 AM. PHIL. Q. at 259 (offers not curtailing liberty). For commentary on Benditt, see Richards, *Acting Under Duress*, 37 PHIL. Q. 21, 35-36 (1987); and Westen, *supra* note 138, at 570-71 nn.98 & 99. For extended discussion, *see generally* A. WERTHEIMER, *supra* note 136.

IV. Conclusion

This Article has suggested that current free speech law is unnecessarily complex, in ways that risk unnecessary arbitrariness, unpredictability, and sheer manipulability of result. More deeply, there is some risk that unnecessarily complex judicially created free speech doctrine will eventually make it more difficult for ordinary citizens to comprehend or profoundly subscribe to freedom of speech as an overriding important constitutional value.[147] Whatever the magnitude of these risks, they need not be taken. Focusing instead, as this Article has suggested, on the availability or lack of alternative speech channels, from the standpoint of the speaker and other affected parties, is itself an adequate alternative to current free speech doctrine.

No free speech test formulation can be guaranteed to be immune from judicial abuse for repressive ends, but the simpler the test, the fewer the possibilities for disguising repressive ends. By its nature, the practically-available-alternative-speech channel analysis above is both inescapably central to what we should be preeminently concerned about in most free speech cases, and inescapably formulated so as to discourage, rather than promote, repression of disfavored ideas. For a governmental restriction of speech to be sustained on this approach, there must in effect be no constitutionally cognizable harm. In the absence of the government restriction on speech, the speaker will be able to present a particular message in a particular way to a particular audience, thereby promoting, from his own standpoint, if that of no other person, such free speech values as the search for truth, political participation, and self-realization.[148] If the government restriction is to be sustained on the theory discussed above, the restriction must leave practically open to the speaker, or as open as the now restricted alternative would have been, at least one alternative that, from all relevant persons' standpoints, is not significantly less promotive, overall, of the relevant free speech values.

Of course, this approach is not simple. Close, difficult cases involving obscure value tradeoffs may arise. The restricted

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147. *See* Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 470-73 (1985).

148. *See, e.g.*, Emerson, *supra* note 87, at 878-79.

speech channel may offer a broad audience, and the proffered alternative greater articulateness, creating problems of commensurability. But in the broad run of cases, it will be reasonably clear that some equivalent speech channel exists. However, the audience might be substantially smaller, or the message substantially distorted, or some other substantial deficiency in free speech value terms might be present. If theoretical problems remain, they are problems that cannot be avoided on any more complex, multifaceted theory than that argued for in this Article.