THE TEST THAT ATE EVERYTHING: INTERMEDIATE SCRUTINY IN FIRST AMENDMENT JURISPRUDENCE

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There is little doubt that over the past thirty years, the most important doctrinal development in the jurisprudence of constitutional rights has been the formulation, and proliferation, of "tiers of scrutiny," which are employed by the courts to reconcile individual liberties with societal needs. These tiers were created by the Supreme Court in order to formalize the jurisprudence of rights, and to reconcile the general presumption of constitutionality and deference to legislative bodies with the inherently countermajoritarian nature of judicial review. Originally, the Court created two tiers – the highly deferential "rational basis review," and the almost always "fatal in fact"[3] strict scrutiny – to structure constitutional analysis. These tests had their roots in the Court's Due Process and Equal Protection jurisprudence, but by the 1980s they provided the dominant mode of analysis throughout the Court's rights jurisprudence.

Whatever the merits of two-tiered analysis in Due Process and Equal Protection analysis,[4] in the area of free speech it was never adequate to explain the subtleties of the Court's jurisprudence. Rather, in addition to the strict scrutiny test (which was limited in the free speech arena to content-based regulations of speech) and the rarely-invoked rational basis test, beginning in the late 1960s the Court developed distinct free-speech tests to assess the constitutionality of regulations of symbolic conduct;[5] restrictions on the time, place, and manner of speech in the public forum;[6] regulations of commercial

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[2] *Cf.* Jeffrey Steingarten, The Man Who Ate Everything (Knopf 1997).
[3] Gerald Gunther, *The Supreme Court, 1971 Term – Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972).
[4] And even here, problems soon arose, *see infra*, notes __ to __ and accompanying text.
[5] *See United States v. O'Brien*, 391 U.S. 367 (1968).
[6] *See, e.g., United States v. Grace*, 461 U.S. 171 (1983); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Hill v. Colorado*, 530 U.S. 703 (2000).

speech;[7] and a number of other areas of free speech law.[8] For a short time, chaos seemed to reign. Beginning in the early to mid 1980s, however, the Supreme Court, and even more so the lower courts and commentators, began to bring order to this tangle, ultimately combining these various "tests" into a single, unitary standard of review which has come to be called intermediate scrutiny (a development which paralleled, and drew upon, the emergence of an "intermediate scrutiny" tier of review in the Equal Protection arena, as the test for sex discrimination).

First Amendment intermediate scrutiny thus emerged as a product of the merging of several distinct, and relatively narrow branches of the Court's jurisprudence. Over the years, however, it has attained central importance in the overall structure of free speech law. Indeed, so important and ubiquitous has intermediate scrutiny become that Justice Scalia has described it (pejoratively, of course) as "some sort of default standard,"[9] and it has been the standard of review in literally dozens of significant Supreme Court and Court of Appeals cases over the past quarter century. Despite this importance, however, scholarly analysis of First Amendment intermediate scrutiny has been curiously muted. Geoffrey Stone's 1987 article on content-neutral restrictions[10] remains the leading, and indeed the only significant comprehensive scholarly examination of this area of law, and while Stone's article is both thorough and insightful, the law has of course evolved in the almost two decades since its publication.

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[7] *See Central Hudson Gas v. Public Service Commission of New York*, 447 U.S. 557 (1980).
[8] These developments are discussed in more detail *infra*, at notes __ to __ and accompanying tesxt.
[9] *See* Susan Dente Ross, *Reconstructing First Amendment Doctrine: The 1990s [R]Evolution of the* Central Hudson *and* O'Brien *Tests*, 23 Hastings Comm/Ent L.J. 723, 727 (2001) (*quoting Madsen v. Women's Health Center*, 512 U.S. 753, 792 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part)).
[10] Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. Chi. L.Rev. 46 (1987).

In this article I begin the task of plugging this hole in modern First Amendment scholarship. In particular, the objective of this article is to explore how First Amendment intermediate scrutiny came to be born, and more importantly, how this form of analysis has been applied *in practice* in the federal appellate courts. And an examination of the cases turns out to be extremely rewarding. The story the cases tell, in short, is that whatever the theoretical merits and institutional convenience (for the Supreme Court, at least) of creating all-encompassing "tests," the lower courts have struggled mightily to apply the intermediate scrutiny test with any degree of consistency or predictability to the vastly divergent range of factual circumstances in which intermediate scrutiny would seem to be the applicable standard of review. Furthermore, the style of reasoning mandated by intermediate scrutiny results in judicial opinions which read as stunted, unnatural, and sometimes dishonest. In other words, the growth of an overarching intermediate scrutiny standard has created order only on the surface, masking underlying chaos; and even worse, it has sacrificed much-needed subtleties for doctrinal simplicity. I conclude with some suggestions regarding where we might go from here to alleviate these problems.

TIERS IN FIRST AMENDMENT LAW

The modern jurisprudence of tiers has its roots in the post-*Lochner* era, when the New Deal revolution forced the Supreme Court to reassess its existing methodologies. It was at this time that the Court came to recognize that for reasons of institutional capacity and democratic legitimacy, under normal circumstances legislation should come to the courts with a strong presumption of constitutionality. As such, even in the face of a claim

of an individual-rights violation, action by the democratic branches of government should be struck down only if completely irrational.[11] This presumption of constitutionality was strongest in the area of economic regulation (a natural reaction to the excesses of *Lochner*), but was never so limited. And thus was born the modern "rational basis" test, under which legislation will be upheld so long as it is "rationally related to a legitimate state interest."[12]

While rational basis review provided an acceptable starting point for analysis in most cases, from the beginning members of the Court recognized that it could not apply in all cases unless the judiciary was to abdicate its responsibilities to check legislative overreaching. This point was of course most famously made in footnote 4 of the seminal rational-basis review opinion in *Carolene Products*, where Justice Stone pointed out that judicial deference may not be appropriate "when legislation appears on its face to be within a specific prohibition of the Constitution," when it "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," or when it is "directed at . . . discrete and insular minorities."[13] Restrictions on freedom of speech would appear to fall squarely within Stone's first category, and indeed he cites two First Amendment cases in support of it.[14] Thus even at the height of the era of post-*Lochner* deference, in free speech cases the Court did not defer to legislative or executive actions, as evidenced by contemporary cases such *Cantwell v.*

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[11] The seminal cases here are *Nebbia v. New York*, 291 U.S. 502 (1934); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); and *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).
[12] *New Orleans v. Duke*, 427 U.S. 297, 303 (1976); *see also Washington v. Glucksberg*, 521 U.S. 702, 728 (1997); *FCC v. Beach Communications*, 508 U.S. 307, 314 (1993); *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457 (1988).
[13] *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).
[14] *Ibid* (*citing Stromberg v. California*, 238 U.S. 359, 369-370 (1931); *Lovell v. Griffin*, 303 U.S. 444, 452 (1938)).

Connecticut[15] and *Bridges v. California*.[16] The more stringent review in these cases was not yet designated strict scrutiny (a label which did not yet exist in the Court's jurisprudence[17]); instead, the Court employed a number of different doctrinal formulations, though the dominant one – invoked in *Cantwell, Bridges*, and a number of other contemporary cases – was the version of the Clear and Present Danger test developed by Justices Holmes and Brandeis in their famous separate opinions.[18] Regardless of names, however, the Court's methodology here provided clear antecedents for modern heightened scrutiny in free speech cases.

The final step in the codification of tiered review in free speech cases was the adoption of the formal standards of review developed in the Equal Protection arena – that is, rational basis review and strict scrutiny – into the edifice of First Amendment law. In particular, because rational basis review plays an extremely limited role in free speech cases,[19] the key event was the formulation of the rule that all content-based restrictions on speech should be subject to strict scrutiny. Oddly enough, this incorporation appears to have happened almost inadvertently. As Justice Kennedy discusses in his concurring opinion in *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd*,[20] the strict scrutiny test for content-based regulations entered free speech law via citations to

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[15] 310 U.S. 296 (1940).

[16] 314 U.S. 252 (1941). Searching scrutiny in free speech cases went into temporarily eclipse in the early 1950s during the McCarthy era, notably in *Dennis v. United States*, 341 U.S. 494 (1951), and *Feiner v. New York*, 340 U.S. 315 (1951), but soon reemerged and of course remains the rule today.

[17] The concept of strict scrutiny, as well as the term itself, originated in the Court's Equal Protection jurisprudence. The term is first used in the modern caselaw in *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), the leading case in the fundamental rights strain of Equal Protection law. The principle that heightened scrutiny should be applied to all racial classifications can be traced to *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

[18] *See Abrams v. United States*, 250 U.S. 616, 627-631 (1919) (Holmes, J., dissenting); *Gitlow v. New York*, 268 U.S. 652, 672-673 (1925) (Holmes, J., dissenting); *Whitney v. California*, 274 U.S. 357, 373-379 (1927) (Brandeis, J., concurring).

[19] *Cf. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 580 (1991) (Scalia, J., concurring in the judgment) (applying rational basis review to a regulation of nude dancing).

[20] 502 U.S. 105, 124-128 (1991) (Kennedy, J., concurring in the judgment).

Carey v. Brown,[21] an Equal Protection case, albeit one involving speech. And *Carey* itself relied on the earlier decision in *Police Department of Chicago v. Mosley*,[22] another Equal Protection case involving discrimination between speech based on content. Regardless of how it happened, however, by the late 1980s the adoption of the two basic Equal-Protection tiers of review into free speech law was complete, and seemingly universally accepted.[23]

THE ROOTS OF INTERMEDIATE SCRUTINY

The above description of the gradual adoption of Equal Protection tiers, while a critical part of the story of modern First Amendment jurisprudence, is clearly incomplete. For one thing, the Court has long recognized, and defined, categories of speech which are completely (or almost completely[24]) unprotected by the First Amendment.[25] But even with respect to protected speech, there have always been a number of strands of free speech cases in which neither the extreme deference of rational basis review nor the almost-automatic invalidation of heightened scrutiny has been applied. It is these areas of caselaw that form the roots of modern intermediate scrutiny.

Time, Place, and Manner Regulations of the Public Forum

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[21] 447 U.S. 455, 461 (1980).
[22] 408 U.S. 92 (1972).
[23] The tiers have also been incorporated into the law of substantive due process, *see e.g., Washington v. Glucksberg*, 521 U.S. 702, 721-729 (1997), and that of free exercise of religion, *see, e.g., Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993).
[24] *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down content-based discrimination within category of unprotected "fighting words").
[25] *See, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) ("fighting words"); *Roth v. United Sates*, 354 U.S. 476 (1957); (obscenity); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement); *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography).

The first of the strands of cases that eventually emerged as intermediate scrutiny has its roots in the very beginning of the modern, post-*Lochner* era, in a series of free speech cases in which the Court declined to apply either the newly-minted form of deferential, rational-basis review, or the heightened scrutiny of the Holmes/Brandeis Clear and Present Danger test, presumably because neither seemed appropriate. Instead, some sort of middle course seemed required, a form of analysis permitting the accommodation of social and private interests. Thus in *Schneider v. State*[26] the Court struck down ordinances banning the distribution of literature in streets and other public places, on the grounds that the State's legitimate interest in preventing litter was insufficient to justify such a severe limitation on free speech. Similarly, in *Martin v. City of Struthers*[27] the Court held unconstitutional a flat ban on the door-to-door distribution of handbills. In contrast, in *Kovacs v. Cooper*[28] the Court (albeit by a 5 to 4 vote) upheld a ban on the use of sound trucks and loud speakers on public streets, on the grounds that the government's legitimate concerns regarding safety and tranquility justified a limited restriction on speech. Finally, in a related line of cases the Court considered, and generally struck down, ordinances requiring speakers to obtain licenses or permits before engaging in particular kinds of communicative activities.[29] The commonality here is that in all of these cases, the Court was faced with laws which imposed substantial burdens on free speech, but which did not involve flat censorship (in today's jargon, content-based regulations), and which did implicate significant, legitimate societal interests. The

[26] 308 U.S. 147 (1939).
[27] 319 U.S. 141 (1943).
[28] 336 U.S. 77 (1949).
[29] *See, e.g., Saia v. New York*, 334 U.S. 558 (1948) (striking down permit requirement for using sound amplification devices); *Cox v. New Hampshire*, 312 U.S. 569 (1941) (upholding requirement of a license before holding a parade or procession on a public street); *Lovell v. Griffin*, 303 U.S. 444 (1938) (striking down permit requirement for all distribution of literature).

methodological solution the Court adopted in these cases was the "weighing"[30] or "balanc[ing]"[31] of rights against community interests, to reach an appropriate compromise.

In recent years, in particular since the early 1980s, the Court has somewhat modified its approach to the problem posed in the above cases, which it now characterizes as the imposition of "content-neutral," "time, place and manner" restrictions on speech on public property. In particular, it has replaced the general balancing approach of the early period with a seemingly more formalized, 4-part test.[32] Under this test, as formulated in the 1989 *Ward* decision, time, place, and manner regulations will survive constitutional scrutiny, provided that they are "justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[33] The Court has further clarified that the "narrowly tailored" aspect of its test requires only that the chosen regulatory means are not "substantially broader than necessary to achieve the government's interest,[34] not that they constitute the least restrictive means to achieve its goals. Finally, in addition to the above requirements, when a licensing scheme is at issue the Court has held that the "regulation [must] contain adequate standards to guide the official's decision and render it subject to effective judicial review."[35] Under this approach the Court has upheld such varied

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[30] *Martin*, 319 U.S. at 143.
[31] *Saia*, 334 U.S. at 562.
[32] Though as I discuss below, in practice this test has amounted to little more than general balancing. *See infra* at __.
[33] *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (*quoting Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)); *see also United States v. Grace*, 461 U.S. 171, 177 (1983); *Hill v. Colorado*, 530 U.S. 703, 725-726 (2000).
[34] *Ward*, 491 U.S. at 800.
[35] *Thomas v. Chicago Park District*, 534 U.S. 316, 323 (2002).

regulations as a ban on camping in a park, as applied to a proposed "tent city" to protest homelessness;[36] a ban on targeted picketing of a residence;[37] a requirement of using city-provided sound equipment for concerts at a Bandshell in Central Park;[38] a statute limiting protests near "health care facilities";[39] and a requirement that a permit be obtained before holding an event involving more than fifty people in a public park.[40] On the other hand, it struck down a flat ban on demonstrations on the sidewalk outside the Supreme Court building,[41] and at least a plurality applied the standard to strike down a flat ban on leafleting at an airport.[42]

Regulations of Symbolic Conduct

The other key source of the modern First Amendment intermediate scrutiny test is the Court's jurisprudence regarding symbolic speech. The leading case here is *United States v. O'Brien,*[43] in which the Court faced a First Amendment challenge to a conviction under a statute forbidding the "forg[ing], alter[ing], knowingly destroy[ing], [or] knowingly mutilate[ing]" of one's draft card, as applied to an individual who publicly burned his draft card in protest against the Vietnam War. The question posed by the case was thus whether the First Amendment forbade the application of a general statute regulating behavior to symbolic conduct which conveyed a distinct, political message. In assessing this claim, the Court created a new, 4-part constitutional test for regulations of expressive conduct: such a regulation will be upheld "if it is within the

[36] *Clark v. Community for Creative Non-Violence, supra*.
[37] *Frisby v. Shultz*, 487 U.S. 474 (1988).
[38] *Ward v. Rock Against Racism, supra*.
[39] *Hill v. Colorado, supra*.
[40] *Thomas v. Chicago Park District, supra*.
[41] *United States v. Grace, supra*.
[42] *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992).
[43] 391 U.S. 367 (1968).

constitutional power of the government; if it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[44] Applying this test (albeit with some dubious reasoning), the Court upheld the conviction.

Since it was adopted in 1968 the *O'Brien* test has become the definitive doctrinal statement in this area. The *O'Brien* test has since been applied by the Court to such diverse activities as the closing of an adult book store pursuant to a statute targeted at buildings used for prostitution,[45] the application of public nudity statutes to bar nude dancing,[46] and the application of the antitrust laws to a boycott by lawyers representing indigent criminal defendants, seeking higher governmental compensation.[47] In each of those instances the Court rejected the First Amendment challenge to the regulation at issue, and in the course has clarified that despite its seemingly strict language, the *O'Brien* test is not an especially strict one.[48]

Regulations of the Mass Media

As the above discussion demonstrates, by the late 1980s the Supreme Court had a fairly well-established, stable jurisprudence regarding time, place and manner restrictions and regulations of symbolic speech. Soon thereafter, a subtle but extremely significant expansion of the ambit of these tests occurred, effectively creating a new body of jurisprudence. In particular, the Court began applying its time, place and manner and

[44] *Id.* at 377.
[45] *Arcara v. Cloud Books*, 478 U.S. 697 (1987).
[46] *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).
[47] *FTC v. Superior Court Trial Lawyers Assn.*, 493 U.S. 411, 428-436 (1990).
[48] *Superior Court Trial Lawyers*, 493 U.S. at 871.

symbolic speech tests to assess content-neutral regulations of the mass media which restricted speech which could *not* in any way be characterized as merely conduct, and which did *not* occur on public property. By so doing, the Court appears to have begun a process of converting its two four-part tests, which as I will discuss had in any event begun to merge into a single test,[49] into a general test for content-neutral regulations of speech, or at least of the mass media.

The beginnings of this expansion can be seen as early as the 1984 decision in *Regan v. Time, Inc.*,[50] where a plurality applied the time, place and manner test to uphold a federal statute regulating the color and size of permissible reproductions of U.S. currency, as applied to a cover on Sports Illustrated magazine. The critical case in this development, however, was the 1994 decision in *Turner Broadcasting System, Inc. v. FCC*.[51] In *Turner*, the Court considered a First Amendment challenge to Congress's so-called "must carry" rules, which required cable television operators to dedicate a proportion of their channel capacity to, and carry, free of charge, the signals of local broadcast television stations. In assessing this claim, the Court first, over a vigorous dissent, concluded that the must carry rules were content-neutral, because they did not facially, and were not intended to, benefit or burden speech of a particular content.[52] Having so concluded, the Court then announced, citing *Ward* and *O'Brien* but without much further analysis, that "the appropriate standard by which to evaluate the constitutionality of must-carry is the intermediate level of scrutiny applicable to content-

[49] *See infra* at notes __ to __ and accompanying text.
[50] 468, U.S. 641, 655-659 (1984).
[51] 512 U.S. 622 (1994).
[52] *Id.* at 643-652.

neutral restrictions that impose an incidental burden on speech."[53] The Court then remanded the case to the lower court for application of this standard. [54]

What is noteworthy is that the Court felt that the relatively deferential *Ward* and *O'Brien* tests should apply even though the must-carry rules clearly (despite the Court's description of the rules as imposing an "incidental burden") imposed a *direct* restriction on speech by the mass media, and even though the government had no special, proprietary justifications for its regulation. As such, the *Turner* Court appears to have (albeit perhaps inadvertently) converted the time, place and manner and symbolic speech tests into a general test for media regulations, or perhaps for all speech regulations, so long as they do not target the content of speech. As such, the decision represents a crucial step in the creation of an overarching intermediate scrutiny standard in First Amendment law.

Regulations of Commercial Speech

The discussion above elucidates the process by which an intermediate scrutiny standard was gradually evolving in the areas of "core" First Amendment concern, where the State was regulating fully protected speech, including notably political speech and speech of the mass media (*i.e.*, "the press"). At the same time, however, a similar legal evolution was occurring in other, perhaps less central but still highly significant areas of First Amendment law. The most important of these developments occurred in the area of commercial speech regulations.

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[53] *Id.* at 661-662.
[54] The lower court upheld the rules on remand, and three years later the Supreme Court affirmed that decision. *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997).

The term commercial speech, as used in First Amendment jurisprudence, refers purely to commercial advertising; the Court has defined it as speech which "does no more than propose a commercial transaction."[55] The category thus does *not* encompass speech merely because it is the *subject* of a commercial transaction, such as the sale of a newspaper or even the placement of a political advertisement – such speech is fully protected by the Constitution. Until 1976 the Court understood commercial speech to be completely outside the ambit of the First Amendment, and therefore subject to unrestricted regulation.[56] In 1976, however, the Court held that commercial speech, though admittedly of lower First Amendment value than other forms of speech, was nonetheless entitled to some level of protection.[57] The exact level of protection was left unclear, though the Court did clarify that some regulations of commercial speech are surely permissible. Four years later, in *Central Hudson Gas v. Public Service Commission of New York*,[58] the Court finally adopted a four-part "test" for commercial speech regulations: (1) first, the Court asks "whether the expression is protected by the First Amendment" – *i.e.*, the speech "must concern lawful activity and not be misleading." If this requirement is met, the challenged regulations will be upheld so long as (2) "the asserted governmental interest is substantial"; (3) "the regulation directly advances the governmental interest"; and (4) the governmental interest cannot "be served as well by a more limited restriction on commercial speech." This test, despite the occasional criticism by various justices,[59] remains the governing standard in this area.

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[55] *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002).
[56] *See Valentine v. Chrestensen*, 316 U.S. 52 (1952).
[57] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).
[58] 447 U.S. 557 (1980).
[59] *See, Thompson, supra*, 535 U.S. at 367-368 (listing criticisms by Justices of *Central Hudson* test).

The *Central Hudson* test has obvious parallels with the 4-part tests for time, place and manner regulations, and for regulations of symbolic speech. There are however, some important differences. Most notably, the *Ward* test for time, place and manner, as well as the *O'Brien* test, are limited to content-neutral regulations. Commercial speech regulations, however, may be, and generally are, content-based; but because of the lower constitutional value of such speech, only intermediate scrutiny applies. In addition, in application the test has performed quite differently from the content-neutral tests. When originally announced, *Central Hudson* was seen as stepping back from *Virginia Pharmacy*, by creating a relatively lenient test for commercial speech regulations.[60] And in fact, for the first decade of its existence the test was indeed applied relatively leniently -- indeed, in 1989 the Court, in an opinion by Justice Scalia, seemed to further weaken the test by clarifying that the fourth prong *Central Hudson* required only a "reasonable" fit, not the use of the least restrictive means available.[61] Since around 1990, however, the Court has notably *not* been deferential to legislatures in this area, and has relied upon the *Central Hudson* test to strike down such diverse regulations as a federal ban on the advertising of compounded drugs,[62] state restrictions on tobacco advertising,[63] and a federal ban on labels stating the alcoholic content of beer.[64] This aggressiveness is in stark contrast to the Court's application of the *Ward* and *O'Brien* tests, which has been notably lacking in force, and has made commercial speech law one of the most active areas of modern First Amendment jurisprudence.

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[60] Indeed, Justice Blackmun, the author of *Virginia Pharmacy*, made precisely this point in his separate opinion in *Central Hudson*. *Central Hudson Gas*, 447 U.S. at 573-576 (Blackmun, J., concurring in the judgment).
[61] *Trustees of SUNY v. Fox*, 492 U.S. 469, 480 (1989).
[62] *Thompson, supra*.
[63] *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).
[64] *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).

Speech of Government Employees

Yet another area of free speech law where in recent years the intermediate scrutiny standard of review has come to be applied is government restrictions on the speech of public employees. To begin with, it should be noted that the issues raised in this area of law have obvious parallels to government regulations of speech on public property, since in both instances we are dealing with the government in the role of proprietor (or employer), rather than in the role of regulator. There is, however, an important distinction here which must be born in mind – in cases involving public property, the intermediate scrutiny standard is limited to *content-neutral* regulations of speech, where the government's regulatory interests are unrelated to the message being conveyed. In the public employee cases, however, the government is punishing precisely because of the content of speech, in particular because of the potentially disruptive impact of the *message* conveyed by an employee. Nonetheless, as we shall see, the governing legal standards for these two situations have turned out to be essentially identical.

The Supreme Court's modern jurisprudence on the speech of government employees has its roots in the 1968 decision in *Pickering v. Board of Education*,[65] in which the Court recognized that speech of government employees on matters of public concern is entitled to constitutional protection. At the same time, however, the Court also recognized that the government clearly has a stronger interest in restricting the speech of its employees than it has in restricting the speech of the general public. As a consequence, the Court stated, it was necessary "to arrive at a balance between the

[65] 391 U.S. 563 (1968).

interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[66] In short, the Court adopted a balancing test in this area, which has come to be known as "*Pickering* balancing."

The basic approach to public employee speech adopted in *Pickering* remains the law today, essentially unchanged. Later cases have clarified some of the details of the test, such as setting forth a framework to determine if an employee was indeed punished "because of" his or her speech,[67] and clarifying the nature of the "matter of public concern" limitation in *Pickering*,[68] but the essential balancing approach remains unaltered and *Pickering* continues to be cited for this proposition.[69] This balancing approach has obvious resemblance to the Court's approach to content-neutral speech regulations, and as we shall see, the lower courts have in recent years tended to subsume it into the general mass of First Amendment intermediate scrutiny.[70]

Regulation of Sexually Oriented Businesses

Regulations imposed by state and local governments on "adult" (*i.e.*, sexually oriented) businesses such as adult book stores, adult movie theaters, and adult "clubs," present some peculiar and distinct jurisprudential problems, which the Supreme Court has dealt with in varying ways over the years. In recent years, however, it seems safe to say that the jurisprudence in this area has largely merged with the general intermediate

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[66] *Id.* at 568.
[67] *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).
[68] *Connick v. Myers*, 461 U.S. 138 (1983).
[69] *See Rankin v. McPherson*, 483 U.S. 378, 388 (1987); *City of San Diego v. Roe*, 543 U.S. 77, 125 S. Ct. 521, 524-525 (2004).
[70] *See infra*, nn. __ to __ and accompanying text.

scrutiny analysis. As such, the regulation of sexually oriented businesses represents yet another strand of modern First Amendment intermediate scrutiny.

For obvious reasons, both moral and pragmatic, state and especially local governments often seek to impose special restrictions on the operation of sexually oriented businesses. Such restrictions can take the form of zoning ordinances, [71] restrictions on multiple adult businesses in a single location,[72] restrictions on completely nude dancing,[73] and any number of other types of limitations or bans.[74] The reason such restrictions pose difficult First Amendment issues is because sexual *speech*, so long as it falls short of obscenity (as it typically does in these cases), is fully protected under the First Amendment, and yet the challenged ordinances appear to single out such speech for special, disfavored treatment on the basis of its content. As such, under the Court's traditional doctrine, such restrictions seemingly should be subject to strict scrutiny, and be presumptively unconstitutional. Nonetheless, in a series of cases beginning with *Young v. American Mini-Theatres* in 1976,[75] the Court has upheld restrictions on sexually oriented businesses without applying strict scrutiny. The key doctrinal innovation adopted by the Court was its conclusion in the 1986 *City of Renton v. Playtime Theatres* decision[76] that so long as a challenged ordinance is directed at the "secondary effects" of adult businesses (*i.e.*, the crime and blight that they often are associated with) rather than seeking to suppress the speech itself, it should be treated as content-neutral, and so subject only to the test for time, place and manner regulations. The secondary effects

[71] *See, e.g., Young v. American Mini-Theatres*, 427 U.S. 50 (1976); *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986).
[72] *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002).
[73] *See, e.g., Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000).
[74] *See infra* at nn. __ - __ and accompanying notes (discussing appellate cases on subject).
[75] 427 U.S. 50 (1976).
[76] 475 U.S. 41 (1986).

doctrine is an extremely odd one, as it seems clearly inconsistent with the Court's approach to content neutrality elsewhere in its First Amendment jurisprudence, and its application has been limited strictly to the context of sexually oriented speech.[77] The secondary effects doctrine has recently been criticized by what seems to be a majority of the Court, and so its continuing vitality might be in doubt.[78] Nonetheless, the basic holding of *Renton* that regulations of adult businesses short of outright bans should be subjected to intermediate and not strict scrutiny, continues to be followed.[79]

Charitable Solicitation

In three cases in the 1980s, the Supreme Court considered, and struck down, various attempts by states to regulate professional, charitable solicitation.[80] In those cases, the Court made clear that charitable solicitation was *not* equivalent to commercial speech, and so deserved strong First Amendment protection. At the same time, however, the Court seemed to suggest that because of its nature (and intertwining with conduct elements), charitable solicitation should be subject to "reasonable regulation."[81] The Court then proceeded in these cases to apply an indeterminate form of balancing/tailoring analysis to strike down the regulations.[82]

The precise doctrinal test applicable to regulations of charitable solicitations thus remains somewhat unclear. The *Riley* Court suggested that at least with respect to

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[77] *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 573-574 (2001) (Thomas, J., concurring in part and concurring in the judgment); *Boos v. Barry*, 485 U.S. 312 (1988).
[78] *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 444-447 (2002) (Kennedy, J., concurring in the judgment); *Id.* at 455-460 (Souter, J., dissenting).
[79] *Id.* at 440 (plurality opinion); *id.* at 447 (Kennedy, J., concurring in the judgment).
[80] *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Sec. of State of Maryland v. Joseph Munson Co.*, 467 U.S. 947 (1984); *Riley v. Nat'l Fed. of the Blind*, 487 U.S. 781 (1988).
[81] *Village of Schaumburg*, 444 U.S. at 632.
[82] *See Riley*, 487 U.S. at 787-789 (describing test applied in cases).

content-based regulations of such solicitation, strict scrutiny should apply;[83] though this suggestion is in itself deceptive, because regulations of charitable solicitations by definition target speech based on its content (a request for money on behalf of a charity), and as such seem necessarily to be content-based under the general test. Nonetheless, so long as the regulations do not restrict the speech a charitable solicitor utters, the applicable test appears to be something short of strict scrutiny.[84] In a recent Fourth Circuit decision authored by Judge Wilkinson, the court recognized that there has been some confusion on this subject in the lower courts, but also recognized that many courts are treating the *Village of Schaumburg* test as converging with the general intermediate scrutiny analysis.[85] Moreover, while the Fourth Circuit itself did not resolve the ambiguity about whether the test is properly described as "strict" or "intermediate," it then proceeded to uphold two quite broad regulations (issued by the Federal Trade Commission) of professional telemarketing on behalf of charitable foundations – a result which would be most unlikely under a true, strict scrutiny standard. As such, it would appear that the test for regulations of charitable solicitation has indeed largely merged into the general, intermediate scrutiny test.[86]

Regulation of Political Contributions

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[83] 487 U.S. at 795-801.

[84] In *Riley*, a disclosure requirement was treated as a direct regulation of content, and so subject to more stringent scrutiny than other regulations. *See ibid.*

[85] *National Federation of the Blind v. FTC*, 420 F.3d 331, 338 n. 2 (4th Cir. 2005) (*citing Nat'l Fed. of the Blind of Arkansas v. Pryor*, 258 F.3d 851, 855 (8th Cir. 2001) (equating *Village of Schaumburg* standard to the time, place and manner test); *see also Fraternal Order of Police, North Dakota State Lodge et al. v. Stenehjem,* 431 F.3d 591, 597 (8th Cir. 2005) (same, and describing test as "intermediate scrutiny"); *Am. Target Adver., Inc. v. Giani*, 199 F.3d 1241, 1247 (10th Cir. 2000) (describing standard as "an intermediate level of scrutiny")).

[86] *Cf. Watchtower Bible & Tract Soc. Of N.Y. v. Village of Stratton*, 536 U.S. 150, 164 (2002) (declining to resolve question of what standard of review applied to ordinance requiring charitable solicitors to obtain permit).

Finally, another area of First Amendment jurisprudence where the applicable standard of review might – and here it is important to emphasize the word *might* – be evolving towards intermediate scrutiny is analysis of the constitutionality of statutory restrictions on political *contributions*. The Supreme Court's leading decision in this area was the 1976 *Buckley v. Valeo* opinion.[87] In *Buckley* the Court heard constitutional challenges to restrictions placed by the Federal Election Campaign Act on both political expenditures by candidates, and political contributions to candidates by members of the public. Critically, the *Buckley* Court distinguished between expenditures and contributions, imposing a substantially higher standard of review on expenditure limitations than on contribution limitations, the result of which was the invalidation of expenditure limits, but the upholding of contribution limits. In more recent cases the Court has reaffirmed this distinction, and relied upon it to sustain numerous regulations and restrictions of political contributions.[88] If the applicable test for expenditure limits is strict scrutiny, as it appears to be, then the test for political contributions, which is clearly more lenient, and deferential, than the latter, would appear to resemble intermediate scrutiny. And indeed, at least one lower court has explicitly applied intermediate scrutiny to uphold a restriction on political contributions (there, a Michigan law requiring annual consent if corporations or labor unions sought to use automatic payroll contributions to obtain political contributions from members or employees).[89]

Having said this, it must be acknowledged that there are grave doubts about whether the Supreme Court itself understands the test for political contributions to be

[87] 424 U.S. 1 (1976).
[88] *See Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 386-390 (2000); *McConnell v. Federal Election Commission*, 540 U.S. 93, 134-138 & n.40 (2003).
[89] *Michigan State v. Miller*, 103 F.3d 1240, 1251-1252 (6th Cir. 1997).

intermediate scrutiny. In *Buckley* the Court explicitly rejected application of either the *O'Brien* or time, place and manner tests to the statute before it (including the contribution limits),[90] and that rejection was reaffirmed in the 2000 *Nixon v. Shrink Missouri Government PAC* case.[91] Indeed, those cases suggest that the applicable standard of review is strict scrutiny. In fact, however, it is obvious that the level of scrutiny the Court has accorded to contribution limits from 1976 through to the recent *McConnell v. FEC* case is simply not as stringent as traditional strict scrutiny. It has permitted the government, in defending those restrictions to invoke such vague governmental interests as preventing the *appearance* of corruption,[92] and has explicitly deferred to congressional judgments regarding the proper balance to be drawn in this area.[93] This approach certainly seems more reminiscent of intermediate than strict scrutiny, no matter how the Court might title the test it is using, suggesting that in practice, if not in name, the standard of review of restrictions on political contributions is evolving towards intermediate scrutiny.[94]

MERGER AND SYNTHESIS

Merger in the Supreme Court

The various areas of First Amendment doctrine described above have very different origins and very different pedigrees. Some, such as the public forum doctrine, have their roots in cases from the 1930s, or even earlier, while others, such as the

[90] *Buckley*, 424 U.S. at 16-18.
[91] 528 U.S. at 386.
[92] *McConnell*, 540 U.S. at 136.
[93] *Id.* at 137.
[94] *Cf. Grutter v. Bollinger*, 539 U.S. 306 (2003) (applying a seemingly more deferential form of "strict scrutiny" to a race-based admissions policy at the University of Michigan Law School).

commercial speech doctrine and rules regarding adult businesses, are entirely products of the last thirty years. Furthermore, the evolutions of these different strands of law reflect quite distinct policies and concerns. The public forum doctrine, for example, reflects the Court's reconciliation of free speech rights with the government's legitimate, managerial concerns, and the symbolic speech cases reflect a similar reconciliation of constitutional values with the government's obviously legitimate power to protect society from harmful conduct. Other areas of law, however, reflect entirely distinct policies. The Court's reasons for protecting commercial speech seem to sound more in substantive due process/economic liberty principles than in free speech policy,[95] and its reasons for tolerating regulation of such speech are also distinct. Similarly, the cases regarding regulation of the mass media (and, for that matter, the cases regarding political contributions) reflect judgments regarding the power of Congress to advance diversity of speech even if the consequence is to burden the speech of some, which has little or nothing to do with the explicit balancing entailed in the time, place, and manner and symbolic speech cases. The variation in these policies and interests, at first, lead to Court to treat each of these bodies of law as distinct, leading to distinct formulations of the relevant doctrinal "tests," insofar as any such tests were formulated.

In recent years, however, these distinctions have been abandoned. Instead, the Supreme Court has come to emphasize the fact that despite somewhat differing formulations, many of the Court's new "tests" share some basic, common characteristics: under these tests, laws will be upheld so long as they serve some sort of a significant/substantial/important governmental interest and are *reasonably* well-tailored to that purpose (*i.e.*, there were not unreasonably overbroad). First, beginning in the

[95] *See Virginia Pharmacy*, 425 U.S. at 762-765.

mid-1980s the Court began to acknowledge that there was little, if any, difference between the time, place and manner test, and the symbolic speech test of *O'Brien*, applying them interchangeably.[96] About the same time, the Court through the "secondary effects" fiction extended this test to regulations of adult businesses. Then, in the late 1980s the Court went further to acknowledge that its commercial speech test was "substantially similar" to its time, place, and manner and symbolic speech tests;[97] and indeed went so far as to rely explicitly on time, place, and manner cases in weakening the "narrow tailoring" prong of the commercial speech doctrine to require only that the fit between the challenged regulation and the government's aims be "reasonable."[98] Next, in the 1994 *Turner* decision the Court extended the time, place, and manner test to content-neutral regulations of the mass media even when the relevant speech was *not* on government property, and so no proprietary or managerial interests of the government were involved. As such, by the mid-1990s, the Court had acknowledged the similarities, and in effect merger, of what I have identified above as most of important strands of First Amendment intermediate scrutiny. And so began the process of creating a new standard of review, albeit a process not yet completed or even fully acknowledged by the Supreme Court itself.[99]

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[96] *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 & n.8 (1984); *Ward*, 491 U.S. at 798; *Barnes*, 501 U.S. at 566. For a description of the evolution, and merging, of the *Ward* and *O'Brien* tests, *see* Ashutosh Bhagwat, *Of Markets and Media: The First Amendment, the New Mass Media, and the Political Components of Culture*, 74 N.C. L. Rev. 141, 166-172 (1994).

[97] *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989), and cases cited therein.

[98] *Id.* at 480.

[99] *But cf. Barnes*, 501 U.S. at 579-580 (Scalia, J., concurring in the judgment) (describing *O'Brien* as "an intermediate level of First Amendment scrutiny"); *Watchtower Bible & Tract Soc. Of N.Y. v. Village of Stratton*, 536 U.S. 150, 175-76 (2002) (Rehnquist, C.J., dissenting) (advocating "intermediate scrutiny" for ordinance regulating charitable solicitation); *Turner Broadcastings Sys. v. FCC*, 520 U.S. 180, 189, 213 (1997) (discussing application of "intermediate scrutiny," and citing both *Ward* and *O'Brien*); *see generally City of L.A. v. Alameda Books*, 535 U.S. 425 (2002) (opinions debating applicability of intermediate scrutiny to regulation of adult businesses).

Synthesis in the Courts of Appeals

If the merger of the various strands of doctrine described above into a unitary, overarching standard of review has not yet been fully accomplished, or acknowledged, by the Supreme Court, that process has in fact occurred in the Courts of Appeals. As the cases described herein indicate, there can be no doubt that the Courts of Appeals seem to uniformly accept the existence of a single, overarching standard of First Amendment scrutiny called "intermediate scrutiny," which has emerged as a synthesis of the various distinct bodies Supreme Court doctrine discussed in the previous section. Moreover, the Courts of Appeals appear to have taken the next step, beyond the Court's current jurisprudence, of treating intermediate scrutiny as a, to use Justice Scalia's words, "default standard,"[100] applicable to *any* governmental regulation of speech which, for whatever reason, does not trigger strict scrutiny. As such, intermediate scrutiny has become a doctrine of surpassing importance in First Amendment law as it operates *in action*, in day-to-day constitutional litigation.

The use of the phrase "intermediate scrutiny" in First Amendment cases in the Courts of Appeals dates back to two cases from the mid-1980s referencing the commercial speech standard.[101] The true explosion of the use of intermediate First Amendment scrutiny by the Court of Appeals began, however, in the mid-1990s, as those courts began to take account of the Supreme Court's statements in cases such as *Clark*, *Ward*, *SUNY v. Fox*, and *Turner*, that there were no significant differences between the standards of review applicable in symbolic conduct, time, place, and manner, commercial speech, and media regulation cases. Thus in 1994 alone, the Courts of Appeals issued at

[100] *See* n.9, *supra*, and accompanying text.
[101] *Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Com.*, 701 F.2d 314 (5th Cir. 1983); *Glover v. Cole*, 762 F.2d 1197, 1200 (4th Cir. 1985).

least six important free speech decisions explicitly invoking the intermediate scrutiny standard, on topics ranging from economically significant regulations of the mass media,[102] to regulations of adult businesses,[103] to regulations of highway signs.[104] And as the next Section indicates, that rate has continued apace since that time, if anything accelerating in the current decade. Furthermore, as those materials also indicate, intermediate scrutiny cases in recent years continue to demonstrate a tremendous range and variety, covering everything from extremely broad, national regulations of the structure of the mass media, to run of the mill local zoning disputes, to cases touching upon the "War on Terror." As such, the cases clearly establish that in the collective vision of the Courts of Appeals, there certainly exists a unitary "intermediate scrutiny" test in First Amendment jurisprudence, and further that that test has a very broad range.

One also finds in the cases repeated recognition by the courts that the various strands of "intermediate scrutiny" doctrine are in fact interchangeable, and so need not be distinguished. Thus in *Hodkins v. Peterson*, in evaluating a youth curfew ordinance, the Seventh Circuit stated that the symbolic speech and time, place, and manner standards are equivalent, and described them jointly as "tests that apply an intermediate level of scrutiny to content neutral government regulations affecting speech."[105] The Seventh Circuit has elsewhere acknowledged the equivalence of the *Renton* standard for adult businesses and the *O'Brien* symbolic speech test;[106] and Tenth Circuit, acknowledging

[102] *See US West v. U.S.*, 48 F.3d 1092 (9th Cir. 1994); *Chesapeake & Potomac Telephone Co. v. U.S.*, 42 F.3d 181 (4th Cir. 1994).
[103] *See American Library Association v. Reno*, 33 F.3d 78 (D.C. Cir. 1994); *MD II Entertainment v. City of Dallas*, 28 F.3d 492 (5th Cir. 1994).
[104] *Rappa v. New Castle County*, 18 F.3d 1043, 1061-1066 (4th Cir. 1994).
[105] *Hodgkins v. Peterson*, 355 F.3d 1048, 1057 (7th Cir. 2004).
[106] *G.M. Enterprises v. Town of St. Joseph*, 350 F.3d 631, 638 (7th Cir. 2003).

the same equivalence, has then applied the test to a regulation of charitable solicitation.[107] Finally, at least one court has held that a generally applicable "intermediate scrutiny" standard, derivable from such diverse sources as the *Pickering* test for speech of government employees, as well as cases dealing with political patronage and political contributions, should govern challenges to the associational and speech rights of government employees.[108] Indeed, as the cases discussed in the next Section demonstatrate, there is now a widespread willingness among the Courts of Appeals to discuss and apply a generic "intermediate scrutiny" standard, often without any effort to disentangle its forebears.[109]

The trend towards integration has proceeded so far in the Courts of Appeals as to have important, substantive consequences. Two developments are especially worth noting. First, there are numerous instances in which, as a consequence of the merging of the various strands of intermediate scrutiny, the "secondary effects" analysis of *City of Renton v. Playtime Theatres* has been extended beyond the arena of regulations of sexually oriented businesses to which the Supreme Court has strictly confined it,[110] into other areas of First Amendment analysis -- with predictably troubling results. Thus in *Brentwood Academy v. Tenn. Secondary Sch. Ath. Assn.*,[111] the Sixth Circuit relied upon secondary effects analysis to hold that a regulation forbidding schools from using "undue influence" in recruiting student athletes, including a flat ban on any contact between

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[107] *American Target Advertising v. Giani*, 199 F.3d 1241, 1247 n.1 (10th Cir. 2000).
[108] *International Ass'n of Firefighters, Local No. 3808 v. City of Kansas City*, 220 F.3d 969, 973-974 (8th Cir. 2000); *see also Akers v. McGinnis*, 352 F.3d 1030, 1037 (6th Cir. 2003) (describing *Pickering* balancing "as a form of intermediate scrutiny").
[109] *Cf. Gun Owners' Action League v. Swift*, 284 F.3d 198, 210-212 (1st Cir. 2002) (in which the court upholds a law banning the use of human-shaped targets in target practice, describing the statute as a "content-neutral regulation of expressive conduct," thereby conflating the *O'Brien* and time, place, manner tests).
[110] *See* nn.75-76, *supra*, and accompanying text.
[111] 262 F.3d 543, 551-554 (6th Cir. 2001).

coaching staff and prospective students, was content-neutral and so subject only to intermediate scrutiny. Similarly, in two separate cases the Sixth and D.C. Circuits upheld a federal statute imposing extensive record-keeping requirements on any person producing visual depictions of sexually explicit conduct, on the theory that this statute targeted only the "secondary effects" of such materials – in particular, the production of child pornography – and not the content of the speech itself.[112] The analysis was thus applied to a statute which was *obviously* facially content-based, in that it imposed a burden on speech triggered precisely by its content, and where the evil to be avoided was in no way a product of the plaintiff's own speech, but was rather that of *other* speakers. The above cases thus illustrate one systematic way in which the coalescence of intermediate scrutiny doctrine has eroded free speech protections.[113]

Even more important than the expansion of the "secondary effects" doctrine, however, has been the expansion by appellate courts of intermediate scrutiny generally to govern *any* challenge to *any* statute regarded by the court as content-neutral, regardless of whether any of the triggers to lowered scrutiny identified by the Supreme Court are present. In other words, the Courts of Appeals have extended the intermediate scrutiny test to all content-neutral regulations of speech, even if the speech does *not* occur on public property (and so implicate the government's proprietary interests), does not involve symbolic *conduct* (and so raise the usual concerns about socially harmful conduct), does not involve structural regulation of the media (with its own special problems), and does not involve lower-value speech such as commercial speech or

[112] *Connection Distribution Company v. Reno*, 154 F.3d 281, 290-291 (6th Cir. 1998); *American Library Association v. Reno*, 33 F.3d 78, 87 (D.C. Cir. 1994).
[113] *Cf. McGure v Kelly*, 260 F.3d 36, 43-44 (1st Cir. 2001) (citing *City of Renton* in the course of finding content-neutral, and upholding, statute restricting speech near abortion clinics).

sexually explicit speech. Put differently, these cases apply intermediate scrutiny to government regulations of private speech, on private property, solely on the grounds that the regulations are not content-based.

Examples of this expansion of intermediate scrutiny abound. Consider for example *Casey v. City of Newport*, involving a challenge to a licensing restriction banning the use of amplification, as well as all singing, in a nightclub.[114] The court concluded that intermediate scrutiny (which it characterized as a form of balancing)[115] applied because the rules were content-neutral, though it did ultimately strike down the rule on tailoring grounds. Or consider *Universal Cities Studios, Inc. v. Corly*, where the Court applied intermediate scrutiny to, and upheld, a provision of the Digital Millennium Copyright Act which prohibited posting or linking to software which permitted decryption of copyrighted materials, because the law was content-neutral, in that it targeted only the functional aspects of prohibited code. Other examples include the *Brentwood Academy* case discussed above, where the court upheld under intermediate scrutiny a rule regulating recruitment of high school athletes, and *National Amusements v. Town of Dedham*,[116] where the court applied intermediate scrutiny to uphold a law barring movie theaters from showing movies between one and 6 a.m.

A particularly interesting instance of this development is *Rappa v. New Castle County*, [117] in which the Fourth Circuit applied intermediate scrutiny to largely uphold a set of state and local laws banning advertising along highways, but with many exceptions built into the ban (including exceptions for direction and traffic signs, for sale signs, and

[114] 308 F.3d 106, 110-111 (1st Cir. 2002).
[115] *Id.* at 116.
[116] 43 F.3d 731 (1st Cir. 1995).
[117] 18 F.3d 1043, 1061-1066 (4th Cir. 1994).

numerous other commonly used highway signs), as applied to signs supporting a political candidacy. Crucially, the ban applied to all signs close to highways, including those located on private property, and yet the court's analysis in no way considered this fact relevant. In each of these cases, the court was faced with a regulation of fully protected speech, where there were no special considerations (such as government ownership) in play suggesting a greater regulatory role for the government, and yet the standard of review applied was no different from, and thus no more protective of, the standard developed by the Supreme Court in the context of the assorted special circumstances discussed above. As *Rappa* demonstrates, and for reasons discussed in more detail below,[118] these cases involve a significant and potentially troubling expansion of the Supreme Court's jurisprudence with important implications for what one would surely consider "core" First Amendment-protected speech.[119]

The lesson to be learned from all of this is that development of intermediate scrutiny matters, and is having a profound, systematic impact on the law of free speech. To fully understand the nature of that impact, however, it is necessary to conduct a more systematic examination of the Court of Appeals cases, to see what "intermediate First Amendment scrutiny" means *in practice*. We now turn to that examination.

INTERMEDIATE SCRUTINY IN THE COURTS OF APPEALS

[118] *See* nn. __ to __, *infra*, and accompanying text.

[119] *Cf. Transunion Corp. v. FCC*, 267 F.3d 1138 (D.C. Cir. 2001) (opinion on Petition for Rehearing) (applying intermediate scrutiny to a congressional ban on the sale of "target marketing lists" by credit reporting agencies, on the grounds that the covered speech, because it involved "matters of purely private concern," was "low-value" speech and so not entitled to strict scrutiny). *Transunion* is distinguishable from the cases discussed in the text because it does not involve "fully protected" speech; but it is another instance of the steady expansion of intermediate scrutiny.

In order to assemble a comprehensive list of Court of Appeals cases applying intermediate scrutiny to free speech claims, I conducted three different searches on the LEXIS/NEXIS "US Court of Appeals Cases, Combined" database. The searches were: 1. "First Amendment" and "intermediate scrutiny"; 2. "intermediate First Amendment scrutiny"; and 3. "intermediate level of scrutiny" and "First Amendment." The searches were conducted for all cases through calendar year 2005, and were last updated on January 20, 2005. It is obvious that the resulting list of cases will not include all opinions falling within the various categories listed in the previous section, since an opinion resolving, for example, a challenge to a commercial speech regulation may not use the phrase "intermediate scrutiny" (or some variant). But the above searches are likely to identify almost all cases where the court was self-consciously applying the intermediate standard of review to a free speech claim. Since the purpose of this paper is to explore the operation of this new standard in the appellate courts, that seemed the relevant criterion.

After the lists of cases produced had been culled for false positives and duplicates (including multiple appeals in the same case), 113 cases remained.[120] The earliest of these cases dates from 1983, and the latest from December of 2005, demonstrating that the intermediate scrutiny test now has a well-established pedigree. The cases, however, also demonstrate that the test has gained substantially greater acceptance in recent years. Of the 113 cases found, only 4 dated from the 1980s, and 47 from the 1990s. A full 62 of the cases, over half, date from the six years from 2000 through 2005; and indeed, of the 47 cases decided in the 1990s, only 8 were decided before 1994. Thus of the 113

[120] The list of resulting cases, along with citations and classifications, is **[available on website/reprinted as Appendix]**.

relevant cases, a full 101, or 89.4%, date from the 11 years from 1995 through 2005. What exactly the trigger for this explosion was is hard to say (perhaps the Supreme Court's *Turner Broadcasting* decision in 1994[121]), but that an explosion has occurred over the past decade, creating a new category of jurisprudence, cannot seriously be doubted given these figures. It is now turn to examine how these cases break down, and what they do.

The Pattern of the Cases

The cases compiled were divided into the eight categories representing the various areas of Supreme Court caselaw from which intermediate scrutiny evolved, along with a ninth category of cases involving challenges to content-neutral regulations of fully valued private speech, on private property.[122] The cases were further classified based on whether the government action was upheld, or the free speech claim was sustained. Each of these classification decisions, of course, required judgment calls, sometimes difficult ones. For example, many of the cases might have been placed into either of two (or even more) categories, and the deciding courts sometimes wavered on their proper classification – indeed, it is one of the theses of this paper that in recent years, the distinct categories of intermediate scrutiny analysis have been blended in the lower courts. I nevertheless placed each case within a single category, the one which seemed the best fit. Furthermore, some of the cases resulted in remands, rather than clear conclusions regarding constitutionality; in those circumstances, I classified the case based on my assessment of whether the terms of the opinion seemed to view the law as likely valid, or

[121] See *supra* at n. __, and accompanying text).
[122] For a discussion of how the Courts of Appeals have extended intermediate scrutiny to this kind of case, see *supra*, nn. __ to __ and accompanying text.

likely invalid (for example, if the appellate opinion was reversing a clear result below regarding constitutionality, I tended to classify the case as opposite to the result reached below). Obviously, another analyst might have made different judgments regarding individual cases; but these minor differences are very unlikely to alter the overall picture.

What then is that picture – what do the numbers reveal?[123] The results of my classifications are set forth in the Table that follows:

Category (Regulations of . . .)	Government Action Upheld	Free Speech Claim Sustained	TOTAL
Time, Place and Manner of Speech on Public Property	11	2	13
Symbolic Conduct	11	2	13
The Mass Media	8	4	12
Commercial Speech	8	5	13
Speech of Government Employees	2	2	4
Sexually Oriented Businesses	23	12	35
Charitable Solicitation	3	0	3
Political Contributions	2	0	2
Protected Private Speech on Private Property (Content-Neutral only)	14	4	18
TOTALS	82	31	113

Some clear patterns emerge from this Table. First, the cases were spread relatively evenly across the nine selected categories; though one category – regulations of

[123] It must be emphasized that the analysis that follows is "empirical" only in the weakest sense. No regressions were run, and no effort was made to code data in any way beyond the results described in the text. Given the limited number of cases, and the malleability of the data itself, such analysis seemed pointless.

sexually oriented businesses – included substantially more cases (indeed, almost three times as many) as any other category, reflecting a depressing recent trend across free speech law. Second, the government tends to win – the constitutionality of the government action was sustained in 82 of the 113 cases, with only 31 free speech victories (*i.e.*, the government wins 72.6%, or almost three-quarters of the time). Third, the outcomes were fairly even across the categories -- in other words, the government's advantage is not limited to those areas, such as regulations of sexually oriented businesses, where the Supreme Court has in recent years signaled a preference for constitutionality. Finally (following from the above), there are a substantial number of cases within the ninth category into which the lower courts have extended the intermediate scrutiny test despite the lack of either weak speech rights or an especially strong regulatory interest,; and in this category, the government's advantage is if anything stronger (with a 77.8% win ratio) than in the general run of intermediate scrutiny cases.

The patterns described above, simple though they are, have important implications for the shape and efficacy of the law in this area. Before turning to those implications, however, there is value in examining the reasoning and results in a sampling of the most interesting cases from those compiled. Such an examination reveals distinct, though complementary, patterns and lessons from a numerical approach.

A Sampling of the Cases

National Federation of the Blind v. FTC:[124] The Fourth Circuit, in an opinion by Judge Wilkinson, upheld a series of regulations issued by the Federal Trade Commission restricting telephone fundraising by professional fundraisers on behalf of charitable

[124] 420 F.3d 331 (4th Cir. 2005).

organizations. The regulations did not ban such fundraising, but limited it in various ways, including limiting the fundraising to daytime hours, imposing disclosure requirements, and requiring fundraisers to respect a request that no further calls be made. The regulations did not, however, restrict fundraising by nonprofit charities on their own behalf. While acknowledging that the speech regulated here was fully protected, and of high First Amendment value, the court concluded that the regulations were properly tailored to advance the government's interests in preventing fraud, and securing privacy in the home.

Bl(a)ck Tea Society v. City of Boston:[125] The First Circuit upheld restrictions placed by the City of Boston on demonstrators during the 2004 Democratic Party Convention in Boston, the effect of which was to limit demonstrators to a "demonstration zone" which was separated from the convention space itself and surrounded by fencing and some coiled razor wire. As the court described them, "the aggregate effect of the security measures was to create an enclosed space that the [demonstrator plaintiff] likens to a pen." Noting that "the government's judgment as to the best means for achieving its legitimate objectives deserves considerable respect," the court concluded that because of the potentially serious security threats facing the Convention, the restrictions constituted a reasonable balance between free speech and regulatory interests. The court acknowledged that this was a difficult case, given the fact that the restrictions here were significant and the regulated speech was of extremely high (indeed, arguably the highest) First Amendment value, but nonetheless found intermediate scrutiny satisfied.

[125] 378 F.3d 8 (1st Cir. 2004).

R.V.S., L.L.C. v. City of Rockford:[126] The Seventh Circuit applied intermediate scrutiny to, but then struck down, a zoning ordinance restricting the location of establishments featuring (clothed) "exotic dancing," and in particular forcing such establishments to locate more than 1000 feet away from schools, churches, residential districts, or other such clubs. The court concluded that the City had failed to demonstrate that its ordinance would in fact reduce the "secondary effects" associated with such clubs, and that in any event the ordinance was not narrowly tailored because it might sweep in some "mainstream performances." In so holding, the court appeared to impose a fairly substantial evidentiary burden on municipalities seeking to adopt such ordinances.

Hodkins v. Peterson:[127] The Seventh Circuit, invoking the *O'Brien* and *Ward* tests, struck down an Indiana curfew law excluding (with certain exceptions) minors between fifteen and seventeen years old from public places during late night hours. The court concluded that the law was not "narrowly tailored" because it lacked adequate exceptions for minors who were engaged in First Amendment activities, even though the court had earlier acknowledged that the law was not directed at, and did not have a disproportionate impact on, free speech.

Casey v. City of Newport:[128] The First Circuit applied intermediate scrutiny to, but then struck down, licensing restrictions on a nightclub which prohibited all amplification and (oddly) all singing. The court concluded that though both restrictions, even the ban on singing, were content neutral because their purpose was to limit disturbance to residential neighbors, neither restriction was narrowly tailored to achieve that goal. As

[126] 361 F.3d 402 (7th Cir. 2004).
[127] 355 F.3d 1048 (7th Cir. 2004).
[128] 308 F.3d 106 (1st Cir. 2002).

noted previously,[129] this case is a prime example of the extension of intermediate scrutiny to a situation where the regulated speech is fully protected, and there are no special circumstances (such as government ownership) elevating the state's regulatory interests.

Universal Cities Studios, Inc. v. Corly:[130] The Second Circuit upheld provisions of the Digital Millennium Copyright Act prohibiting "trafficking" in technology used in circumventing encryption or other "digital walls" used to protect copyrighted works, as applied to the posting on a website of computer code usable to decrypt DVDs' digital protections. The court held that the provisions were content-neutral because they targeted the functional, rather than the communicative, aspects of the code, and then applying intermediate scrutiny found the legislation properly tailored. Again, this case involved application of intermediate scrutiny to purely private speech, albeit in this case the speech had a "conduct" element to it, given the intertwined communicative and functional aspects of computer code.

Transunion Corp. v. FTC:[131] The D.C. Circuit upheld a regulation banning the sale of "target marketing lists" by credit reporting agencies. The court concluded that intermediate scrutiny was appropriate, even though the regulation was arguably content-based, because the regulated speech was of "purely private concern" and so merited reduced First Amendment protection. The court then found the regulation easily passed intermediate scrutiny. This too was a case involving purely private speech, and the court pushed precedent quite far (relying, for example, on libel cases involving false speech) to invoke intermediate scrutiny.

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[129] *See supra* at __.
[130] 273 F.3d 429 (2nd Cir. 2001).
[131] 267 F.3d 1138 (D.C. Cir. 2001).

Time-Warner Entertainment Co. v. FCC:[132] The D.C. Circuit struck down regulations enacted by the Federal Communications Commission which imposed horizontal and vertical limits on ownership in the cable television industry. The rules prohibited any single cable company from reaching more than 30% of the total number of U.S. subscribers to multichannel video programming services (*i.e.*, cable television and direct broadcast satellite services), and prohibited cable firms from dedicating over 40% of their channels to programming in which they had a financial interest. The court applied intermediate scrutiny because the rules were content-neutral, but then struck down the regulations on the grounds that there was insufficient evidence to establish that the rules were necessary (*i.e.*, narrowly tailored) to achieve the Commission's objectives. This case was of some importance, because it represented an important setback to congressional efforts to regulate the cable industry.

Humanitarian Law Project v. Reno:[133] The Ninth Circuit, by Judge Kozinski, upheld a criminal statute prohibiting the provision of "material aid" to terrorist organizations. The court applied intermediate scrutiny, citing *O'Brien*, but then found the standard easily satisfied.

Michigan State v. Miller:[134] The Sixth Circuit upheld a statute requiring annual consent to political contributions collected from union members through automatic payroll deductions. The court concluded (counter-intuitively) that the law was content-neutral, despite being limited to *political* contributions, on the grounds that the *purpose* of the law was not related to content, and then upheld the law under intermediate scrutiny as a reasonable means to ensure that political contributions indeed respect the wishes of

[132] 240 F.3d 1126 (D.C. Cir. 2001).
[133] 209 F.3d 1130 (9th Cir. 2000).
[134] 103 F.3d 1240 (6th Cir. 1997).

union members. As with the *Bl(a)ck Tea Society* case discussed above (and the *Rappa* case discussed below), the court here upheld restrictions directed at absolutely core First Amendment values (assuming, as should be uncontroversial, that political speech is the most highly valued under the First Amendment) by avoiding strict scrutiny, and then applying a relatively deferential form of intermediate scrutiny.

Time-Warner Entertainment v. FCC:[135] The D.C. Circuit upheld legislation and implementing regulations restricting the rates charged by cable television companies. Citing *Turner*, the court applied intermediate scrutiny, and then found the test easily satisfied.

National Amusements v. Town of Dedham:[136] The First Circuit upheld a municipal law barring movie theaters from showing movies between 1 and 6 a.m. The regulation was (obviously) content-neutral, and was found to be a reasonable effort to control the noise and disruption caused by late night crowds. Note that this too is an example of intermediate scrutiny being applied to purely private, fully protected speech, on purely private property.

Rappa v. New Castle County:[137] The Third Circuit considered, and largely upheld, various Delaware statutes barring many but not all highway signs on or adjacent to state highways, including signs on private property adjacent to highway right-of-ways. The statutes were challenged by a candidate for the U.S. House of Representatives, who wished to post campaign signs which violated the statutes. The court applied intermediate scrutiny despite the fact that the laws clearly distinguished between permissible and impermissible signs based on their content (*e.g.*, permitting "for sale"

[135] 56 F.3d 151 (D.C. Cir. 1995).
[136] 43 F.3d 731 (1st Cir. 1995).
[137] 18 F.3d 1043 (3rd Cir. 1994).

and directional signs), because the purpose of those exemptions was not to suppress speech, but rather was related to the function of the relevant property. It then concluded that the statutory schemes were largely permissible under this approach, though it struck down aspects of the challenged statutes on the grounds that some of the exemptions were not justifiable under the court's analysis. As discussed above, the obvious impact of this case was to place substantial barriers in the way of political candidates, such as the plaintiff in this case, who seek to use signage to obtain the name recognition necessary to challenge political incumbents. As such, the ruling has a significant, and arguably perverse, impact on political speech and the political process.

IMPLICATIONS

As the numerical analyses and summaries provided above indicate, close examination of free speech intermediate scrutiny cases in the Courts of Appeals reveals some extraordinary patterns and results. Moving now from the descriptive to the prescriptive, it is time to consider what overarching conclusions may be drawn here, and what implications this has for the future. As I will argue, there are in fact important lessons to be gleaned from the above, relating both to the role of doctrine in a hierarchical judicial system, and to its capacity to produce predictable and desirable results. I conclude with some thoughts about where the Supreme Court might go from here, to avoid or alleviate the problems that this paper has exposed.

The Supreme Court and the Problem of Coherence

The first and most significant lesson that emerges from the above analysis is that a very large disjunction has arisen in recent years between the Supreme Court's apparent preferences and policies and what the Courts of Appeals are actually *doing*. The doctrine that the Supreme Court has created in this area of First Amendment law has simply failed as a mechanism for control over lower court decisionmaking. In other words, the lower courts are not following the Supreme Court's marching orders.

What is the basis for this conclusion? Consider the various strands of the Supreme Court's decisions. As my description in the first part of this paper demonstrates, even a cursory examination of the cases within those strands leaves no doubt that in the Court's eyes, all free speech claims within the general rubric of "intermediate scrutiny" are *not* equal. In certain areas, the Court has been *extremely* speech-protective, consistently upholding claims against even quite powerful governmental regulatory interests. For example, in the commercial speech area the Court has in recent years been highly receptive to attacks on regulations, striking down limitations on tobacco advertising, drug advertising, and liquor labeling.[138] Similarly, the Court has also consistently struck down restrictions on charitable solicitations, emphasizing along the way the highly protected status of such speech. Finally, while the Court has not taken a consistent stance in the area of regulations of political contributions, there can be no doubt that since *Buckley v. Valeo*[139] the Court has strongly signaled that such speech is entitled to substantial constitutional protection, and in recent

[138] *See supra* at nn. __-__ and accompanying text.
[139] 424 U.S. 1 (1976).

years a number of Justices (albeit often in dissent) have argued that such speech should be entitled to full First Amendment protection.[140]

In contrast, in other areas the Court has been much more, indeed resoundingly, unreceptive to constitutional claims. Most notably, in the area of regulating sexually oriented businesses the Court, since the 1986 *Renton* decision[141] and through the 2002 *Alameda* Books case,[142] has been extraordinarily consistent in rejecting constitutional claims, going so far as to describe the speech in the nude dancing context as "within the outer perimeters of the First Amendment, [but] only marginally so."[143] Similarly, in the symbolic conduct area the Court has since the 1968 *O'Brien* decision[144] rejected challenges to content-neutral statutes with absolute consistency; indeed, so much so that Justice Scalia, noting this pattern, has urged the Court to abandon any heightened scrutiny of such regulations at all.[145] Indeed, the pattern of cases is so clear in these two areas of law that there is a strong case to be made that the Court has in fact adopted a categorical balancing approach in these two areas, and resolved the balance against speech claims. The problem is, of course, that if this is the Court's conclusion it has not made it explicit, but rather has subsumed these areas of law into general "intermediate scrutiny" analysis, thereby sending very mixed signals to the lower courts.

The pattern of the Supreme Court decisions in this area is thus relatively clear. Moreover, the pattern makes good sense, as a matter of constitutional policy. Close

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[140] *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 410-418 (2000) (Thomas, J., dissenting); *McConnell v. Federal Election Commission*, 540 U.S. 93, 266 (2003) (Thomas, J., dissenting); *id*. At 311-312 (Kennedy, J., dissenting).
[141] *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986).
[142] 535 U.S. 425 (2002).
[143] *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (plurality opinion).
[144] *United States v. O'Brien*, 391 U.S. 367 (1968).
[145] *Barnes v. Glen Theatre, Inc.*, 501 U.S. at 578-579 (Scalia, J., concurring); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 307-310 (2000) (Scalia, J., concurring in the judgment).

judicial scrutiny of the application of content-neutral regulations to symbolic conduct raises profound problems of manageability and interferes with legitimate legislative policy, since essentially *any* conduct can be employed to "communicate a message" (consider the September 11 attacks). And no serious theory of the First Amendment would place regulations of sexually oriented businesses at anything but the outer periphery of free speech policy. Charitable solicitations, however, are an essential component of the activities of nonprofit organizations, which are in turn heavily involved in political and policy advocacy in this country. Similarly, regulations of the political process raise profound concerns about legislative interference with democracy, and so with the "self-governance" rationale of the First Amendment.[146] And finally, while strong protection for commercial speech might be more controversial, it seems clear that in recent years a number of Justices have begun to question the proposition that commercial speech has systematically "lower value" than other speech protected by the First Amendment.[147]

An examination of the cases, however, suggests that the Courts of Appeals have largely failed to pick up on these cues, or these ideas. As noted above, the lower courts' analysis of cases in different areas of "intermediate scrutiny" is very consistent – regardless of context, the government usually wins. Indeed, insofar as there *are* differences in outcomes, they seem to fly in the face of the Supreme Court's guidance. As noted earlier, overall free speech claims were upheld by the Courts of Appeals in 31 out of a total of 113 cases, or 27.4% of the time. In the highly protected areas of charitable solicitations and political contributions, however, *none* of the First Amendment

[146] *See generally* A. Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948).
[147] *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 575 (2001) (Thomas, J., concurring).

claims were upheld (albeit out of a small sample of five cases). In contrast, a surprising 34.3% (12 out of 35) of the challenges to regulations of sexually oriented businesses succeeded, despite the lack of any success for such claims in the Supreme Court. In the symbolic conduct area the lower courts were more hostile, accepting only 15.4% (2 out of 13) claims, though even that might be generous given the Supreme Court's posture; and in any event, the numerical breakdown in the symbolic speech cases is *identical* to that in the time, place, and manner cases, where the Supreme Court itself has been far less hostile to speech claims.[148] It is only in the commercial speech area that there is some significant evidence that the Court's cues are being read – the lower courts have accepted 5 out of 13, or 38.5% of claims, which is obviously substantially higher than the average overall. Even here, however, some doubts arise. A 38.5% win ratio (barely higher than 1 out of 3) seems rather low, given the trend of cases in the Supreme Court, the seeming, gradual merger of commercial speech doctrine with the doctrine governing fully-protected speech, and the fact that commercial speech regulations are essentially *always* content-based.

What explains the gap between the Supreme Court's decisions and lower court applications of those decisions? One possible answer is deliberate defiance – lower court judges simply do not share the assessments of the Justices regarding the relative weights of speech and regulatory interests, and so are reaching different conclusions. But this does not seem a terribly plausible story. It seems exceedingly unlikely, for example, that a large number of federal appellate judges think that pornographic theaters and nude dancing constitute more valuable speech than charitable solicitation or political contributions. And in any event, the opinions themselves do not suggest any consistent

[148] *See supra* nn. __-__ and accompanying text.

pattern of criticism of the Court's decisions, making a pattern of such consistent divergence unlikely to be a product of conscious disregard.

Another possible explanation for the discrepancies between Supreme Court and appellate outcomes is case selection – *i.e.*, that in the categories where government win rates are high, plaintiffs tend to bring weaker claims. This explanation (though harder to refute without a more detailed, and inevitably subjective, examination of all of the cases in my sample) also seems inadequate. In particular, with respect to regulations of sexually oriented businesses, given the obvious, strong economic incentives of plaintiffs in those cases to challenge regulations even when the claim on the merits is relatively weak, one would expect a *lower* win ratio than in other areas of intermediate scrutiny; yet the result is the opposite. And while economic incentives to bring weak claims (combined, presumably, with a bias in the certiorari process for the Supreme Court to hear relatively strong claims) might explain the lack of plaintiff success in political contribution and charitable solicitation cases, that bias seems hardly sufficient to explain a 0% success rate. Finally, an examination of individual appellate case in areas where the Supreme Court has accorded strong protection, such as commercial speech[149] and charitable solicitation,[150] strongly suggests that in a number of them, appellate courts rejected constitutional challenges which the Court would have sustained. Thus case

[149] *See, e.g., Capobianco v. Summers*, 377 F.3d 559 (6th Cir. 2004) (upholding 30 day bar on soliciting of accident victims by chiropractors); *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30 (1st Cir. 2000), *aff'd in part, rev'd in part sub nom. Lorillard Tobacco v. Reilly*, 533 U.S. 525 (2001) (rejecting First Amendment challenges to extensive regulation of tobacco advertising; First Amendment analysis largely rejected by Supreme Court on certiorari); *Anheuser-Busch v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995) (upholding ban on billboard advertising of alcohol).

[150] *See, e.g., FOP v. Stenehjem*, 431 F.3d 591 (8th Cir. 2005) (upholding ban on professional solicitors acting on behalf of charities calling telephone numbers on state "do not call" registry); *National Federation of the Blind v. FTC*, 420 F.3d 331 (4th Cir. 2005) (upholding broad regulation of telemarketing on behalf of charitable foundations); *American Target Advertising v. Giani*, 199 F.3d 1241 (10th Cir. 2000) (upholding statute imposing licensing and other obligations on "professional fundraising consultants," though striking down a few provisions of statute).

selection also seems a poor, or at least insufficient, explanation for why results in appellate intermediate scrutiny cases diverge so sharply from those in the Supreme Court.

Rather, the problem here seems to stem from the very *shape*, the structure, of the Court's doctrine in this area. As noted above, the common characteristic of all of the various intermediate scrutiny "tests" announced by the Supreme Court is a requirement that a reviewing court examine both the strength of the (important/substantial/significant) governmental interest asserted in support of the regulation, and the level of "tailoring" of the regulation (including, notably the availability of alternate channels of communication). In fact, however, as Geoffrey Stone noted almost twenty years ago, all of these tests clearly constitute an implicit form of balancing (albeit some of them might constitute categorical, rather than case-by-case balancing).[151] A number of Court of Appeals decisions recognize that intermediate scrutiny constitutes a form of balancing,[152] and of course the *Pickering* test for restrictions on the speech of government employees has always been described as "*Pickering* balancing."[153] Moreover, balancing follows naturally from the very vacuity of the intermediate scrutiny formulations. The tests, or test, require courts to assess whether a government interest is "important" or "substantial" or "significant," but that inquiry obviously cannot be made in a vacuum, especially given the malleability of the intermediate scrutiny formulations (what exactly is an "important" or "significant" policy?), and given the institutional limitations on the ability of courts to

[151] Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 58 (1987).
[152] *See, e.g., Wirzburger v. Galvin*, 412 F.3d 271, 275 (1st Cir. 2005); *Bl(a)ck Tea Society v. City of Boston*, 378 F.3d 8, 19 (1st Cir. 2004) (Lipez, J., concurring); *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251, 1273 (11th Cir. 2003); *Casey v. City of Newport*, 308 F.3d 106, 110-111 (1st Cir. 2002); *Bartnicki v. Vopper*, 200 F.3d 109, 123 (3rd Cir. 1999), *aff'd* 532 U.S. 514 (2001).
[153] *See supra* at __.

make such policy judgments regarding the abstract strength of a social policy.[154] Instead, the tests inevitably invite courts to *compare* – *i.e.*, to balance – the strength of the asserted policy against the constitutional interests on the other side. Tailoring analysis factors into this balancing because it informs one's judgments regarding the extent and necessity of the burden on speech interests. The difficulty is that such a balancing approach, with no further elucidation (and the Supreme Court, at least in enunciating doctrine has given none), provides little or no guidance about *how* to balance. In particular, it does not clarify what kinds of speech rights should be highly valued (or concomitantly, what kinds should not), and what kinds of regulatory interests, in what contexts, should be given more or less weight. Indeed, the falling back onto vaguely articulated balancing tests seems almost an admission of the Supreme Court's inability to articulate such standards. But the inevitable result of that inability is, of course, unpredictability and inconsistency.

Another way to describe the jurisprudential difficulty in this area is that the Courts of Appeals have demonstrated a systematic inability to calibrate their constitutional analysis to the relative strengths of the speech and regulatory interests in individual cases. The sharp disjunctions described above between the Supreme Court's decisions and the results in the lower courts, especially in the areas of charitable speech, political contributions, and time, place, and manner restrictions, are indicative of this phenomenon, since they seem to evince an inability to grapple with the fact that the speech in such cases *matters*, and should be given at least a presumption of protection,

[154] I have discussed these institutional problems in detail elsewhere. *See* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Law*, 85 Cal. L. Rev. 297, 321-325 (1997); Ashutosh Bhagwat, *Affirmative Action and Compelling Interests: Equal Protection Jurisprudence at the Crossroads*, 4 U. Pa. J. Const. L. 260, 272-274 (2002).

albeit not an absolute one. Even more salient are the outcomes in cases involving content-neutral regulations of the mass media, as well as of private, fully protected speech on private property (the area into which the lower courts have extended the intermediate scrutiny jurisprudence). These are all cases in which the regulated speech is fully protected, and therefore presumptively of high value (especially, of course, in the context of mass media regulation). At the same time, there are *not* cases where the State has special interests, either as a proprietor (as is true in the time, place, and manner/public forum and government employee cases) or as a regulator (as is true in the symbolic conduct cases). And yet, in the Courts of Appeals there is simply *no* significant difference between these and other intermediate scrutiny cases. In the mass media category, the success rate of First Amendment claims is 33.3% (4 out of 12), only marginally higher than the overall 27.4% rate; and in the private speech cases, the success rate is only 22.2% (4 out of 18), *lower* than the overall rate, and lower than the success rate in commercial speech (38.5%) and sexually oriented businesses (34.3%) categories. These results simply make no social sense.

In addition to being unprincipled and unpredictable, that fact that intermediate scrutiny has over time collapsed into undifferentiated balancing also probably explains the substantial advantage enjoyed by the government in these cases. The difficulty is this: in any intermediate scrutiny case, a reviewing court is being asked to compare a burden on speech against a claimed regulatory objective. By definition, however, in any individual intermediate scrutiny case, the speech interest is going to be relatively marginal, either because the regulation does not target communicative impact, because it is targeted at "low value" speech, or perhaps both (both factors would seem to be in play

in the symbolic conduct cases, for example). This is true by definition because if the speech interests were *not* reduced, the court would be applying strict, not intermediate scrutiny. On the other hand, the regulatory interests in intermediate scrutiny cases are no less weighty than in strict scrutiny cases. Indeed, they are often weightier, because intermediate scrutiny is often applied in contexts such as commercial speech, regulation of conduct, or regulation of publicly owned property, where the government's regulatory interests are particularly powerful. The result is a systematic bias in judicial perceptions and decisions in favor of the government, resulting in a rejection of First Amendment claims in almost three-quarters of cases.[155]

But, one might argue, isn't that entirely appropriate given the relative weights of the constitutional and regulatory interests here? Perhaps so in any individual case, since in no individual case does the loss of free speech seem all that significant. Furthermore, absent a theoretically grounded base rate, there is no way to know whether the actual win rate for the government one sees in the cases (72.6%) is "too high" or "too low." I do not claim to possess any theory for derive such a base rate, and indeed doubt that such a base rate *can* be meaningfully defined with the decision rule is as amorphous as case-by-case balancing. The problem is that the *cumulative* effects of a large number of decisions, all prone to the same pro-government bias, leads to the suppression of a great deal of speech indeed, so much so as to potentially skew the shape of political and cultural debate. Consider, for example, the cumulative effect of cases such as *Bl(a)ck Tea Society* and *Rappa*,[156] upholding very intrusive restrictions on the time and place of core, political speech. Such restrictions are far more likely to burden political insurgents or "the poorly

[155] For a similar argument, *see* Stone, *supra*, 54 U. Chi. L. Rev. at 79.
[156] *See supra* at __.

financed causes of little people,"[157] than political incumbents or socially powerful interests, resulting in an entrenchment of governing interests and ideas -- the very opposite of the purposes of the First Amendment. Similarly, the consistent validation of restrictions on charitable solicitations threatens to hamstring nongovernmental organizations, which provide an important source of social dissent. And the (fairly) consistent sustaining of structural regulations of the mass media also gives the state a tool to exert pressures on, and extract favors from, the institutional media, thereby restricting yet another source of dissent or oversight. None of this is to say that Armageddon is upon us, or that our democracy is on the verge of collapse; but it is to say that the intermediate scrutiny cases do contribute to the general weakening of "debate on public issues [that is] uninhibited, robust, and wide-open."[158]

It must be understood that the above arguments should not necessarily be considered a wholesale condemnation of balancing methodology (though such condemnations might be appropriate, and certainly have been offered elsewhere).[159] There is nothing about balancing as a methodology that necessarily precludes judges from carefully considering the relative strengths, in each individual case, of speech and regulatory interests. The difficulty is that the intermediate scrutiny doctrine, as articulated by the Supreme Court, does not provide any guidance on how such assessments should be made, thereby eliminating any hope that the Court can assert control over (and consistency among) appellate courts applying its precedents. And

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[157] *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943) (Black, J.); *see also Kovacs v. Cooper*, 336 U.S. 77, 102-104 (1949) (Black, J., dissenting).
[158] *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).
[159] *See, e.g.,* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943 (1987). For a summary of the commentary, *see* Ashutosh Bhagwat, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30 Conn. L. Rev. 961, 989-1001 (1998).

furthermore, the pattern of appellate results and their variation from the Supreme Court's articulated preferences suggest that *in practice* the lower courts, in applying intermediate scrutiny, have failed to take into account in any systematic way such obviously relevant factors as the value of the different kinds speech, and whether there exists any special *need* for regulation in different spheres of life and activity. The question that obviously remains is whether there exist strategies by which doctrine might be reformed to advance the complementary goals of control, consistency, and principle in this area of First Amendment jurisprudence.

A Call for Disaggregation

The fundamental irrationalities and inconsistencies that one observes in the "intermediate scrutiny" free speech caselaw in the Courts of Appeals appear to be a direct, and rather predictable, product of the imprecision and malleability of the doctrine announced by the Supreme Court. This imprecision and malleability appear in turn to be direct results of the fact that the "test," or "tests," that constitute intermediate scrutiny inevitably collapse into unguided balancing. One might therefore be tempted to conclude that the only solution to the problem is to abandon balancing altogether. Such a radical solution, however, is not necessary, and furthermore is probably not even desirable. Instead, a better and more achievable goal might be to move towards more focused, and targeted, doctrinal tests, albeit tests which still incorporate an element of balancing.

Taking the desirability point first, it is not at all clear that balancing can or should be eliminated altogether from the various areas of law that constitute intermediate scrutiny. As Geoffrey Stone has argued, reduced scrutiny of content-neutral regulations,

and some element of balancing (whether categorical or case-by-case), may be unavoidable in resolving these cases. The reason is simple. As noted above,[160] intermediate scrutiny cases are by definition cases where the Court has concluded that strict scrutiny should *not* apply, because of some combination of the lower value of protected speech (as in the commercial and sexual speech cases), the strong societal interests at stake (as in the public property, symbolic conduct, government employee and political contribution cases), or simply because of lessened concerns about governmental misconduct (as in the mass media and pure content-neutral cases).[161] Nonetheless, because of the highly preferred status of free speech in our constitutional ideology, the Court also does not believe that the utterly supine rational basis standard is appropriate in these cases. Thus in every intermediate scrutiny case some difficult reconciliation of speech and regulatory interests will be necessary. And that need would seem to lead logically to balancing – even if with respect to some kinds of speech or regulations, the result of balancing is to conclude (as in the child pornography context)[162] that constitutional claims should be rejected on a categorical basis.

Balancing thus may be inevitable here. But it need not be unguided, unfettered balancing. The lack of guidance, indeed the chaos, in this area is not a result of balancing as such, it is a result of the vague and open-ended nature of the tests the Court has fashioned here -- the ultimate in doctrinal mush. That mush is an inevitable consequence of trying to deal with the extraordinarily varied issues and problems which arise in the various areas of doctrine that have been subsumed into intermediate scrutiny through one

[160] *Supra* at __.
[161] Stone, *supra*, 54 U. Chi. L. Rev. at 74-76; *see also* Bhagwat, *supra*, 30 Conn. L. Rev. at 1000.
[162] *New York v. Ferber*, 458 U.S. 747 (1982).

overarching "test." But *that* step, the creation of a single, indivisible middle tier in free speech law, was neither necessary nor desirable, and it should be reversed.

In short, the solution here is disaggregation, the dismantling of the intermediate scrutiny test into its constituent parts. The primary benefit of such disaggregation is that it will permit the development of a more detailed jurisprudence (or more accurately, multiple bodies of jurisprudence) regarding how courts should balance speech and societal interests in different areas of free speech law. In particular, such a jurisprudence could begin to articulate standards regarding what kinds of speech, and what kinds of regulatory interests, should be accorded more or less weight (or indeed, any weight at all) in each of the different areas of law which have been combined into intermediate scrutiny– including in some instances, perhaps, a categorical conclusion that certain kinds of free speech claims should always be rejected.[163] Such bodies of jurisprudence could substantially reduce the disjunction between appellate decisions and the Supreme Court's apparent preferences, as well as the seeming randomness of the results in the lower courts.[164]

To understand fully why disaggregation holds promise for such desirable outcomes, some further explanation is necessary. One key insight here is that that speech interests are *not* equally strong across these different areas of law. It seems obvious that media speech, charitable solicitations, and political speech generally, whether it be on

[163] Unsurprisingly, Justice Scalia has advocated abandoning balancing in favor of just such a conclusion in two areas of law within the "intermediate scrutiny" rubric: content-neutral regulations of symbolic conduct, and regulations of "the business of pandering sex." *See Barnes v. Glen Theatre, Inc.*, 501 U.S. at 578-579 (Scalia, J., concurring); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 307-310 (2000) (Scalia, J., concurring in the judgment); *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 433 (Scalia, J., concurring).

[164] For a sophisticated examination of the broader jurisprudential question of how the Supreme Court can exert greater control over results in the lower courts, tying that issue to the general rules versus standards debate, *see* Caroline Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 Washington & Lee L. Rev. __ (2006) (forthcoming).

public property, by government employees, or completely private, has greater constitutional value than sexual speech. The Court should make that an overt element of its precedent. Similarly, the Court should and must explicitly resolve the question of whether commercial speech is, or is not, systematically of lower value than the kinds of scientific, artistic, and literary speech that receive full First Amendment protection. Such guidance should have a substantial impact on disciplining balancing.

Even more significant than recognition of the varying strength of speech interests (which is, after all, implicit in current law), the law in this area would benefit greatly from the realization that different state regulatory interests should *not* be accorded equivalent weights when invoked to regulate different kinds of speech. Consider, for example, the governmental proprietary interests in order, management, and bureaucratic discipline which so often underlie restrictions on speech on public property, or speech by government employees – such interests can and should certainly be accorded great weight in those contexts, but *not* in other areas of free speech law. Similarly, the kinds of interests in preventing harm, combined with manageability concerns, which so often justify the application of generally applicable laws to symbolic conduct should be given less or even no weight when regulation specifically targets speech such as commercial speech, mass media operations, and charitable solicitation. Or again, the acknowledged interests in preventing false or even misleading speech in the commercial speech and charitable solicitations contexts should have little or no relevance for regulations of other speech (including most especially political speech) or of the mass media. Concomitantly, if commercial speech is truly of high First Amendment value, perhaps no *other* regulatory interests should be permitted.

Indeed, a careful examination of relevant and irrelevant regulatory interests has promise for entirely revolutionizing some areas of intermediate scrutiny law. In mass media cases, for example, there is a powerful argument to the made that the *only* permissible state interest should be one in preserving competition and a diversity of voices, without preferring any specific speech or speakers.[165] Similarly, when speech of government employees is at issue, why should *any* suppression be permitted when the relevant speech is not on government property, and does not disclose confidential information? Surely in those circumstances the State's proprietary interests are only most marginally involved, and if that is the case, what reason is there for reduced protection of the speech? Finally, with respect to regulation of sexual speech and sexually oriented businesses, the Court might articulate with greater precision what exactly *are* the relevant regulatory interests here. Is it secondary effects -- and if so, what kinds of secondary effects? Is it protection of children? If so, protection from what, and what role do parental preferences play here?[166] Or is it simply because nudity and depictions of sexuality are "*contra bonos mores*," to quote Justice Scalia?[167] Lower courts might like to know.

Would such greater specificity in doctrinal formulations make any difference in individual cases? There are of course no guarantees, but it might. Consider for example the *Bl(a)ck Tea Society* case, involving demonstrators at the 2004 Democratic National Convention,[168] the *National Federation of the Blind* case involving regulation of

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[165] For a more detailed elucidation of this argument, *see* Ashutosh Bhagwat, *Of Markets and Media: The First Amendment, the New Mass Media, and the Political Components of Culture*, 74 N.C. L. Rev. 141, 187-193 (1995).
[166] *See generally* Ashutosh Bhagwat, *What If I Want My Kids to Watch Pornography? Protecting Children from "Indecent" Speech*, 11 Wm. & Mary Bill of Rts. J.671 (2003).
[167] *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 575 (1991) (Scalia, J., concurring in the judgment).
[168] *See supra* at __.

charitable solicitations,[169] or the *Rappa* case concerning roadside signs.[170] In each of those cases, the appellate court might have reached different results if it had given more weight to the fact that the suppressed speech was of very high value. Concomitantly, in the 2001 *Time-Warner Entertainment* case,[171] the D.C. Circuit might have been more tolerant of the cable industry regulations it struck down if it had acknowledged the power of the governmental interest in maintaining competition and a diversity of voices. Another case, this time in the commercial speech arena, where more specificity might have made a difference is *Anheuser-Busch v. Schmoke*,[172] where the Fourth Circuit upheld a flat ban on billboard advertising of alcoholic products in most of the City of Baltimore. Given the later result in *Lorillard Tobacco* in which the Supreme Court struck down a similar regulation of tobacco advertising,[173] the result here seems inconsistent with the Court's views; and clearer guidance from the Court might have avoided the divergence. In the cases involving regulation of sexually oriented businesses, a forthright statements by the Court that in its view such regulations raise only the most attenuated First Amendment concerns, which are easily trumped by concerns about public morality, might have altered the result in all such cases where the claimants prevailed. Finally, in the cases where courts are evaluating content-neutral regulations of speech on private property, a recognition that *neither* of the critical factors counseling for deference in other "intermediate scrutiny" cases – low-value speech or special regulatory interests – is present might well lead appellate courts to take a far more skeptical stance towards regulation.

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[169] *See supra* at __.
[170] *See supra* at __.
[171] *See supra* at __.
[172] 63 F.3d 1305 (4th Cir. 1995).
[173] *See supra* at __.

The above discussion represents a most preliminary survey of the possibilities for doctrinal precision here. Each of the distinct bodies of law which have in recent years become subsumed into "intermediate scrutiny" deserves a careful, independent analysis of the relevant constitutional and regulatory policies that are raised therein. This will take time and effort, both in the courts and in the scholarly literature. But the issues here are sufficiently important, and the promise of improvement sufficiently real, that the effort is worthwhile.

CONCLUSION

Over the past two to three decades, a new, overarching doctrinal test has emerged in the area of free speech jurisprudence: the test of intermediate scrutiny. The test was born as a result of the consolidation and merger of a number of distinct strands of First Amendment doctrine, including notably public forum analysis, symbolic conduct analysis, the commercial speech doctrine, and the *Pickering* balancing test for restrictions on government employee speech. Since the mid-1990s, however, especially in the decisions of the Courts of Appeals the intermediate scrutiny test has become, in Justice Scalia's words, a "default standard" applicable to essentially all free speech cases where strict scrutiny is not, for some reason, appropriate. Its importance is thus very substantial.

In this paper, I have examined how First Amendment intermediate scrutiny functions in practice in the United States Courts of Appeals. After examining in some detail the very substantial body of intermediate scrutiny caselaw that has emerged, especially over the past two decades, I conclude that the test does not in fact function very well. In particular, when applying intermediate scrutiny the Courts of Appeals

decide cases in ways that do not seem to conform with the policies expressed by Supreme Court decisions, the decisions seem to systematically favor the government, and most problematically, the pattern of the decisions as a whole does not seem to demonstrate any coherent constitutional or social policy. In short, the cases show a judiciary which is adrift.

The doctrinal solution I propose, which should alleviate at least some of the dysfunctions revealed by an analysis of the cases, is disaggregation. I believe that the doctrinal merger that has occurred should be reversed, and instead the Supreme Court, and the judiciary generally, should restart the process of building distinct, detailed bodies of jurisprudence within the different areas of free speech law currently subsumed in the "intermediate scrutiny" rubric. Such a jurisprudence, or such a body of jurisprudences, promise to provide clearer answers to the difficult questions raised in intermediate scrutiny cases regarding the relative weights to be accorded speech and general societal interests, and therefore to provide better guidance to the lower courts. This is an important task for the simple reason that these cases matter. They matter because despite the seemingly triviality of many of the individual cases, collectively their resolution has a substantial impact on the shape and content of public debate in our country. And after all, preserving the vitality of that debate is what the First Amendment is all about.