Assessing the Constitutionality of Laws That Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus

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INTRODUCTION

> Such a multi-faceted analysis cannot be conflated into two dimensions. Whatever the allure of absolute doctrines, it is just too simple to declare expression "protected" or "unprotected" or to proclaim a regulation "content-based" or "content-neutral."
> John Paul Stevens (1992)[1]

American legal doctrine evolved from a formalistic categorical approach that dominated legal thinking during the nineteenth century to a realistic balancing approach that developed over the course of the twentieth century.[2] A similar process is now occurring in the constitutional doctrine governing freedom of expression—a process that may culminate in the adoption of what United States Supreme Court Justice John Paul Stevens calls a "constitutional calculus."[3]

The law governing freedom of expression is in ferment. During the 2002 term, the Supreme Court decided six cases dealing with freedom of expression,[4] and it

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1. R.A.V. v. City of St. Paul, 505 U.S. 377, 431 (1992) (Stevens, J., concurring).

2. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 17-18, 199-200 (1992). Horwitz describes this change from "formalism" to "realism" in the following terms:

> Nineteenth-century legal thought was overwhelmingly dominated by categorical thinking—by clear, distinct bright-line classifications of legal phenomena. Late-nineteenth-century legal reasoning brought categorical modes of thought to their highest fulfillment.
>
> By contrast, in the twentieth century, the dominant conception of the arrangement of legal phenomena has been that of a continuum between contradictory policies or doctrines. Contemporary thinkers typically have been engaged in balancing conflicting policies and "drawing lines" somewhere between them.

Id. at 17.

Grant Gilmore more colorfully characterizes the period of categorical analysis as "the Age of Faith" (that is, faith in legal principles), and the ensuing period of policy analysis as "the Age of Anxiety." GRANT GILMORE, THE AGES OF AMERICAN LAW 41-98, 41, 68 (1977). *See generally* Wilson R. Huhn, *The Stages of Legal Reasoning: Formalism, Analogy, and Realism*, 48 VILL. L. REV. 305 (2003).

3. *See* Bartnicki v. Vopper, 532 U.S. 514, 533 (2001) (holding that a radio broadcast of an illegally recorded private conversation concerning a matter of public importance is constitutionally protected, stating that "it seems to us that there are important interests to be considered on *both* sides of the constitutional calculus") (emphasis in original).

4. *See* Ashcroft v. ACLU, 535 U.S. 564 (2002) (holding that a reference to "community standards" in a statute censoring the internet did not by itself make the law substantially overbroad); Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (striking down a law

reviewed five more during the 2003 term.[5] Over the past decade a number of justices—in particular, John Paul Stevens, Stephen Breyer, David Souter, and, to a lesser extent, Sandra Day O'Connor and Anthony Kennedy—have expressed dissatisfaction with standard First Amendment doctrine.[6] This dissatisfaction has arisen because current First Amendment doctrine relies heavily on categorical analysis. The categorical distinctions that the Court has previously established—speech occurring in the public forum versus speech occurring in the nonpublic forum, prior restraints versus subsequent punishments, and above all, content-based laws versus content-neutral laws—are too rigid to adequately explain the complexity of First Amendment law. It is necessary to revise First Amendment doctrine and create a formula that takes into account the multi-dimensional contours of freedom of expression problems. In particular, this Article recommends that in measuring the constitutionality of a law that affects expression, instead of attempting to determine *whether* the law is content-based or content-neutral, it is more appropriate to assess the *extent* to which the law suppresses particular ideas and/or restricts opportunities for expression.

Once it has been found that a law infringes upon freedom of expression,[7]

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banning virtual child pornography); City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002) (upholding municipal zoning law banning multiple-use adult businesses); Republican Party v. White, 536 U.S. 765 (2002) (striking down canon of judicial ethics that prohibited judicial candidates from announcing views on disputed legal or political issues); Thomas v. Chicago Park Dist., 534 U.S. 316 (2002) (upholding permit requirement for conducting events for more than fifty persons in municipal parks); Watchtower Bible & Tract Soc'y v. Village of Stratton, 536 U.S. 150 (2002) (striking down municipal ordinance that required registration and permits for door-to-door solicitors).

5. *See* FEC v. Beaumont, 123 S. Ct. 2200 (2003) (upholding the application of the federal law that prohibits corporations and labor unions from making direct campaign contributions and independent expenditures in connection with federal elections to a nonprofit corporation whose primary purpose is to engage in political advocacy); Illinois *ex rel.* Madrigan v. Telemarketers Assocs., Inc., 123 S. Ct. 1829 (2003) (upholding state prosecution for fraud as against a professional fundraiser who allegedly represents that donations will be used for charitable purposes but who keeps the vast majority of all funds donated); United States v. Am. Library Ass'n, 123 S. Ct. 2297 (2003) (upholding federal law requiring libraries to block internet access to pornographic websites in order to qualify for federal funding); Virginia v. Black, 123 S. Ct. 1536 (2003) (upholding in part and striking down in part a state statute banning cross burning); Virginia v. Hicks, 123 S. Ct. 2191 (2003) (upholding against facial attack the trespass policy of a government housing agency requiring protestors and leafleters to obtain advance permission to enter low-income housing development); *see also* Nike, Inc. v. Kasky, 123 S. Ct. 2554 (2003) (dismissing writ of certiorari as improvidently granted in a case involving the definition of commercial speech and an application of the commercial speech doctrine).

6. *See infra* notes 138-283, 366-86 and accompanying text.

7. Words or actions constitute "expression" if two conditions are satisfied: (1) the speaker or actor intends to communicate an idea, and (2) a person hearing or seeing the words or actions would likely understand that an idea was being communicated. *See* Spence v. Washington, 418 U.S. 405 (1974) (striking down a state law requiring "proper display" of the American flag as applied to a person who had flown an American flag upside down and superimposed with tape in the shape of a peace symbol as a war protest). Noting that the defendant displayed this symbol shortly after the invasion of Cambodia and the Kent State shootings, the *Spence* Court found "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Id.* at 410-11; *see also Hicks*, 123 S. Ct. at

standard First Amendment doctrine requires the courts to determine whether the law is "content-based" or "content-neutral."[8] Content-based laws regulate the ideas being expressed, while content-neutral laws regulate the time, place, or manner of expression.[9] The distinction between content-based and content-neutral laws has played a crucial role in determining the standards of review that are used to measure the constitutionality of laws that affect freedom of expression.[10] As Daniel Farber has explained:

> The content distinction is the modern Supreme Court's closest approach to articulating a unified First Amendment doctrine. Government regulations linked to the content of speech receive severe judicial scrutiny. In contrast, when government is regulating speech, but the regulation is unrelated to content, the level of scrutiny is lower.[11]

Furthermore, under the current doctrine, the format for assessing the constitutionality of content-based laws is different from the format that is used to evaluate content-neutral laws. The constitutionality of content-based laws depends upon the value of the category of speech that is being regulated.[12] Political, artistic,

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2199 (upholding trespass policy against facial overbreadth challenge, and stating, "it is Hicks' nonexpressive *conduct*—entry in violation of the notice-barment rule—not his speech, for which he is punished as a trespasser") (emphasis in original).

8. Professor Tribe refers to content-based analysis as "track one" and content-neutral analysis as "track two." *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 791-92 (2d ed. 1988).

9. *See id.* Tribe describes content-based laws as those that are "aimed at the communicative impact of an act," *id.* at 791, and content-neutral laws as those that are "aimed at the noncommunicative impact of an act." *Id.* at 792.

10. *See* Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 49 (2000) ("[I]ncreasingly in free speech law, the central inquiry is whether the government action is content based or content neutral.").

11. DANIEL A. FARBER, THE FIRST AMENDMENT 21 (1998); *see also* Chemerinsky, *supra* note 10, at 55 ("In *Turner Broadcasting System, Inc. v. FCC*, the Court said that the general rule is that content-based restrictions on speech must meet strict scrutiny, while content-neutral regulations only need meet intermediate scrutiny.").

12. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992) ("[A] limited categorical approach has remained an important part of our First Amendment jurisprudence."). Professor Tribe describes content-based analysis as essentially categorical, and content-neutral analysis as essentially requiring balancing. With respect to content-based laws, he states:

> [A] regulation is unconstitutional unless government shows that the message being suppressed poses a "clear and present danger," constitutes a defamatory falsehood, or otherwise falls on the unprotected side of one of the lines the Court has drawn to distinguish those expressive acts privileged by the first amendment from those open to government regulation with only minimal due process scrutiny.

TRIBE, *supra* note 8, at 791-92. In contrast, with respect to content-neutral laws, he says that "the 'balance' between the values of freedom of expression and the government's regulatory interests is struck on a case-by-case basis, guided by whatever unifying principles may be articulated." *Id.* at 792.

In my opinion, it is an oversimplification to describe content-based analysis as categorical and content-neutral analysis as depending upon balancing. Content-based analysis often requires balancing. For example, the Court has assigned value to each content-

literary, and scientific speech are considered to be "high value" speech,[13] and accordingly laws that infringe on such speech must meet the "strict scrutiny" standard of review.[14] In contrast, commercial speech has been considered to be of middling value,[15] and laws suppressing such speech are subjected to intermediate scrutiny.[16] The Supreme Court has determined that other categories of speech such as obscenity and fighting words are of low value,[17] and that laws punishing such speech are constitutional without further analysis.[18]

Content-neutral laws are evaluated in a different manner. The constitutionality of laws that restrict the time, place, or manner of expression is evaluated under the *O'Brien* standard, which is essentially a form of intermediate scrutiny,[19] with the

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based category of speech, and the test or standard of review for assessing the constitutionality of a law suppressing a particular category of speech reflects this value. *See infra* notes 13-18 and accompanying text. Moreover, content-neutral analysis is often categorical in nature. For example, laws that regulate speech in a public forum are subjected to stricter review than laws that regulate speech in non-public forums. *See infra* notes 22-23 and accompanying text.

13. *See, e.g.*, Miller v. California, 413 U.S. 15, 24 (1973) (stating that sexually explicit material is only unprotected obscenity if "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value").

14. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 321 (1988) ("Our cases indicate that as a *content-based* restriction on *political speech* in a *public forum*, [the law] must be subjected to the most exacting scrutiny.") (emphasis in original).

15. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562 (1980) ("The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.").

16. *See* Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995) ("[W]e engage in 'intermediate' scrutiny of restrictions on commercial speech . . . .").

17. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (stating that insulting or fighting words "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality").

18. *See id.* at 571-72 ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . . ."); Miller v. California, 413 U.S. 15, 23 (1973) ("[O]bscene material is unprotected by the First Amendment."). *But see R.A.V.*, 505 U.S. at 383, where Justice Scalia explained that so-called "unprotected" categories of speech are nevertheless still subject to the First Amendment. He stated:

> We have sometimes said that these categories of expression are "not within the area of constitutionally protected speech." . . . Such statements must be taken in context, however . . . . What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution.

Id. at 383 (citations omitted) (emphasis in original).

19. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968) (applying intermediate scrutiny). The Court stated that in cases evaluating the constitutionality of laws regulating expressive conduct,

> we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the

additional proviso that any content-neutral law must "leave open ample alternative channels of communication."[20] In particular, the *O'Brien* test has been used to evaluate the constitutionality of laws regulating symbolic speech[21] and laws regulating the time, place, or manner of expression that occurs in places that are considered to be part of the "public forum."[22] A lower standard of review—the rational basis or "reasonableness" test—is applicable to laws regulating expression that occurs in places that are not part of the public forum,[23] subject to the same proviso that even regulations of nonpublic fora must leave open substantial alternative channels of communication.[24]

Because content-based laws are analyzed one way and content-neutral laws are analyzed another way under current doctrine, it is obviously crucial to be able to tell the difference between them. There are some cases where it is obvious that a law is purely content-based or purely content-neutral. For example, a law that makes it illegal to advocate the violent overthrow of the government is purely content-based,[25] while a law that outlaws the use of sound trucks is purely content-neutral.[26]

However, it is not always possible to classify a law as purely content-based or purely content-neutral. Many laws regulating expression—perhaps most such laws—are *both* content-based *and* content-neutral. For example, zoning laws that

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> incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id.

20. City of Ladue v. Gilleo, 512 U.S. 43, 56 (1994) (striking down municipal ordinance banning display of signs on residential property) ("[E]ven regulations that do not foreclose an entire medium of expression, but merely shift the time, place, or manner of its use, must 'leave open ample alternative channels for communication,'") (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

21. *O'Brien*, 391 U.S. at 367 (upholding federal law forbidding the destruction of a draft card as applied to person who burned draft card as war protest).

22. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions '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.'") (quoting *Clark*, 468 U.S. at 293).

23. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679 (1992) (stating that in cases involving content-neutral regulations of nonpublic fora "[t]he challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view").

24. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 53 (1983) ("[T]he reasonableness of the limitations on PLEA's access to the school mail system is also supported by the substantial alternative channels that remain open for union-teacher communication to take place.").

25. *See* Dennis v. United States, 341 U.S. 494 (1951) (upholding federal law prohibiting any person to "knowingly . . . advocate . . . overthrowing . . . any government in the United States by force or violence") (quoting § 2 of Smith Act of 1940, Pub. L. No. 76-670, § 2, 54 Stat. 670, 671 (1940)).

26. *See* Kovacs v. Cooper, 336 U.S. 77 (1949) (upholding city ordinance that banned the use of sound trucks from public streets). Justice Frankfurter stated that sound trucks could be banned "[s]o long as a legislature does not prescribe what ideas may be noisily expressed." *Id.* at 97 (Frankfurter, J., concurring).

disperse sexually oriented businesses,[27] campaign finance reform laws that limit the amount of money a person or a political party may contribute to a candidate,[28] policies and regulations restricting access of religious groups to public schools and universities,[29] laws prohibiting electioneering at polling places on the day of an election,[30] laws requiring specific media to give "equal time" or a "right of reply" to those officials or candidates who are attacked,[31] and laws that regulate indecent or pornographic speech over specific media[32] are both content-based and content-neutral on their face. In addition, there are many laws which are content-neutral on their face, but which are also content-based in fact. These include laws and injunctions limiting protests at health care facilities;[33] public nudity laws as applied

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27. *See* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002) (upholding zoning law banning multiple-use adult businesses against facial challenge); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (upholding zoning law requiring adult movie theaters to be located more than 1000 feet from any residence, church, park, or school).

28. *See* FEC v. Beaumont, 123 S. Ct. 2200 (2003) (upholding federal law barring corporations from making contributions to political candidates as applied to nonprofit advocacy groups); FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001) (upholding statutory limitations on coordinated expenditures by political parties); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) (upholding state law limiting political contributions to state and local campaigns); Buckley v. Valeo, 424 U.S. 1 (1976) (upholding federal law prohibiting individuals from making political contributions of more than $1000 to any candidate or more than $25,000 in total in any one year).

29. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (striking down public school policy that denied equal access to organizations holding religious worship); Rosenberger v. Rector and Visitors of Univ. of Virginia, 515 U.S. 819 (1995) (striking down state university policy prohibiting support for student religious publications).

30. *See* Burson v. Freeman, 504 U.S. 191 (1992) (upholding state law prohibiting solicitation of votes and display of campaign materials within 100 feet of polling place on election day).

31. *See* Miami Herald Co. v. Tornillo, 418 U.S. 241 (1974) (striking down state "right of reply" statute that required newspapers to print replies by candidates who were attacked by the newspaper); Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (upholding FCC's fairness doctrine giving any person or group reasonable opportunity to respond to broadcast attacks).

32. *See* United States v. Am. Library Ass'n, 123 S. Ct. 2297 (2003) (upholding against facial attack a federal statute requiring public libraries to install internet filters against pornographic websites as a condition of receipt of federal funding); Ashcroft v. ACLU, 535 U.S. 564 (2002) (refusing to invalidate "community standards" provision of Child Online Protection Act, Pub. L. No. 105-277, 122 Stat. 2681 (1998) (codified at 47 U.S.C. §§ 223, 230-31 (2000))); Reno v. ACLU, 521 U.S. 844 (1997) (striking down federal law that effectively prohibited indecent or patently offensive speech on the internet); Denver Area Educ. Television Consortium, Inc. v. FCC, 518 U.S. 787 (1996) (upholding in part and striking down in part federal law that gave cable operators the power to refuse to carry indecent programming on leased access and public access channels); Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989) (striking down federal statute prohibiting indecent telephone messages); FCC v. Pacifica Found., 438 U.S. 726 (1978) (upholding Commission ruling prohibiting the broadcast of patently offensive language at times of day when there is reasonable risk that children may be in the audience).

33. Hill v. Colorado, 530 U.S. 703 (2000) (upholding statute forbidding protesters from approaching within eight feet of another person at health care facilities); Schenck v. Pro-Choice Network, 519 U.S. 357 (1997) (upholding injunction establishing a fixed buffer zone around an abortion clinic but striking down "floating" buffer zones); Madsen v. Women's

to nude dancing establishments;[34] laws prohibiting draft card burning,[35] flag burning,[36] and cross burning;[37] laws requiring cable television operators to carry broadcast stations;[38] and laws governing the publication or broadcast of stolen or intercepted communications.[39]

Over the past few years the Supreme Court has increasingly struggled to establish a consistent standard of review governing such "dual-effect" laws. Although several Supreme Court justices (particularly Justice Stevens, whose analysis is the principal focus of this Article) have expressed dissatisfaction with the standard model of First Amendment analysis, the Court as a whole has failed to acknowledge that the source of the difficulty is the dual nature of laws regulating expression, and as a result the Court has failed to adopt a consistent and workable method of measuring the constitutionality of laws that regulate both the ideas being expressed and the modes of expression.

The principal purpose of this Article is to describe and expand upon one of the proposed alternative methods of analyzing freedom of expression problems: the multi-factor "constitutional calculus" proposed by Justice Stevens in his concurring opinion in the 1992 hate-speech case *R.A.V. v. City of St. Paul*.[40] Justice Stevens suggested that First Amendment cases involve the interaction of five variables: content, character, context, nature, and scope. I suggest that by considering these five factors, the Court should be able to estimate the value of the expression that is being suppressed, and may then use that estimation of value to calibrate the quantum of proof that the State must offer to justify the regulation of expression. The same five factors are also relevant in determining whether the law could be more narrowly tailored, that is, less restrictive of expression. Because this constitutional calculus measures both the content-based and content-neutral effects on expression, it may be employed to measure the constitutionality of any law affecting the freedom of expression. The following equation expresses the factors that the Court takes into account in determining the constitutionality of laws affecting freedom of expression:

Health Ctr., Inc., 512 U.S. 753 (1994) (upholding in part and striking down in part injunction issued against abortion protesters); Frisby v. Schultz, 487 U.S. 474 (1988) (upholding municipal ordinance outlawing residential picketing).

34. *See* City of Erie v. Pap's A.M., 529 U.S. 277 (2000) (upholding city ordinance that prohibited public nudity as applied to nude dancing establishment); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (upholding state statute that prohibited public nudity as applied to nude dancing establishments).

35. *See* United States v. O'Brien, 391 U.S. 367 (1968) (upholding federal statute forbidding destruction of draft cards).

36. *See* United States v. Eichman, 496 U.S. 310 (1990) (striking down federal statute prohibiting burning of the American flag); Texas v. Johnson, 491 U.S. 397 (1989) (striking down state statute prohibiting desecration of the American flag).

37. *See* Virginia v. Black, 123 S. Ct. 1536 (2003) (upholding in part and striking down in part state statute banning cross burning on public property).

38. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) (holding that "must carry" provisions of federal law were content-neutral and would be subjected to intermediate scrutiny); Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997) (upholding "must carry" provisions of federal law).

39. *See* Bartnicki v. Vopper, 532 U.S. 514 (2001) (finding federal and state laws prohibiting disclosure of contents of an illegally recorded conversation unconstitutional as applied to a broadcast of a matter of public importance).

40. 505 U.S. 377 (1992); *see infra* notes 45-54 and accompanying text.

EXPRESSIVE VALUE (content, character, context, nature, and scope)	COMPARED TO	PROOF OF HARM (scienter, causation, nature, and degree of harm)

The purpose of this Article is to describe the left-hand of the constitutional calculus, the measurement of the expressive value of speech. Part I generally describes what a "constitutional calculus" is and contrasts it with a categorical approach, and it describes the five-part multi-factor standard that was proposed by Justice Stevens in 1992 as a basis for determining the constitutionality of laws affecting freedom of expression. Part II describes the standard "intent test" for determining whether a law affecting freedom of expression is content-based or content-neutral, and it summarizes scholarly treatment of the distinction. This Part concludes that the distinction between content-based and content-neutral laws is too amorphous to serve as a determinative test of constitutionality. Part III examines a number of recent cases decided by the Supreme Court that have both content-based and content-neutral elements. It concludes that the Court is moving away from categorizing laws affecting expression as purely "content-based" or "content-neutral," and is instead attempting to measure the value of the ideas being suppressed and the importance of the reduction in the opportunity for expression. Part IV addresses the question of whether the constitutional calculus will be as protective of speech rights as the categorical approach. It concludes that this new "constitutional calculus" is an efficient and transparent method of analyzing problems involving freedom of expression, but that the Court should retain one outcome-determinative categorical distinction: that is, the rule that viewpoint-based laws suppressing speech should be considered unconstitutional per se.

I. A NEW CONSTITUTIONAL CALCULUS

A. Distinguishing a "Constitutional Calculus" from a Categorical Approach

A "constitutional calculus" is a multi-factor standard in which a number of factual variables are balanced in order to determine the constitutionality of a law or other governmental action.[41] In a case reviewing the constitutionality of a punitive

41. The term "constitutional calculus" was first used by the Supreme Court in a 1968 case reviewing a decision of the Federal Power Commission for "reasonableness." *See In re* Permian Basin Area Rate Cases, 390 U.S. 747, 769 (1968) ("[I]nvestors' interests provide only one of the variables in the constitutional calculus of reasonableness."). Since then, the Supreme Court has used the phrase to refer to multi-factored standards of constitutionality in a variety of contexts: a substantive due process claim, *see* Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Trust, 508 U.S. 602, 641 (1993) ("Nor does the possibility that trustee decisions made 'before [Concrete Pipe] entered [the Plan]' may have led to the unfunded liability alter the constitutional calculus."); a Sixth Amendment case, *see* Alabama v. Shelton, 535 U.S. 654, 668 n.6 (2002) ("The Alabama Supreme Court has thus *already* spoken on the issue we now address, and in doing so expressed not the slightest hint that revocation-stage procedures—real or imaginary—would affect the constitutional calculus.") (emphasis in original); a separation of powers case, *see* Mistretta v. United States, 481 U.S. 361, 394 (1989) ("We note, however, that the constitutional calculus is different for considering nonadjudicatory activities performed by bodies that exercise judicial power and enjoy the constitutionally mandated autonomy of courts from what it is for considering the nonadjudicatory activities of independent nonadjudicatory agencies that Congress merely

damages award under the Due Process Clause, Justice Stevens contrasted a "constitutional calculus" with a "categorical approach":

> It is appropriate, therefore, to reiterate our rejection of a categorical approach. Once again, "we return to what we said . . . in *Haslip*: 'We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus.'"[42]

Significantly, Justice Stevens also used the term "constitutional calculus" in a 2001 freedom of expression case, *Bartnicki v. Vopper*,[43] to describe First Amendment law. The Court's decision in *Bartnicki*, which is described in Part III of this Article, is representative of the emerging "constitutional calculus" in freedom of expression cases.

The following portion of this Article describes Justice Stevens' proposed constitutional calculus for freedom of expression cases.

B. Justice Stevens's Proposed Constitutional Calculus

Justice Stevens' characterization of the law of freedom of expression as a "constitutional calculus" in *Bartnicki* is significant because it concisely and accurately describes the multi-factor balancing approach that he employs in deciding difficult freedom of expression cases.[44] Justice Stevens developed this multi-factor approach in his opinion concurring in the judgment in *R.A.V. v. City of St. Paul*.[45] In *R.A.V.*, the Court unanimously struck down a municipal hate speech

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has located within the Judicial Branch pursuant to its powers under the Necessary and Proper Clause."); and death penalty cases, *see* Lowenfield v. Phelps, 484 U.S. 231, 238 (1988) ("The difference between the division of function between the jury and judge in this case and the division in *Allen* obviously weighs in the constitutional calculus, but we do not find it dispositive."), *quoted in* Romine v. Georgia, 484 U.S. 1048, 1049 (1988) (Marshall, J., dissenting from denial of certiorari).

42. BMW of N. Am., Inc., v. Gore, 517 U.S. 559, 582-83 (1996) (quoting T.X.O. Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 458 (1993) (alterations and omissions in original); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991) (discussing test for constitutionality of punitive damages award)).

43. 532 U.S. 514 (2001) (radio broadcast of illegally recorded conversation is constitutionally protected).

44. Justice Stevens' concentration on multiple factors is characteristic of his approach to resolving difficult questions of law. *See* William D. Popkin, *A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens*, 1989 DUKE L.J. 1087, 1091 (stating that Justice Stevens' jurisprudence is characterized by "judicial deliberation focused on the facts of the particular case"); Frederick Schauer, *Justice Stevens and the Size of Constitutional Decisions*, 27 RUTGERS L.J. 543, 545 (1996) (describing Justice Stevens' opinions as "focusing on the facts of particular controversies"). *But see* Robert F. Nagel, *Six Opinions by Mr. Justice Stevens: A New Methodology for Constitutional Cases?*, 78 CHI.-KENT L. REV. 509, 529 (2003) (criticizing Justice Stevens for "blatant inconsistencies" in balancing specific factors and in his occasional reliance on existing doctrine).

45. 505 U.S. 377 (1992). *See* Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 88-89 (1992) (describing Justice Stevens' rejection of the categorical approach in *R.A.V.*).

ordinance that made it illegal to display a burning cross, a Nazi swastika, or any other symbol that "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[46] Justice Antonin Scalia authored the majority opinion, which characterized the ordinance as both content-based and viewpoint-based.[47] Justice Stevens concurred in the judgment, but found the majority opinion flawed in its analysis in that it overlooked a number of critical considerations. Justice Stevens acknowledged that the ordinance was content-based, but contended that not all content-based ordinances are alike. Specifically, he stated that the Court must consider a number of other factors which determine the scope of the invasion of First Amendment freedom that a law presents:

> Not all content-based regulations are alike; our decisions clearly recognize that some content-based restrictions raise more constitutional questions than others. Although the Court's analysis of content-based regulations cannot be reduced to a simple formula, we have considered a number of factors in determining the validity of such regulations.[48]

Justice Stevens identified five factors that affect the constitutionality of a content-based law. First, the subject matter of the speech, its "content," in part determines its constitutional value and consequently the level of review to which it will be subjected.[49] Second, the "character" of the expression, that is, whether it is written, spoken, or expressive conduct, also affects the level of constitutional

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46. *R.A.V.*, 505 U.S. at 380.

47. *Id.* at 391 ("In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination.").

48. *Id.* at 429 (Stevens, J., concurring in the judgment).

49. *See id.* (Stevens, J., concurring in the judgment). Justice Stevens explained that different categories of speech receive different levels of constitutional protection:

> First, as suggested above, the scope of protection provided expressive activity depends in part upon its content and character. We have long recognized that when government regulates political speech or "the expression of editorial opinion on matters of public importance," "First Amendment protectio[n] is 'at its zenith.'" In comparison, we have recognized that "commercial speech receives a limited form of First Amendment protection," and that "society's interest in protecting [sexually explicit films] is of a wholly different, and lesser, magnitude than [its] interest in untrammeled political debate. . . ."

Id. (Stevens, J., concurring in the judgment) (citations omitted).

See also Schauer, *supra* note 44. Schauer explains that Justice Stevens employs a contextual approach to deciding First Amendment cases, offering a number of examples of cases where Stevens highlighted nuances that were ignored by the other members of the Court. *Id.* at 546-50. For example, Schauer notes that in *Young v. American Mini Theatres* and *FCC v. Pacifica Foundation*, Justice Stevens indicated that the lesser value of the expression in each case affected the analysis. "As Young, Pacifica, and Ferber demonstrate, one of these distinctions for Justice Stevens is a distinction between material having, to put it loosely, more First Amendment value, and material having less." *Id.* at 547. Similarly in *City of LaDue v. Gilleo*, Justice Stevens acknowledged that the particular problems associated with the mode of expression (residential signs) had to be taken into account. *Id.* at 549.

protection to which it is entitled.[50] The third factor influencing Justice Stevens' "constitutional calculus" is the "context" of the expression, for example whether the speech takes place in the context of a labor relations dispute, a university environment, a secondary school, a public forum, or a nonpublic forum.[51] Fourth, Justice Stevens noted that whether the restriction on speech is a prior restraint and/or viewpoint-based affects the analysis, factors which he characterized as bearing upon the "nature" of the restriction.[52] Justice Stevens identified the fifth element of the constitutional calculus to be the "scope" of the law regulating expression; for example, whether the law is merely a limitation on the places or times of expression.[53]

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50. *See R.A.V.*, 505 U.S. at 429 (Stevens, J., concurring in the judgment). Justice Stevens stated: "The character of expressive activity also weighs in our consideration of its constitutional status. As we have frequently noted, '[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.'" *Id.* (quoting Texas v. Johnson, 491 U.S. 397, 406 (1989)).

51. *See id.* at 429-30 (Stevens, J., concurring in the judgment). Stevens stated:

> The protection afforded expression turns as well on the context of the regulated speech. We have noted, for example, that "[a]ny assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting . . . [and] must take into account the economic dependence of the employees on their employers." Similarly, the distinctive character of a university environment, or a secondary school environment, influences our First Amendment analysis. The same is true of the presence of a "'captive audience[, one] there as a matter of necessity, not of choice.'" Perhaps the most familiar embodiment of the relevance of context is our "fora" jurisprudence, differentiating the levels of protection afforded speech in different locations.

Id. (Stevens, J., concurring in the judgment) (citations omitted).

52. *See id.* at 430 (Stevens, J., concurring in the judgment). Stevens observed:

> The nature of a contested restriction of speech also informs our evaluation of its constitutionality. Thus, for example, "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." More particularly to the matter of content-based regulations, we have implicitly distinguished between restrictions on expression based on *subject matter* and restrictions based on *viewpoint*, indicating that the latter are particularly pernicious.

Id. (Stevens, J., concurring in the judgment) (citation omitted) (emphasis in original).

53. *See id.* at 430-31 (Stevens, J., concurring in the judgment). Stevens stated:

> Finally, in considering the validity of content-based regulations we have also looked more broadly at the scope of the restrictions. For example, in *Young v. American Mini Theatres* we found significant the fact that "what [was] ultimately at stake [was] nothing more than a limitation on the place where adult films may be exhibited." Similarly, in *FCC v. Pacifica Foundation*, the Court emphasized two dimensions of the limited scope of the FCC ruling. First, the ruling concerned only broadcast material which presents particular problems because it "confronts the citizen . . . in the privacy of the home"; second, the ruling was not a complete ban on the use of selected offensive words, but rather merely a limitation on the times such speech could be broadcast.

Id. at 431 (Stevens, J., concurring in the judgment) (citations omitted).

The factors identified by Justice Stevens are relevant to both the "ends" analysis and the "means" analysis of First Amendment law. The content, character, context, scope, and nature of the law in question all contribute to an evaluation of the *extent* of the restriction on expression, which in turn is used to calibrate the *quantum* of proof that the government must adduce in order to justify the restriction. Furthermore, whenever any form of heightened scrutiny applies, the Court must also consider whether the regulation of expression could be "less restrictive" (under strict scrutiny) or more "narrowly tailored" (under intermediate scrutiny). Using Stevens' factors, the Court would inquire whether the law might restrict less content, whether it might regulate fewer modes of expression, whether the regulation might be applicable in fewer contexts, whether the scope of the restriction might be narrower, and whether the nature of the restriction might be more limited. Charts 1 and 2 summarize how these factors are utilized in analyzing the constitutionality of laws affecting freedom of expression.

1. What Is the Extent of the Expression Being Restricted (Ends)?

Content: What is the subject matter of speech affected?	*Character*: What is the medium of expression being restricted?	*Context*: What is the setting where the speech occurs?	*Scope*: What is the extent of the restriction in terms of time and place?	*Nature*: Is the regulation a prior restraint or a subsequent punishment?	*Nature*: To what extent does the law have a tendency to be viewpoint-based?

2. Is the Law Narrowly Tailored or Least Restrictive (Means)?

Content: Could the government restrict a more limited category of speech or utilize a content-neutral means?	*Character*: Could the government restrict fewer or less important mediums of expression?	*Context*: Could the government limit speech in fewer or less important settings?	*Scope*: Could the government adopt more limited restrictions of time and place?	*Nature*: Could the government employ a less burdensome prior restraint or a subsequent punishment instead of a prior restraint?	*Nature*: Could the government utilize a more viewpoint-neutral law?

Justice Stevens summarized this multi-factor test and contrasted it to the categorical approach in the following passage:

> All of these factors play some role in our evaluation of content-based regulations on expression. Such a multi-faceted analysis cannot be conflated into two dimensions. Whatever the allure of absolute doctrines, it is just too simple to declare expression "protected" or "unprotected" or to proclaim a regulation "content-based" or "content-neutral."[54]

In characterizing the distinction between content-based and content-neutral laws as "just too simple," Justice Stevens is not utterly rejecting the relevance of these categories to constitutional analysis. Rather, he contends that this distinction standing alone, despite its "allure," is inadequate to establish a standard for reviewing the constitutionality of laws affecting expression. The following portion of this Article describes the development, the use, and the shortcomings of the categorical distinction between content-based and content-neutral laws.

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54. *Id.* at 431. (Stevens, J., concurring in the judgment).

II. THE CATEGORICAL APPROACH: CONTENT-BASED AND CONTENT-NEUTRAL LAWS

Standard First Amendment doctrine recognizes two categories of laws affecting expression: content-based laws and content-neutral laws. Content-based laws restrict the subject matter of expression, while content-neutral laws restrict the opportunity for expression. Under current doctrine, a federal, state, or local law must be characterized as falling into one of these two categories, and that characterization determines the process of assessing the constitutionality of the law. This categorical approach is flawed because most laws contain both content-based and content-neutral elements. I start with a discussion of how the Court determines whether a law is content-based or content-neutral.

A. Telling the Difference Between Content-Based and Content-Neutral Laws: The Ambivalence of O'Brien

The leading case establishing the standard of review for content-neutral laws is *United States v. O'Brien*.[55] In that case, the Court, speaking through Chief Justice Warren, upheld the conviction of a Vietnam War protestor for burning his draft card in violation of the 1965 Amendments to the Selective Service Act, which made it illegal to knowingly destroy or mutilate a draft card.[56] But in making the determination that this law was content-neutral, the opinion of the Court reveals an ambivalence that may reflect the divisiveness of the Vietnam War.

Chief Justice Warren stated that where the governmental interest served by a law is "unrelated to the suppression of free expression," the law will be upheld if it serves "an important or substantial interest" and the law is "no greater than is essential to the furtherance of that interest."[57] Justice Warren found that the Congress had a number of valid reasons for outlawing the destruction of draft cards[58] which were "limited to preventing harm to the smooth and efficient

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55. 391 U.S. 367 (1968) (establishing standard of review in cases regulating expressive conduct).

56. *Id.* at 370 (citing 50 U.S.C. § 462(b)(3) (1965)).

57. *Id.* at 377. The Court stated that in cases evaluating the constitutionality of laws regulating expressive conduct,

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

Id.

58. *See id.* at 378-80. The Court stated:

> 1. The registration certificate serves as proof that the individual described thereon has registered for the draft. . . .
>
> 2. The information supplied on the certificates facilitates communication between registrants and local boards, simplifying the system and benefiting all concerned. . . .
>
> 3. Both certificates carry continual reminders that the registrant must notify his local board of any change of address, and other specified changes in his status. . . .

functioning of the Selective Service System"[59] an interest which the Court implicitly found to be "unrelated to the suppression of free expression."[60]

From today's perspective, the trouble with the Court's decision in *O'Brien* is that it is perfectly obvious that the primary and perhaps sole purpose of this legislation was to crack down on a particularly effective form of war protest because of its communicative impact. However, the *O'Brien* Court did not embrace the principle that the Court now accepts, that whether a law is content-based or content-neutral is determined by the intent or purpose of the legislation.[61] In *O'Brien*, Chief Justice Warren stated: "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[62] Warren indicated that it was proper to inquire into legislative purpose when determining the *meaning* of a statute, but that it was improper to do so for the purpose of determining its *constitutionality*.[63] He ruled that a law that was neutral on its face would be invalidated only if the "inevitable effect"[64] of the law was violative of rights, and that "the purpose of the legislation was irrelevant."[65]

> 4. . . . The destruction or mutilation of certificates obviously increases the difficulty of detecting and tracing abuses such as [alteration, forgery, and similar deception].

Id.

59. *Id.* at 382 ("The governmental interest and the scope of the 1965 Amendment are limited to preventing harm to the smooth and efficient functioning of the Selective Service System.").

60. *Id.* at 377.

61. In the opinion of Professor Tribe, the *O'Brien* Court was not faithful to existing constitutional doctrine when it refused to consider legislative purpose. Tribe states: "The Court's conclusion that legislative motive is therefore irrelevant failed to acknowledge, let alone account for, the many cases in which such motive has been the focus of constitutional adjudication." TRIBE, *supra* note 8, at 820 (footnote omitted); *see also* Jeb Rubenfeld, *The First Amendment's Purpose*, 53 STAN L. REV. 767, 775, 778 (2001) (criticizing the *O'Brien* Court's dismissal of legislative intent). Subsequent cases have established that "the government's purpose is the controlling consideration" in determining whether a law is content-based or content-neutral. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989), discussed *infra* in the text accompanying notes 73-82.

62. 391 U.S. at 383.

63. *See id.* at 383-84 ("When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it.").

64. *Id.* at 384-85. The Court stated:

> O'Brien's position, and to some extent that of the court below, rest upon a misunderstanding of Grosjean v. Am. Press Co., 297 U.S. 233 (1936), and Gomillion v. Lightfoot, 364 U.S. 339 (1960). These cases stand, not for the proposition that legislative motive is a proper basis for declaring a statute unconstitutional, but that the inevitable effect of a statute on its face may render it unconstitutional. . . . The statute attacked in the instant case has no such inevitable unconstitutional effect, since the destruction of Selective Service certificates is in no respect inevitably or necessarily expressive. Accordingly, the statute itself is constitutional.

Id. at 384-85.

65. *Id.* at 385.

The Court then noted that in any event the evidence of a content-based purpose in the case under consideration was weak: "We are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it."[66] Regrettably, the Court did not accurately describe the evidence of legislative intent. Not only did the statements of three members of Congress indicate that the bill was aimed at war protestors,[67] the portions of the House and Senate Reports that were quoted by the Court in an appendix to the opinion unequivocally indicate that the purpose of the legislation was to discourage war protestors from persuading young men to resist the draft,[68] which is a manifestly content-based purpose.[69]

The unrecognized problem in *United States v. O'Brien* was that the 1965 Amendment to the Selective Service Act was *both* content-based and content-neutral. On its face, the law simply regulated a particular form of conduct—the destruction or mutilation of draft cards. However, the law had the effect and the evident purpose of stifling a particular form of war protest. It is possible that in 1969, at the height of the Vietnam War, the Supreme Court was unwilling to stand in the way of Congress as it sought to eliminate a potent symbol of protest. However, under the standard established two decades later in *Ward v. Rock Against*

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66. *Id.* at 384. The Court described this evidence in the following passage:

> There was little floor debate on this legislation in either House. Only Senator Thurmond commented on its substantive features in the Senate. After his brief statement, and without any additional substantive comments, the bill, H.R. 10306, passed the Senate. In the House debate only two Congressmen addressed themselves to the Amendment—Congressmen Rivers and Bray. The bill was passed after their statements without any further debate by a vote of 393 to 1. It is principally on the basis of the statements by these three Congressmen that O'Brien makes his congressional 'purpose' argument.

Id. at 385 (citations to Congressional Record omitted).

67. *Id.*

68. *See id.* at 387. The Court cited the following statements in an Appendix to its opinion:

> The [Senate] committee has taken notice of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy. If allowed to continue unchecked this contumacious conduct represents a potential threat to the exercise of the power to raise and support armies.
>
> . . . .
>
> The House Committee on Armed Services is fully aware of, and shares in, the deep concern expressed throughout the Nation over the increasing incidences in which individuals and large groups of individuals openly defy and encourage others to defy the authority of their Government by destroying or mutilating their draft cards.

Id.

69. *See* TRIBE, *supra* note 8, at 825 (concluding that *O'Brien* "appears to have been wrongly decided"); *see also* Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 149-50 (1981) (characterizing the reasoning of the Court's opinion in *O'Brien* as "strained," and concluding that the asserted governmental interests were not compelling enough to justify the restriction on freedom of speech).

Racism,[70] and applied in the flag burning cases of *Texas v. Johnson*[71] and *United States v. Eichman*,[72] the Court would have had to conclude that the law forbidding destruction of draft cards was content-based.

B. Ward v. Rock Against Racism *and the Intent Test*

The standard that is presently used to determine whether a law is content-based or content-neutral was articulated by Justice Kennedy in *Ward*.[73] That case concerned the constitutionality of a New York City ordinance that required musicians performing in the bandshell in Central Park to use amplification equipment and sound technicians provided by the City instead of equipment and technicians of their own choosing.[74] A key issue in the case was whether the law was content-based or content-neutral, for the Court recognized that a content-based law would have to pass strict scrutiny, while a content-neutral law would only have to survive intermediate scrutiny.[75]

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70. 491 U.S. 781, 791 (1989) (making governmental purpose the test for determining whether law is content-based or content-neutral). *See infra* notes 73-82.

71. 491 U.S. 397 (1989) (invalidating state law forbidding desecration of the American flag because governmental purpose was disagreement with the message of protesters).

72. 496 U.S. 310, 317 (1990) (stating that the "fundamental flaw" of the flag burning statute was that "it suppresses expression out of concern for its likely communicative impact").

73. 491 U.S. at 791 (making governmental purpose the test for determining whether law is content-based or content-neutral).

74. *See id.* at 784 ("The city's regulation requires bandshell performers to use sound-amplification equipment and a sound technician provided by the city.").

75. *See id.* at 791. The Court described the intermediate scrutiny test for content-neutral laws in the following passage:

> Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "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."

Id. (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

The respondent had argued that the city's requirement that performers use a sound technician provided by the city was not the "least restrictive means" of controlling the volume of sound emanating from the bandshell during performances, citing *Boos v. Berry*, 485 U.S. 312 (1988), where the Court struck down a restriction on expression because it was "not narrowly tailored; a less restrictive alternative is readily available." *Id.* at 329. The Court in *Ward* responded by noting that *Boos* involved a content-based law forbidding the display of signs critical of foreign governments within 500 feet of a foreign embassy. The Court distinguished between the strict scrutiny test required for content-based laws, and the intermediate scrutiny test for content-neutral laws:

> While time, place, or manner regulations must also be "narrowly tailored" in order to survive First Amendment challenge, we have never applied strict scrutiny in this context. As a result, the same degree of tailoring is not required of these regulations, and least-restrictive-alternative analysis is wholly out of place.

Ward, 491 U.S. at 798 n.6. Justice Kennedy drove home the point succinctly: "Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or

The Supreme Court held that the municipal ordinance was content-neutral because it was not adopted because of any disagreement with the message conveyed by the music, but only because the City was attempting to control the volume of sound emanating from the bandshell.[76] The Court indicated that the standard for determining whether a law is content-based or content-neutral is an *intent* test, stating that "the government's purpose is the controlling consideration."[77]

Intent tests are not confined to freedom of expression cases. The Supreme Court has made governmental intent a key factor in determining the constitutionality of laws under the Equal Protection Clause,[78] the Dormant Commerce Clause,[79] the Establishment Clause,[80] and the Free Exercise Clause.[81]

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manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so." *Id.* at 798.

76. *See id.* at 792. The Court stated:

> The principal justification for the sound-amplification guideline is the city's desire to control noise levels at bandshell events, in order to retain the character of the Sheep Meadow and its more sedate activities, and to avoid undue intrusion into residential areas and other areas of the park. This justification for the guideline "ha[s] nothing to do with content," and it satisfies the requirement that time, place, or manner regulations be content neutral.

Id. (quoting Boos v. Berry, 485 U.S 312, 320 (1988)) (citation omitted).

77. *Id.* at 791. Kennedy stated:

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is "*justified* without reference to the content of the regulated speech."

Id. (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)) (citations omitted) (emphasis in original).

78. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976) (upholding qualifying test for police officers that had disparate impact on hiring of racial minorities on ground that there was no evidence of discriminatory purpose).

79. *See* Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 352 (1977) (suggesting that there was evidence that the law's "discriminatory impact on interstate commerce was not an unintended byproduct," but concluding that "we need not ascribe an economic protection motive to the North Carolina Legislature to resolve this case" because the law was unconstitutional on other grounds). *But see* City of Philadelphia v. New Jersey, 437 U.S. 617, 626 (1977) ("[T]he evil of protectionism can reside in legislative means as well as legislative ends.").

80. *See* Edwards v. Aguillard, 482 U.S. 578, 583 (1987) (striking down Louisiana law requiring creationism to be taught if theory of evolution is taught on ground that law lacked a secular purpose, stating that "the legislature must have adopted the law with a secular purpose").

81. *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990) (overruling the "substantial burden" test of *Sherbert v. Verner*, 374 U.S. 398 (1963) in cases challenging the constitutionality of generally applicable criminal laws under the Free

These intent tests have been subjected to sustained criticism from many legal scholars who believe that the Court ought to be more concerned with the *effects* of a piece of legislation rather than its supposed *motivation*.[82] As discussed in the following portion of this Article, the requirement of governmental intent has been the focus of criticism by scholars who have addressed the distinction between content-based and content-neutral laws.

C. Scholarly Criticism of the Content-Based/Content-Neutral Distinction

In 1981, Professor Martin Redish suggested that the distinction between content-based and content-neutral laws is based on two misconceptions.[83] According to Redish, the first misconception is that content-based laws are necessarily more restrictive of speech than content-neutral laws.[84] He stated: "The most puzzling aspect of the distinction between content-based and content-neutral restrictions is that either restriction reduces the sum total of information or opinion

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Exercise Clause, concluding "that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [*Sherbert*] test inapplicable to such challenges").

82. The leading critic of intent tests in constitutional analysis is Professor Stephen Gottlieb, who has written a number of works condemning their use. *See* STEPHEN E. GOTTLIEB, MORALITY IMPOSED: THE REHNQUIST COURT AND LIBERTY IN AMERICA (2000); Stephen E. Gottlieb, *The Speech Clause and the Limits of Neutrality*, 51 ALB. L. REV. 19 (1986); Stephen E. Gottlieb, *Reformulating the Motive/Effects Debate in Constitutional Adjudication*, 33 WAYNE L. REV. 97 (1986). Gottlieb's principal objection to intent tests is that they enforce notions of *morality* instead of ensuring that constitutional norms are protected in *actuality*. *See* GOTTLEIB, MORALITY IMPOSED, *supra*, at 57 ("This substitution of personal morality for earthly results plays a significant role in free speech, racial, and gender discrimination cases.").

Another significant scholarly commentary on the limitations of the "intent test" in equal protection cases is K.G. Jan Pillai, *Shrinking Domain of Invidious Intent*, 9 WM. & MARY BILL RTS. J. 525 (2001). Professor Pillai states that "the invidious intent doctrine is hopelessly adrift, having no certainty in meaning or consistency in application." *Id.* at 531. He proposes that the element of "invidious intent" be replaced with a requirement of "neutrality," and that discriminatory *effects* as well as discriminatory *intent* should be considered proof that the law is non-neutral, and therefore presumptively unconstitutional. *Id.* at 588 ("Intentional discrimination is the prototype of non-neutrality, but not all instances of non-neutrality are the product of intentional discrimination."); *see also* Gerard J. Clark, *An Introduction to Constitutional Interpretation*, 34 SUFFOLK U. L. REV. 485, 488-89 (2001) (listing a number of problems with determining "intent" of groups such as legislatures or the Constitutional Convention).

83. *See* Redish, *supra* note 69, at 114 (critiquing the distinction between content-based and content-neutral laws). Redish stated:

> Those endorsing such a distinction labor under two misconceptions. The first is that the interests and values of free expression are necessarily more seriously threatened by governmental regulations aimed at content than those which are not; the second is that it is always possible to draw a conceptual distinction between content-based and content-neutral regulations. It is therefore time to rethink, and ultimately to abandon, the content distinction.

Id.

84. *See id.*

disseminated."[85] The second misconception noted by Redish is that that it is always possible to tell the difference between content-based and content-neutral laws.[86] He concluded that the distinction between content-based and content-neutral laws was "pragmatically unworkable"[87] and he recommended that the distinction should be abandoned.[88] Since then, other legal scholars have come to similar conclusions.[89]

Professor Geoffrey Stone, on the other hand, perceives merit in the distinction between content-based and content-neutral laws. He has identified a number of reasons why content-based laws should be presumed unconstitutional. In particular, he states that content-based laws may distort public debate in a differential manner, that they may represent attempts by government to restrict speech because it disagrees with a particular message, and that they may be aimed at the communicative impact of speech.[90] Professor Stone also identifies three reasons why viewpoint-based laws are unconstitutional: "they impede the search for truth, obstruct meaningful participation in self-government, and frustrate individual self-fulfillment."[91] I agree with Professor Stone that content-based and viewpoint-based laws are discouraged or prohibited for the foregoing reasons, however, these reasons are also applicable to a number of laws that may appear to be content-neutral. In my opinion, the constitutionality of *all* laws affecting expression,

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85. *Id.* at 128. *Cf.* Geoffrey R. Stone, *Content Neutral Restrictions*, 54 U. CHI. L. REV. 46, 54-57 (1987) (admitting that both content-based and content-neutral laws reduce the flow of information, but explaining that content-based laws are more likely to distort public debate, have an improper motivation, and restrict speech because of their communicative impact).

86. *See* Redish, *supra* note 69, at 114.

87. *Id.* at 140.

88. *See id.* at 114.

89. *See, e.g.*, Chemerinsky, *supra* note 10 (criticizing the Supreme Court's application of the content-based/content-neutral distinction); K.G. Jan Pillai, *Neutrality of the Equal Protection Clause*, 27 HASTINGS CONST. L.Q. 89, 131-34 (1999) (critiquing the Supreme Court's handling of the content-based/content-neutral distinction in *Turner Broad. Sys., Inc. v. FCC* and *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984)). Pillai states:

> Since the Court assigned pivotal significance to content neutrality it has encountered recurring problems in figuring out its precise meaning. The most telling statement the Court has made concerning this problem is that "deciding whether a particular regulation is content based or content neutral is not always a simple task." Frequently, the Justices take diametrically opposite positions on the subject.

Id. at 131-32 (quoting *Turner*, 512 U.S. at 642); *see also* Clay Calvert, *Free Speech and Content-Neutrality: Inconsistent Applications of an Increasingly Malleable Doctrine*, 29 MCGEORGE L. REV. 69, 110 (1997) (concluding that if the Court does not "articulate clearer standards in the near future" then "heroic measures will be needed to save the content neutrality doctrine"). *Cf.* Stone, *supra* note 85, at 117-18 (generally supportive of the Court's distinction between content-based and content-neutral laws, but stating that the Court "should make clear both the lines between content-based and content-neutral review and the three-tiered approach it takes toward content-neutral restrictions on speech").

90. *See* Stone, *supra* note 85, at 54-57 (discussing distortion of public debate, improper motivation, and communicative impact as reasons to discourage content-based regulations of speech).

91. *See id.* at 56 (discussing reasons why laws that restrict speech because the government disapproves of a particular message are unconstitutional).

whether content-based, content-neutral, or some combination of the two, depends upon the *degree* to which they distort the public debate, impede the search for truth, obstruct participation in self-government, frustrate self-fulfillment, and attempt to control the communicative impact of expression.[92]

Professor Stephen Gottlieb persuasively argues that in applying the Constitution we should be concerned with building and preserving a just society, and not with attempting to police the "intent" of governmental actions.[93] Gottlieb favors a consequentialist approach to Constitutional interpretation rather than a categorical approach.[94] Professor Jed Rubenfeld argues just as ardently that governmental purpose should be the principal ground for determining constitutionality under the First Amendment, a principle that he calls "purposivism."[95] He states that the categorical approach of purposivism is superior to the balancing approach:

> [P]urposivism would eliminate most of the cost-benefit, balancing-test rhetoric so common in today's free speech jurisprudence. The language of balancing in First Amendment law, appealing as it may seem, is unacceptable in its implications and unnecessary in the cases where it is supposedly indispensable.[96]

I agree with Professor Rubenfeld that when the government enacts a law for an illegal purpose, the categorical approach appropriately determines the outcome. For example, where a state reserves an economic market merely for the benefit of the state's residents,[97] where it places a burden upon a group out of hatred or dislike,[98]

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92. *But see id.* at 55. Professor Stone maintains that it is not feasible to calibrate the standard of review to the degree that the law distorts public debate, and accordingly the strict scrutiny test should be applied to all content-based laws. He states: "[A]s a practical matter content-based restrictions cannot be neatly divided into those that do and do not seriously distort public debate. The question is one of degree, and such a line would be extremely difficult to draw on a case-by-case basis." *Id.*

93. *See* GOTTLIEB, MORALITY IMPOSED, *supra* note 82, at 54 ("The role of intent in law may seem quite arcane but, in fact, it has had a shattering effect on large areas of law and once again it reflects the substitution of a conservative moral view for a liberal / utilitarian view."); *id.* at 57 ("In the speech and racial areas, . . . the conservatives have used the intent standard to substitute conservative notions of morality for an instrumental standard, which would have judged actions by their often predicable result."); *see also* Stephen E. Gottlieb, *Tears for Tiers on the Rehnquist Court*, 4 U. PA. J. CONST. L. 350, 350 (2002) ("There is no justification for the Rehnquist Court's corruption of equal protection doctrine and the academy must commit itself to the task of making that entirely clear.").

94. *See* GOTTLIEB, MORALITY IMPOSED, *supra* note 82, at 197 ("The conservative majority is determined to move the country toward its nonconsequentialist conception of law."); *see also* Gottlieb, *Tears for Tiers*, *supra* note 93, at 361, 366 (arguing in favor of consequentialist reasoning rather than the *a priori* reasoning of the Rehnquist Court).

95. *See generally* Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 768 (2001).

96. *Id.* at 768 (rejecting balancing tests in favor of purposivism in First Amendment cases).

97. *See* H.P. Hood & Sons v. Dumond, 336 U.S. 525 (1949) (striking down state's denial of license to business that shipped milk to another state for processing). In explaining why the Commerce Clause prohibits the states from enacting protectionist legislation, Justice Jackson said:

or where it suppresses speech because it disagrees with the viewpoint being expressed,[99] the law is *per se* unconstitutional, and must be struck down.[100] However, I do not agree that the balancing approach may be dispensed with in other cases.

Furthermore, if Professor Gottlieb is to be understood as rejecting inquiry into governmental purpose altogether, then I also disagree with his position. Where the governmental purpose is not illegal, but is instead one that is fraught with danger—where a state intentionally discriminates against interstate commerce,[101] or where government intentionally discriminates on the basis of race or gender,[102] or where it intentionally discriminates on the basis of the subject matter of expression[103]—it is appropriate to establish a rebuttable presumption that the law is unconstitutional, and to demand that the government come forward with persuasive evidence that the

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> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

Id. at 539.

98. *See* U.S. Dept. of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (overturning residency restriction in federal food stamp program, stating that "the legislative history . . . indicates that the amendment was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program"); City of Cleburne v. Cleburne Living Centers, Inc., 473 U.S. 432, 455 (1985) (Stevens, J., concurring) (striking down city's refusal to allow group home for the mentally retarded, stating "[t]he record convinces me that this permit was required because of the irrational fears of neighboring property owners rather than for the protection of the mentally retarded persons who would reside in [the] home"); Romer v. Evans, 517 U.S. 620, 635 (1996) (invalidating state constitutional amendment that blocked the adoption of gay rights legislation, stating that "[w]e must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else").

99. *See* Texas v. Johnson, 491 U.S. 397, 414 (1989) (striking down state law forbidding desecration of the American flag, stating that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

100. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) ("[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.") (emphasis in original); *Romer*, 517 U.S. at 634 ("'[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'") (quoting *Moreno*, 413 U.S. at 534) (emphasis in original); *Johnson*, 491 U.S. at 414.

101. *See* Maine v. Taylor, 477 U.S. 131, 144 (1986) (considering constitutionality of state law banning the importation of baitfish from other states).

102. *See* United States v. Virginia, 518 U.S. 515 (1996) (considering constitutionality of denying women admission to state military academy, instead offering women admission to separate leadership program at another institution).

103. *See* Burson v. Freeman, 504 U.S. 191 (1992) (considering constitutionality of state law forbidding solicitation of votes or display of campaign materials within 100 feet of polling place on election day).

legislation is necessary.[104] However, I agree with Professor Gottlieb that the effect of a law on constitutionally protected values and interests should ultimately determine whether the law is constitutional, and that this effect can be evaluated only by means of a thorough and sensitive examination of the consequences of the law. Governmental purpose to discriminate against subject matter is neither irrelevant nor is it determinative. It is one factor among many to be balanced by the Court.

The most comprehensive evaluation of the distinction between content-based and content-neutral laws in recent years has been conducted by Professor Clay Calvert.[105] Calvert examined the Court's treatment of the distinction in three different contexts.[106] In *Turner Broadcasting v. FCC* [hereinafter *Turner I*][107] and *Turner Broadcasting v. FCC* [hereinafter *Turner II*],[108] the Court considered the constitutionality of a federal statute that required cable operators to carry local broadcast stations.[109] In *Madsen v. Women's Health Center, Inc.*[110] and *Schenck v. Pro-Choice Network*,[111] the issue was the constitutionality of judicial injunctions that had been issued against anti-abortion protestors.[112] And in *Renton v. Playtime Theatres, Inc.*,[113] at issue was the constitutionality of a municipal zoning regulation that dispersed adult movie theaters.[114] In each of these cases the Supreme Court decided that the governmental action was content-neutral.[115] Calvert contends that

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104. *See* Maine v. Taylor, 477 U.S. at 144 ("[T]he proffered justification for any local discrimination against interstate commerce must be subjected to 'the strictest scrutiny.'") (quoting Hughes v. Oklahoma, 441 U.S. 322, 337 (1979)); *Burson*, 504 U.S. at 197 ("[A] content-based regulation of political speech in a public forum is valid only if it can survive strict scrutiny."); *Virginia*, 518 U.S. at 533 (stating that the state had the burden of proving an "exceedingly persuasive" justification for gender discrimination).

105. *See* Calvert, *supra* note 89.

106. *See id.* at 78-94 (analyzing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (holding that "must carry" provisions of Cable Act would be subjected to intermediate scrutiny) and *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (upholding "must carry" provisions of Cable Act)); *id.* at 94-101 (analyzing *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994) (upholding injunction creating buffer zone around abortion clinic) and *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997) (upholding fixed buffer zone but striking down "floating" buffer zones)); *id.* at 102-03 (discussing "secondary effects" doctrine from *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (holding ordinance dispersing adult movie theaters to be content-neutral)).

107. 512 U.S. 622 (1994) (holding that "must carry" provisions of Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 [hereinafter Cable Act] would be subjected to intermediate scrutiny).

108. 520 U.S. 180 (1997) (upholding "must carry" provisions of the Cable Act).

109. *See id.* at 185 (referring to Sections 4 and 5 of the Cable Act).

110. 512 U.S. 753 (1994) (upholding fixed buffer zone around abortion clinic).

111. 519 U.S. 357 (1997) (upholding fixed buffer zone around abortion clinic but striking down "floating" buffer zones).

112. *See Madsen*, 512 U.S. at 759-61 (setting forth the injunction issued by the trial court); *Schenck*, 519 U.S. at 366 (setting forth the injunction issued by the district court).

113. 475 U.S. 41 (1986) (upholding zoning ordinance dispersing adult movie theaters).

114. *Id.* at 43 (describing zoning ordinance requiring adult movie theaters to be located at least 1000 feet from any residence, church, park, or school).

115. *See Turner I*, 512 U.S. at 655 ("[T]he must-carry rules are content neutral in application."); *Madsen*, 512 U.S. at 763 (finding that the injunction was not content- or viewpoint-based); *Schenck*, 519 U.S. at 374 (applying content-neutral standard of *Madsen*);

the Court erred in all of these cases because the governmental actions "appear content-based, either on their face or by their operation."[116]

Calvert demonstrates how the Supreme Court used a variety of rationales to ignore or downplay the content-based aspects of the governmental actions and elevate the content-neutral aspects, thus justifying content-neutral treatment of each action. He explains that in *Turner I* and *Turner II* the core difficulty was that the 1992 Cable Act had both a content-based and a content-neutral purpose.[117] The content-neutral purpose, according to Justice Kennedy writing for the majority, was to preserve free broadcast television from unfair competition by cable television.[118] Justice O'Connor, in dissent, found that the law was content-based because its purpose was to promote diversity of viewpoints and local news coverage.[119] She concluded that "the must-carry provisions should be subject to strict scrutiny, which they surely fail."[120] Justice Kennedy and the majority resolved the conflict by finding that the economic motive to preserve broadcast television was the "overriding objective" of the legislation.[121]

Madsen and *Schenck* involved injunctions directed at named individuals protesting at abortion clinics and those who share the protestors' anti-abortion views.[122] The Court found the injunctions to be content-neutral in that they were adopted "because of" the prior intimidating conduct of the protestors.[123] As in *Turner*, the dissenting justices in *Madsen* would have treated the injunction as content-based and unconstitutional.[124]

Renton, 475 U.S. at 48 ("[T]he Renton ordinance is completely consistent with our definition of 'content neutral' speech regulations.").

116. Calvert, *supra* note 89, at 71.

117. *See id.* at 105 ("As *Turner I* and *Turner II* illustrate, there are times when there may be more than one government purpose . . . . A central problem illustrated in the must-carry cases is that the justices apparently do not agree on what to do in the multi-purpose situation.").

118. *See Turner I*, 512 U.S. at 662 (stating that the law served three interests: "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming").

119. *See id.* at 677 (O'Connor, J., concurring in part and dissenting in part) ("Preferences for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make reference to content.").

120. *Turner II*, 520 U.S. at 235 (O'Connor, J., dissenting).

121. *Id.* at 646.

122. *See Madsen*, 512 U.S. at 759 n.1 (injunction directed to certain named individuals and organizations as well as "all persons acting in concert or participation with them, or on their behalf"); *Schenck*, 519 U.S. at 367 n.3 (injunction directed to defendants "and all other persons whomsoever, known or unknown, acting in their behalf or in concert with them").

123. *Madsen*, 512 U.S. at 764 n.2 ("[T]he injunction was issued not because of the content of [the protesters'] expression, . . . but because of their unlawful conduct."). The test for governmental intent employed in *Madsen* echoes the standard for determining governmental intent in equal protection cases that was adopted in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1977) (stating that a finding of "'discriminatory purpose' . . . implies that the decisionmaker [selected] or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group").

124. *Madsen*, 512 U.S. at 793 (Scalia, J., dissenting) (stating that the injunction should be subjected to strict scrutiny just like a content-based statute because "[t]he injunction was sought against a single-issue advocacy group by persons and organizations with a business

The problem in *Renton* was that the ordinance on its face was directed at "adult motion picture theater[s]."[125] The Court construed the law as content-neutral because it found that the "intent" of the law was to address the "secondary effects" (such as crime and reduction in property values) that are associated with the presence of adult theaters, and not the communicative impact of the erotic speech itself.[126] Once again the dissenting justices asserted that the law was content-based.[127]

Calvert observes that in each type of case, the Court failed to properly acknowledge and consider the content-based nature of the law in question.[128] Calvert contends that the determination of an "overriding purpose" in *Turner I* is little more than a "guessing game,"[129] that the injunctions that were issued in *Madsen* and *Schenck* against named individuals and their allies had an obvious disparate impact on anti-abortion protesters,[130] and that the City of Renton's focus on crime and property values does not diminish the fact that its zoning law singled out adult movie theaters for regulation.[131] Accordingly, Calvert states that the "seemingly nice and neat dialectical categories of content-neutral and content-based regulations"[132] are, in fact, "anything but tidy,"[133] because "the standards and criteria used for determining whether a regulation on speech is content-neutral or

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or social interest in suppressing that group's point of view"). In *Schenck*, Justice Scalia dissented on the ground that in framing the injunction the district court improperly recognized a "right to be left alone" on the public streets. *Schenck*, 519 U.S. at 390.

125. *Renton*, 475 U.S. at 44 (setting forth terms of zoning ordinance).

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

127. *Id.* at 55 (Brennan, J., dissenting) ("Renton's zoning ordinance selectively imposes limitations on the location of a movie theater based exclusively on the content of the films shown there. The constitutionality of the ordinance is therefore not correctly analyzed under standards applied to content neutral time, place, and manner restrictions."); *see also* Christina E. Wells, *Beyond Campaign Finance: The First Amendment Implications of* Nixon v. Shrink Missouri Government PAC, 66 MO. L. REV. 141, 161 (2001) (stating that the Court had "subvert[ed] the content-based/content-neutral distinction"); Stone, *supra* note 85, at 115, 116 (stating that the "secondary effects" doctrine of *Renton* "is a disturbing, incoherent, and unsettling precedent" that "threatens to undermine the very foundation of the content based/content neutral distinction").

128. Calvert, *supra* note 89, at 71 ("This article argues that a quartet of recent United States Supreme Court decisions . . . undermines and erases rational distinctions between the content-neutral and content-based categories. In particular, laws and court orders that appear content based, either on their face or by their operation, are held content neutral by the Supreme Court.").

129. *See id.* at 86 ("Picking which purpose dominates often may amount to little more than a guessing game.").

130. *See id.* at 100 ("[T]he impact of the law in question was not only content-based, singling out speech on abortion, but also viewpoint based, restricting speech of anti-abortion activists.").

131. *See id.* at 103 (noting that Justice Brennan had found the law to be "content based both on its face and in its operation and effect on adult movie theaters"); *see also* Chemerinsky, *supra* note 10 at 61 ("[I]t is simply wrong to say that a facial, content-based distinction is otherwise because it is based on a permissible purpose.").

132. Calvert, *supra* note 89, at 72.

133. *Id.*

content-based are so malleable and amorphous."[134] Chart 3, set forth in the next portion of this Article, summarizes the cases described by Calvert, the ostensible content-neutral purpose of each law, the underlying content-based objective of each law, and the reasoning that the Court used to elevate the content-neutral purpose over the content-based one.

Professor Calvert questioned whether it is presently possible to determine whether a law is "content-based" or "content-neutral" in cases where the law has both content-based and content-neutral objectives.[135] Calvert called upon the Court to clarify the distinction by refining the tests that are used to tell the difference between content-based and content-neutral laws.[136] I agree with Professor Calvert's analysis of the problem, but I do not agree with his proposed solution suggesting that the line between content-based and content-neutral laws can be preserved. Instead of attempting to categorize laws or other governmental actions as *purely* content-based or content-neutral, the Courts should determine the *extent* to which laws suppress particular content and/or close off opportunities for communication. The categories are essential for isolating the considerations that bear upon the constitutionality of laws affecting freedom of expression, but the distinction between the categories is not sufficiently clear to serve as the determinative factor.

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134. *Id.* at 73; *see also* Chemerinsky, *supra* note 10, at 59 ("A . . . major problem with the Court's application of the principle of content neutrality has been its willingness to find clearly content-based laws to be content-neutral because they are motivated by a permissible content-neutral purpose.").

135. Calvert, *supra* note 89, at 107. Calvert stated:

> Is it really possible for a court rationally to extricate one purpose from another, and, in so doing, discard the potentially damaging content based purposes from the benign content-neutral ones? This certainly is a slippery and subjective task that poses problems for the future of the content-neutrality doctrine. In some cases there simply will be both content-based and content-neutral objectives that cannot be separated.

Id.

136. *See id.* at 110 ("The problems with the doctrine are not intractable. The Court, however, must take pause to reflect on and articulate clearer standards in the near future."). Other legal scholars have proposed adjustments and clarifications of the distinction between content-based and content-neutral laws. *See* Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647, 707 (2002). Professor Heyman argues for a broader understanding of what constitutes a content-based law:

> [A] regulation should be regarded as content-based if its application turns on content in any of the four senses that I have discussed: (1) the meaning of the speech for the speaker; (2) its objective meaning; (3) its impact on the listener; or (4) the communication of meaning from speaker to listener.

Id.; *see also* Stephan E. Oestreicher, *Effectual Interpretation and the Content Neutrality Inquiry: On Justice Scalia and* Hill v. Colorado, 12 GEO. MASON U. CIV. RTS. L.J. 1, 22 (2001). Professor Oestreicher

> proposes an "effectual" framework to the content-neutrality inquiry. This framework would direct a court at the free speech threshold to deploy all of its interpretive tools—including review of legislative history—to determine whether a particular speech restrictive statute has the effect of singling out a particular message.

Id.

The difficulties with the content-based/content-neutral distinction that Calvert identified have continued to resonate in cases decided over the seven intervening years. Furthermore, the debate among the justices over the usefulness and the application of the distinction has sharpened. Increasingly the Court is inquiring into the *degree* or *extent* of the infringement on freedom of expression, instead of relying on the distinction between content-based and content-neutral laws to establish an outcome determinative standard of review.[137] The reasoning of the Court in these recent cases is described in the following portion of this Article, and is summarized in Chart 4 set forth in that portion.

III. RECENT CASES INVOLVING DUAL-EFFECT LAWS

In several recent cases the distinction between content-based and content-neutral laws has played a central and determinative role, but in some cases the reasoning of the Court or of swing justices has turned not upon the *category* to which the law was assigned, but upon the *degree* to which the law suppressed expression of particular ideas or denied people the opportunity to express themselves.

A. Descriptions of Recent "Dual-Effect" Cases

1. *Reno v. American Civil Liberties Union* (1997)[138]

The Communications Decency Act ("CDA") prohibited the knowing transmission over the internet of obscene, indecent or patently offensive material to persons under the age of eighteen.[139] The Supreme Court upheld the provision forbidding the transmission of obscene material,[140] but struck down the provisions relating to indecent or patently offensive material.[141] The government contended the CDA was constitutional because the *Pacifica* case had established that the FCC could prohibit the broadcast of indecent material on the radio during daytime hours,[142] and the *Ginsberg* case had held that the government could bar the sale of pornographic material to minors.[143] Justice Stevens, writing for the majority, conducted a sensitive review of the factors that distinguished this case from

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137. *See* Oestreicher, *supra* note 136, at 1-2 ("Indeed, whether a particular restriction on expression is found to be content-based or content-neutral has proven outcome-determinative in a string of the United States Supreme Court's speech cases.").

138. 521 U.S. 844 (1997) (striking down federal law that effectively prohibited transmission of indecent or patently offensive speech over the Internet).

139. *Id.* at 859-60 (describing "indecent transmission" and "patently offensive display" provisions of Communications Decency Act, 47 U.S.C. §§ 223(a)(1)(B)(ii), 223(d) (1996)).

140. *See id.* at 883 (severing and upholding provisions of the statute prohibiting transmission of obscene material on the Internet).

141. *See id.* at 882 (striking down provisions of the statute prohibiting transmission of indecent material on the internet).

142. *See id.* at 864 (noting that the government relied upon *FCC v. Pacifica Found., Inc.*, 438 U.S. 726 (1978) (upholding FCC ruling prohibiting radio broadcast of indecent language during daytime hours)).

143. *See id.* (noting that the government relied upon *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding state law prohibiting sale to minors of materials that is obscene as to minors)).

previous cases that allowed for suppression of indecent speech to minors. Justice Stevens distinguished *Ginsberg* on the ground that the CDA was not limited to commercial transactions,[144] did not allow parents to consent to their children's receipt of the material,[145] did not define the term "indecent,"[146] and did not define "patently offensive" materials as those which lack serious value.[147] He distinguished *Pacifica* because the CDA did not limit transmission of indecent or patently offensive material to certain times of day,[148] it was not issued by an agency with responsibility for regulating this media,[149] and it was a punitive measure.[150] Justice Stevens also found that the Internet differs from radio and television broadcast because it is not a scarce expressive commodity,[151] the Internet has not traditionally been subject to government supervision and regulation,[152] and the Internet is not as invasive as radio and television.[153] He explained that a person must take a series of affirmative steps to access a web page or chat room[154] and is unlikely to come across sexually explicit material on the Internet by accident.[155] Another critical factor in this case was that there was no effective way to determine the identity of the Internet audience, and thus the age of the recipient.[156] The

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144. *See id.* at 865 ("[T]he New York statute applied only to commercial transactions, whereas the CDA contains no such limitation." (citation ommitted)); *see also id.* at 877 ("The breadth of the CDA's coverage is wholly unprecedented.").

145. *See id.* ("Under the CDA, by contrast, neither the parents' consent—nor even their participation—in the communication would avoid the application of the statute.").

146. *See id.* ("The CDA fails to provide us with any definition of the term 'indecent.'"). *See also id.* at 871-74 (discussing the problems presented by the vagueness of the relevant provisions of the CDA).

147. *See id.* at 165 ("The CDA . . . omits any requirement that the 'patently offensive' material . . . lack serious literary, artistic, political, or scientific value."); *see also id.* at 877 ("The general, undefined terms 'indecent' and 'patently offensive' cover large amounts of nonpornographic material with serious educational or other value.").

148. *See id.* at 867 ("The CDA's broad categorical prohibitions are not limited to particular times . . . .").

149. *See id.* (stating that the order of the FCC in the *Pacifica* case had been "issued by an agency that had been regulating radio stations for decades").

150. *See id.* ("[U]nlike the CDA, the Commission's declaratory order [in *Pacifica*] was not punitive.").

151. *See id.* at 870 ("[U]nlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a 'scarce' expressive commodity.").

152. *See id.* at 868-69 ("Neither before nor after the enactment of the CDA have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry.").

153. *See id.* at 869 ("Moreover, the internet is not as 'invasive' as radio or television.").

154. *See id.* at 854 ("Unlike communications received by radio or television, 'the receipt of information on the internet requires a series of affirmative steps more deliberate and directed than merely turning a dial.'").

155. *See id.* at 869 (noting that the trial court had found that "[a]lmost all sexually explicit images are preceded by warnings as to the content," and citing testimony that "'odds are slim' that a user would come across a sexually explicit sight by accident").

156. *See id.* at 876 ("The District Court found that at the time of trial existing technology did not include any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying access to adults."); *see generally id.* at 849-55 (citing findings of the trial court describing the Internet and the World Wide Web).

Government also argued that the law left open substantial alternative channels of communication,[157] but Justice Stevens responded that this factor was applicable only where the law is content-neutral, not where it is content-based.[158]

Although all of the justices agreed that the CDA was a content-based law, its constitutionality turned upon consideration of a number of factors, including the content of the speech being restricted, the character of the Internet, the scope of the restrictions, and the nature of the imposed penalty.

2. *Hill v. Colorado* (2000)[159]

In *Hill*, the Court considered the constitutionality of a state statute that prohibited any person from approaching within eight feet of another person to pass a leaflet or handbill, show him or her a sign, or engage in protest, education, or counseling, if such actions occurred within 100 feet of a heath facility.[160] Following the pattern established in *Madsen* and *Schenck*, the majority of the Court found that the statute was a content-neutral law[161] that was narrowly tailored[162] to serve significant state interests.[163] In evaluating the constitutionality of the statute Justice Stevens discussed the likely impact of the size of the buffer zone on oral communication and leafleting[164] and the salient aspects of the hospital setting.[165] The dissenting justices found the statute unconstitutional in part because they considered the law to be a content-based law which was thus subject to strict scrutiny,[166] as well as being a viewpoint-based law.[167]

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157. *See id.* at 879 (setting forth the government's argument that CDA leaves open ample opportunities for expression).

158. *See id.* ("This argument is unpersuasive because the CDA regulates speech on the basis of its content. A 'time, place, and manner' analysis is therefore inapplicable.").

159. 530 U.S. 703 (2000) (upholding state statute creating an eight foot floating buffer zone around health care facility patients).

160. *See id.* at 707 (describing the challenged portion of Colo. Rev. Stat. § 18-9-122(3) (1999)).

161. *See id.* at 719-20.

162. *See id.* at 725-26.

163. *See id.* at 725.

164. *See id.* at 726-28.

165. *See id.* at 728-29 (discussing factors such as patients' need for privacy and easy access to clinics).

166. *Id.* at 748. Scalia noted:

> [I]t blinks reality to regard this statute, in its application to oral communications, as anything other than a content-based restriction upon speech in the public forum. As such, it must survive that stringent mode of constitutional analysis our cases refer to as "strict scrutiny," which requires that the restriction be narrowly tailored to serve a compelling state interest.

Id. (Scalia, J., dissenting); *see also id.* at 766 (Kennedy, J., dissenting) ("Colorado's statute is a textbook example of a law which is content based.").

167. *See id.* at 741 (Scalia, J., dissenting) (stating that the statute was "a speech regulation directed against the opponents of abortion"). Justice Kennedy, dissenting, stated:

> If, just a few decades ago, a State with a history of enforcing racial discrimination had enacted a statute like this one, regulating "oral protest, education, or counseling" within 100 feet of the entrance to any lunch counter, our predecessors would not have hesitated to hold it was

3. *Nixon v. Shrink Missouri Government PAC* (2000)[168]

Shrink Missouri concerned the constitutionality of a state law limiting contributions to state political campaigns.[169] The Court's evolution away from the categorical approach is evident in that the Court did not evaluate the constitutionality of limits on political contributions according to any established standard of review. Writing for the majority, Justice Souter reaffirmed *Buckley v. Valeo*[170] and applied the standard articulated in that case that contribution limits must be "'closely drawn' to match a 'sufficiently important interest.'"[171] Professor Christina Wells criticizes the majority for failing to clarify whether it was applying strict scrutiny or intermediate scrutiny.[172] As in *Hill*, the dissenting justices contended that this was a content-based law that failed strict scrutiny.[173]

The categorization of campaign finance reform laws as content-based or content-neutral is complicated by disagreement over whether contribution limits even implicate the First Amendment.[174] For instance, although he concurred in the majority opinion in *Shrink Missouri*, Justice Stevens contended that the case was properly conceived as a substantive due process regulation of the use of property rather than a First Amendment infringement,[175] stating, "Money is property; it is

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> content based or viewpoint based. It should be a profound disappointment to defenders of the First Amendment that the Court today refuses to apply the same structural analysis when the speech involved is less palatable to it.

Id. at 767 (Kennedy, J., dissenting).

168. 528 U.S. 377 (2000).

169. *See id.* at 382 (finding the state law under review, section 130.032.1 of the Missouri Revised Statutes, set a cap of $1000 for contributions to political campaigns for governor and certain other statewide elected officials).

170. *See id.* at 382 ("We hold *Buckley* to be authority for comparable state regulation.").

171. *Id.* at 387-88 (quoting Buckley v. Valeo, 424 U.S. 1, 25 (1976)). *Accord* FEC v. Beaumont, 123 S. Ct. 2200, 2210 (2003) ("[I]nstead of requiring contribution regulations to be narrowly tailored to serve a compelling governmental interest, a contribution limit involving significant interference with associational rights passes muster if it satisfies the lesser demand of being closely drawn to match a sufficiently important interest.") (citations omitted).

172. *See* Wells, *supra* note 127, at 152 ("The Court's current use of either strict or intermediate scrutiny, however, is firmly grounded, and *Shrink*'s refusal to confront and clarify its standard of review in light of the prevailing approach is inexcusable.").

173. *See Hill*, 530 U.S. at 742 (Scalia, J., dissenting) (finding the law to be "obviously and undeniably content based"); *id.* at 766 (Kennedy, J., dissenting) ("The law imposes content-based restrictions on speech by reason of the terms it uses, the categories it employs, and the conditions for its enforcement. It is content based, too, by its predictable and intended operation.").

174. *See Beaumont*, 123 S. Ct. at 2210 (upholding a federal law prohibiting corporations from making contributions to political candidates as applied to nonprofit advocacy groups, stating that "restrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression").

175. *See Shrink Missouri*, 528 U.S. at 399 (Stevens, J., concurring) ("Reliance on the First Amendment to justify the invalidation of campaign finance regulations is the functional

not speech."[176] Justice Breyer agreed with Justice Stevens that money is not speech, but acknowledged that it enables speech.[177] The dissenting justices perceived the donation of money as pure speech and that the limits therefore implicated core First Amendment values.[178]

4. *Bartnicki v. Vopper* (2001)[179]

In *Bartnicki*, the Court took another step away from the purely categorical approach established in *O'Brien* and *Ward*. In this case, although all of the justices agreed that the law was content-neutral, the majority of the Court reasoned that the *application* of the law in the particular case mandated a higher level of judicial review than intermediate scrutiny.

Vopper was a radio talk show host who broadcasted a recording of a conversation between a union president and chief union negotiator, in which one of the union officials said, "[I]f they're not gonna move for three percent, we're gonna have to go to their, their homes . . . . To blow off their front porches, we'll have to do some work on some of those guys."[180] The conversation, which took place over a cellular telephone, was illegally intercepted by an unknown third party,[181] then the recording of the conversation was delivered to Vopper's radio station,[182] which broadcast the tape in violation of federal and state wiretap laws which made it illegal to "intentionally disclose . . . to any other person the contents of any . . . electronic communication, knowing or having reason to know that the information was obtained through [illegal] interception."[183] The issue in *Bartnicki* was whether

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equivalent of the Court's candid reliance on the doctrine of substantive due process as articulated in the two prevailing opinions in *Moore v. East Cleveland*.").

176. *Id.* at 398 (Stevens, J., concurring).

177. *See id.* at 400 (Breyer, J., concurring) ("On the one hand, a decision to contribute money to a campaign is a matter of First Amendment concern—not because money *is* speech (it is not); but because it *enables* speech.").

178. *See id.* at 405 (Kennedy, J., dissenting) (describing political contributions as "one of our most essential and prevalent forms of political speech"); *id.* at 412 (Thomas, J., dissenting) ("[C]ontributions to political campaigns generate essential political speech. And contribution caps, which place a direct and substantial limit on core speech, should be met with the utmost skepticism and should receive the strictest scrutiny."); *see also Beaumont*, 123 S. Ct. at 2212 (Thomas, J., dissenting) ("I continue to believe that campaign finance laws are subject to strict scrutiny.").

179. 532 U.S. 514 (2001) (prohibiting the application of federal and state laws forbidding disclosure of information obtained by means of an illegal wiretap to a radio station that broadcast the recording of the tape containing information of public importance, where the station did not participate in the illegal eavesdropping).

180. *Id.* at 518-19 (alteration in original) (quoting the president of the union).

181. *See id.* at 519. The Court recited the following testimony concerning discovery of the recording and delivery to the radio station. The tape had come into the possession of

> Jack Yocum, the head of a local taxpayers' organization that had opposed the union's demands throughout the negotiations. Yocum, who was added as a defendant, testified that he had found the tape in his mailbox shortly after the interception and recognized the voices of Bartnicki and Kane. Yocum played the tape for some members of the school board, and later delivered the tape itself to Vopper.

Id.

182. *See id.*

183. *Id.* at 520 n.3 (quoting 18 U.S.C. § 2511(1)(c)).

the radio station had the right, under the First Amendment, to broadcast the tape; in other words, whether the state and federal wiretap laws were constitutional as applied.[184]

Justice Stevens commenced the opinion for the majority by noting that this was a content-neutral law.[185] He stated that the purpose of the law was to protect one aspect of personal privacy—the confidentiality of communications[186]—and that the law performs this function in two ways: it deters invasions of privacy by suppressing the outlet or market for intercepted conversations, and it creates a civil remedy for any person whose privacy has been invaded.[187]

Although the purpose of the law—protecting privacy—is unrelated to the suppression of free expression, Justice Stevens observed that this law affects "pure speech," not expressive conduct,[188] and that the type of speech being suppressed in the case before the Court concerned matters of public importance.[189] As such, Justice Stevens ruled that the state would be held to a higher standard of justification than mere intermediate scrutiny before it would be permitted to suppress this speech: "This Court has repeatedly held that 'if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order.'"[190] Justice Stevens noted that this case presented a conflict between two principles of constitutional dimension—personal privacy and the public's right to know—and ruled that the conflict must be resolved by balancing these principles against each other: "Accordingly, it seems to us that there are important interests to be considered on *both* sides of the constitutional calculus."[191] Justice Stevens acknowledged that the privacy concerns were weighty: "In considering that balance, we acknowledge that some intrusions on privacy are more offensive than others, and that the disclosure of the contents of a private conversation can be an even greater intrusion on privacy than the interception

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184. *See id.* at 379 (quoting § 292.02 of the St. Paul, Minnesota Legislative Code).

185. *See id.* at 526.

> We agree with petitioners that § 2511(1)(c) as well as its Pennsylvania analog, is in fact a content-neutral law of general applicability. "Deciding whether a particular regulation is content based or content neutral is not always a simple task. . . . As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based."

Id. (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642-43 (1994)).

186. *See id.* at 526 ("In this suit, the basic purpose of the statute at issue is to 'protec[t] the privacy of wire[, electronic,] and oral communications.'").

187. *See id.* at 529 ("The Government identifies two interests served by the statute—first, the interest in removing an incentive for parties to intercept private conversations, and second, the interest in minimizing the harm to persons whose conversations have been illegally intercepted.").

188. *See id.* at 526 ("On the other hand, the naked prohibition against disclosures is fairly characterized as a regulation of pure speech.").

189. *See id.* at 535 ("The months of negotiations over the proper level of compensation for teachers at the Wyoming Valley West High School were unquestionably a matter of public concern, and respondents were clearly engaged in debate about that concern.").

190. *Id.* at 527-28 (quoting Smith v. Daily Publ'g Co., 443 U.S. 97, 103 (1979)).

191. *Id.* at 533.

itself."[192] Nevertheless, Justice Stevens concluded that in the particular case before the Court involving disclosure of matters of public importance, privacy had to give way: "In these cases, privacy concerns give way when balanced against the interest in publishing matters of public importance."[193]

Justice Breyer concurred with Justice Stevens' opinion and agreed with his balancing approach, cautioning against the adoption of "rigid constitutional rules,"[194] stating that "we should avoid adopting overly broad or rigid constitutional rules, which would unnecessarily restrict legislative flexibility. I consequently agree with the Court's holding that the statutes as applied here violate the Constitution, but I would not extend that holding beyond these present circumstances."[195]

In dissent, Chief Justice Rehnquist criticized the majority for failing to employ intermediate scrutiny in its analysis of this law:

> The Court correctly observes that these are "content-neutral law[s] of general applicability" which serve recognized interests of the "highest order": "the interest in individual privacy and . . . in fostering private speech." It nonetheless subjects these laws to the strict scrutiny normally reserved for governmental attempts to censor different viewpoints or ideas. There is scant support, either in precedent or in reason, for the Court's tacit application of strict scrutiny.[196]

Chief Justice Rehnquist strenuously argued that the state and federal privacy laws were content-neutral, that intermediate scrutiny applies, that the laws pass the intermediate scrutiny test, and that the majority mistakenly measured the constitutionality of the laws using strict scrutiny instead of intermediate scrutiny.[197]

5. *City of Erie v. Pap's A.M.* (2000)[198]

In *City of Erie v. Pap's A.M.* and the next case, *Los Angeles v. Alameda Books, Inc.*, the Court took up the constitutionality of municipal regulation of sex-themed businesses. In neither case did the traditional categorical approach produce the result.

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192. *Id.*

193. *Id.* at 534.

194. *Id.* at 541 (Breyer, J., concurring).

195. *Id.* (Breyer, J., concurring).

196. *Id.* at 544 (Rehnquist, C.J., dissenting) (internal citations omitted).

197. *See id.* at 548 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist stated:

> These laws are content neutral; they only regulate information that was illegally obtained; they do not restrict republication of what is already in the public domain; they impose no special burdens upon the media; they have a scienter requirement to provide fair warning; and they promote the privacy and free speech of those using cellular telephones. It is hard to imagine a more narrowly tailored prohibition of the disclosure of illegally intercepted communications, and it distorts our precedents to review these statutes under the often fatal standard of strict scrutiny.

Id.

198. 529 U.S. 277 (2000) (upholding a city ordinance applying a public nudity ordinance against nude dancing establishments).

In *Erie*, the Pennsylvania Supreme Court had found that the public nudity ordinance adopted by the City of Erie was content-based.[199] The United States Supreme Court reversed. Writing for four justices, Justice O'Connor ruled that the law was content-neutral[200] following the reasoning of the plurality opinion in *Barnes v. Glen Theatre, Inc.*[201] The categorical approach, however, cannot be considered to be the determinative factor in this case. Although Justice Souter concurred with the plurality that the law was content-neutral, he dissented from the conclusion that the law was constitutionally applied because he found that the City of Erie had failed to prove that this law would mitigate the secondary effects of such businesses.[202] The deciding votes in favor of constitutionality were supplied by Justice Scalia and Justice Thomas concurring in the judgment, who contended that this ordinance did not regulate speech and accordingly did not present a significant First Amendment problem.[203]

Justice Stevens, in dissent, cited evidence from the preamble of the act[204] and the statements of members of the city council to the effect that the law was aimed at nude dancing establishments, not nudity in general.[205] However, for Justice Stevens the determinative factor was not that the law was content-based, but rather

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199. *See* Pap's A.M. v. City of Erie, 719 A.2d 273, 279 (Pa. 1998) ("We believe . . . that the stated purpose for promulgating the Ordinance is inextricably linked with the content-based motivation to suppress the expressive nature of nude dancing.").

200. *Erie*, 529 U.S. at 289 ("[G]overnment restrictions on public nudity such as the ordinance at issue here should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech.").

201. 501 U.S. 560, 566-72 (1991) (evaluating an Indiana statute prohibiting public nudity as a "time, place or manner" regulation, as applied to nude dancing establishments).

202. *Erie*, 529 U.S. at 310-11 (Souter, J., concurring in part and dissenting in part). Justice Souter stated:

> I . . . agree with the analytical approach that the plurality employs in deciding this case. Erie's stated interest in combating the secondary effects associated with nude dancing establishments is an interest unrelated to the suppression of expression under *United States v. O'Brien*, and the city's regulation is thus properly considered under the *O'Brien* standards. I do not believe, however, that the current record allows us to say that the city has made a sufficient evidentiary showing to sustain its regulation.

Id. (citation omitted).

203. *Id.* at 307-08 (Scalia, J., concurring in the judgment). Justice Scalia stated:

> In Barnes, I voted to uphold the challenged Indiana statute "not because it survives some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all." Erie's ordinance, too, by its terms prohibits not merely nude dancing, but the act—irrespective of whether it is engaged in for expressive purposes—of going nude in public.

Id. (citations omitted).

204. *See id.* at 327 (Stevens, J., dissenting) (quoting the preamble of the ordinance, which stated that it was adopted "for the purpose of limiting a recent increase in nude live entertainment within the City").

205. *See id.* at 329 (Stevens, J., dissenting) ("The four city councilmembers who approved the measure (of the six total councilmembers) each stated his or her view that the ordinance was aimed specifically at nude adult entertainment, and not at more mainstream forms of entertainment that include total nudity, nor even at nudity in general.").

that the law effected a "total ban" on the expressive activity of nude dancing.[206] He distinguished *Young* on the ground that the zoning law that passed constitutional muster in that case did not utterly outlaw adult businesses but merely dispersed them.[207] He concluded that a total ban on nude dancing violated the requirement that a content-neutral law must "leave open substantial alternative channels for communication."[208]

6. *City of Los Angeles v. Alameda Books, Inc.* (2002)[209]

The case of *City of Los Angeles v. Alameda Books, Inc.* was another in the series of cases assessing the constitutionality of municipal zoning ordinances that disperse so-called "adult businesses," that is, businesses that purvey erotic films, books, products, and services. In *City of Renton v. Playtime Theatres, Inc.*, the Court had found a similar law content-neutral on the theory that these zoning ordinances are not aimed at the communicative impact of erotic speech, but rather at the "secondary effects" of adult businesses, including increases in crime and diminution of property values in the neighborhoods where these businesses exist.[210] In *Alameda Books*, however, only four justices continued to adhere to this view. In her plurality opinion, Justice O'Connor initially summarized the Court's holding in *Renton*.[211] She observed that the Court in *Renton* found the ordinance content-neutral because "the Renton ordinance was aimed not at the content of the films shown at adult theaters, but rather at the secondary effects of such theaters on the surrounding community, namely at crime rates, property values, and the quality of the city's neighborhoods."[212] While not making a final determination as to whether the Los Angeles ordinance was content-based or content-neutral,[213] Justice O'Connor stated that it would be "unwise" to "depart from the *Renton*

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206. *See id.* at 319 (Stevens, J., dissenting) ("If one assumes that the same erotic message is conveyed by nude dancers as by those wearing miniscule costumes, one means of expressing that message is banned; if one assumes that the messages are different, one of those messages is banned. In either event, the ordinance is a total ban.") (footnote omitted).

207. *See id.* at 319 (Stevens, J., dissenting) ("[T]he ordinance is a total ban.").

208. *Id.* at 321 (Stevens, J., dissenting) ("Because time, place, and manner regulations must 'leave open ample alternative channels for communication of the information,' a total ban would necessarily fail that test.") (citation omitted).

209. 535 U.S. 425 (2002) (holding that the city could reasonably rely upon 1977 police department study correlating adult businesses with increases in crime to outlaw multi-use adult business establishments).

210. *See* 475 U.S. 41, 49-52 (1986); *see also supra* notes 125-26 and accompanying text.

211. *See Alameda Books*, 535 U.S. at 433-34 (O'Connor, J., plurality opinion) (summarizing the reasoning of the Court in *Renton*).

212. *Id.* at 434 (explaining why *Renton* ordinance was content-neutral).

213. *See id.* at 441 ("In this case, the Court of Appeals has not yet had an opportunity to address the issue, having assumed for the sake of argument that the city's ordinance is content neutral. It would be inappropriate for this Court to reach the question of content neutrality before permitting the lower court to pass upon it.") (citation omitted).

framework,"[214] and that the plurality was guided by the content-neutral reasoning of *Renton*.[215]

In an opinion concurring in the judgment, Justice Kennedy, who until this case had been a firm supporter of the categorical approach, suddenly departed from the *Renton* judgment that this type of zoning ordinance is content-neutral. Justice Kennedy stated, "These ordinances are content-based and we should call them so."[216] However, even though he conceded that this law was content-based, Justice Kennedy was unwilling to apply strict scrutiny, because in his opinion zoning laws that are directed to controlling the "secondary effects" of speech should nevertheless be judged under the standard of intermediate scrutiny.[217]

The critical point is that instead of using the content-based/content-neutral distinction to determine the standard of review, Justice Kennedy analyzed the *extent* to which the law suppressed ideas or opportunities for expression, stating that "the ordinance is more in the nature of a typical land-use restriction and less in the nature of a law suppressing speech,"[218] and "[a]s a matter of common experience, these sorts of ordinances are more like a zoning restriction on slaughterhouses and less like a tax on unpopular newspapers."[219]

Justice Souter's position in *Alameda Books* is, if possible, even less clear than that of Justice Kennedy. Justice Souter refused to categorize the law as content-based or content-neutral. In explaining the difference between a pure time, place, or manner regulation such as a noise ordinance, and the type of zoning ordinance at hand, he noted:

> A restriction on loudspeakers has no obvious relationship to the substance of what is broadcast, while a zoning regulation of businesses in adult expression just as obviously does. And while it may be true that an adult business is burdened only because of its secondary effects, it is clearly burdened only if its expressive products have adult content. Thus, the Court has recognized that this kind of regulation, though called content-neutral, occupies a kind of limbo between full-blown, content-based restrictions and regulations that apply without any reference to the substance of what is said.[220]

Justice Souter suggested that this type of zoning regulation ought to bear a label of its own, which he calls "content correlated,"[221] and he proposed that a key factor for determining whether a law should be characterized as content-based or

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214. *Id.* ("We think this proposal unwise. First, none of the parties request the Court to depart from the *Renton* framework.").

215. *Id.* at 440 ("We are also guided by the fact that *Renton* requires that municipal ordinances receive only intermediate scrutiny if they are content neutral.").

216. *Id.* at 448 (Kennedy, J., concurring in the judgment).

217. *See id.* ("Nevertheless, for the reasons discussed above, the central holding of *Renton* is sound: A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny.").

218. *Id.* at 447.

219. *Id.* at 449.

220. *Id.* at 456-57 (Souter, J., dissenting) (citing *Renton*, 475 U.S. at 47).

221. *Id.* at 457 ("It would in fact make sense to give this kind of zoning regulation a First Amendment label of its own, and if we called it content correlated, we would not only describe it for what it is, but keep alert to a risk of content-based regulation that it poses.").

content-neutral is the quantum of evidence supporting the judgment that the law will achieve the goal of alleviating the secondary effects. He stated, "The weaker the demonstration of facts distinct from disapproval of the 'adult' viewpoint, the greater the likelihood that nothing more than condemnation of the viewpoint drives the regulation."[222]

Accordingly, the ultimate touchstone for Justice Souter in determining the constitutionality of this law is not a categorical judgment that the law is content-based or content-neutral, but rather the quantum of evidence offered by the city to support this law. Justice Souter stated that the main reason that he dissented from the decision of the Court upholding the law was the "evidentiary insufficiency" of the 1977 police department study that was purported to support the legislative judgment.[223] This is the same reason that Justice Souter gave for dissenting in *Erie*.[224]

7. *Watchtower Bible & Tract Society v. Village of Stratton* (2002) [225]

The movement toward a constitutional calculus reached its zenith in *Watchtower*, which involved the constitutionality of a village ordinance that required all door-to-door solicitors to register with the village. Writing for the majority, Justice Stevens declined to adopt or apply any particular level of scrutiny, despite the fact that the parties had battled over that very issue.[226] Justice Stevens started by reviewing a series of seven cases, six of which had been decided between 1938 and 1943, dealing mainly with the efforts of municipalities to restrict door-to-door solicitation by Jehovah's Witnesses.[227] He noted that in each of these cases the Court had taken into account the value of the speech,[228] the importance of the method of communication,[229] and the governmental interests served by the law

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222. *Id.* at 458 (footnote omitted). Justice O'Connor disputed this point, stating that "there is no evidence suggesting that courts have difficulty determining whether municipal ordinances are motivated primarily by the content of adult speech or by its secondary effects without looking to evidence connecting such speech to the asserted secondary effects." *Id.* at 441 (O'Connor, J., plurality opinion).

223. *See id.* at 454 (Souter, J., dissenting) ("The justification claimed for this application of the new policy remains, however, the 1977 survey, as supplemented by the authority of one decided case on regulating adult arcades in another State. The case authority is not on point, and the 1977 survey provides no support for the breakup policy. Its evidentiary insufficiency bears emphasis and is the principal reason that I respectfully dissent from the Court's judgment today.") (internal citation omitted).

224. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 310-11 (2000) (Souter, J., concurring in part and dissenting in part); *see also supra* note 202 and accompanying text.

225. 536 U.S. 150 (2002) (striking down village ordinance requiring door-to-door solicitors to register with village).

226. *See id.* at 164 (stating that the content-based/content-neutral distinction was a "preliminary issue that the parties adamantly dispute").

227. *Id.* at 160 n.10 (citing Hynes v. Mayor & Council of Oradell, 425 U.S. 610 (1976); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Martin v. Struthers, 319 U.S. 141 (1943); Jamison v. Texas, 318 U.S. 413 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. State, 308 U.S. 147 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938)).

228. *Id.* at 161 ("First, the cases emphasize the value of the speech involved.").

229. *Id.* at 162 ("In addition, the cases discuss extensively the historical importance of door-to-door canvassing and pamphleteering as vehicles for the dissemination of ideas.").

suppressing or regulating the expression.[230] Justice Stevens stated that while these cases offered guidance on the constitutionality of the ordinance in question, they did not speak to the standard of review:

> Although these World War II-era cases provide guidance for our consideration of the question presented, they do not answer one preliminary issue that the parties adamantly dispute. That is, what standard of review ought we use in assessing the constitutionality of this ordinance. We find it unnecessary, however, to resolve that dispute because the breadth of speech affected by the ordinance and the nature of the regulation make it clear that the Court of Appeals erred in upholding it.[231]

Justice Stevens then attacked the problem in a systematic fashion. First, he analyzed the amount of speech covered by the ordinance. He observed that the text of the ordinance applies to "canvassers" for any "cause," and that the Village had interpreted these terms broadly:

> Indeed, on the "No Solicitation Forms" provided to the residents, the canvassers include "Camp Fire Girls," "Jehovah's Witnesses," "Political Candidates," "Trick or Treaters during Halloween Season," and "Persons Affiliated with Stratton Church." The ordinance unquestionably applies, not only to religious causes, but to political activity as well. It would seem to extend to "residents casually soliciting the votes of neighbors," or ringing doorbells to enlist support for employing a more efficient garbage collector.[232]

Justice Stevens concluded that "[t]he mere fact that the ordinance covers so much speech raises constitutional concerns."[233]

Next, Justice Stevens criticized the ordinance for discouraging speech in three ways. First, he observed that the ordinance sacrifices the anonymity of the canvasser.[234] Second, he noted that many people, for religious or political reasons, prefer silence to obtaining a permit to speak.[235] Third, Stevens argued that "there is

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230. *Id.* ("[T]hese early cases also recognized the interests a town may have in some form of regulation, particularly when the solicitation of money is involved.").

231. *Id.* at 164.

232. *Id.* at 165 (quoting Hynes v. Mayor & Council of Oradell, 425 U.S. 610, 620 n.4 (1976)) (citation omitted).

233. *Id.*

234. *See id.* at 166 ("'The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible.' The requirement that a canvasser must be identified in a permit application filed in the mayor's office and available for public inspection necessarily results in a surrender of that anonymity.") (quoting McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341-42 (1995)).

235. *Id.* at 167 ("As our World War II-era cases dramatically demonstrate, there are a significant number of persons whose religious scruples will prevent them from applying for such a license. There are no doubt other patriotic citizens, who have such firm convictions about their constitutional right to engage in uninhibited debate in the context of door-to-door advocacy, that they would prefer silence to speech licensed by a petty official.").

a significant amount of spontaneous speech that is effectively banned by the ordinance."[236]

Justice Stevens also found that the law was not narrowly tailored.[237] He concluded that the Village's interest in preventing invasions of privacy was adequately protected by the portion of the ordinance allowing residents to post "No Solicitation" signs,[238] and that its interest in preventing crime would not be served by the ordinance.[239]

Justice Breyer, concurring, observed that the Village offered only "anecdote and supposition"[240] in support of the ordinance and that the evidence was insufficient: "'We have never accepted mere conjecture as adequate to carry a First Amendment burden.'"[241]

In dissent, Chief Justice Rehnquist argued that in previous decisions the Court had expressly approved registration laws for door-to-door canvassers.[242] Then, after criticizing the majority for failing to identify a standard of review,[243] Justice

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236. *Id.*

237. *See id.* at 168 ("Also central to our conclusion that the ordinance does not pass First Amendment scrutiny is that it is not tailored to the Village's stated interests."). Justice Stevens also stated: "The Village ordinance, however, sweeps more broadly, covering unpopular causes unrelated to commercial transactions or to any special interest in protecting the electoral process." *Id.* at 167.

238. *See id.* at 168 ("[I]t seems clear that § 107 of the ordinance, which provides for the posting of 'No Solicitation' signs and which is not challenged in this case, coupled with the resident's unquestioned right to refuse to engage in conversation with unwelcome visitors, provides ample protection for the unwilling listener.") (citation omitted).

239. *See id.* at 168-69. Justice Stevens stated:

> The annoyance caused by an uninvited knock on the front door is the same whether or not the visitor is armed with a permit.
>
> With respect to the latter, it seems unlikely that the absence of a permit would preclude criminals from knocking on doors and engaging in conversations not covered by the ordinance. They might, for example, ask for directions or permission to use the telephone, or pose as surveyors or census takers. Or they might register under a false name with impunity because the ordinance contains no provision for verifying an applicant's identity or organizational credentials. Moreover, the Village did not assert an interest in crime prevention below, and there is an absence of any evidence of a special crime problem related to door-to-door solicitation in the record before us.

Id. (citation omitted).

240. *Id.* at 171 (Breyer, J., concurring) (quoting United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 822 (2000)).

241. *Id.* at 170 (Breyer, J., concurring) (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 392 (2000)).

242. *Id.* at 174-75 (Rehnquist, C.J., dissenting) (citing Hynes v. Mayor & Council of Oradell, 425 U.S. 610 (1976); Martin v. Struthers, 319 U.S. 141 (1943); and Cantwell v. Connecticut, 310 U.S. 296 (1940)).

243. *Id.* at 175 (Rehnquist, C.J., dissenting). Justice Rehnquist stated:

> Just as troubling as the Court's ignoring over 60 years of precedent is the difficulty of discerning from the Court's opinion what exactly it is about the Stratton ordinance that renders it unconstitutional. It is not clear what test the Court is applying, or under which part of that indeterminate test the ordinance fails. See [majority opinion] (finding it "unnecessary . . . to resolve" what standard of review applies to the

Rehnquist stated that "There is no support in our case law for applying anything more stringent than intermediate scrutiny to the ordinance. The ordinance is content-neutral and does not bar anyone from going door-to-door in Stratton."[244]

Even though Justice Rehnquist utilized the categorical approach to establish the standard of review, he evaluated the *degree* of the infringement on the speaker in light of the context of the speech. Justice Rehnquist argued that speech on private property deserves less protection than speech in a public forum,[245] and that, in particular, speech at the private residence of another person deserves relatively little protection.[246] Next, Justice Rehnquist took issue with the majority for saying that the law applies to too much speech, and should be limited to commercial solicitors only, stating that "[t]he Court takes what should be a virtue of the ordinance—that it is content-neutral . . . and turns it into a vice."[247] Finally, Justice Rehnquist, citing "common sense"[248] and reliance on findings in prior cases,[249] stated that the Village had presented enough evidence to satisfy intermediate scrutiny.[250] He reasoned that "[i]n order to survive intermediate scrutiny, however, a law need not solve the crime problem, it need only further the interest in preventing crime."[251]

8. *United States v. American Library Association* (2003)[252]

United States v. American Library Association concerned the constitutionality of the Children's Internet Protection Act, which required public libraries receiving federal funding to install internet filters on their computer terminals in order to

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> ordinance). We are instead told that the "breadth of speech affected" and "the nature of the regulation" render the permit requirement unconstitutional. Under a straightforward application of the applicable First Amendment framework, however, the ordinance easily passes muster.

Id. (internal citations omitted; omission in original).

244. *Id.* (Rehnquist, C.J., dissenting).

245. *See id.* at 176 (Rehnquist, C.J., dissenting) ("But it would be puzzling if regulations of speech taking place on *another citizen's* private property warranted greater scrutiny than regulations of speech taking place in public forums.") (emphasis in original).

246. *See id.* (Rehnquist, C.J., dissenting) ("'Of all the methods of spreading unpopular ideas, [house-to-house canvassing] seems the least entitled to extensive protection.'") (quoting *Hynes*, 425 U.S. at 619 (quoting ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 406 (1954))).

247. *Id.* at 178 (Rehnquist, C.J., dissenting) (citation and quotation omitted).

248. *Id.* (Rehnquist, C.J., dissenting) ("We have approved of permit requirements for those engaging in protected First Amendment activity because of a common-sense recognition that their existence both deters and helps detect wrongdoing.").

249. *See id.* at 177 (Rehnquist, C.J., dissenting) ("But the village is entitled to rely on our assertion in *Martin* that door-to-door canvassing poses a risk of crime.").

250. *See id.* at 176 (Rehnquist, C.J., dissenting) ("But it would be puzzling if regulations of speech taking place on *another citizen's* private property warranted greater scrutiny than regulations of speech taking place in public forums. Common sense and our precedent say just the opposite.") (emphasis in original).

251. *Id.* at 179-80 (Rehnquist, C.J., dissenting).

252. 123 S. Ct. 2297 (2003) (upholding federal Children's Internet Protection Act ("CIPA"), requiring public libraries to install internet filters as a condition to receiving federal funding).

prevent minors from visiting pornographic websites.[253] The Court upheld the Act, though there was no majority opinion. The plurality of the Court, led by Chief Justice Rehnquist, reasoned that Congress was permitted to place conditions upon the receipt of federal funding so long as it did not "'induce' the recipient 'to engage in activities that would themselves be unconstitutional.'"[254] According to the plurality, the case therefore turned upon whether a public library, in the exercise of its own discretion, might install internet filters on its computers.[255] Justice Rehnquist noted that public libraries have traditionally exercised discretion in assembling a collection of materials for public use,[256] and that libraries are not "public forums" created to permit speakers to express themselves.[257] Accordingly, limitations on internet access through a computer terminal in a public library would not be evaluated under any form of heightened scrutiny.[258] The Chief Justice did not expressly specify the standard of review that did apply to this law, but by process of elimination, it would appear that the plurality had the rational basis test in mind.

Justice Kennedy and Justice Breyer concurred in the judgment only. Justice Kennedy implied that strict scrutiny was applicable,[259] while Justice Breyer found that a less strict standard applied.[260] Both Justices emphasized that the

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253. *See id.* (Rehnquist, C.J., plurality opinion) (describing CIPA).

254. *Id.* at 2298 (quoting South Dakota v. Dole, 483 U.S. 203, 210 (1987)).

255. *See id.*

256. *See id.* at 2304 ("Public library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them.").

257. *See id.* at 2305 ("A public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak.").

258. *See id.* at 2304. Chief Justice Rehnquist stated:

> Just as forum analysis and heightened judicial scrutiny are incompatible with the role of public television stations and the role of the NEA, they are also incompatible with the discretion that public libraries must have to fulfill their traditional missions. Public library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them.

Id.

259. *See id.* at 2310 (Kennedy, J., concurring in the judgment) ("The interest in protecting young library users from material inappropriate for minors is legitimate, and even compelling, as all Members of the Court appear to agree.").

260. *See id.* (Breyer, J., concurring in the judgment) ("I would apply a form of heightened scrutiny," and "we should not examine the statute's constitutionality as if it raised no special First Amendment concern—as if, like tax or economic regulation, the First Amendment demanded only a 'rational basis' for imposing a restriction."). Justice Breyer invoked the ad hoc balancing test that he utilized in *Denver Area Educ. Telecomms. Consortium, Inc., v. FCC*, 518 U.S. 727 (1996), stating that the Court should determine "whether the harm to speech-related interests is disproportionate in light of both the justifications and the potential alternatives." *Id.* at 2311. However, he also described this standard as not involving balancing, stating:

> This approach does not substitute a form of "balancing" for less flexible, though more speech-protective, forms of "strict scrutiny." Rather, it *supplements* the latter with an approach that is more flexible but nonetheless provides the legislature with less than ordinary leeway in light of the fact that constitutionally protected expression is at issue.

Id. at 2311-12 (emphasis in original).

constitutionality of the law was premised upon the expectation, reinforced by the Solicitor General in oral argument before the Supreme Court,[261] that adults would still have unfettered access to the internet under the terms of the Act.[262]

Justice Souter, joined by Justice Ginsburg in dissent, agreed that if the law did no more than shield children from pornography, then it would be constitutional,[263] but he was not persuaded that the Act guaranteed unfettered use of the internet to adult users.[264] He therefore concluded that this content-based law was subject to strict scrutiny, and that the law failed to meet that standard.[265]

9. *Virginia v. Black* (2003)[266]

Virginia v. Black concerned the constitutionality of a Virginia statute that made it illegal to burn a cross on public property or on the private property of

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261. *See id.* at 2309 (Kennedy, J., concurring in the judgment).

262. *See id.* at 2306-07 (plurality opinion) ("The Solicitor General confirmed that a 'librarian can, in response to a request from a patron, unblock the filtering mechanism altogether,' and further explained that a patron would not 'have to explain . . . why he was asking a site to be unblocked or the filtering to be disabled.'") (citations omitted); *id.* at 2309 (Kennedy, J., concurring in the judgment) ("If, on the request of an adult user, a librarian will unblock filtered material or disable the Internet software filter without significant delay, there is little to this case. The Government represents this is indeed the fact."); *id.* at 2312 (Breyer, J., concurring in the judgment) ("As the plurality points out, the Act allows libraries to permit any adult patron access to an 'overblocked' Web site; the adult patron need only ask a librarian to unblock the specific Web site or, alternatively, ask the librarian, 'Please disable the entire filter.'").

263. *See id.* at 2319 (Souter, J., dissenting). Justice Souter stated:

> Like the other Members of the Court, I have no doubt about the legitimacy of governmental efforts to put a barrier between child patrons of public libraries and the raw offerings on the Internet otherwise available to them there, and if the only First Amendment interests raised here were those of children, I would uphold application of the Act.

Id.

264. *See id.* (observing that the FCC has "pointedly declined" to require libraries to unblock computers, and noting that the District Court had found that "unblocking may take days, and may be unavailable, especially in branch libraries") (quoting Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 411 (E.D. Pa. 2002)).

265. *Id.* at 2324-25. Justice Souter stated:

> There is no good reason, then, to treat blocking of adult enquiry as anything different from the censorship it presumptively is. For this reason, I would hold in accordance with conventional strict scrutiny that a library's practice of blocking would violate an adult patron's First and Fourteenth Amendment right to be free of Internet censorship, when unjustified (as here) by any legitimate interest in screening children from harmful material. On that ground, the Act's blocking requirement in its current breadth calls for unconstitutional action by a library recipient, and is itself unconstitutional.

Id. (footnote omitted).

266. 123 S. Ct. 1536 (2003) (upholding state statute making it a crime to burn a cross on public property or the private property of another person for purposes of intimidation).

another person for the purpose of intimidating someone.[267] The Court struck down the provision of the law that made the act of burning a cross *prima facie* evidence of intent to intimidate,[268] but it upheld the core provision of the law making it illegal to burn a cross for purposes of intimidation.[269] The Court acknowledged that cross burning is expressive[270] and that the Virginia statute was a content-based law discriminating against that expression.[271] However, the Court also noted that "intimidation" is one type of "true threat," which is a category of speech that is not protected by the First Amendment.[272] Accordingly, the Court ruled that the law was justified in light of the history of cross burning as a tool of intimidation down to the present day.[273] In contrast, the Virginia Supreme Court[274] and the dissenting justices on the Supreme Court found that the law was unconstitutional because it singled out cross burning for punishment.[275]

The Supreme Court has now decided three cases reviewing laws that prohibit the burning of an object fraught with meaning: *United States v. O'Brien* (draft card), *Texas v. Johnson* (flag), and *Virginia v. Black* (cross). The reasoning and results in these cases cannot be reconciled. In each case, the Supreme Court assigned the law in question to a different First Amendment category. In *O'Brien*, the Court decided that the law prohibiting destruction of a draft card was content-

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267. *See id.* at 1541 (quoting VA. CODE ANN. § 18.2-423 (1996), which states that "[i]t shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place").

268. *See id.* at 1551-52 ("[T]he prima facie evidence provision, as interpreted through the jury instruction and as applied in Barry Black's case, is unconstitutional on its face.").

269. *See id.* at 1547-48.

270. *Id.* Justice O'Connor stated:

> It is true, as the Supreme Court of Virginia held, that the burning of a cross is symbolic expression. The reason why the Klan burns a cross at its rallies, or individuals place a burning cross on someone else's lawn, is that the burning cross represents the message that the speaker wishes to communicate. Individuals burn crosses as opposed to other means of communication because cross burning carries a message in an effective and dramatic manner.

Id.

271. *Id.* at 1549 ("We did not hold in *R.A.V.* that the First Amendment prohibits *all* forms of content-based discrimination within a proscribable area of speech. Rather, we specifically stated that some types of content discrimination did not violate the First Amendment . . . .") (emphasis in original).

272. *Id.* at 1548 ("Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.").

273. *Id.* at 1549 ("Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence.").

274. *Id.* at 1548 (citing Black v. Commonwealth, 553 S.E.2d 738, 742-45 (2001)) (finding statute to be both content-based and viewpoint-based).

275. *See id.* at 1560 (Souter, J., concurring in the judgment in part and dissenting in part) ("I thus read *R.A.V.*'s examples of the particular virulence exception as covering prohibitions that are not clearly associated with a particular viewpoint, and that are consequently different from the Virginia statute.").

neutral[276] and upheld the law.[277] In *Texas v. Johnson*, the Court found the law forbidding desecration of the American flag to be both content-based and viewpoint-based[278] and therefore unconstitutional.[279] In *Virginia v. Black*, the Court held that the law banning cross burning was content-based but that under the reasoning of *R.A.V.* the government could single out cross burning used as a tool of intimidation for differential treatment.[280] The failure of the Supreme Court to analyze these laws in a consistent manner is a serious indictment of how the Court performs the function of categorizing laws as content-based, content-neutral, or viewpoint-based.

All three cases cry out for a categorical determination of unconstitutionality rather than the balancing approach. In *Virginia v. Black*, Justice Thomas took the position that the government has the power to declare which symbols are sacred and which are profane.[281] In my opinion, in this nation it is *not* for the government to say which symbols are sacred and which are profane.[282] What we hold sacred and profane is a matter of individual conscience, and not law. This is not a principle that can be balanced. In my opinion, all three laws are viewpoint-based and therefore per se unconstitutional.[283]

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276. United States v. O'Brien, 391 U.S. 367, 382 (1968). Chief Justice Warren stated:

> The governmental interest and the scope of the 1965 Amendment are limited to preventing harm to the smooth and efficient functioning of the Selective Service System. When O'Brien deliberately rendered unavailable his registration certificate, he wilfully frustrated this governmental interest. For this noncommunicative impact of his conduct, and for nothing else, he was convicted.

Id.

277. *Id.* at 386.

278. Texas v. Johnson, 491 U.S. 397, 412, 413 n.9 (1989) ("[T]his restriction on Johnson's expression is content based," and "if Texas means to argue that its interest does not prefer *any* viewpoint over another, it is mistaken.") (emphasis in original).

279. *Id.* at 416 ("[G]overnment may not prohibit expression simply because it disagrees with its message.").

280. Virginia v. Black, 123 S. Ct. 1536, 1549 (2003) ("We did not hold in *R.A.V.* that the First Amendment prohibits *all* forms of content-based discrimination within a proscribable area of speech. Rather, we specifically stated that some types of content discrimination did not violate the First Amendment . . . .").

281. *Id.* at 1562. Justice Thomas stated in dissent:

> In every culture, certain things acquire meaning well beyond what outsiders can comprehend. That goes for both the sacred [(citing Texas v. Johnson, 491 U.S. 397, 422-29 (1989) (Rehnquist, C.J., dissenting) ("describing the unique position of the American flag in our Nation's 200 years of history"))], and the profane. I believe that cross burning is the paradigmatic example of the latter.

Id.

282. The first words of the Bill of Rights are: "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

283. *See* Chemerinsky, *supra* note 10, at 56 ("[V]iewpoint restrictions have never been upheld.").

10. Summary of Calvert's Analysis of Court's Handling of Dual Nature Laws

CASES	GOVERNMENTAL ACTION	CONTENT-BASED PURPOSES AND/OR EFFECTS	CONTENT-NEUTRAL PURPOSES AND EFFECTS	REASONING OF MAJORITY AND DISSENT
Turner I and *Turner II*	Congress enacted "must carry" provision requiring cable operators to carry local broadcast stations	To preserve diversity of viewpoints, localism, educational programming, news, and public affairs	To preserve free broadcast television in the face of competition from cable television	Majority: The "overriding purpose" of the law was economic; Dissent: "A" motivation for the law was to increase diversity of viewpoints
Madsen v. Schenck	Courts issued injunctions requiring abortion protestors to stay specific distance away from clinic entrances	Injunctions targeted speakers espousing anti-abortion views	To prevent intimidation of patients, staff, and physicians	Majority: Injunctions issued because of the conduct of the protestors, not because of their message; Dissent: Injunctions were directed at named individuals and their supporters
City of Renton v. Playtime Theatres, Inc.	City adopted ordinance requiring adult movie theatres to be 1000 feet from any home, school, or church	Statute expressly treats "adult movie theatres" differently than other types of theatres	To prevent crime and loss of value in surrounding property associated with adult movie theatres	Majority: Zoning ordinance justified by the secondary effects of adult movie theatres; Dissent: Zoning ordinance was expressly aimed at adult movie theatres

11. Summary of Court's Handling of Dual Nature Laws 1999-2002

CASES	GOVERNMENTAL ACTION	CONTENT-BASED PURPOSES AND/OR EFFECTS	CONTENT-NEUTRAL PURPOSES AND EFFECTS	REASONING OF MAJORITY AND DISSENT
Reno v. A.C.L.U.	Federal statute prohibited transmission of indecent or patently offensive material over the internet	To protect children and unwilling viewers from exposure to sexually oriented materials	Law applies to the internet	Majority: Content based law that fails strict scrutiny, distinguishable from *Pacifica* as to content and context; Dissent: Law is valid under *Pacifica*
Hill v. Colorado	State enacted statute forbidding protestors from approaching patients at health clinics	Disparate impact on anti-abortion protestors	To prevent harassment and intimidation of patients	Majority: Law aimed at controlling conduct of protesters; Dissent: Law is aimed at abortion protesters
City of Erie v. Pap's A.M.	Municipal ordinance prohibiting public nudity	To outlaw nude dancing	To reduce the secondary effects of nude dancing establishments on community	Majority: Ordinance aimed at secondary effects; Dissent: Law aimed at nude dancing establishments
City of Los Angeles v. Alameda Books	Municipal ordinance defining "Adult Business" as each separate use	To outlaw pornographic messages	To reduce secondary effects of adult businesses on community	Plurality: Ordinance aimed at secondary effects; Concurrence: Ordinance is content-based, but apply intermediate scrutiny; Dissent: Ordinance is content-based, apply strict scrutiny

Bartnicki v. Vopper	Federal and state statutes prohibiting disclosure of information gathered from illegal eavesdropping	As applied to radio broadcast of recorded conversation regarding threats in labor dispute	To eliminate market for stolen communications and to protect privacy	Majority: Laws are content-neutral, but higher level of scrutiny applies to matters of public importance; Dissent: Laws are content-neutral, apply *O'Brien*
Village of Stratton v. Watchtower	Village ordinance required door to door solicitors to register with city	Takes important means of communication from the "little people"	To protect residential privacy and to discourage fraud	Majority: Applied balancing test taking content, character, context, etc. into account; Dissent: Ordinance is content-neutral, apply intermediate scrutiny

B. Patterns in Recent Cases

In the foregoing cases, we see a number of patterns. First, in most cases the justices are still attempting to draw the traditional categorical dichotomy between content-based and content-neutral laws. In some judicial opinions, such as the majority opinion in *Hill* and the plurality opinion in *Erie*, the result turns primarily upon the categorization that the Court assigns to the law in a manner consistent with traditional First Amendment doctrine.[284] But even in the cases where the distinction plays a major role another dynamic is also at work, and it has garnered enough votes in enough cases that we must now recognize it as an emerging trend. Instead of characterizing a law as content-based or content-neutral and establishing what amounts to an outcome-determinative standard of review on the basis of that distinction,[285] the Court is beginning to consider the *degree* to which a law restricts the expression of ideas or restricts opportunities for expression, which in turn determines the quantum of evidence that the state must produce to justify the law. These patterns are described below.

1. Content: Types of Subject Matter Restricted

The *Bartnicki* case clearly turned upon the content of the speech being restricted; that is, newsworthy information. Justice Stevens ruled that laws prohibiting the disclosure of information garnered by illegal eavesdropping could not be applied to block the broadcast of information concerning a matter of public importance.[286] The dissenting justices in effect took the position that the effect of this law on public debate was irrelevant to the decision. They relied upon a

284. Hill v. Colorado, 530 U.S. 703 (2000) (finding state statute creating an eight-foot floating buffer zone around health care facility patients to be content-neutral and constitutional); City of Erie v. Pap's A.M., 529 U.S. 277 (2000) (finding city ordinance applying public nudity ordinance against nude dancing establishments to be content-neutral and constitutional); *see also* Thomas v. Chicago Park Dist., 534 U.S. 316 (2002) (finding permit requirement for conducting events for more than fifty persons in municipal parks to be content-neutral and constitutional).

285. *See* Oestreicher, *supra* note 136 (characterizing content-based/content-neutral distinction as "outcome-determinative").

286. *See supra* note 179 and accompanying text.

straightforward application of intermediate scrutiny, reasoning that this law was a content-neutral law whose purpose was to protect privacy.[287]

The *Bartnicki* case indicates that a content-neutral law that effectively distorts public debate by depriving the public of information necessary for intelligent self-government will be examined under a higher level of scrutiny.[288] The reasoning in *Bartnicki* thus blurs the distinction between content-based and content-neutral laws.

The distinction between content-based and content-neutral laws was further blurred in *Alameda Books* in opinions by Justice Kennedy and Justice Souter. Justice Kennedy admitted that the law was "content-based" but nevertheless applied intermediate scrutiny,[289] while Justice Souter characterized the law as "content correlated," and demanded more proof supporting the governmental interest than he had deemed necessary in prior cases.[290] For both Justice Kennedy and Justice Souter, the categorization of the law as content-based or content-neutral mattered less than their evaluation of the quantum of evidence necessary to support the city's legislative judgment.

Finally, in *Watchtower*, the Court implicitly acknowledged that in certain circumstances a content-based law may be less restrictive of speech than a content-neutral one. Content-neutral laws apply to all categories of speech. The Court indicated that if the city had only required registration of persons soliciting for commercial purposes, and had allowed political and religious solicitation to continue unhindered, the law might have passed First Amendment muster.[291]

2. Nature: Viewpoint-Oriented Laws—Secondary Effects, Disparate Impact, and Content Discrimination

Viewpoint-based laws that suppress speech are per se unconstitutional.[292] However, it is often difficult to determine whether a law is viewpoint-based because rather than there being a dichotomy between viewpoint-based and

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287. *See supra* note 197 and accompanying text.

288. *See supra* notes 188-90 and accompanying text.

289. *See supra* note 217 and accompanying text.

290. *See supra* notes 221, 223 and accompanying text; *see also* City of Erie v. Pap's A.M., 529 U.S. 277, 316-17 (2000), where Justice Souter explained why he was demanding more proof than he had in *Barnes*:

> Careful readers, and not just those on the Erie City Council, will of course realize that my partial dissent rests on a demand for an evidentiary basis that I failed to make when I concurred in *Barnes*. I should have demanded the evidence then, too, and my mistake calls to mind Justice Jackson's foolproof explanation of a lapse of his own, when he quoted Samuel Johnson, "'Ignorance, sir, ignorance.'" I may not be less ignorant of nude dancing than I was nine years ago, but after many subsequent occasions to think further about the needs of the First Amendment, I have come to believe that a government must toe the mark more carefully than I first insisted. I hope it is enlightenment on my part, and acceptable even if a little late.

Id. (Souter, J., concurring in part and dissenting in part) (citation and footnote omitted).

291. *See supra* note 237 and accompanying text.

292. *See* Chemerinsky, *supra* note 10, at 59 ("The Supreme Court has created a virtually complete prohibition of the government engaging in viewpoint discrimination.").

viewpoint-neutral laws, there is instead a spectrum from viewpoint-neutral to viewpoint-based.[293] Laws along this spectrum may be characterized as "viewpoint-oriented."

Laws that single out adult businesses because of their secondary effects (*Alameda Books*), laws that have a disparate impact on one viewpoint (*Hill*, *Erie*, and *Shrink Missouri*), and laws that discriminate on the basis of specific content within a category of "unprotected" speech (*Virginia v. Black*) run the *risk* of being viewpoint-based.[294] In these types of cases, the Court must remain sensitive to the danger of viewpoint discrimination, and should demand more evidence supporting a legislative judgment that the law regulating speech is necessary to accomplish the governmental objective.

In general, as content distinctions become more specific, the danger of viewpoint discrimination becomes more acute. In my opinion, the cross burning law in *Virginia v. Black* crosses the line from being "viewpoint-oriented" to being "viewpoint-based," because the state was principally concerned with the communicative impact of this particular symbol. When the government imposes sanctions upon a particular expression because society finds it hateful, the balancing approach is not adequate to protect First Amendment rights.

3. Character: The Medium of Expression

The Supreme Court has long noted that each medium of expression poses different problems and opportunities for expression. As Justice Jackson observed a half century ago:

> The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers.[295]

In *Reno v. ACLU*,[296] the Court declared the Communications Decency Act unconstitutional primarily because of the specific characteristics of the Internet. As noted above, the Court distinguished the Internet from radio and television broadcast in a number of respects, including the pervasiveness and intrusiveness of broadcast, and the passive nature of viewing and listening in contrast to the affirmative steps needed to achieve access that the Internet requires.[297] Then, in a reference that may foreshadow a future of unparalleled freedom of expression for our society, the Court observed: "Neither before nor after the enactment of the CDA have the *vast democratic forums of the Internet* been subject to the type of

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293. *Cf. id.* at 59 (criticizing the Supreme Court for adopting "a narrow definition of viewpoint discrimination").

294. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 387 (1992) ("The rationale of the general prohibition, after all, is that content discrimination 'raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'") (citation omitted).

295. Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring).

296. 521 U.S. 844 (1997) (striking down federal law that effectively prohibited transmission of indecent or patently offensive speech over the Internet).

297. *See supra* notes 151-55 and accompanying text.

government supervision and regulation that has attended the broadcast industry."[298]

The medium of expression—principally oral "counseling" and leafleting—was also a critical factor in *Hill v. Colorado*,[299] as the majority and the dissent debated whether the eight-foot floating buffer zone around clinic patients would unnecessarily interfere with these forms of communication.[300] For example, the majority noted that "[u]nlike the 15-foot zone in *Schenck*, this 8-foot zone allows the speaker to communicate at a 'normal conversational distance,'"[301] while the dissent countered that the majority had in effect ruled that "the moral debate is not so important after all and can be conducted just as well through a bullhorn from an 8-foot distance as it can through a peaceful, face-to-face exchange of a leaflet."[302]

4. Context: The Setting of the Speech

Just as the characteristics of the medium of expression affect the ability of the speaker to communicate his or her message and the ability of unwilling recipients to avoid this message, the setting of the speech may raise special issues concerning the rights of speakers and the interests of listeners. In *Hill v. Colorado*, Justice Stevens noted that the Court had previously recognized "the special governmental interests surrounding schools, courthouses, polling places, and private homes."[303] Justice Stevens quoted a previous case involving labor picketing of hospitals[304] where the Court had found that patients "'often are under emotional strain and worry'"[305] and that they need a "restful, uncluttered, relaxing, and helpful atmosphere."[306] In dissent, Justice Kennedy noted that the sidewalks outside health

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298. *Reno*, 521 U.S. at 868-69 (noting absence of regulatory oversight over the Internet) (emphasis added). *But see* United States v. Am. Library Ass'n, 123 S. Ct. 2297 (2003) (upholding Children's Internet Protection Act against facial attack).

299. 530 U.S. 703 (2000); *see supra* note 164 and accompanying text.

300. *Id.* at 726-28 (finding that buffer zone would not unduly restrict oral communication and leafleting); *id.* at 791 (Kennedy, J., dissenting) (stating that buffer zone would unduly restrict oral communication and leafletting).

301. *Id.* at 726-27 (discussing effect of buffer zone on protesters and distinguishing injunction establishing buffer zone in *Schenck*).

302. *Id.* at 791 (Kennedy, J., dissenting) (discussing effect of buffer zone on protesters).

303. *Id.* at 728 (citing Frisby v. Schultz, 487 U.S. 474, 484-85 (1998) (private homes); Burson v. Freeman, 504 U.S. 191, 206-08 (1992) (polling places); Grayned v. City of Rockford, 408 U.S. 104, 119 (1972) (schools); Cox v. Lousiana, 379 U.S. 559, 562 (1965) (courthouses)) (footnotes omitted).

304. NLRB v. Baptist Hosp., 442 U.S. 773 (1979).

305. *Hill*, 530 U.S. at 728 (quoting *Baptist Hosp.*, 442 U.S. at 783-84 n.12 (quoting Beth Israel Hosp. v. NLRB, 437 U.S. 483, 509 (1978) (Blackmun, J., concurring))).

306. *Id.* at 728-29 (quoting *Baptist Hosp.*, 442 U.S. at 783-84 n.12 (quoting *Beth Israel Hosp.*, 437 U.S. at 509 (Blackmun, J., concurring))). Justice Stevens also stated:

> Persons who are attempting to enter health care facilities—for any purpose—are often in particularly vulnerable physical and emotional conditions. The State of Colorado has responded to its substantial and legitimate interest in protecting these persons from unwanted encounters, confrontations, and even assaults by enacting an exceedingly modest restriction on the speakers' ability to approach.

Id. at 729.

care facilities are part of the public forum,[307] and that access to patients entering abortion clinics is indispensable to protesters who are attempting to dissuade patients.[308]

In the *Watchtower* case, the majority and the dissent switched sides in this debate. It was the majority who focused on the right of solicitors to ring doorbells,[309] while the dissent claimed that this was an invasion of personal privacy in the home.[310]

5. Scope: Extent of Limits on Expression

The scope of the restriction on expression was a critical factor for Justice Stevens in *Erie* and for Justice Souter in *Alameda Books*. A principal objection to the municipal ordinances restricting erotic expression in those cases was that they limited the *amount* of speech that would reach the public. Justice Stevens found that the Erie public nudity ordinance amounted to a "total ban" on nude dancing, since by definition nude dancing is performed in the nude.[311] Justice Souter came to the same conclusion in the *Alameda Books* case, but the chain of causation was more complex. The Los Angeles zoning ordinance prohibited "multi-use" adult businesses, which had the effect of reducing erotic speech because adult businesses such as arcades cannot practically operate as separate businesses.[312] Accordingly, the ban on multi-use adult businesses amounted to a content-based ban on erotic expression.[313]

6. Nature: Extent of Prior Restraints

Prior restraints are subjected to a stricter level of scrutiny than subsequent punishments. The Supreme Court has stated that "'[a]ny system of prior restraints

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307. *Id.* at 765. Justice Kennedy stated in dissent:

> For the first time, the Court approves a law which bars a private citizen from passing a message, in a peaceful manner and on a profound moral issue, to a fellow citizen on a public sidewalk. If from this time forward the Court repeats its grave errors of analysis, we shall have no longer the proud tradition of free and open discourse in a public forum.

Id.

308. *Id.* at 789. Justice Kennedy stated in dissent:

> For these protesters the 100-foot zone in which young women enter a building is not just the last place where the message can be communicated. It likely is the only place. It is the location where the Court should expend its utmost effort to vindicate free speech, not to burden or suppress it.

Id.

309. *See supra* notes 225-39 and accompanying text.

310. *See supra* notes 242-51 and accompanying text.

311. *See supra* note 206 and accompanying text.

312. *See Alameda Books*, 535 U.S. at 464 n.8 (Souter, J., dissenting) ("[T]he far more likely outcome is that the stand-alone video store will go out of business.").

313. *See id.* at 466 (Souter, J., dissenting) ("Every month business will be more expensive than it used to be, perhaps even twice as much. That sounds like a good strategy for driving out expressive adult businesses. It sounds, in other words, like a policy of content-based regulation.").

comes to this Court bearing a heavy presumption against its constitutional validity.'"[314] In a similar vein, Professor Michael Shiver describes the standard for determining the constitutionality of a prior restraint to be one of "sublime simplicity."[315] He explains the rule in these terms: "Simply stated, the prior restraint will be found invalid except in the most extreme circumstances."[316]

Another way of analyzing the constitutionality of prior restraints is to consider the *extent* of the prior restraint on speech and examine whether less restrictive alternatives exist. In cases where the restraint has a significant effect on expression, as in *Schenck* and *Watchtower*, the Supreme Court has closely scrutinized the breadth of the restraint on speech, even though the laws in question were content-neutral.[317] In contrast, in *Thomas v. Chicago Park District*,[318] the Court downplayed the significance of the prior restraint contained in the municipal park permit requirement because "the licensing scheme at issue here is not subject-matter censorship but content-neutral time, place, and manner regulation of the use of a public forum."[319] However, the difference between *Watchtower* and *Schenck* on the one hand and *Thomas* on the other hand lay not in the distinction between content-based and content-neutral laws, but in the fact that the ordinance in *Thomas* would likely have little or no effect on expression.[320]

7. Replacing Categories with Evidence

The principal change that the "constitutional calculus" makes in the analysis of freedom of expression cases is that the opinions of the justices are less concerned with defining a law as content-based or content-neutral, and are more concerned with the quantum of evidence that the state has offered to prove that the harm the government is trying to prevent justifies the infringement on expression.

In the *Turner* cases, the government's evidence concerning the impact of cable television on broadcast television took center stage. *Turner I* remanded the case to the lower courts to develop that evidence more fully,[321] and when the case returned

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314. New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).

315. Michael W. Shiver, Jr., *Objective Limitations or, How the Vigorous Application of "Strong Form" Idea/Expression Dichotomy Theory in Copyright Preliminary Injunction Hearings Might Just Save the First Amendment*, 9 U.C.L.A. ENT. L. REV. 361, 364 (2002). ("Whereas many avenues of constitutional jurisprudence (First Amendment jurisprudence included) twist and wind their way through multi-faceted and often contradictory balancing tests, a prior restraint on speech, once it has been identified, will face scrutiny of sublime simplicity.") (internal citation omitted).

316. *Id.*

317. *See supra* notes 115, 232-36 and accompanying text.

318. 534 U.S. 316 (2002) (upholding a permit requirement for conducting events for more than fifty persons in municipal parks).

319. *Id.* at 322 (finding the park ordinance to be content-neutral).

320. *See id.* at 321-25. The Court distinguished censorship boards and cases where a public official had broad discretion to deny the permit. *See id.* The Court also stated that if permits were denied on a discriminatory basis, "we think that this abuse must be dealt with if and when a pattern of unlawful favoritism appears." *Id.* at 325.

321. *See Turner I*, 512 U.S. at 667. Justice Kennedy stated:

> Without a more substantial elaboration in the District Court of the predictive or historical evidence upon which Congress relied, or the

to the Supreme Court in *Turner II*, the justices embarked on an exhaustive examination of the economic facts that had been developed in the judicial and legislative record.[322]

In *Erie* and *Alameda Books*, the justices split over the adequacy of the evidence supporting the legislative judgment that prohibiting nude dancing and dispersing adult businesses would diminish crime and support property values in the surrounding neighborhoods. Justice Souter, in particular, made it clear that the "principal reason" for his dissents in both cases was the "insufficiency" of the evidence offered by each municipality.[323]

In recent cases the justices have not only examined the evidence offered by the government to justify infringements on speech, but they also have also debated the standards by which that evidence should be measured. In *Turner I* and *Turner II* Justices Kennedy and Stevens called for substantial deference to Congress[324] for three reasons: 1) "because the institution 'is far better equipped than the judiciary to "amass and evaluate the vast amounts of data" bearing upon' legislative questions,"[325] 2) because of the "inherent complexity and assessments about the likely interaction of industries undergoing rapid economic and technological change,"[326] and 3) "out of respect for [Congress's] authority to exercise the legislative power."[327]

In *Shrink Missouri*, Justice Souter contended that the state's burden of proof in a freedom of expression case was variable. He stated that "the quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."[328]

In *Watchtower*, Justice Breyer complained that the arguments setting forth the risks of door-to-door solicitation that were advanced by the Village of Stratton amounted to little more than "anecdote," "supposition," and "conjecture."[329] In dissent, Chief Justice Rehnquist pointed out that the Village of Stratton had only

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> introduction of some additional evidence to establish that the dropped or repositioned broadcasters would be at serious risk of financial difficulty, we cannot determine whether the threat to broadcast television is real enough to overcome the challenge to the provisions made by these appellants.

Id.

322. *See Turner II*, 520 U.S. at 197-213.

323. *See supra* notes 202, 223.

324. *See Turner II*, 520 U.S. at 195. Justice Kennedy relied upon the following statements from his own and Justice Stevens' opinions in *Turner I*: "In reviewing the constitutionality of a statute, 'courts must accord substantial deference to the predictive judgments of Congress.' Our sole obligation is 'to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.'" *Id.* (citations omitted) (quoting *Turner I*, 512 U.S. at 665-66 (Kennedy, J.)). He continued, "As noted in the first appeal, substantiality is to be measured in this context by a standard more deferential than we accord to judgments of an administrative agency." *Id.* (citing *Turner I*, 512 U.S. at 666-67) (Stevens, J., concurring in part and concurring in judgment).

325. *Id.* (citations omitted) (quoting *Turner I*, 512 U.S. at 665-66 (quoting Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 331 n.12 (1985))).

326. *Id.* at 196.

327. *Id.*

328. *Shrink Missouri*, 528 U.S. at 391.

329. *See supra* notes 240-41 and accompanying text.

278 residents and that, unlike the petitioners, they "do not have a team of attorneys at their ready disposal."[330] The Chief Justice would have allowed the Village to rely upon the "common sense" conclusion that door-to-door solicitation poses risks to homeowners.[331]

8. Ad Hoc Standards of Review

As the Court finds it more difficult to tell the difference between content-based and content-neutral laws, it has less use for the concomitant standards of review of strict scrutiny and intermediate scrutiny. In the *Denver Area* case, the Court developed an ad hoc standard of review,[332] in *Shrink Missouri* it applied one,[333] in *Bartnicki* it adjusted the standard of review,[334] and in *Watchtower* the Court did not articulate any standard of review at all.[335] Because in previous cases the established standards of review were perceived as outcome-determinative,[336] their demise necessitates a different method of reaching results. I predict that more and more we shall see the Court identify and balance the various elements that affect the constitutional calculus in freedom of expression cases.

9. Result-Oriented Reasoning

A final pattern that emerges from an examination of the cases is that the distinction between content-based and content-neutral laws may mask other factors influencing the decision. A fairly consistent pattern that has emerged in the cases is that liberal justices tend to consider laws regulating sexual expression to be content-based, while conservatives treat these laws as content-neutral.[337] The shoe is on the other foot, however, when abortion protestors are regulated. In those

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330. *See Watchtower*, 536 U.S. at 173 (Rehnquist, C.J., dissenting) ("In order to reduce these very grave risks associated with canvassing, the 278 'little people' of Stratton, who, unlike petitioners, do not have a team of attorneys at their ready disposal, enacted the ordinance at issue here.") (citations omitted). Justice Rehnquist also stated:

> Stratton is a village of 278 people located along the Ohio River where the borders of Ohio, West Virginia, and Pennsylvania converge. It is strung out along a multilane highway connecting it with the cities of East Liverpool to the north and Steubenville and Weirton, West Virginia, to the south. One may doubt how much legal help a village of this size has available in drafting an ordinance such as the present one.

Id. at 172 (Rehnquist, C.J., dissenting).

331. *Id.* at 176 (Rehnquist, C.J., dissenting); *see supra* notes 248-51 and accompanying text.

332. *See supra* note 260.

333. *See supra* note 171 and accompanying text.

334. *See supra* note 190 and accompanying text.

335. *See supra* note 226-31 and accompanying text; *see also* Illinois *ex rel.* Madigan v. Telemarketing Assocs., 538 U.S. 600 (2003) (upholding state fraud prosecution of fundraisers under the First Amendment without specifying whether the law was content-based or content-neutral and without identifying the standard of review).

336. *See supra* notes 137, 284-85 and accompanying text.

337. *See, e.g.*, discussion of *Renton*, *supra* notes 113-27 and accompanying text; discussion of *Erie*, *supra* notes 198-208 and accompanying text; discussion of *Alameda Books*, *supra* notes 209-24 and accompanying text; discussion of *American Library Ass'n*, *supra* notes 252-65 and accompanying text.

cases, the liberal wing of the Court considers the injunctions or statutes to be content-neutral, while conservatives perceive such actions to be content-based.[338] This relatively consistent trend calls the objectivity of the content-based/content-neutral distinction into question.

In summary, in difficult cases, whether a law is content-based or content-neutral is increasingly beside the point. Most laws affecting freedom of expression have both content-based and content-neutral elements, and as a result the Supreme Court has begun to replace the categorical approach in freedom of expression cases with a balancing approach. However, before abandoning the distinction between content-based and content-neutral laws, it is appropriate to inquire whether this will result in less protection for freedom of expression. This point is addressed in the following Part.

IV. WILL THE BALANCING APPROACH BE LESS PROTECTIVE OF SPEECH THAN THE CATEGORICAL APPROACH?

Leading constitutional scholars have warned that a balancing approach is less protective of freedom of expression than a categorical approach. For example, Professor Tribe writes:

> Categorical rules . . . tend to protect the system of free expression better because they are more likely to work in spite of the defects in the human machinery on which we must rely to preserve fundamental liberties. The balancing approach is contrastingly a slippery slope; once an issue is seen as a matter of degree, first amendment protections become especially reliant on the sympathetic administration of the law.[339]

Professor Rubenfeld attacks the whole enterprise of balancing, saying:

> The alternative to purposivism is balancing. But if we really believe, as it seems so natural to believe, that First Amendment rights are a matter of weighing costs and benefits, then we are, ultimately, where Judge Posner is. And if speech is prohibitable whenever, as Posner puts it, "in American society its harmful consequences are thought to outweigh its expressive value," there is no longer a First Amendment at all.[340]

Also supporting the argument for the categorical approach is the unfortunate history of the balancing approach in leading cases. Oliver Wendell Holmes developed the "clear and present danger" test in *Schenck v. United States*[341] and

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338. *See* discussion of *Madsen*, *supra* notes 110, 122-24 and accompanying text; discussion of *Schenck*, *supra* notes 111, 122-23 and accompanying text; discussion of *Hill*, *supra* notes 159-67 and accompanying text.

339. TRIBE, *supra* note 8, at 794.

340. Rubenfeld, *supra* note 61, at 832 (quoting Miller v. Civil City of South Bend, 904 F.2d 1081, 1097 (1990) (Posner, J., concurring), *rev'd sub nom.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991)).

341. 249 U.S. 47 (1919) (upholding convictions under the Espionage Act for circulating a document urging repeal of the military draft and urging draftees to assert their rights).

utilized it to affirm convictions of war protesters under the Espionage Act.[342] Similarly, Learned Hand coined his famous formula balancing "the gravity of the 'evil,' discounted by its improbability" against speech rights in *United States v. Dennis*.[343] He and the majority of the Supreme Court used this test to affirm the convictions of leaders of the Communist Party under the Smith Act.[344] In both of these cases, the Supreme Court notoriously failed to protect the expression of unpopular views. Also supporting this apprehension that the balancing approach is insufficiently protective of speech is the fact that Justice Stevens has voted to uphold laws that imposed restrictions on the use of powerful symbols of political expression. Justice Stevens dissented in *Texas v. Johnson*,[345] where he voted to uphold a state law banning desecration of the American flag,[346] and he concurred in *Virginia v. Black*,[347] where the Court upheld a state law prohibiting cross burning.[348] In my opinion, the balancing approach was not sufficiently protective of expressive rights in those cases. The fatal flaw in the laws banning flag burning and cross burning is not that the laws are *content-based*, but that they are *viewpoint-based*. Justice Stevens failed to acknowledge this fact in *Texas v. Johnson*[349] and

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342. *See id.* at 53.

343. *See* United States v. Dennis, 183 F.2d 201, 212 (2d. Cir. 1950) ("In each case [the courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."), *aff'd sub nom.*, Dennis v. United States, 341 U.S. 494, 510 (1951) (quoting Hand's formula with approval).

344. Dennis v. United States, 341 U.S. 494, 517 (1951) (upholding conviction of leaders of the American Communist Party under the Smith Act for advocating the overthrow of the government of the United States). The Court's ruling in *Dennis v. United States* was effectively overturned six years later in *Yates v. United States*, 354 U.S. 298 (1957) (holding that mere advocacy of force and violence was insufficient to sustain conviction under the Smith Act).

345. 491 U.S. 397, 436-39 (1989) (Stevens, J., dissenting).

346. *Id.* at 439. Justice Stevens stated:

> The ideas of liberty and equality have been an irresistible force in motivating leaders like Patrick Henry, Susan B. Anthony, and Abraham Lincoln, schoolteachers like Nathan Hale and Booker T. Washington, the Philippine Scouts who fought at Bataan, and the soldiers who scaled the bluff at Omaha Beach. If those ideas are worth fighting for—and our history demonstrates that they are—it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration.

Id.

347. 123 S. Ct. 1536, 1552 (2003).

348. *See id.* (upholding state law which made it illegal to burn a cross with intent to intimidate).

349. *See Johnson*, 491 U.S. at 439 n.* (Stevens, J., dissenting). Justice Stevens was uncharacteristically resistant to analyzing either the purpose or the effect of the flag desecration law. He stated:

> The Court suggests that a prohibition against flag desecration is not content neutral because this form of symbolic speech is only used by persons who are critical of the flag or the ideas it represents. In making this suggestion the Court does not pause to consider the far-reaching consequences of its introduction of disparate-impact analysis into our First Amendment jurisprudence.

Id.

Virginia v. Black,[350] just as Earl Warren failed to acknowledge that the law against burning draft cards was viewpoint-based in *United States v. O'Brien*.[351] Laws that ban the use of particular symbols are viewpoint-based and unconstitutional *per se*.

But in other cases—in cases where the law in question is not viewpoint-based—it is not necessarily true that the balancing approach will be less protective of speech than the categorical approach. The *Brandenburg* decision[352] effectively overruled the balancing approaches utilized in *Schenck* and *Dennis*. However, the *Brandenburg* standard was itself derived using a balancing approach that highly values political speech,[353] and even in its application it requires a calculated judgment to determine the immediacy, likelihood, and seriousness of the harm.[354]

In 1996, the justices of the Supreme Court debated the relative merits of the categorical approach and the balancing approach in the context of the First Amendment in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*,[355] which concerned the constitutionality of a provision of federal law that allowed cable television operators to refuse to carry indecent programming on leased access channels.[356] One of the issues in dispute was whether cable television

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350. *See supra* notes 266-83 and accompanying text.

351. *See supra* notes 55-72 and accompanying text.

352. Brandenburg v. Ohio, 395 U.S. 444 (1969) (striking down state Criminal Syndicalism statute law as applied to KKK members who advocated violence, and overruling *Whitney v. California*, 274 U.S. 357 (1927)).

353. *See generally* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (criticizing a number of decisions by the Supreme Court under Earl Warren, including *Brandenburg*, on the ground that the rules they articulate were not derived, defined, or applied by means of "neutral principles").

354. *Brandenburg*, 395 U.S. at 447 ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."); *see also id.* at 453-56 (Douglas, J., concurring). Douglas condemned the balancing approach of Holmes, Hand, and the majority in *Brandenburg*, stating:

> My own view is quite different. I see no place in the regime of the First Amendment for any 'clear and present danger' test, whether strict and tight as some would make it, or free-wheeling as the Court in Dennis rephrased it.
>
> When one reads the opinions closely and sees when and how the 'clear and present danger' test has been applied, great misgivings are aroused.

Id. at 454 (Douglas, J., concurring).

355. 518 U.S. 727 (1996). For an extended discussion of the contrasting methods of analysis employed by various members on the Court in deciding the *Denver Area* case, see Wilson Huhn, *The Stages of Legal Reasoning: Formalism, Analogy, and Realism*, 48 VILL. L. REV. 305, 347-62 (2003). The most famous confrontation between these competing methods of analysis is reflected in the Black-Frankfurter debate in *Adamson v. California*, 332 U.S. 46 (1947), *overruled in part*, *Malloy v. Hogan*, 378 U.S. 1 (1964). In interpreting the Due Process Clause, Justice Black favored a purely textual approach referred to as "total incorporation," while Justice Frankfurter employed a balancing test referred to as "fundamental fairness." *See* Wilson R. Huhn, *Teaching Legal Analysis Using a Pluralistic Model of Law*, 36 GONZ. L. REV. 433, 469 (2000-01) (briefly describing the methods of reasoning used by Justice Black and Justice Frankfurter in *Adamson*).

356. Cable Television Competition and Consumer Protection Act § 10(a)(2), 47 U.S.C. § 532(h) (1984) (authorizing cable operator to prohibit programming that the operator

constitutes the equivalent of a "public forum," and therefore a medium of expression that the government has a duty to keep open for expression by members of the public.[357] Justice Kennedy found that the law in question was a content-based[358] restriction of speech in a medium that was equivalent to a "public forum,"[359] and that therefore the law should be reviewed under the standard of "strict scrutiny."[360] In contrast, in his plurality opinion Justice Breyer declined to draw an analogy between leased access channels on cable television and public forums.[361] In fact, Justice Breyer utterly rejected the categorical approach,[362] choosing instead to employ an ad hoc balancing test to measure the constitutionality of the law.[363] Justice Breyer declined to use the content-based/content-neutral distinction and the public forum doctrine because, he said, the underlying values and interests at stake were the same regardless of how the

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"reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards").

357. *See generally* Ronnie J. Fisher, *"What's In a Name?": An Attempt to Resolve the "Analytic Ambiguity" of the Designated and Limited Public Fora*, 107 DICK. L. REV. 639, 641 (2003) (describing the confusion among the categories of public fora, stating that "[a]s a result of the confusion among the categories, courts may classify the same or similar locations under different names, and because particular—if sometimes differing—standards of review are attached to these names, these courts may reach contrary results").

358. *Denver Area*, 518 U.S. at 798 (Kennedy, J., concurring in part and dissenting in part) (characterizing the law as one that sought to "impose content discrimination by law").

359. *See id.* at 783 ("A public access channel is a public forum, and laws requiring leased access channels create common-carrier obligations. When the government identifies certain speech on the basis of its content as vulnerable to exclusion from a common carrier or public forum, strict scrutiny applies.").

360. *See id.*

361. *See id.* at 749 ("[I]t is unnecessary, indeed, unwise, for us definitively to decide whether or how to apply the public forum doctrine to leased access channels.").

362. *See id.* at 739-40. Justice Breyer stated:

> Like petitioners, Justices Kennedy and Thomas would have us decide these cases simply by transferring and applying literally categorical standards this Court has developed in other contexts. . . . Both categorical approaches suffer from the same flaws: They import law developed in very different contexts into a new and changing environment, and they lack the flexibility necessary to allow government to respond to very serious practical problems without sacrificing the free exchange of ideas the First Amendment is designed to protect.

Id. Justice Breyer also stated:

> Justice Kennedy would have us decide that *all* common carriage exclusions are subject to the highest scrutiny, and then decide these cases on the basis of categories that provide imprecise analogies rather than on the basis of a more contextual assessment, consistent with our First Amendment tradition, of assessing whether Congress carefully and appropriately addressed a serious problem.

Id. at 748 (internal citation omitted).

363. *See id.* at 743. Justice Breyer eschewed standard formulas such as strict scrutiny, intermediate scrutiny, and rational basis, instead formulating the following standard: "[W]e can decide this case . . . by closely scrutinizing § 10(a) to assure that it properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech."

law was characterized.[364] Justice Breyer characterized the categorical approach as a mere "label":

> But unless a label alone were to make a critical First Amendment difference (and we think here it does not), the features of these cases that we have already discussed—the Government's interest in protecting children, the "permissive" aspect of the statute, and the nature of the medium—sufficiently justify the "limitation" on the availability of this forum.[365]

Justices Stevens, Souter, and O'Connor concurred in Justice Breyer's plurality opinion. Justice Stevens unequivocally endorsed Justice Breyer's rejection of the categorical approach, stating: "Like Justice Souter, I am convinced that it would be unwise to take a categorical approach to the resolution of novel First Amendment questions arising in an industry as dynamic as this."[366] Justice Souter expressed support generally for the categorical approach,[367] but ultimately agreed with Justice Breyer that the balancing approach better served the law in this particular case because of the "protean" nature of cable programming[368] and a technological and regulatory framework which was in rapid flux.[369] Justice Souter concluded that it was neither necessary nor desirable to conclude that "a simple category subject to a standard level of scrutiny ought to be recognized at this point."[370] Justice O'Connor stated: "I agree with Justice Breyer that we should not yet undertake fully to adapt our First Amendment doctrine to the new context we confront here."[371]

Justice Kennedy, in dissent, argued vigorously in favor of the categorical approach. He characterized the plurality opinion as "adrift,"[372] as "wander[ing] into uncharted areas of the law with no compass other than our own opinions about good policy,"[373] and as "a legalistic cover for an ad hoc balancing of interests" that would "sow confusion in the courts."[374] Justice Kennedy stated that "strict scrutiny at least confines the balancing process in a manner protective of speech,"[375] and he

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364. *See id.* at 750 ("Finally, and most important, the effects of Congress' decision on the interests of programmers, viewers, cable operators, and children are the same, whether we characterize Congress' decision as one that limits access to a public forum, discriminates in common carriage, or constrains speech because of its content.").

365. *Id.*

366. *Id.* at 768 (Stevens, J., concurring).

367. *Id.* at 774 (Souter, J., concurring) ("First Amendment values generally are well served by categorizing speech protection according to the respective characters of the expression, its context, and the restriction at issue.").

368. *Id.* at 777 ("Accordingly, in charting a course that will permit reasonable regulation in light of the values in competition, we have to accept the likelihood that the media of communication will become less categorical and more protean.").

369. *Id.* at 776 ("All of the relevant characteristics of cable are presently in a state of technological and regulatory flux.").

370. *Id.* at 775-76.

371. *Id.* at 779-80 (O'Connor, J., concurring in part and dissenting in part).

372. *Id.* at 780 (Kennedy, J., concurring in part, concurring in judgment in part, dissenting in part).

373. *Id.* at 787.

374. *Id.* at 786.

375. *Id.* at 784.

made the following compelling argument in favor of employing established categories and standards of review:

> [T]he creation of standards and adherence to them, even when it means affording protection to speech unpopular or distasteful, is the central achievement of our First Amendment jurisprudence. Standards are the means by which we state in advance how to test a law's validity, rather than letting the height of the bar be determined by the apparent exigencies of the day. They also provide notice and fair warning to those who must predict how the courts will respond to attempts to suppress their speech.[376]

The positions taken by Justice Kennedy and Justice Stevens in the *Denver Area* case reflect longstanding jurisprudential preferences for predictability and policy analysis respectively. Their jurisprudential views have appeared in other cases interpreting our fundamental rights. Justice Kennedy co-authored the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[377] in which he, Justice O'Connor, and Justice Souter reaffirmed *Roe v. Wade*[378] on the ground of stare decisis,[379] even though they might not have voted for it initially.[380] Their opinion commenced with these words: "Liberty finds no refuge in a jurisprudence of doubt."[381] Justice Stevens, in contrast, adheres to the "sliding scale" theory of equal protection, in which classifying groups as "suspect" or "non-suspect" matters less than discovering *how suspect* a particular classification is.[382]

Based on the position he took in the *Denver Area* case, it appears that Justice Kennedy is the foremost advocate of the categorical approach in First Amendment cases, and that he adheres to this position primarily because he considers the categorical approach to be more protective of speech than balancing. But over the past two years Justice Stevens may have won Justice Kennedy over to balancing in at least some First Amendment cases. Justice Kennedy concurred in Stevens'

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376. *Id.* at 785.

377. 505 U.S. 833 (1992).

378. 410 U.S. 113 (1973) (establishing the fundamental right of woman to choose to have an abortion).

379. 505 U.S. 833 (1992).

380. *Id.* at 853 (O'Connor, J., Kennedy, J., and Souter, J.) ("[T]he reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*.").

381. *Id.* at 844.

382. *See* Craig v. Boren, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring). Justice Stevens stated:

> There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases. . . .
>
> In this case, the classification is not as obnoxious as some the Court has condemned, nor as inoffensive as some the Court has accepted.

Id. (footnote omitted); *see generally* Note, *Justice Stevens' Equal Protection Jurisprudence*, 100 HARV. L. REV. 1146 (1987) (describing and approving Justice Stevens' approacb to equal protection cases); *see also* Popkin, *supra* note 44, and Schauer, *supra* note 44 (describing Justice Stevens' jurisprudence generally as focusing on the facts of particular cases).

balancing opinions in both *Bartnicki v. Vopper* and *Village of Stratton v. Watchtower Bible & Tract Society*. In both of these cases the balancing approach was more protective of speech than the categorical approach used by the dissenting justices.[383] Furthermore, in *City of Los Angeles v. Alameda Books*, Justice Kennedy concurred in the judgment only,[384] finding that the law was content-based,[385] but nevertheless applying intermediate scrutiny.[386] In that case the balancing approach was no less protective of speech than the categorical approach used by the plurality.

Accordingly, the only cases where the balancing approach has threatened freedom of expression are those where the government has chosen to suppress speech because it disagrees with the views expressed by the speaker. Such laws should be considered categorically unconstitutional. Content-based laws that are not viewpoint-based and content-neutral laws may be safely evaluated using the emerging constitutional calculus.

CONCLUSION

The distinction between content-based and content-neutral laws has broken down because most laws regulating expression have both content-based and content-neutral elements. The Supreme Court is in the process of replacing the categorical approach with a constitutional calculus, in which a number of factors which Justice Stevens calls "content," "character," "context," "scope," and "nature," are used to adjust the government's burden of proof up or down, affecting the quantum of evidence that the government must adduce to establish the constitutionality of the regulation of speech.

Does the emerging "constitutional calculus" signal the demise of the categorical approach? Not at all. In easy cases, the distinctions that are drawn in First Amendment cases will continue to be essentially outcome-determinative.[387] But in difficult cases the categories that are drawn in First Amendment cases will become elements to be balanced, rather than determinants of a specific standard of review. These distinctions, which include content-based and content-neutral laws; categories of speech of different value; public forums and nonpublic forums; prior restraints and subsequent punishments; restrictions on speech, coerced speech and subsidization of speech; and the characteristics of the different mediums of communication, will all be incorporated into a comprehensive constitutional calculus. The only categorical distinction that should continue to determine the result of a freedom of expression case will be the per se prohibition on viewpoint-based suppression of speech. In all other cases, the Court will use the First Amendment categories to determine the *extent* to which a law suppresses speech, and based upon that determination it will calibrate how much evidence it will demand from the state to justify the restriction on expression. The higher the value of the sum total of expression that is restricted by a regulation, the more evidence the government must offer to prove that the law is justified.

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383. *See supra* notes 179-97, 225-51 and accompanying text.

384. *See Alameda Books*, 535 U.S. at 444.

385. *Id.* at 448 (Kennedy, J., concurring in the judgment) ("These ordinances are content based and we should call them so.").

386. *Id.* at 449.

387. *See* Thomas v. Chicago Park Dist., 534 U.S. 316, 322-26 (2002) (Court unanimously found law to be content-neutral and constitutional).

In the final analysis, we cannot escape balancing. It will either be performed in a forthright manner, or it will be obscured by the use of formulaic categories.[388] Professor Calvert notes that under current doctrine the content-based/content-neutral distinction creates a "paradox": "A rigid, formulaic First Amendment jurisprudence that ultimately depends on a subjective, slippery, and speculative analysis of legislative impact."[389] Rather than pretending that a law is purely content-based or purely content-neutral, it is more efficient and appropriate to consider how each of the underlying factors identified by Justice Stevens adjusts the state's burden of proof to justify the law. The only categorical distinction that the Court must vigilantly enforce is the prohibition against viewpoint-based laws. So long as the Court faithfully observes the rule that viewpoint-based laws suppressing speech are per se unconstitutional, the balancing approach should prove to be as protective of speech as the categorical approach in determining the constitutionality of laws affecting freedom of expression.

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388. *See* Nagel, *supra* note 44, at 529 (although harshly criticizing Justice Stevens' contextual approach, conceding that the formalistic approach may be no better, and that it at least has the virtue of "transparency"). Professor Nagel states:

> Even accepting the worst characterization of [Justice Stevens'] emerging jurisprudence—that it amounts to the overconfident imposition of highly debatable personal preferences—I myself am not at all sure that would be clearly worse than the alternatives. Much the same can be said and has been said of other, more conventional forms of constitutional interpretations. In my view, the ambitious pursuit of progress through the heavy hand of formalism or through the deceptiveness of doctrinal rigor is also dangerous. Stevens' opinions at least have the advantage of relative transparency.

Id.

389. Calvert, *supra* note 89, at 93.