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Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century

Geoffrey R. Stone*

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At the turn of the twentieth century, we knew almost nothing about the First Amendment. Although there had been important disputes about free speech over the Sedition Act of 1798, the suppression of abolitionist literature in the early nineteenth century and during the Civil War, and although both state and federal courts had occasionally wrestled during the nineteenth century with such diverse free speech issues as obscenity and lotteries, for the most part, there was no settled understanding about the meaning of the First Amendment.[1]

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1. *See* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 15–78 (W.W. Norton 2004) (discussing the Sedition Act of 1798); *see also* MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 105–116 (Duke University Press 2000) (regarding abolitionist literature); DAVID RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS, 1870–1920 (Cambridge University Press 1997) (addressing free speech between 1870 and 1920).

At the dawn of the twenty-first century, however, we have an astonishingly rich, multi-faceted, and often maddeningly complex free speech jurisprudence. In this Essay, I will try to identify the ten judgments that the Supreme Court made during the course of the twentieth century that most fundamentally shaped the overall framework of contemporary First Amendment doctrine.

I. UNDERSTANDING THE TEXT

The first fundamental judgment we made in the twentieth century is that the First Amendment does not mean what it says. "Congress," it says, "shall make no law . . . abridging the freedom of speech, or of the press."[2] Most obviously, we decided that "Congress" does not mean Congress. Rather, it means the "national government," including the executive and judicial branches, despite the express and rather puzzling limitation of the text. Moreover, after the enactment of the Fourteenth Amendment and the advent of the incorporation doctrine, we decided that "Congress" effectively means the "government," which includes not only the national government, but all state and local governments, as well.[3]

We also decided that the First Amendment does not mean what it *appears* to mean. The text says that the government may not abridge the freedom of speech.[4] At first blush, this appears to suggest that the government may not restrict an individual's freedom to say what he wants, where he wants, how he wants, and when he wants. But Justice Oliver Wendell Holmes decisively put this apparent meaning to rest in *Schenck v. United States*[5] with his famous example of a false cry of fire in a crowded theatre.[6] From that moment on, we have acknowledged that although the government may not "abridge" the freedom of speech, we must define what we mean by the "freedom of speech" that the government may not abridge. That freedom, in other words, is not self-defining and, indeed, nothing in the text of the First Amendment helps us to decide what it means.[7]

2. U.S. CONST. amend I, § 2.

3. *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 672 (1925) (applying the First Amendment to the states).

4. U.S. CONST. amend I.

5. Schenck v. United States, 249 U.S. 47 (1919).

6. *Id.* at 52.

7. A related conclusion was the judgment that the First Amendment is not limited to the Blackstone conception of prohibiting only previous restraints. *See Schenck*, 249 U.S. at 51–52.

II. REJECTING ABSOLUTISM, AD HOC BALANCING, AND A UNITARY STANDARD

The second fundamental judgment we made in the twentieth century was to reject three strongly-advocated approaches to interpreting the First Amendment. The first of these approaches, championed by Justice Hugo Black, insisted that the First Amendment is an absolute—that is, "no law" means "no law."[8] To make this approach credible in the light of Justice Holmes's false cry of fire, its advocates had to define rather narrowly "the freedom of speech" that could *never* be abridged. Otherwise, absolute protection would require all sorts of implausible outcomes. Ultimately, we rejected this approach because the broad range of issues posed by the First Amendment proved too varied and too complex to be governed sensibly by a simple absolute protection versus no protection dichotomy.[9]

We also rejected ad hoc balancing as a general approach to First Amendment interpretation.[10] Under this approach, the Court's task would be to weigh the benefits of restricting speech against the benefits of protecting speech in each case in order to decide whether the challenged restriction is reasonable.[11] In theory, this approach seems sensible, but in practice it proved unworkable. It turns out to be incredibly difficult to identify and assess all of the many factors that should go into this judgment on a case-by-case basis. As a result, its application would produce a highly uncertain, unpredictable, and fact-dependent set of outcomes that would

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8. *See* Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874, 879 (1960) (arguing that "[t]he phrase 'Congress shall make no law' is composed of plain words, easily understood" and that the language is "absolute"); *see generally* Konigsberg v. State Bar of Cal., 366 U.S. 36, 61 (1961) (Black, J., dissenting); HUGO BLACK, A CONSTITUTIONAL FAITH 43–63 (Alfred A. Knopf 1968); Hugo Black & Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549 (1969); Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

9. For examples of cases that strained Justice Black's "absolutist" approach, see Cohen v. California, 403 U.S. 15, 27 (1971) (Black, J., dissenting) (disagreeing with the holding that the state cannot constitutionally prohibit the use of the word "fuck" in public); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 516 (1969) (Black, J., dissenting) (disagreeing with the holding that students have a right to free speech); and Adderley v. Florida, 385 U.S. 39, 41 (1966) (Black, J., opinion) (rejecting the First Amendment right to speak on public property).

10. On ad hoc balancing, see ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 93–97 (Yale University Press 1962); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 583–84 (1st ed. 1978); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); Laurent B. Franz, *Is the First Amendment Law? A Reply to Professor Mendelson*, 51 CAL. L. REV. 729 (1963); Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821, 825–26 (1962).

11. *See* Frantz, *supra* note 10, at 729.

leave speakers, police officers, prosecutors, jurors, and judges in a state of constant uncertainty. Thus, although this approach arguably sought to ask the right question, it attempted to do so in a manner that proved fatally unpredictable.

The third approach we rejected in the twentieth century was the notion that a single standard of review should govern all First Amendment cases. Whether that standard is set at a high level of justification, such as clear and present danger, strict scrutiny, necessary to promote a compelling government interest, or at a low level of justification, such as reasonableness or rational basis review, it became readily apparent that a "one-size fits all" standard would not do the trick. Applied in a consistent manner, any single standard would inevitably dictate implausible results, sometimes insufficiently protective of free speech, sometimes insufficiently respectful of competing government interests.[12] The only single approach that could sensibly apply in all cases was ad hoc balancing, but for the reasons already noted, that test was too vague. So, in short, we concluded that there is no unified field theory of the First Amendment—no single test that can apply to all cases.[13]

Now, when I say that these standards would dictate results that would be unacceptably over or under protective of free speech, what I am obviously assuming is that there is some set of results that most reasonable people—including the Supreme Court Justices—would properly regard as clearly "right" or clearly "wrong." And that, of course, assumes that we have some intuitive sense of what the First Amendment sensibly means. What I am suggesting, in other words, is that we built First Amendment doctrine backwards—not from theory to doctrine to results, but from intuited results to doctrine, with only passing attention to theory. This is an important point, for it suggests that First Amendment doctrine as we know it today is largely the product of practical experience rather than philosophical reasoning.

III. LEARNING THE LESSONS OF EXPERIENCE

This, then, brings me to my third twentieth century judgment. While we were in the process of rejecting these three proposed approaches to First Amendment interpretation, we learned several practical lessons about the

12. *See* TRIBE, *supra* note 10, at 583–84.

13. On definitional balancing and the recognition that a series of separate and distinct rules were necessary for different First Amendment issues, see William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107, 148–49 (1982). *See generally* TRIBE, *supra* note 10, at 583–84; John Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Melville B. Nimmer, *The Right to Speak from* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935 (1968); Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915 (1978).

workings of what Professor Thomas Emerson once called "the system of free expression"—lessons that played a critical role in shaping contemporary First Amendment jurisprudence.[14] Three such lessons, or effects, are especially worthy of note.

First, we learned about the so-called "chilling effect."[15] That is, we learned that people are easily deterred from exercising their freedom of speech.[16] This is so because the individual speaker usually gains very little personally from signing a petition, marching in a demonstration, handing out leaflets, or posting on a blog. Put simply, except in the most unusual circumstances, whether any particular individual speaks or not is unlikely to have any appreciable impact on the world. Thus, if the individual knows that he might go to jail for speaking out, he will often forego his right to speak. This makes perfect sense for each individual. But if many individuals make this same decision, then in the words of Professor Alexander Meiklejohn, the net effect will often be to mutilate "the thinking process of the community."[17] Recognition of this "chilling effect," and of the consequent power of government to use intimidation to silence its critics and to dominate and manipulate public debate, was a critical insight in shaping twentieth century free speech doctrine.[18]

Second, we learned in the twentieth century about what we might call the "pretext effect."[19] That is, we learned that government officials will often defend their restrictions of speech on grounds quite different from their real motivations for the suppression, which will often be to silence their critics and to suppress ideas they do not like.[20] The pretext effect is not unique to the realm of free speech, but it is especially potent in this context, because public officials will often be sorely tempted to silence dissent in order to insulate themselves from criticism and preserve their own authority.

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14. *See generally* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970).

15. *See id.* at 158.

16. *See id.*

17. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 24–27 (1948).

18. On "chilling effect," see Bartnicki v. Vopper, 532 U.S. 514, 514 (2001) (Rehnquist. C.J., dissenting); Lamont v. Postmaster Gen., 381 U.S. 301, 306–07 (1965); N.Y. Times v. Sullivan, 376 U.S. 254, 300 (1964); *see also* Paul A. Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 539 (1950).

19. On the pretext effect and improper motivation, see Elena Kagan, *Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996).

20. *See id.*

Of course, the very idea of the pretext effect turns on what we mean by legitimate and illegitimate reasons for restricting speech. One thing we decided in the twentieth century is that the First Amendment forbids government officials from suppressing particular ideas because they do not want citizens to accept those ideas in the political process. This principle, which was first clearly stated by the Supreme Court in 1919 in Justice Holmes's dissenting opinion in *Abrams v. United States*,[21] is central to contemporary First Amendment doctrine and rests at the very core of the pretext effect's strong suspicion of any government regulation of speech that is consistent with such an impermissible motive.[22]

Third, we learned about what we might call the "crisis" effect.[23] That is, we learned that in times of crisis, real or imagined, citizens and government officials tend to panic, to grow desperately intolerant, and to rush headlong to suppress speech they can demonize as dangerous, subversive, disloyal, or unpatriotic.[24] Painful experience with this "crisis effect," especially during World War I and the Cold War, led us to embrace what Professor Vincent Blasi has aptly termed a "pathological perspective" in crafting First Amendment doctrine.[25] That is, we structure First Amendment doctrine to anticipate and to guard against the worst of times.[26]

IV. THE CONTENT-BASED/CONTENT-NEUTRAL DISTINCTION

This, then, brings me to my fourth observation about what we learned in the twentieth century. Having rejected absolutism, ad hoc balancing, and the quest for a unitary standard of review,[27] we divided First Amendment issues into a series of distinct problems, in the hope of addressing each of them separately with a specific standard that would be relatively predictable and easy to administer, would approximate the results of ad hoc balancing, and would guard against the chilling, pretext, and crisis effects.

The critical step in this development was the Court's recognition of the content-based/content-neutral distinction. Until roughly 1970, the Court did not clearly see that laws regulating the content of expression posed a different First Amendment issue than laws regulating expression without regard to content. The Court first articulated this concept in an otherwise

21. Abrams v. United States, 250 U.S. 616 (1919).

22. *See* Kagan, *supra* note 19, at 414.

23. On the crisis effect and the pathological perspective, see STONE, *supra* note 1, at 542–50. *See generally* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

24. *See* Blasi, *supra* note 23, at 450–51.

25. *See id.*

26. *Id.*

27. *See supra* Parts I–III.

uneventful 1970 decision, *Schacht v. United States*.[28] In *Schacht*, the Court held unconstitutional a law prohibiting soldiers from wearing their uniforms in theatrical productions if those productions held the military in contempt.[29]

Although conceding that the government could constitutionally prohibit soldiers from wearing their uniforms in all theatrical productions—a regulation that would be content-neutral—the Court nonetheless held it unconstitutional for the government to prohibit soldiers from wearing their uniforms only in productions that mocked the military.[30] In effect, the Court held that a content-neutral law that banned more speech was less problematic under the First Amendment than a content-based law that banned less speech. As the Court put the point, the government cannot constitutionally punish soldiers for wearing their uniforms to protest "the role of . . . our country in Vietnam" while at the same time allowing them to wear their uniforms to "praise the war in Vietnam." Such a distinction, the Court declared, "cannot survive in a country which has the First Amendment."[31]

Now, this might seem obvious to us today, but it was not at all obvious at the time. It was, indeed, a pivotal insight, and the Court followed it up two years later in *Police Department of Chicago v. Mosley*,[32] in which the Court invalidated a Chicago ordinance prohibiting peaceful picketers, except peaceful labor picketers, from picketing near a school while the school was in session.[33] The Court assumed that a content-neutral ban on all picketing in such circumstances would be constitutional, but as in *Schacht* it invalidated the seemingly less speech-restrictive content-based ban, explaining that because "[t]here is an 'equality of status in the field of ideas,'" the "government must afford all points of view an equal opportunity to be heard."[34] The Chicago ordinance, the Court declared, "'slip[s] from . . . neutrality . . . into a concern about content.' This is never permitted."[35] The Court added that, at the very least, such content-based regulations "must be carefully scrutinized."[36]

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28. Schacht v. United States, 398 U.S. 58, 65 (1970).
29. *Id.* at 63.
30. *Id.*
31. *Id.* at 58.
32. Police Dep't of Chi. v. Mosley, 408 U.S. 92 (1972).
33. *Id.* at 102.
34. *Id.* at 96 (citing ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1948)).
35. *Id.* at 99 (internal citation omitted).
36. *Id.*

With *Schacht* and *Mosley*, we entered a new era in First Amendment jurisprudence. Ever since those decisions, the first question we must ask about any First Amendment case is whether the challenged regulation is content-based or content-neutral, for the answer to that question dictates the terms of the constitutional inquiry. Some scholars, such as Professors Martin Redish and Barry McDonald, have criticized this distinction as simplistic, wooden, and unduly rigid.[37] Other commentators, including myself, have defended it as a sensible organizing principle that enables us to sort First Amendment problems in a way that responds to a host of concerns, including the chilling, pretext and crisis effects.[38]

In brief, the rationale for analyzing content-based restrictions differently from content-neutral restrictions, and for being particularly suspicious of them, is that content-based restrictions are more likely to skew public debate for or against particular ideas and are more likely to be tainted by a constitutionally impermissible motivation. The Court's recognition of this distinction was the fourth critical step in the evolution of twentieth century free speech jurisprudence.

V. A STRONG PRESUMPTION AGAINST CONTENT-BASED RESTRICTIONS

The fifth important twentieth century development relates to the content-based side of this distinction. Recognizing that content-based and content-neutral regulations pose different First Amendment problems does not tell us how to evaluate the constitutionality of specific laws that fall on one side of the line or the other.

In *Mosley*, Justice Thurgood Marshall, who authored the Court's opinion, offered several strong statements about the constitutionality of content-based restrictions, noting, for example, that content regulation "is never permitted," regulations of speech "may not be based on content," and content-based restrictions must be "carefully scrutinized."[39] In declaring

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37. *See* Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347 (2006); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981); *see also* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297 (1997); Wilson R. Huhn, *Assessing the Constitutionality of Laws that are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801 (2004).

38. *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987) [hereinafter Stone, *Content-Neutral*]; Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983) [hereinafter Stone, *Content Regulation*]; Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978); *see also* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Kagan, *supra* note 19, at 446–63; Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203 (1982).

39. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 99 (1972).

content-based restrictions at least presumptively unconstitutional, *Schacht* and *Mosley* gave structure to an insight that had stumbled around in First Amendment discourse from its earliest days. Beginning with the writings of Professor Zechariah Chafee[40] and the early dissenting and concurring opinions of Justices Holmes and Brandeis in cases like *Abrams v. United States*[41] and *Whitney v. California*,[42] and running through the later dissenting opinions of Justices Black and Douglas in cases like *Dennis v. United States*,[43] a minority view forcefully argued that at least some types of content-based restrictions should be declared unconstitutional unless the government could prove that the speech created a clear and present danger of grave harm.

But it was not until *Brandenburg v. Ohio*[44] in 1969 and the *Pentagon Papers* decision[45] in 1971 that the Supreme Court clearly embraced this view. *Schacht* and *Mosley*, which were decided within a year of those decisions, were tied directly to this pivotal shift in First Amendment doctrine.

It is noteworthy that, in declaring content-based restrictions presumptively unconstitutional, *Schacht* and *Mosley* also drew on the Court's Equal Protection Clause jurisprudence, which at the time was more well-developed than its First Amendment jurisprudence.[46] The Court invoked the Equal Protection Clause because *Schacht* and *Mosley* were different kinds of First Amendment cases than the Court was used to. In the typical First Amendment case, the government prohibits certain speech, such as criticism of the war or the violent overthrow of government, and the defendant argues that the law violates his right to free speech.

Schacht and *Mosley*, however, were, at bottom, equality cases. In each case, the Court conceded that a content-neutral law—prohibiting all soldiers from wearing their uniforms in theatrical productions or prohibiting all protestors from picketing near schools—would be constitutional.[47] The

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40. *See* ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES (Harvard University Press 1967) (1941).

41. Abrams v. United States, 250 U.S. 616, 624 (1919).

42. Whitney v. California, 274 U.S. 357 (1927).

43. Dennis v. United States, 341 U.S. 494 (1951).

44. Brandenburg v. Ohio, 395 U.S. 444 (1969).

45. N.Y. Times Co. v. United States (Pentagon Papers), 403 U.S. 713 (1971).

46. *See* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975); Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 274–80 (1974) [hereinafter Stone, *Fora Americana*]; Geoffrey R. Stone, *Kenneth Karst's Equality as a Central Principle in the First Amendment*, 75 U. CHI. L. REV. 37 (2008).

47. *See supra* notes 28–32 and accompanying text.

defendants' constitutional claim therefore, was not that they had a First Amendment right to wear a uniform in theatrical productions or to picket near schools, but rather that they had a right to be treated equally with other speakers the government allowed to wear a uniform or picket near schools.[48] In effect, then, the constitutional violation in these cases was one of under inclusion. That is, the government violated the First Amendment not because it limited Schacht's and Mosley's right to speak, but because it discriminated against them based on the content of their message.

This is significant because it was the inequality issue that enabled the Court to draw the critical insight about content-based restrictions, which in turn shaped its approach to such restrictions more generally. Building upon its Equal Protection Clause jurisprudence, the Court invoked the language of "strict scrutiny," which, as Professor Gerald Gunther was soon to point out, was "'strict' in theory, and fatal in fact."[49] Indeed, it was for that reason that Justice Marshall could easily conflate the language of "strict scrutiny" with "impermissible," for in practical effect, those two phrases had come to mean essentially the same thing by the early 1970s.[50] Put differently, the Court seemed to be saying in *Mosley* that content-based regulation in the First Amendment context was analogous to discrimination against African-Americans in the Equal Protection context.

Except in the most extraordinary of circumstances, such laws are, in *Mosley*'s words, "impermissible." As Professor Kenneth Karst noted at the time, the Court in these cases recognized equality as a "[c]entral [p]rinciple in the First Amendment," for the first time.[51] In important respects, this doctrinal development stabilized a central part of First Amendment doctrine. With two significant exceptions, which I will address shortly—low value speech and what I will loosely call "special circumstances"—the Court has adhered to this doctrine, with the result that it has not upheld a single content-based restriction of speech, not involving one of these two exceptions, in half a century.

The key point I want to make about this development is that it was the combination of Justices Holmes and Brandeis's early clear and present danger arguments with the strict scrutiny element of the Court's Equal Protection jurisprudence that finally enabled the Court to deal effectively with the chilling, pretext and crisis effects. By recognizing that these dangers are most likely to arise when the government targets speech of a specific content, and by making it almost impossible for the government to

48. *Id.*

49. Gerald Gunter, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

50. Police Dep't of Chi. v. Mosley, 408 U.S. 92, 99 (1972).

51. Karst, *supra* note 46, at 20.

justify such laws, the Court went a long way toward solving those critical First Amendment problems.

VI. LOW VALUE SPEECH

This brings me to the sixth important twentieth century development—the concept of low value speech. One obvious problem with a doctrine that presumptively holds all content-based restrictions unconstitutional is that there may be some types of content that do not merit such protection. Some speech might not sufficiently further the values and purposes of the First Amendment to warrant such extraordinary immunity from regulation. In part, this was what Justice Holmes was getting at with his false cry of fire.[52]

The Court first formally recognized this concept in its 1942 decision in *Chaplinsky v. New Hampshire*,[53] which declared that "[t]here are certain well-defined and narrowly limited classes of speech" that "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."[54] Over the years, the Court has characterized several categories of speech as "low value," including express incitement of unlawful conduct, threats, fighting words, false statements of fact, obscenity, and commercial advertising.[55] Following *Chaplinsky*, the Court has held that because these categories of expression do not further core First Amendment values, they can be restricted without meeting the usual standards of First Amendment review.[56]

Whether this doctrine is justified has been a matter of some controversy, both as to its existence and as to the specific categories of speech that have—and have not—been deemed of "low" value. Professor Cass Sunstein has suggested that the Court considers four factors in determining whether speech qualifies as "low value," specifically whether: (1) the speech is "far afield from the central concerns of the first amendment" (which he defines as "effective popular control of public affairs"); (2) there are important

52. *See supra* text accompanying note 6.

53. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

54. *Id.* at 571–72.

55. *See* Virginia v. Black, 538 U.S. 343 (2003) (threats); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (commercial advertising); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (false statements of fact); Watts v. United States, 394 U.S. 705 (1969) (threats); Roth v. United States, 354 U.S. 476 (1957) (obscenity); *Chaplinsky*, 315 U.S. at 571–72 (fighting words); Gitlow v. New York, 268 U.S. 652 (1925) (express incitement).

56. *See supra* note 55.

"noncognitive aspects" of the speech; (3) "the speaker is seeking to communicate a message"; and (4) the speech is in an area in which the "government is unlikely to be acting for constitutionally impermissible reasons."[57] I have offered a slightly different four-factor explanation, noting that (1) low value speech does not "primarily advance political discourse," (2) is not defined in terms of "disfavored ideas or political viewpoints," (3) usually has "a strong noncognitive" aspect, and (4) has "long been regulated without undue harm to the overall system of free expression."[58]

Although the precise rationale of these categories remains controversial, and although some scholars, such as Professor Thomas Emerson, have attacked the very existence of the doctrine on the ground that it injects the Court "into value judgments . . . foreclosed to it by the basic theory of the First Amendment,"[59] my own view is that the low value doctrine is a sensible and pragmatic compromise that serves a salutary function by operating as a useful safety valve, enabling the Court to deal reasonably with somewhat harmful, but relatively insignificant, speech—without requiring the Court to dilute the protection it properly accords speech at the very heart of the guarantee.

Moreover, two significant developments in the Court's application of the low value doctrine have cabined its impact. First, as noted in my fourth factor, the Court has been quite reluctant to recognize new "low value" categories that have not been well established over time. Although this can be criticized as unduly rigid, it constrains what might otherwise be the temptation to manipulate the low value doctrine in ways that would more seriously implicate Emerson's concerns. That is, confining the concept of "low value" speech to those categories that have been recognized as "low value" time out of mind lessens the risk that judges will conflate politically unpopular ideas with constitutionally low value speech.[60] (The debate over this question, by the way, has been especially acute in recent decades over the issues of violent expression, hate speech, pornography, and non-newsworthy invasions of privacy.)

The second constructive limitation on the scope of the low value doctrine concerns the degree of protection accorded such speech. Originally, the Court treated "low value" speech as completely unprotected by the First Amendment. Restrictions of such speech therefore received essentially no First Amendment scrutiny.[61] Since *New York Times v.*

57. Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 603–04 (1986).

58. Geoffrey R. Stone, *Sex, Violence, and the First Amendment*, 74 U. CHI. L. REV. 1857, 1863–64 (2007).

59. EMERSON, *supra* note 14, at 326.

60. *See supra* note 55.

61. *See* Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1

Sullivan[62] in 1964, however, the Court has increasingly abandoned the idea that regulations of low value speech are immune from First Amendment review. Beginning with *Sullivan*, the Court has recognized that restrictions of even low value speech can pose significant dangers to free expression.

In some instances, illustrated by the false statements of fact at issue in *Sullivan*,[63] low value speech may itself have no First Amendment value, but regulations of such speech may have spillover or chilling effects on speech with important First Amendment value. The threat of liability for false statements of fact, for example, may chill speakers from making even true statements. As the Court recognized in *Sullivan*, regulations of low value speech must take such effects into account in order to pass constitutional muster.[64] In other instances, even low value speech may have some First Amendment value. This is illustrated by the Court's 1974 decision in *Virginia Pharmacy*,[65] which held that although commercial advertising may be of only low First Amendment value, it nonetheless serves a useful informational purpose and must therefore be accorded significant if not full First Amendment protection.

Using these two considerations, the Court over the past half-century has engaged in what Professor Melville Nimmer has usefully described as a process of categorical balancing with respect to these low value categories, attempting to fine-tune the degree of constitutional protection accorded each category based upon its relative First Amendment value and the risk of chilling valuable expression.[66]

VII. CONTENT-BASED RESTRICTIONS IN SPECIAL CIRCUMSTANCES

The seventh important twentieth century development also involves content-based regulation, but relates to what I earlier described as the "special circumstances" exception to the strong constitutional presumption against content-based regulation. The key problem here is that, even apart from low value speech, an almost absolute presumption against content regulation often turns out to be too speech-protective. There are some circumstances, in other words, in which such a presumption would demand

(1960).

62. N.Y. Times v. Sullivan, 376 U.S. 254 (1964).

63. *See id.* at 256–59.

64. *Id.* at 278.

65. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

66. Nimmer, *supra* note 13, at 942–43.

too great a sacrifice of competing government interests without sufficiently serving important First Amendment values.

Alas, there is a long list of such "special circumstances," ranging from regulations of speech by government employees, to regulations of speech on public property, to regulations of speech by students, soldiers, and prisoners, to regulations of the government's own speech, to regulations that compel individuals to disclose information to the government.[67] In theory, of course, it would be possible to apply the strict presumption against content-based regulation in all of these situations, but this would sometimes produce unwise and even foolish results. Consider a high school mathematics teacher who asserts a First Amendment right to preach Marxist doctrine instead of the Pythagorean Theorem in her mathematics classroom. Or an IRS employee who claims a First Amendment right to post confidential tax returns on the Internet. Or a taxpayer who claims that the government cannot constitutionally create a library or museum dedicated only to science or American history. Or a witness who claims that a congressional committee cannot constitutionally investigate alleged corruption in Iraq without also investigating the use of steroids by athletes.

All of these examples regulate speech on the basis of content, none involves low value speech, and none poses the sort of clear and imminent danger of grave harm that might otherwise be sufficient to justify a content-based restriction of speech. Must we, then, hold all of these regulations unconstitutional? Examples like these caused the Court to rethink the scope of the strong presumption against content-based restrictions. More specifically, they prompted the Court to rethink two facets of that doctrine.

First, they caused the Court to recognize that not all content-based restrictions are equally threatening to core First Amendment values. On closer inspection, the Court came to realize that regulations of viewpoint are much more dangerous to fundamental First Amendment values than other regulations of content, such as regulations of the subject matter of expression, the use of profanity, or the use of certain images. Indeed, for many of the same reasons that content-based restrictions were seen as different from and more threatening than content-neutral restrictions, so too were viewpoint-based restrictions seen as different from and more threatening than other forms of content-based restrictions. That is, they are more likely to distort public debate in a politically-biased manner, and they are more likely to be motivated by hostility to particular points of view. To

67. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173 (1991) (government speech); Perry Educators' Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (public property); Jones v. N.C. Prisoners' Union, 433 U.S. 119 (1977) (prisoners); Parker v. Levy, 417 U.S. 733 (1974) (soldiers); Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969) (students); Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (public employees); Gibson v. Fla. Legis. Investigating Comm., 372 U.S. 539 (1963) (compelled disclosure).

return to the Equal Protection analogy on which the content-based/content-neutral distinction was initially founded, one might say that it is really viewpoint-based restrictions that are analogous to laws that discriminate against African-Americans, whereas other types of content-based restrictions more sensibly warrant something akin to an intermediate level of concern.[68]

Although this insight has real force, and although viewpoint-based restrictions are indeed the most problematic form of content-based regulation, the question remains, how much should we make of this insight? One possibility would be to revisit the understanding that flowed from *Schacht* and *Mosley*—that content regulation is presumptively unconstitutional—and to limit that presumption only to viewpoint-based restrictions.[69] That might seem sensible in theory, but as the Court quickly came to recognize the line between viewpoint and other forms of content regulation is often distressingly elusive. In cases like *R.A.V.*,[70] *Rosenberger*,[71] and *Lamb's Chapel*,[72] for example, the Court discovered that in many instances this distinction is far from clear. Does a university policy refusing to subsidize student religious publications regulate content or viewpoint? Does a law prohibiting fighting words only if they are based on race regulate content or viewpoint? Does a law prohibiting sexually explicit images on the Internet regulate content or viewpoint? There is no simple answer to these questions.

Thus, to attach great significance to the line between content and viewpoint could generate precisely the sort of uncertainty, ambiguity, and confusion that the strict presumption against content regulation was designed to prevent. But to ignore the distinction and to treat all viewpoint and content restrictions alike would require either a dilution of the strict presumption against viewpoint-based restrictions or a large sacrifice of competing and legitimate government interests, as illustrated by the mathematics teacher, public library and congressional witness hypotheticals.

To resolve this dilemma, the Court has essentially split the difference in a rather creative way. In dealing with regulations of speech in general

68. For illustrative decisions recognizing this distinction, see Morse v. Frederick, 127 S. Ct. 2618 (2007); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1985); *Perry Educators' Ass'n*, 460 U.S. 37; Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico, 457 U.S. 853 (1982); and FCC v. Pacifica Found., 438 U.S. 726 (1978).

69. *See supra* note 28–32 and accompanying text.

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

71. *Rosenberger*, 515 U.S. 819.

72. Lamb's Chapel v. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

public discourse, the Court has adhered to the strong presumption against all content regulation. But in dealing with what I have termed "special circumstances," the Court has recognized a distinction between viewpoint and content.[73] Thus, a public library can constitutionally choose to collect books only about American history, but cannot constitutionally choose to exclude books because they criticize the Vietnam War. A government grants program can constitutionally fund research only about the environment, but cannot constitutionally refuse to fund research because it substantiates global warming. And a public university can constitutionally allow students to post notices on a university bulletin board only if they relate to the curriculum, but cannot constitutionally exclude notices because they criticize the university administration.

Now, I do not want to suggest that this area of First Amendment law is in any way simple, straightforward, or transparent. To the contrary, it is filled with deep ambiguities and complexities. The general proposition, though, is clear. It is that in these special circumstances, when the government is not regulating general public discourse, it can constitutionally regulate content as long as it does so reasonably and in a viewpoint-neutral manner.

For the record, let me identify several facets of continuing complexity in the scope and application of this doctrine. First, as I have already noted, the line between content and viewpoint is often unclear. Although most cases are easy to classify, the marginal cases are genuinely hard.[74] Second, the boundaries of what I have called "special circumstances" are far from clear, the doctrine is in a state of flux, and some of the subcategories that make up the core of the doctrine, such as the distinction between nonpublic forums and limited public forums, are also unclear. Third, and not surprisingly, what constitutes "reasonable" regulation is often a source of confusion. *Morse v. Frederick*, for example, the recent "Bong Hits for Jesus" decision, illustrates the difficulty of defining "reasonable."[75] Fourth, although the prohibition of viewpoint discrimination remains extremely strong even in the context of these "special circumstances," it is not absolute. Most notably, as the Court held in *Rust v. Sullivan*,[76] when the government itself speaks, it can constitutionally insist that its agents convey a point of view the government is legally entitled to communicate. So, for example, if the government wants to discourage abortion or encourage energy conservation,

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73. *See, e.g.*, *Morse*, 127 S. Ct. 2618; *Nat'l Endowment for the Arts*, 524 U.S. 569; *Bethel Sch. Dist. No. 403*, 478 U.S. 675; *Perry Educators' Ass'n*, 460 U.S. 37; Greer v. Spock, 424 U.S. 828 (1976); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

74. The issue of religious expression has been especially difficult in this regard. *See Rosenberger*, 515 U.S. 819; *Lamb's Chapel*, 508 U.S. 384.

75. *Morse*, 127 S. Ct. 2618.

76. Rust v. Sullivan, 500 U.S. 173, 192–200 (1991).

it can constitutionally retain private individuals and agencies to communicate this message on its behalf.

Even acknowledging these myriad and often vexing complexities, the Court's doctrine in this respect is generally sound. The world is a complicated place, and the realist must recognize that constitutional doctrine can never achieve both perfect results and perfect clarity. The challenge is to reach the right result when the right result is most important, while at the same time having reasonably clear and predictable rules that otherwise reach the "right" result most of the time.

In the realm of content-based regulation, the Court has achieved these conflicting goals reasonably well. In the situation that matters most—the freedom of individuals to express their ideas, beliefs, and convictions in public debate without fear of government censorship—existing doctrine has come a long way toward making that aspiration a reality. At the same time, the Court has not pushed the principle of free speech so far that it has either alienated the American people from their own Constitution by demanding absurd results or paralyzed the government's capacity to fulfill its most basic responsibilities. This is no small achievement.

VIII. CONTENT-NEUTRAL RESTRICTIONS

The eighth major development of twentieth century free speech jurisprudence concerns the other side of the content-based/content-neutral divide. Why do we care about laws that do not regulate the content of speech? Consider three laws. The first prohibits anyone to criticize an ongoing war. The second prohibits anyone to criticize the war within 150 feet of a military recruiting center. The third prohibits any billboard in a residential area.

The first law is a classic viewpoint-based restriction that forbids anyone to advocate a specific point of view. Such a law profoundly distorts public debate and was very likely enacted at least in part because of the constitutionally impermissible desire to silence dissent and to manipulate political discourse, although the government would no doubt defend it on other grounds. Such a law directly implicates the most fundamental reasons for protecting free speech and under any credible theory of the First Amendment must be at least presumptively unconstitutional.[77]

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77. *See generally* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 275–76 (1964) (discussing the invalidity of the Alien and Sedition Acts of 1798).

The second law is what we might call a "modest" viewpoint-based restriction. One might sensibly argue that, as compared with the first law, the second is much less troubling. It leaves open broad opportunities for speakers to convey an anti-war message and is therefore much less likely seriously to distort public debate. Nonetheless, the Court clearly decided in the twentieth century to treat this viewpoint-based law like the first one.[78] That is, the Court is unwilling to engage in fine-tuned inquiries into the extent to which particular viewpoint-based laws actually distort public discourse. In part this is because it is very difficult to assess the actual distorting effects of particular viewpoint-based restrictions, especially when there may be many of them, and in part it is because even modest viewpoint-based laws pose a high risk of constitutionally impermissible motivation. Thus, although one could imagine a regime in which the Court would attempt to assess the distorting effect and the risk of impermissible motivation of every viewpoint-based restriction on a case-by-case basis, the Court has wisely opted for a clear, straightforward standard that is difficult to evade and renders all such laws presumptively invalid.[79]

The third law, prohibiting all billboards in residential areas, does not regulate the content of speech at all. One might therefore argue that it has nothing to do with the First Amendment. One might insist, in other words, that the First Amendment is about censorship and that censorship is about regulating content. Although this is a theoretically plausible approach, the Court has rightly rejected it.[80] But that poses further puzzles, for if content-neutral laws can violate the First Amendment, we need to know how and why they threaten First Amendment values.

To begin, it is important to note that content-neutral laws come in many shapes and sizes. They include, for example, laws prohibiting anyone to publish a newspaper, to hand out leaflets in a public park, to scatter leaflets from a helicopter, to spend money to elect political candidates, to discriminate on the basis of sexual orientation, to appear naked in public, or to knowingly destroy a driver's license.[81] Some of these laws have a severe impact on the opportunities for free expression, whereas others have only a trivial impact. Clearly, a content-neutral law that severely impacts the

78. *See, e.g.*, *Rosenberger*, 515 U.S. 819; Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico, 457 U.S. 853 (1982); Schacht v. United States, 398 U.S. 58 (1970).

79. *See* Stone, *Content Regulation*, *supra* note 38.

80. *See, e.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 520–21 (1981) (holding that a billboard ordinance was invalid under the First and Fourteenth Amendment because it "reache[d] too far into the realm of protected speech" and stating "[t]here can be no question that a prohibition on the reaction of billboards infringes freedom of speech").

81. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); Arcara v. Cloud Books, 478 U.S. 697 (1986); Wayte v. United States, 470 U.S. 598 (1985); Roberts v. U.S. Jaycees, 468 U.S. 609 (1984); Branzburg v. Hayes, 408 U.S. 665 (1972); United States v. O'Brien, 391 U.S. 367 (1968).

opportunities for free expression should be more likely to be unconstitutional than a content-neutral law that has only a minor impact, and not surprisingly that turns out to be a central concern in assessing the constitutionality of such laws. A robust system of free expression assumes that individuals have ample opportunities to express their views, and content-neutral laws that significantly limit those opportunities should be more closely scrutinized for that reason.

But there are also other reasons why we might be concerned with content-neutral laws, for not only do they limit the opportunities for free speech, but they sometimes do so in a way that has content-differential effects. For example, a law restricting leafleting in public parks will have more of an effect on some types of speakers and on some types of messages than on others. Even though such laws may be content-neutral on their face, they may distort public discourse in a non-neutral manner. Indeed, in some instances the government may enact a content-neutral law in order to achieve a content-differential effect. Consider, for example, laws that have recently been enacted to limit protests near funerals. Although these laws are usually neutral on their face, they were clearly driven in large part by a desire to suppress a particular group of speakers who have engaged in highly offensive protests at the funerals of soldiers.

So, there are several reasons why even content-neutral laws may trouble us. In dealing with such laws, the Court has generally adopted a form of ad hoc balancing, in which it considers many possible factors, including: (1) the restrictive impact of the law; (2) the ability of speakers to shift to other means of expression; (3) the substantiality of the state's interest; (4) the ability of the state to achieve its interest in a less speech-restrictive manner; (5) whether the speech involves the use of private property; (6) whether the speech involves the use of government property; (7) whether the means of expression has traditionally been allowed; (8) whether the regulation has a disparate impact on certain points of view; (9) whether there is a serious risk of impermissible motivation; and (10) whether the law is a direct or incidental restriction of speech.[82] The eighth major development, then, is that content-neutral restrictions of speech are presumptively analyzed with a form of ad hoc balancing.

A good example of ad hoc balancing in this context is *Buckley v. Valeo*,[83] in which the Court employed such balancing in the realm of campaign finance regulation to uphold contribution limits as relatively

82. *See infra* notes 83–85 and accompanying text.

83. Buckley v. Valeo, 424 U.S. 1, 23–29 (1976).

modest content-neutral restrictions of free expression but to invalidate expenditure limitations as much more restrictive limitations of free speech. Additional examples would include *City of Ladue v. Gilleo*,[84] which invalidated an ordinance prohibiting homeowners from displaying political signs on their property in order to minimize "visual clutter," and *Martin v. City of Struthers*,[85] which invalidated a law prohibiting individuals to "ring the door bell" of any homeowner for the purpose of distributing handbills. In both decisions, the Court indicated that some measure of regulation would be permissible (for example, limiting the size of the signs or the hours of the handbill distribution), but that a flat ban on these activities violated the First Amendment.[86]

Now, if the Court were really to take all the factors I listed above into account in every case involving a content-neutral restriction, the law in this area would be a complete muddle. That is the nature of ad hoc balancing. To avoid this state of affairs, the Court, as in the content-based context, has therefore attempted to carve out a few specific and recurring categories of content-neutral problems for which it has articulated more clearly-defined rules of decision. I will offer two significant examples.[87]

IX. PUBLIC FORUM DOCTRINE

The first of these examples, which represents the ninth major development in twentieth century free speech doctrine, involves the public forum problem. The central question here is whether an individual has a First Amendment right to speak on government property over the objections of the government. To begin with, suppose Mary, who lives on the forty-fourth floor of an apartment building, puts a sign on Joe's front lawn, saying "Mary Supports Obama," claiming that her speech is protected by the First Amendment. Joe objects to this invasion of his property. Joe will prevail, for two reasons: First, Joe's private property rights trump Mary's desire to commandeer his property; and second, Joe is not the government, so there is no relevant state action to bring Mary's First Amendment rights into play.

Now suppose Mary wants to put her sign not on Joe's front lawn, but on the lawn in front of city hall. The government, like Joe, objects. Here, of course, there is state action, so the First Amendment comes into play. Moreover, Mary maintains that the First Amendment should be understood

84. City of Ladue v. Gilleo, 512 U.S. 43 (1994).

85. Martin v. City of Struthers, 319 U.S. 141 (1943).

86. *See Gilleo*, 512 U.S. at 58–59; *Martin*, 319 U.S. at 145–49.

87. Despite the effort to carve out some clear rules, there remains a large residual area in the realm of content-neutral regulations in which the Court employs ad hoc balancing. *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514 (2001); *Gilleo*, 512 U.S. 43; *Buckley*, 424 U.S. 1; NAACP v. Button, 371 U.S. 415 (1963); Talley v. California, 362 U.S. 60 (1960); *Martin*, 319 U.S. 141.

as guaranteeing her a reasonable opportunity for effective free expression, and putting her sign on the lawn in front of city hall seems reasonable to her. The government responds that it, no less than a private owner of property, has the authority to control the use of its property, and that as long as it acts in a content-neutral manner, and does not discriminate among would-be speakers, it should be free to prohibit Mary's sign.

When this issue first arose in the nineteenth century, Justice Oliver Wendell Holmes, then a justice on the Supreme Judicial Court of Massachusetts, took the view that the government has the same authority as a private individual to exclude those who want to use its property for speech purposes.[88] The Supreme Court, however, has embraced a more nuanced approach. In dealing with this question, the Court has divided public property into essentially two categories. As the Court noted in its 1939 decision in *Hague v. Committee for Industrial Organization*,[89] some public property, most notably parks, streets, and sidewalks, have been dedicated "time out of mind" for the purposes of "assembly, communicating thoughts between citizens, and discussing public questions."[90] The Court reasoned that, wherever the title to such property might rest, the traditional dedication of such property to speech purposes created what Professor Harry Kalven termed a sort of "First-Amendment easement."[91] Following this line of reasoning, the Court over time developed the principle that in such traditional "public forums" the government may reasonably regulate expressive activities "in the interest of all," but may not "in the guise of regulation" restrict those activities unreasonably.[92]

Under this approach, the Court has generally protected the right of individuals to demonstrate, leaflet, parade, speak, and congregate for expressive purposes in public parks, streets, and sidewalks, subject to reasonable regulation.[93] Thus, a content-neutral prohibition of leafleting on the lawn in front of city hall would be unconstitutional, but a content-neutral

88. *See* Commonwealth v. Davis, 39 N.E. 113 (1895), *aff'd sub nom.* Davis v. Massachusetts, 167 U.S. 43 (1897).

89. Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939).

90. *Id.* at 515.

91. *See* Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1 (1965).

92. *Hague*, 307 U.S. at 516.

93. *See id.*; *see also* Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 315 (1968) (citing opinions holding that "streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely").

law restricting the use of loudspeakers in a public park near a hospital would be upheld as reasonable. For the most part, this approach has worked reasonably well for these traditional public forums, though serious questions have recently arisen about the way in which public authorities have sometimes limited public demonstrations to so-called "Free Speech Zones."[94]

But even if this approach generally works well for traditional public forums—that is, streets, parks, and sidewalks—it still leaves untouched the vast majority of public property. What about a speaker's desire to hand out leaflets in a welfare office, to post signs on the outside of a public building or on the inside of a public bus, to use the government's loudspeakers or printing presses, or to enter a prison, public school, military base, or public hospital to speak with inmates, teachers, soldiers, patients, and staff?

The justices have put forth three different approaches on this question. One approach, suggested by Justice Black in *Adderley v. Florida* in 1966, insisted that the government, "no less than a private owner of property," has the authority to limit the use of its property to the purposes to which it has been dedicated.[95] In other words, as long as the government acts neutrally, it has absolute authority to exclude expression from non-public forum public property.

The second approach, advanced most forcefully by Justices William Brennan and Thurgood Marshall in the *Grayned* case in 1972, insisted that the "crucial question" in every case should be "whether the manner of expression is basically incompatible with the normal activity of a particular

94. For illustrative decisions, see Hill v. Colorado, 530 U.S. 703 (2000) (affirming the constitutionality of a narrowly tailored and content-neutral statute prohibiting the attempting to pass handbills to a person within 100 feet of the entrances to a health care facility without their consent); Schenck v. Pro-Choice Network of W.N.Y., 519 U.S. 357 (1997) (finding "fixed buffer zone" limitations prohibiting demonstrations within fifteen feet of entrances and driveways to be constitutional but holding that "floating buffer zones" within fifteen feet of persons to be unconstitutional); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994) (upholding noise restrictions and buffer zone around entrances and driveway to health clinic but finding the rest of the injunction unconstitutional because it was too broad); Frisby v. Schultz, 487 U.S. 474 (1988) (finding an anti-picketing ordinance narrowly tailored to protect the unwilling listener in the privacy of their house to be constitutional); United States v. Grace, 461 U.S. 171 (1983) (holding that a statute banning the display of a flag, banner, or device on public sidewalks in front of the Supreme Court, a public forum, unconstitutional because it failed to sufficiently serve the public interest); Grayned v. City of Rockford, 408 U.S. 104 (1972) (upholding an anti-noise ordinance near a school because it held maintaining an undisrupted school session to be a sufficient and compelling interest but an anti-picketing ordinance near the school was unconstitutional because it failed to cause the same disruption); Schneider v. New Jersey, 308 U.S. 147 (1939) (finding the purpose of a city ordinance—keep the streets clean—insufficient to prohibit the distribution of handbills). On free speech zones, see Nick Suplina, Note, *Crowd Control: The Troubling Mix of First Amendment Law, Political Demonstrations, and Terrorism*, 73 GEO. WASH. L. REV. 395 (2005); Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581 (2006).

95. Adderley v. Florida, 385 U.S. 39, 47 (1966).

place at a particular time."[96] In effect, this approach invites a form of open-ended balancing to determine whether the challenged content-neutral restriction is constitutional.[97]

The third approach, which has carried the day, holds that the government can constitutionally prohibit expressive activity in non-public forum public property as long as the restriction is content-neutral and reasonable.[98] Although "reasonable" might be understood to imply balancing, the Court has consistently applied this standard in such a way that "reasonable" means "not irrational," and the Court has never invalidated any content-neutral restriction under this standard.[99]

The result, then, is that there is effectively no First Amendment right to use non-public forum public property for speech purposes as long as the government acts in a content-neutral manner. Whether this is good or bad is a matter of some debate.[100] The argument against this position, reflected in the Brennan–Marshall approach, is that the First Amendment should be construed to require the government to bend over backwards to accommodate free speech, and that giving the administrators of government property broad discretion to exclude expressive activity will inevitably result in a weak and ineffective marketplace of ideas.[101] The prevailing approach maintains that we already have a robust marketplace of ideas, that individuals do not need to use non-public forum public property to communicate their views effectively, and that a more open-ended approach would swamp the courts with an endless array of petty constitutional disputes about where and when individuals can commandeer public property over the objections of government administrators.[102] For what it is worth,

96. Grayned v. Rockford, 408 U.S. 104, 116 (1972).

97. *See* Stone, *Fora Americana*, *supra* note 46, at 251–52.

98. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

99. *See, e.g.*, Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789 (1984) (public utility poles); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (state fair); U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981) (letter boxes); Greer v. Spock, 424 U.S. 828 (1976) (military base); *but see* Int'l Soc'y for Krishna Consciousness, Inc., v. Lee, 505 U.S. 672 (1992) (invalidating ban on distribution of literature in airport terminals because an airport terminal is a "public forum").

100. Matthew D. McGill, *Unleashing the Limited Public Forum: A Modest Revision to a Dysfunctional Doctrine*, 52 STAN. L. REV. 929 (2000) (arguing that the limited public forum must have a vibrant concept for the continued health of the First Amendment); Allen Lichtenstein & Gary Peck, *Sidewalk Democracy: Free Speech, Public Space and the Constitution*, 8 NEVADA LAWYER 18 (2000) (arguing that restrictions aimed to stifle expression are legally indefensible).

101. *See* Stone, *Fora Americana*, *supra* note 46.

102. *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1199–1200 (1996) (discussing incidental restrictions).

my own view is that the Brennan–Marshall position has the better argument, although their view has not prevailed.

It may be useful at this point to offer a simple illustration of the intersection of content-neutral balancing with the Court's approach to content-regulation. Consider, for example, laws designed to improve the marketplace of ideas. Here are three decisions that seem inconsistent but are readily explained by the interaction of these doctrines. In *Miami Herald Publishing Co. v. Tornillo*,[103] the Court considered a state law requiring newspapers to give political candidates an opportunity to reply to attacks. In *Red Lion Broadcasting Co. v. FCC*,[104] the Court considered the Fairness Doctrine, which among other things, required broadcasters to give political candidates who had been attacked on-air an opportunity to respond. And in *PruneYard Shopping Center v. Robins*,[105] the Court considered a state law requiring privately-owned shopping centers to allow individuals to distribute leaflets on the grounds of their shopping malls. In each instance, the newspaper,[106] broadcaster[107] and shopping center owner[108] maintained that the law violated the First Amendment by compelling it to associate with speech with which it disagreed.

In *PruneYard*, the Court upheld the shopping center regulation because it was content-neutral and reasonable.[109] In *Tornillo*, the Court invalidated the right-of-reply statute because it was a content-based regulation not involving any "special circumstances."[110] Unlike the law in *PruneYard,* which was content-neutral, the law in *Tornillo* was content-based because it kicked-in only in response to the newspaper's own speech. In *Red Lion*, the Court upheld the fairness doctrine because it was a reasonable, viewpoint-neutral regulation of content on non-public forum public property—that is, the airwaves.[111] *Tornillo* was different from *Red Lion* because it regulated expression by a private speaker on private property, whereas *Red Lion* regulated expression by a private speaker on publicly-owned property. It is analogous to the distinction between *City of Ladue v. Gilleo*,[112] which invalidated a prohibition of political signs on private property, and *Members*

103. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).
104. Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).
105. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).
106. *Tornillo*, 418 U.S. 241.
107. *Red Lion*, 395 U.S. 367.
108. *PruneYard*, 447 U.S. 74.
109. *Id.*
110. *Tornillo*, 418 U.S. at 258.
111. *Red Lion*, 395 U.S. 367.
112. City of Ladue v. Gilleo, 512 U.S. 43 (1994).

of the City Council of Los Angeles v. Taxpayers for Vincent,[113] which upheld a prohibition of political signs on publicly-owned public utility poles.

X. INCIDENTAL IMPACT

This brings me to my tenth and final observation about what we learned in the twentieth century. This observation also concerns a judgment about a sub-problem in the realm of content-neutral restrictions. Here, we are concerned with laws that have an incidental rather than a direct effect on free expression. Illustrations of direct regulation of speech are laws restricting the location of billboards, limiting campaign contributions and expenditures, prohibiting speeches on military bases, and forbidding posting signs on public utility poles.[114] Such laws directly and specifically regulate speech.

Illustrations of laws having only an incidental effect on speech are laws prohibiting open fires in public places, as applied to an individual who burns a flag in public;[115] forbidding urinating in public, as applied to an individual who urinates on a military recruiting center to convey his opposition to the war; requiring witnesses to testify before grand juries, as applied to a reporter who wants to shield her confidential sources;[116] and demanding that we pay taxes, as applied to a citizen who claims that the payment of taxes limits his ability to support his favored political candidates.

As we have seen, content-neutral laws that directly regulate expression are generally subjected to a form of ad hoc balancing. Laws that have only an incidental effect on free speech, however, are treated as presumptively constitutional.[117] The Court first established this principle in *United States v. O'Brien* in 1968, in which the Court upheld a conviction for knowingly destroying a draft card, even though the defendant clearly committed the crime in order to express his opposition to the Vietnam War.[118] Although

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113. Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789 (1984).

114. *See, e.g.*, People for the Ethical Treatment of Animals, Inc. v. Gittens, 414 F.3d 23 (D.C. Cir. 2005) (governmental contributions); Giebel v. Sylvester, 244 F.3d 1182 (9th Cir. 2001) (bulletin boards at state university available for use by the public); Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003 (9th Cir. 2000) (bulletin boards in public high school); Schwaner v. Dep't of Army, 370 F. Supp. 2d 408 (E.D. Va. 2004), *aff'd*, 119 Fed. App'x 565 (4th Cir. 2005) (military bases); Cimarron Alliance Found. v. City of Oklahoma City, 290 F. Supp. 2d 1252 (W.D. Okla. 2002) (public utility poles).

115. United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989); *see also* Kagan, *supra* note 19, at 501 (discussing incidental restrictions).

116. Branzburg v. Hayes, 408 U.S. 665 (1972).

117. United States v. O'Brien, 391 U.S. 367, 381–82 (1968).

118. *Id.* at 385–86.

the Court implied that a form of balancing was appropriate in such cases, as in the non-public forum cases the Court in fact gave great deference to the government.[119]

The logic of this position is that, as compared with laws that directly regulate speech, laws that have only an incidental effect on speech are both less likely to be tainted by impermissible motivations and less likely to have a significant limiting or distorting effect on free expression. Moreover, because every law can conceivably have an incidental effect on someone's speech, a doctrine that required courts to evaluate every such claim would open the door to endless litigation and encourage all sorts of fraudulent claims. For example, if Tom is stopped for speeding, he could claim that he was speeding to protest the speed limit laws.[120]

This doctrine has a broad impact, especially on claims of the press to special First Amendment protection. For example, reporters might argue that in order to gather newsworthy information they should be exempt from laws of otherwise general application that prohibit wiretapping, burglary, trespass, and bribery. Invoking the incidental effects doctrine, the Court, in cases like *Branzburg v. Hayes*,[121] has generally rejected such claims.

In at least a few instances, however, the Court has held incidental effects unconstitutional as applied when the incidental effect of the law was seen by the Court as particularly severe. *NAACP v. Alabama*,[122] *Brown v. Socialist Workers '74 Campaign Committee*,[123] and *Boy Scouts of America v. Dale*[124] illustrate such decisions. In general, however, the Court has erected a strong presumption that laws having a mere incidental effect on speech are not unconstitutional.

XI. CONCLUSION

With these ten judgments, the Supreme Court has shaped most of our contemporary First Amendment jurisprudence. Given that these principles were adopted by many different justices, with widely varying perspectives,

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119. *Id.* at 381–82.

120. On incidental restrictions, see generally Dorf, *supra* note 102; Jeb Jubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 769 (2001); Kagan, *supra* note 19, at 494–508; Stone, *Content-Neutral*, *supra* note 38, at 114.

121. *Branzburg*, 408 U.S. 665 (holding the public interest in ensuring law enforcement sufficient to override a reporter's privilege statute).

122. NAACP v. Alabama, 357 U.S. 449 (1958) (holding that an order requiring an association to produce a list of its members violated the members' right to freely associate with others).

123. Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982) (holding disclosure requirements for party that had historically been object of harassment unconstitutional to both campaign contributors and recipients of the party).

124. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (holding preservation of a group's mission and official position to be sufficient for freedom of association purposes).

over many decades, it is not surprising that there are inconsistencies, ambiguities, conundrums, and perplexities in the doctrine. On the other hand, by the end of the twentieth century the Court, in my view, had for the most part built a sensible and reasonably effective set of principles for sorting First Amendment issues and for reaching reasonably sound and predictable outcomes.

Although I have my differences with some of these doctrines, on the whole I applaud the Court for exercising common sense, staying focused on the most fundamental values of the First Amendment, learning from its own mistakes and experience, seeking to articulate a set of relatively simple rules—even if they are sometimes both over and under protective of speech—and refusing to let the perfect be the enemy of the good. And now, with that, we can turn to the twenty-first century.