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## *ARTICLES*

### CONTENT DISCRIMINATION REVISITED

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## INTRODUCTION

FOR forty years, the prohibition on content discrimination has been a touchstone of First Amendment law.<sup>1</sup> For all its longevity, the principle often seems as disliked as it is foundational. While some criticize it on normative grounds,<sup>2</sup> others believe that, what-

<sup>1</sup> See *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 94–96 (1972).

<sup>2</sup> See, e.g., Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 *Stan. L. Rev.* 299, 338 (1978); Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 *Notre Dame L. Rev.* 1347, 1352–53 (2006); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 *Stan. L. Rev.* 113, 113–14 (1981); Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 *Va. L. Rev.* 203, 203–06 (1982); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 *U. Pa. L. Rev.* 615, 617 (1991); see also Larry Alexander, *Is There a Right of Freedom of Expression?* 185 (2005) (concluding that

ever the merits of a content-discrimination principle as a conceptual matter, the Supreme Court's application of it has been unprincipled, unpredictable and deeply incoherent.<sup>3</sup>

My aim here is to show that these claims of incoherence are greatly overstated. In fact, the case law largely reflects a coherent position—though, to be fair to the critics, not a position the Court has clearly claimed for itself. Instead, its approach bears a strong resemblance to Equal Protection jurisprudence, with the suspect classifications in question being subject-matter and viewpoint discrimination. I do not claim to show that the Court has done this by design: the pattern could have been generated by end-determined decision making, or at random. But there is a pattern to which the Court has adhered in many cases over a long time.

Recognition of this pattern leads to several conclusions. First, it allows for more grounded normative evaluation of the content-discrimination principle. I only provide the barest such evaluation

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the principle of neutrality he sees underlying the prohibition is unworkable as a moral matter); Jed Rubenfeld, *The First Amendment's Purpose*, 53 *Stan. L. Rev.* 767, 768, 782 (2001) (arguing that the Court's conception of content discrimination fails to advance Rubenfeld's conception of a purposivist First Amendment).

<sup>3</sup>This observation is such a truism that citation does not entirely do it justice, but see, for example, 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, 50 (2000) ("The Court's applications are inconsistent with the very reasons that this principle is at the core of First Amendment analysis."); David S. Day, *The Hybridization of the Content-Neutral Standards for the Free Speech Clause*, 19 *Ariz. St. L.J.* 195, 196 (1987) ("The Court has frequently strayed from a strict application of the two-track system."); Leslie Gielow Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations*, 34 *McGeorge L. Rev.* 595, 602 (2003) ("[T]he Court has experienced increasing difficulty in making [content determinations], and in making them consistently."); McDonald, *supra* note 2, at 1353 ("[T]he vagaries inherent in characterizing speech regulations as content-based versus content-neutral have resulted in standards for distinguishing between them that are applied in an inconsistent and results-driven manner by the Court."); see also Clay Calvert, *Free Speech and Content-Neutrality: Inconsistent Applications of an Increasingly Malleable Doctrine*, 29 *McGeorge L. Rev.* 69, 70–73 (1997); Edward L. Carter & Brad Clark, *Death of Procedural Safeguards: Prior Restraint, Due Process and the Elusive First Amendment Value of Content Neutrality*, 11 *Comm. L. & Pol'y* 225, 234–35 (2006); 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, 808 (2004); Dan V. Kozlowski, *Content and Viewpoint Discrimination: Malleable Terms Beget Malleable Doctrine*, 13 *Comm. L. & Pol'y* 131, 132–34 (2008); R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 *U. Miami L. Rev.* 333, 335 (2006).

here, in order to suggest that the Court's own position is at least a normatively plausible one. More developed normative discussions can only benefit from a better description of the rule that is in place.

Second, to the extent that the supposed inconsistency of content-discrimination jurisprudence often serves as a freestanding criticism of the principle, I offer a counterweight. The merits of the current approach are worth keeping in mind when considering the many calls to replace it, from some members of the Court<sup>4</sup> and many critics of it.<sup>5</sup> Tests offered to replace the current approach nearly always involve a multi-factor standard. If the current approach is more rule-like than usually believed, it may be preferable to a standard-based approach, which can hardly be expected to offer better results in terms of predictability.

The paper proceeds in five parts. Part I lays out the standard account of the doctrine and the incoherence objection. Part II identifies potential ambiguities in the concept of content discrimination. Part III begins to give shape to the Court's conception of content discrimination by showing its consistency toward subject matter and viewpoint classifications. Part IV explains what can be gleaned from the Court's treatment of other types of facial classifications. Finally, Part V offers a synthesis of the entire doctrine and an extended analogy to Equal Protection law. In conclusion, I briefly consider some normative critiques.

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<sup>4</sup> See, e.g., *United States v. Am. Library Ass'n*, 539 U.S. 194, 217 (2003) (Breyer, J., concurring) (rejecting content discrimination's strict scrutiny as "too limiting and rigid a test" and advocating multi-factor balancing); *Bartnicki v. Vopper*, 532 U.S. 514, 536 (2001) (Breyer, J., concurring) (eschewing content discrimination's strict scrutiny and instead "ask[ing] whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences"); Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, 246-47, 252-53 (2002) (advocating a judicial theory that emphasizes consequences rather than a more "legalistic" approach).

In his tenure on the Court, Justice Stevens sometimes advocated a multi-factor test. See, e.g., *Bartnicki*, 532 U.S. at 533 (noting issues on "both sides of the constitutional calculus"); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 429-31 (1992) (Stevens, J., concurring) (proposing five-factor test to replace the current approach).

<sup>5</sup> These critics include many of those cited above. See, e.g., Huhn, *supra* note 3, at 808 (proposing multi-factor "constitutional calculus" based upon Justice Stevens's *R.A.V.* concurrence); Kozlowski, *supra* note 3, at 174 (advocating three-prong face-purpose-effect test); McDonald, *supra* note 2, at 1412-26 (advocating importation of First Amendment expressive-association test).

## I. THE CONTENT DISCRIMINATION PRINCIPLE

At a high level of generality, content discrimination is, as a doctrinal matter, fairly straightforward. In application, however, critics argue that it is inconsistent and confused. I first offer the barest sketch of content discrimination law and then turn to the objection that, as applied, it is thoroughly incoherent.

*A. The Law of Content Discrimination*

The two basic ideas behind the content-discrimination principle are that it is usually wrong for the government to regulate speech because of what it is saying and that it is usually acceptable, as a First Amendment matter, for the government to regulate speech for reasons other than what it is saying.<sup>6</sup>

So, for example, “burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not.”<sup>7</sup> In the first instance, the government is punishing a potentially expressive act out of a concern unrelated to what it says. In the second, the government is punishing the same act precisely because of what it is likely to say.

The principle recognizes that all sorts of governmental action affect our ability to express and receive messages. An ordinance prohibiting outdoor fires will assuredly affect the number of messages incorporating the burning of things outside. But what is of strong First Amendment concern is a governmental decision to regulate expression *on account of* the message it is communicating.<sup>8</sup> As the Supreme Court somewhat grandiosely put it in *Police Department of Chicago v. Mosley*, “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>9</sup>

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<sup>6</sup> The latter idea attracts a large portion of normative criticism of the principle. See, e.g., McDonald, *supra* note 2, at 1352; Redish, *supra* note 2, at 114; Williams, *supra* note 2, at 617–18.

<sup>7</sup> *R.A.V.*, 505 U.S. at 385.

<sup>8</sup> I use the term “message” here advisedly. As I shall show, much debate about content discrimination stems from disagreement about the scope of the anti-discrimination principle in play. See *infra* Part II.

<sup>9</sup> 408 U.S. 92, 95 (1972).

Such a sweeping pronouncement can only work (if at all) in a prescribed area. The Court has accordingly applied it only to direct governmental regulation of expression and regulation within the traditional public fora of streets, parks, and sidewalks.<sup>10</sup> It does not apply to other expressive endeavors subsidized by the government, such as public schools, arts funding, or government employment, where some higher degree of content regulation is a necessity.<sup>11</sup> Nor does it apply to speech that is not protected by the First Amendment, such as incitement, obscenity, or threats.<sup>12</sup> The existence of these unprotected categories is not necessarily at odds with the prohibition on content discrimination: they may amount to categories which, for various reasons, have overcome the heavy presumption against content regulation on a wholesale level.<sup>13</sup> But

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<sup>10</sup> Direct regulation and regulation of public streets, parks, and sidewalks effectively are governed by the same criteria.

<sup>11</sup> How much of a necessity and when are highly contested questions. Compare, for example, *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (ruling that a doctor's advice to a patient at a federally-funded facility qualifies as governmental speech), with *Legal Servs. Corp. v. Velazquez*, 531 U.S. 535, 542–43 (2001) (holding that an attorney's advice to a client does not constitute governmental speech); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573–74 (1968) (“[S]tatements made by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors.”), with *Garcetti v. Ceballos*, 547 U.S. 410, 418, 421 (2006) (“[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment [p]urposes, and the Constitution does not insulate their communications from employer discipline.”).

<sup>12</sup> I might separately identify classes of expression which are presumably unprotected by the First Amendment but for which the Supreme Court has drawn no clear line between protected and unprotected expression. These include perjury, insider trading, contractual agreements, and criminal solicitation. Professor Schauer has described these categories as outside the “coverage” of the First Amendment, which means that they do not trigger the heavy presumption against regulation at work in the content-discrimination principle and in the unprotected categories. See, e.g., Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 *Harv. L. Rev.* 1765, 1769–71 (2004). (For accuracy's sake, I note that Schauer would consider obscenity, like these other forms of expression, to be uncovered rather than unprotected. See *id.* at 1774–75.) Whatever terminology is most apt, the Court treats regulation of such communication as outside the content-discrimination principle.

<sup>13</sup> See, e.g., John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 *Harv. L. Rev.* 1482, 1491 (1975) (discussing the benefits of a categorical approach over ad hoc balancing); Williams, *supra* note 2, at 701 (explaining the *Brandenburg* incitement test as a variant of strict scrutiny).

where wholesale exceptions have not been made, the content-discrimination principle imposes a presumption against retail exceptions.

In order to implement the content-discrimination principle, the Court must identify which laws fall on which side of the line. To do this, it performs a *content analysis*, which seeks to determine which laws are “content based” and which “content neutral”—that is, which laws regulate speech because of its content and which do not.

After distinguishing content-based from content-neutral laws, the Court must give each its appropriate level of review. This is the *scrutiny analysis*. Content-based laws receive strict scrutiny, which nearly always proves fatal.<sup>14</sup> Meanwhile, content-neutral laws receive what the Court calls “intermediate scrutiny,” in practice a highly deferential form of review which virtually all laws pass.<sup>15</sup>

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<sup>14</sup> In fact, *Mosley* was one of the cases Gerald Gunther discussed in coining the phrase “‘strict’ in theory and fatal in fact.” Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8, 17 (1972).

There are exceptions. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2724, 2730 (2010); *Burson v. Freeman*, 504 U.S. 191, 211 (1991) (plurality opinion); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990), overruled by *Citizens United v. FEC*, 130 S. Ct. 876 (2010). Of these, only in *Humanitarian Law Project* did a majority of the Court allow a law to pass what appeared to be content-discrimination strict scrutiny. In *Burson*, Justice Scalia, concurring, employed a public forum analysis. See *Burson*, 504 U.S. at 214 (Scalia, J., concurring in the judgment). *Austin*, while a strict scrutiny case, is technically not a content-discrimination case because in campaign finance cases the Court, for obscure reasons, uses an effects test, which asks about the burden a regulation imposes on freedom of expression. See, e.g., *Citizens United*, 130 S. Ct. at 898; *Austin*, 494 U.S. at 658; *Buckley v. Valeo*, 424 U.S. 1, 44–45 (1976).

This is a good time to recognize that the content distinction, though often described as central, co-exists with any number of other First Amendment doctrines. Thus, one could puzzle over whether “strict scrutiny” under the content distinction is the same scrutiny under which the Court has upheld some laws imposing substantial burdens on free association. See *Keller v. State Bar of Cal.*, 496 U.S. 1, 4 (1990); *Roberts v. Jaycees*, 468 U.S. 609, 623 (1984) (dictum); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977).

<sup>15</sup> See, e.g., *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 189 (1997); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804–05 (1984); see also Frederick Schauer, *Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications*, 26 Wm. & Mary L. Rev. 779, 788 (1985) (“In practice, the application of the lower track of this analysis, although open linguistically to the possibility of some bite, has resembled rational basis review.”). But see *City of Ladue v. Gilleo*, 512

Given that almost all laws fail strict scrutiny and almost all laws pass intermediate scrutiny, the pivotal point in the doctrinal structure is the content analysis. Clear statements of the structure of content analysis are unfortunately rare within the case law,<sup>16</sup> but the case law strongly suggests, and most commentators agree, that a law may be content based *either* (1) on its face<sup>17</sup> *or* (2) in its purpose, most often in the shape of the justifications the government offers for it in litigation.<sup>18</sup> By implication, laws that employ *neither* a content-related classification *nor* a content-related justification are content neutral.<sup>19</sup>

Thus, for example, a law that on its face bans “political speech” is content based. A law that bans sound trucks because they are used to disseminate political messages is also content based. And a law that bans sound trucks because they are noisy is content neutral. The first two of these laws would be subjected to strict scrutiny. The last would warrant intermediate scrutiny.

Or so, at least, the story goes. A major thrust of the incoherence objection is that actual doctrine bears no great resemblance to this outline.

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U.S. 43, 56 (1994) (striking down a residential sign ban for failing to leave ample alternative channels of communication); *United States v. Grace*, 461 U.S. 171, 181 (1983) (concluding that a neutral law did not have a sufficient nexus to the interests advanced).

<sup>16</sup> But see *Mosley*, 408 U.S. at 96 (“Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.”).

<sup>17</sup> See, e.g., *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994); *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n*, 447 U.S. 530, 536 (1980).

<sup>18</sup> The foundational case is *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (asking whether the “governmental interest is unrelated to the suppression of free expression”); see also, e.g., *United States v. Eichman*, 496 U.S. 310, 315 (1990); *Texas v. Johnson*, 491 U.S. 397, 406–07 (1989).

To the extent that the case law offers a coherent framework, it strongly echoes that imparted by John Hart Ely. See Ely, *supra* note 13, at 1483–84. Another classic formulation is that of Laurence Tribe: a governmental action is content based if “[1] *on its face* [it] is targeted at ideas or information that government seeks to suppress, or [2] if a governmental action neutral on its face was *motivated* by (i.e., would not have occurred but for) an intent to single out constitutionally protected speech for control or penalty.” Laurence H. Tribe, *American Constitutional Law* § 12-3, at 794 (2d ed. 1988).

<sup>19</sup> See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001); *Heffron v. Int’l Soc’y for Krishna Consciousness*, 452 U.S. 640, 648 (1981).



*B. The Incoherence Objection*

Some critics contend that, even if the content-discrimination principle is normatively acceptable, the doctrine implementing this principle has been an utter failure. Content analysis is unpredictable and imposes little, if any, restraint on judicial decision-making.<sup>20</sup> This critique has become so commonplace as to border on cliché: content analysis almost cannot be mentioned without being described as “malleable,”<sup>21</sup> “inconsistent,”<sup>22</sup> or both.<sup>23</sup> The force of all these claims is that the doctrine produces incoherent results; I will call this the incoherence objection.

To demonstrate their point, proponents of the incoherence objection need look no further than the Supreme Court’s articulation of its own doctrine. Consider the following formulation:

Deciding whether a particular regulation is content based or content neutral is not always a simple task. We have said that the principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of agreement or disagreement with the message it conveys. The purpose, or justification, of a regulation will often be evident on its face. But while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary to such a showing in all cases. Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content.<sup>24</sup>

A model of doctrinal clarity this is not. What makes a law content based, its face or its purpose? What happens when the two diverge, as when a law that is content related on its face has a neutral justification? Is “disagreement” with the message the only suspect purpose?

These ambiguities are at the heart of the incoherence objection. One recent survey of content analysis concluded that the Supreme

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<sup>20</sup> See *supra* note 3.

<sup>21</sup> See, e.g., Kozlowski, *supra* note 3, at 134; see also Huhn, *supra* note 3, at 825–26.

<sup>22</sup> See, e.g., Chemerinsky, *supra* note 3, at 50; Jacobs, *supra* note 3, at 602; McDonald, *supra* note 2, at 1353; Wright, *supra* note 3, at 353.

<sup>23</sup> Calvert, *supra* note 3, at 71.

<sup>24</sup> *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642–43 (1994) (internal citations and quotation marks omitted). For a similar attempt, see *Bartnicki*, 532 U.S. at 526 & n.9.

Court takes three different approaches in finding laws content based: it finds them content based on their face; it looks instead at their purpose; or, if a law appears content based both on its face and in its purpose, it relies on both factors.<sup>25</sup> The upshot is that the doctrinal rules are so unclear that the Court picks and chooses among its own pronouncements to suit its own ends.<sup>26</sup>

This criticism is an indictment of the entire case law: if the Court handpicks the rule for the occasion, then every application of the rules is undermined. In addition to this generalized malady, the proponents of the incoherence objection also focus on a few problem cases, in which they believe the Court seriously misapplied the content-discrimination principle. These include:

- the “secondary-effects” cases, in which the Court treated zoning ordinances targeting adult entertainment as content neutral;<sup>27</sup>
- two cases involving injunctions against abortion protestors, where the injunctions were deemed to be content neutral, but were nevertheless given some form of scrutiny between content-neutral intermediate scrutiny and strict scrutiny;<sup>28</sup>
- another abortion-related case, *Hill v. Colorado*, in which the Court upheld as content neutral a law banning “oral protest, education, or counseling” on any subject within eight feet of an unwilling listener and a radius of 100 feet of the entrance of a medical facility;<sup>29</sup>

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<sup>25</sup> McDonald, *supra* note 2, at 1382.

<sup>26</sup> *Id.* at 1412 (noting that the doctrines comprising content analysis are “inherently flawed and seem to be inconsistently applied in a results-driven manner”).

<sup>27</sup> *City of L.A. v. Alameda Books*, 535 U.S. 425, 434 (2002); *City of Renton v. Playtime Theatres*, 475 U.S. 41, 47–48 (1986); *Young v. Am. Mini Theatres*, 427 U.S. 50, 70 (1976).

<sup>28</sup> *Schenck v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357, 372 (1997); *Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 763–65 (1994).

<sup>29</sup> 530 U.S. 703, 707, 725 (2000).

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- a case upholding as content neutral a requirement that cable companies carry broadcast programming;<sup>30</sup>
- a case treating as content neutral a ban on publishing information likely obtained through illegal eavesdropping, but nevertheless giving higher scrutiny to an application of the law because of its impact on publications on matters of public concern;<sup>31</sup> and
- various cases treating as content neutral regulations that involved content-related justifications, such as listeners' interests in avoiding unwanted communications.<sup>32</sup>

For proponents of the incoherence objection, these cases show that the doctrinal rules do little to cabin discretion or promote predictable outcomes. This lack of consistency is a reason for the Court to reconsider its approach to content discrimination.<sup>33</sup>

## II. DEFINING CONTENT DISCRIMINATION: CONCEPTUAL AMBIGUITIES

On two issues the incoherence objection contains a grain of truth. First, as illustrated above, the Supreme Court has failed to articulate its standards for content analysis clearly and consistently. The order I am attempting to show in the Court's jurisprudence is, without doubt, latent rather than patent. Second, one possible observation which the objection might encompass is that the concept of content discrimination—as opposed to the case law which im-

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<sup>30</sup> *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 652 (1994).

<sup>31</sup> *Bartnicki v. Vopper*, 532 U.S. 514, 526–27 (2001).

<sup>32</sup> See, e.g., *Hill*, 530 U.S. at 725; *Schenck*, 519 U.S. at 372; *Madsen*, 512 U.S. at 763; *United States v. Kokinda*, 497 U.S. 720, 736 (1990) (plurality opinion); *Frisby v. Schultz*, 487 U.S. 474, 482 (1988); *United States v. Grace*, 461 U.S. 171, 181 n.10 (1983); *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 648–49 (1981). *Kokinda* was actually a non-public-forum case, but the Court said in dicta that the solicitation law at issue was content neutral; I thus include the case for its elucidation on the Court's understanding of content analysis.

<sup>33</sup> See supra note 5. Some critics make the coherence objection along with more substantive criticisms. See, e.g., McDonald, supra note 2; Wright, supra note 3. But whether it appears alone or in tandem with others, the objection is regularly cited as a freestanding reason for the Court to reconsider its approach.

plements it—is rife with ambiguity. For instance, how should one define “content” for purposes of content discrimination? What role must discrimination play to render a law presumptively invalid? Although I argue here that the Court’s decisions provide implicit answers to these questions, they certainly have not offered systematic discussions of, or explicit eliminations of, possible alternatives. The result is that the case law exists against a backdrop of unresolved conceptual issues, where each decision may be understood not as the selection of a particular conception of content discrimination, but as a botched application of a different conception. I will argue that the Court has, in fact, made consistent and normatively plausible choices, but to show this, I shall first set out some possible alternative conceptions of content discrimination.

### *A. Defining “Content”*

Perhaps the biggest difficulty with content discrimination is that “content” is hardly self-defining. As the Court illustrated in its list of not-quite-synonyms in *Police Department of Chicago v. Mosley*, the term could mean any number of things.<sup>34</sup> The first question, then, is which forms of governmental action count as suspect “content” discrimination that triggers the demands of strict scrutiny. In what follows, I use the term “discrimination” to mean differential treatment, regardless of motivation. In the next Section, I will consider the role of invidious motivation in justifying a prohibition on differential treatment of “content.”

#### *1. Viewpoint Discrimination*

One potential definition is that the government usually cannot discriminate among instances of expression on the basis of viewpoint. There is a great deal of agreement that viewpoint discrimination is at the core of what the First Amendment forbids.<sup>35</sup> A few

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<sup>34</sup> 408 U.S. 92, 95 (1972) (prohibiting discrimination on the basis of an expression’s “message, its ideas, its subject matter, or its content”).

<sup>35</sup> See, e.g., Alexander, *supra* note 2, at 12 (“I cannot imagine anyone’s believing that ‘you are free to express anything you want so long as I don’t believe it to be untrue, base, or harmful’ constitutes freedom of expression on *any* conception.”); see also Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 *Wm. & Mary L. Rev.* 189, 239–42 (1983) [hereinafter Stone, *Content Regulation*] (describing subject-matter restrictions as substantively and normatively different from viewpoint-

commentators have gone further to argue that viewpoint discrimination is the only impermissible kind.<sup>36</sup> Among members of the Court, Justice Stevens was notable for sometimes making this contention.<sup>37</sup>

## 2. *Subject-Matter and Viewpoint Discrimination*

Others have argued that viewpoint classifications are very difficult to distinguish, both descriptively and normatively, from subject-matter classifications.<sup>38</sup> For many, the concept of content discrimination at least consists of subject matter and viewpoint discrimination; for some, it appears to be primarily comprised of them.<sup>39</sup>

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based restrictions); Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. Chi. L. Rev. 81, 83 (1978) (same).

<sup>36</sup> See, e.g., Marjorie Heins, *Viewpoint Discrimination*, 24 Hastings Const. L.Q. 99, 115 (1996) (arguing that “the truly compelling First Amendment principle is viewpoint neutrality” and casting doubt on the need for “a separate content neutrality rule”); Stephan, *supra* note 2, at 233, 251 (arguing that the prohibition on viewpoint discrimination long predated *Mosley* and that consideration of other forms of discrimination requires reference to a hierarchy of speech value).

<sup>37</sup> See, e.g., *Hill*, 530 U.S. at 719; *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 553–54 (1981) (Stevens, J., dissenting); *NLRB v. Retail Store Emps. Union, Local 1001*, 447 U.S. 607, 618–19 (1980) (Stevens, J., concurring); *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978) (plurality opinion); *Young v. Am. Mini-Theaters*, 427 U.S. 50, 67–68 (1976) (plurality opinion). But see *Hill*, 530 U.S. at 723 (recognizing that subject-matter discrimination is also a First Amendment evil).

<sup>38</sup> See, e.g., Steven J. Heyman, *Sphere of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 Wm. & Mary Bill Rts. J. 647, 665–66 (2002) (collecting cases demonstrating the difficulty of distinguishing between subject-matter and viewpoint discrimination); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 Vand. L. Rev. 265, 285 (1981) (“The more serious objection to not moving from viewpoint neutrality to subject matter neutrality, however, is that the distinction finds no basis in the theoretical foundations of the first amendment.”).

<sup>39</sup> See, e.g., Chemerinsky, *supra* note 3, at 51 (discussing “message” discrimination but further defining that as subject-matter and viewpoint discrimination); McDonald, *supra* note 2, at 1354 n.13 (discussing “content” discrimination in terms that appear to define it as subject-matter and viewpoint discrimination).

### 3. Message-Related Discrimination

“Content” is most frequently glossed in terms such as “message,”<sup>40</sup> “substance,”<sup>41</sup> “meaning,”<sup>42</sup> or “communicative significance.”<sup>43</sup> Some phrase the concern in terms of the “communicative impact” of speech: regulations that turn on the communicative impact of speech are content based, while those that are not are content neutral.<sup>44</sup> These formulations may have slight variations, but the dominant thrust is that government action is presumptively impermissible if it is targeted at “what the defendant was saying,” as opposed to some other feature of the communication.<sup>45</sup>

Such a category would clearly encompass restrictions on the subject matter and viewpoint of expression, but would also appear to cover more. For instance, it might include discrimination on the basis of entire classes of discourse (e.g., advocacy or instruction), choices of particular words (e.g., vulgar language),<sup>46</sup> or non-cognitive attributes that contribute to the cognitive substance of expression (e.g., offensive phrasing or confrontational delivery). To the extent that these features are part of what a speaker is “saying,” they would appear to be message related.

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<sup>40</sup> See, e.g., Alexander, *supra* note 2, at 11, 19 n.24 (discussing message-related discrimination); Tribe, *supra* note 18, § 12-2, at 789–90 (explaining that regulations that target expression “because of the specific message or viewpoint” are presumptively unconstitutional); Stone, Content Regulation, *supra* note 35, at 190 (“Content-based restrictions . . . limit communication because of the message conveyed.”).

<sup>41</sup> Redish, *supra* note 2, at 116 (defining content as the “substance of what is being said”).

<sup>42</sup> See Heyman, *supra* note 38, at 654 (discussing content in terms of “meaning,” a term which seems to correspond to message).

<sup>43</sup> Ely, *supra* note 13, at 1497 (defining content-neutral regulation as that which “would arise even if the defendant’s conduct had no communicative significance whatever”).

<sup>44</sup> See, e.g., Tribe, *supra* note 18, § 12-2, at 789–91; Ely, *supra* note 13, at 1490; Redish, *supra* note 2, at 117 (equating message and “communicative impact”); Williams, *supra* note 2, at 618; see also Schauer, *supra* note 38, at 278–79 (describing proponents of the content-discrimination principle as caring about the communicative impact of expression).

<sup>45</sup> Ely, *supra* note 13, at 1497; see also Elena Kagan, Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 431 (1996) (referring to “hostility toward ideas as such”).

<sup>46</sup> See, e.g., Williams, *supra* note 2, at 662 (“[A] law restricting the very words one may use is surely so obvious a content-based regulation of speech that no consideration of the government’s purposes is necessary.”).

In practice, however, the category of “message”-related discrimination proves only marginally less vague than that of content discrimination. Some commentators seem to treat it as a synonym for subject-matter and viewpoint discrimination.<sup>47</sup> Some explicitly define it to include non-cognitive aspects of messages, while others express doubt that regulation of such aspects should count as content discrimination.<sup>48</sup> The framing of the category suggests it extends beyond subject-matter and viewpoint discrimination, but few are clear about how far.<sup>49</sup>

#### *4. Persuasion-Related Discrimination*

Another formulation states that it is presumptively wrong for the government to discriminate against expression on the basis of its persuasive effect.<sup>50</sup> This category obviously overlaps a great deal with message-related discrimination. Whether the two are coterminous depends upon how one defines persuasion. To the extent that it includes regulation of speech by reason of its offensiveness as well as its persuasiveness, its correspondence to message-related discrimination increases.<sup>51</sup>

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<sup>47</sup> See, e.g., Chemerinsky, *supra* note 3, at 51 (defining “message” discrimination as subject-matter and viewpoint discrimination); McDonald, *supra* note 2, at 1354 n.13 (seeming to equate “content” discrimination with subject-matter and viewpoint discrimination).

<sup>48</sup> Compare Ely, *supra* note 13, at 1492–93 (noting protection of emotive content from discrimination), and Williams, *supra* note 2, at 661–62 (arguing that many content-neutral laws impermissibly affect speakers’ ability to express messages in a particular way), with Redish, *supra* note 2, at 141 (arguing it is not clear that “emotive force” should count as content).

<sup>49</sup> But see Schauer, *supra* note 38, at 283–86 (arguing for identical treatment for discrimination on the basis of viewpoint, subject matter, and “manner of presentation” or “mode of expression”); see also Williams, *supra* note 2, at 661–62 (attempting to distinguish between circumstances that are merely facilitative of expression and those that are constitutive of a particular message and arguing for protection of the latter).

<sup>50</sup> See, e.g., David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 *Colum. L. Rev.* 334, 334 (1991) (“[T]he government may not justify a measure restricting speech by invoking harmful consequences that are caused by the persuasiveness of the speech.”); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 *Cornell L. Rev.* 1277, 1302 (2005).

<sup>51</sup> See Strauss, *supra* note 50, at 342 (arguing that the persuasion principle does not formally prohibit regulation on the basis of offensiveness, but must create a presumption against such regulation for prophylactic reasons); Volokh, *supra* note 50, at 1301

But some regulations may be message related without being persuasion related. David Strauss, for example, excludes from his persuasion principle “statements that seek to precipitate ill-considered action.”<sup>52</sup> Because his persuasion principle is concerned with rational deliberation, it would contemplate regulation on the basis of seemingly message-related but non-cognitive aspects of expression.<sup>53</sup> While some versions of persuasion-related discrimination may correspond with some versions of message-related discrimination, the two remain sufficiently distinct to warrant their separate identification.

### 5. *Communication-Related Discrimination*

Finally, “content” discrimination could encompass any discrimination against communicative endeavors. Such a principle would inherently include message-related regulation, but it would also take in laws that target “message-bearing” activity “not out of concern with the messages borne.”<sup>54</sup> An example would be a regulation of leafleting out of concerns about litter: the law is not related to the messages leaflets bear, but it targets a certain form of communication.<sup>55</sup> Other examples might involve regulations of a particular medium—such as cable or broadcast—which relate to physical, non-message-related features of that medium but result in its being singled out for special treatment.<sup>56</sup>

The status of such regulations is contested, as both a doctrinal matter and a normative one. Some commentators contend that ex-

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(defining protection on the basis of “the persuasive, informative, or offensive force of the facts or opinions expressed”).

<sup>52</sup> Strauss, *supra* note 50, at 365.

<sup>53</sup> Strauss recognizes that this line is difficult to draw, because “every action is to some degree ill-considered.” *Id.* at 367. He forbears drawing conclusions, but posits that the question to ask is whether an individual whose only interest was in making a correct decision would want to have the information under consideration for regulation. *Id.* at 369–70.

<sup>54</sup> Alexander, *supra* note 2, at 19 n.24.

<sup>55</sup> See *id.* (contrasting prohibiting littering generally to banning pamphlets out of litter concerns).

<sup>56</sup> Cf. *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 577–78 (1983) (describing regulation exempting newspapers—which are often sold at vending machines—from sales tax, but imposing a use tax on publication materials).



isting doctrine disallows them<sup>57</sup> and that it should do so.<sup>58</sup> More claim that existing doctrine permits message-neutral regulation of communicative endeavors, though some approve of this rule, while others criticize it.<sup>59</sup> Others note cases and arguments on both sides.<sup>60</sup>

In summary, then, there is little agreement about what exactly “content” discrimination comprises. Taken together, however, the scholarly literature provides a fairly exhaustive survey of the possible positions.

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<sup>57</sup> Frank I. Michelman, *Liberties, Fair Values, and Constitutional Method*, 59 U. Chi. L. Rev. 91, 108 n.56 (1992) (concluding on the basis of *Minneapolis Star* that “[c]ourts will apply strict scrutiny to laws that selectively burden speech as opposed to other activity”); Rubinfeld, *supra* note 2, at 832 (arguing that precedents reveal that “states cannot impose special legal liabilities on people for engaging in a communicative activity”).

<sup>58</sup> Rubinfeld, *supra* note 2, at 831–32.

<sup>59</sup> Compare Tribe, *supra* note 18, § 12-2, at 790–91 (defining communication-related regulations as content neutral and defending this treatment), and Stone, *Content Regulation*, *supra* note 35, at 189–90, 193 (approving content-neutral treatment as a “sensible response”), with Day, *supra* note 3, at 196–98 (criticizing the doctrine for treating communication-related regulation the same as regulations of conduct), Robert Post, *Recuperating First Amendment Doctrine*, 47 Stan. L. Rev. 1249, 1256–57, 1261–62 (1995) (same), and Williams, *supra* note 2, at 659–61 (same). In his early article on content discrimination, Professor John Hart Ely recognized the problem of communication-related regulations. He regarded them as content neutral but expressed ambivalence about the level of scrutiny they should receive. See Ely, *supra* note 13, at 1485–89.

Some part of this normative disagreement goes back to differences in descriptive premises about how content-neutral scrutiny works. Tribe and Stone, for example, assume that it will involve some amount of scrutiny. See Tribe, *supra* note 18, § 12-2, at 791; Stone, *Content Regulation*, *supra* note 35, at 193. Post, by contrast, takes it as “neither rigorous nor critical.” Post, *supra* note 59, at 1262. Ely, writing early in the development of the doctrine, recognizes that it could go many directions and that each has problems. Rational basis scrutiny will permit regulations having serious effects on communications. Heightened scrutiny for all content-neutral regulations will result in most, if not all, laws triggering serious First Amendment scrutiny. And heightened scrutiny for regulation of traditional communication (of the kind advocated by Post) creates difficult line-drawing problems and favors entrenched modes of communication. Ely, *supra* note 13, at 1487–89. The debate in the ensuing decades has circled around the same trade-offs Ely identified.

<sup>60</sup> See Alexander, *supra* note 2, at 19 n.24 (collecting cases and arguing that, while communication-related regulation should be permissible in itself, it may create sufficient risk of message-related discrimination to warrant treating it as content based).

*B. Defining the Role of Discriminatory Purpose*

The potential meanings of “content” do not exhaust the field of ambiguities. Several arise from the relation between the content-discrimination principle and government purpose. Whatever the precise contours of the principle, it is difficult to formulate it in a way that is not concerned with *why* the government is regulating: the government usually may not regulate expression on the basis of its “content,” but it usually may do so for other reasons. For this reason, the content-discrimination principle is often glossed as an inquiry into government purpose.<sup>61</sup>

*1. Defining Suspect Purpose*

On this account it becomes important to know what constitutes an illicit purpose. Unsurprisingly, there are a variety of formulations, roughly tracking the variety of conceptions of “content.” At the narrow end is government hostility toward particular view-

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<sup>61</sup> See Williams, *supra* note 2, at 618 (“Most observers appear to agree with the Court that the special danger in cases of content discrimination lies in the fact that the government’s purpose is connected to the ‘communicative impact’ of the speech regulated.”); see also, e.g., *Hill v. Colorado*, 530 U.S. 703, 718 n.25 (2000) (referring to a “purpose” of Colorado law); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 645 (1994) (“Our cases have recognized that even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys.”); Tribe, *supra* note 18, § 12-3, at 794 (asking whether a law was “motivated by . . . an intent to single out constitutionally protected speech for control or penalty”); Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 *Hastings L.J.* 921, 921 (1993) (employing the term “purpose”); Kagan, *supra* note 45, at 414, 425 (employing the terms “purpose” and “motive”); McDonald, *supra* note 2, at 1358–59 (employing the term “purpose”); Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 *Pepp. L. Rev.* 273, 280 (2009) (employing the term “motivation”); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 *U. Chi. L. Rev.* 190, 200 (1988) (employing the term “motive”).

Not all attempted justifications for the content-discrimination principle emphasize government purpose, but the purpose justification remains the most dominant. See Stone, *Content Regulation*, *supra* note 35, at 201–33 (assessing equality, communicative impact, distortion, and motivation as justifications); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 *U. Chi. L. Rev.* 46, 54–56 (1987) (noting distortion of public debate, improper motivation, and communicative impact as potential justifications). Some commentators think that discriminatory purpose constitutes a special wrong, but that the law should also be concerned with the effects of incidental regulation on communication. See Williams, *supra* note 2, at 658.

points, whether motivated by self-interest, dislike, or disapproval.<sup>62</sup> In the middle are views that the government is not permitted to legislate out of hostility toward “messages.”<sup>63</sup> At the broad end are contentions that not only must the government not act out of hostility, but that it must remain neutral toward all messages<sup>64</sup> or, more broadly still, toward all communicative endeavors.<sup>65</sup>

Most, though not all,<sup>66</sup> of these conceptions are also suspicious of governmental attempts to regulate on the basis of anticipated responses to expression, whether positive responses (e.g., listeners’ being persuaded to follow the speaker’s suggestion of breaking the law) or negative responses (e.g., listeners’ being violently offended at the speaker’s suggestion).<sup>67</sup> On most views, a “clear and present

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<sup>62</sup> See, e.g., Heins, *supra* note 36, at 115; Stephan, *supra* note 2, at 233; see also *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If 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.”); *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (“[T]here are some purported interests—such as a desire to suppress support for a minority party or an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas—that are so plainly illegitimate that they would immediately invalidate the rule.”); *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n*, 447 U.S. 530, 536 (1980) (“[W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited ‘merely because public officials disapprove the speaker’s views.’” (quoting *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring))).

<sup>63</sup> See, e.g., Ely, *supra* note 13, at 1497; Kagan, *supra* note 45, at 431; see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) (“The government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed.”).

<sup>64</sup> See, e.g., Alexander, *supra* note 2, at 11 (“[A]t its core [freedom of expression] requires regulators to abstain from acting on the basis of their own assessments of a message’s truth or value.”).

<sup>65</sup> I take Rubinfeld to be staking out a position along these lines. Rubinfeld, *supra* note 2, at 776 (stating First Amendment scrutiny will not attach so long as “the communicativeness of [a speaker’s] actions has no bearing on his liability”).

<sup>66</sup> See Kagan, *supra* note 45, at 430–34 (attempting to distinguish between “ideological” and “harm-based” purposes).

<sup>67</sup> See, e.g., Tribe, *supra* note 18, § 12-2, at 790 (“[I]f the constitutional guarantee is not to be trivialized, it must mean that government cannot justify restrictions on free expression by reference to the adverse consequences of allowing certain ideas or information to enter the realm of discussion and awareness.”); Ely, *supra* note 13, at 1497; Stone, *Content Regulation*, *supra* note 35, at 207; Volokh, *supra* note 50, at 1302; see also *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992) (“Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.”); *Hustler Magazine v. Falwell*,

danger” or similar exigency may justify regulation on the basis of anticipated responses, but the circumstances must be extreme.<sup>68</sup> The impropriety of response-related purposes may be explained by the government’s commitment to evaluative neutrality<sup>69</sup> or, more typically, by an argument that such purposes may easily conceal hostility toward the ideas at issue.<sup>70</sup>

The concept of illicit purpose may relate to the definition of suspect discrimination in more than one way. For example, a form of discrimination may be suspect because it expresses a high risk of the same type of illicit purpose. Thus, a law that facially discriminates on the basis of viewpoint may have a high probability of harboring hostility toward that viewpoint. A form of discrimination may also be suspect because it seems likely to conceal a more narrowly drawn form of illicit purpose. For example, some have argued that subject-matter discrimination is suspect, at least in part, because it may conceal hostility toward particular viewpoints.<sup>71</sup> Professor Alexander has argued that communication-related discrimination may be permissible in itself but suspect for its risk of concealing hostility toward particular messages.<sup>72</sup> It is not always

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485 U.S. 46, 55 (1988) (“The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection.” (internal citation and quotation marks omitted)); *Cohen v. California*, 403 U.S. 15, 21 (1971) (“The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.”).

<sup>68</sup> *Abrams v. United States*, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting); *Schenck v. United States*, 249 U.S. 47, 52 (1919); see, e.g., *Cohen*, 403 U.S. at 21 (finding that regulation is permissible when “substantial privacy interests are being invaded in an essentially intolerable manner”); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (allowing regulation of incitement when intended and likely to lead to imminent violence or lawlessness).

<sup>69</sup> See Alexander, *supra* note 2, at 11; Alexander, *supra* note 61, at 945, 948.

<sup>70</sup> See, e.g., Tribe, *supra* note 18, § 12-2, at 790; Ely, *supra* note 13, at 1497; Stone, Content Regulation, *supra* note 35, at 217.

<sup>71</sup> See, e.g., Schauer, *supra* note 38, 284–85 (observing that subject-matter regulations are often viewpoint discriminatory, while also arguing for independent wrongfulness of subject-matter discrimination); Strauss, *supra* note 61, at 199–200 (describing the content discrimination principle as a prophylactic rule designed to identify viewpoint discrimination).

<sup>72</sup> Alexander, *supra* note 2, at 19 n.24.

clear which parts of a proposed conception of discrimination are substantive and which parts are prophylactic.

Particular conceptions of content discrimination and illicit government purpose necessarily rest on deeper substantive propositions about the First Amendment, if not ultimately on moral or political commitments antecedent to a specific concern with freedom of expression.<sup>73</sup> Some commentators relate the content-discrimination principle to democratic self-governance theories of the First Amendment.<sup>74</sup> Some root it in a conception of personal autonomy.<sup>75</sup> Some link it explicitly with liberalism,<sup>76</sup> some with tolerationist or anti-paternalist values that appear to sound in the liberal tradition.<sup>77</sup> For its part, the Supreme Court's statements have encompassed all these views.<sup>78</sup>

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<sup>73</sup> But see Rubinfeld, *supra* note 2, at 821 (purporting to derive an “anti-orthodoxy principle . . . [n]ot from moral philosophy. Nor from rumination on the necessary or ideal conditions of democracy[, but] from the First Amendment’s paradigm cases”).

<sup>74</sup> See, e.g., John Hart Ely, *Democracy and Distrust* 112 (1980) (“If the First Amendment is even to begin to serve its central function of assuring an open political dialogue and process, we must seek to minimize assessment of the dangerousness of the various messages people want to communicate.”); Post, *supra* note 59, at 1275.

<sup>75</sup> See, e.g., Heyman, *supra* note 38, at 653 (“When individuals act within the scope of their own autonomy, government may not intrude into this realm by regulating the content of thought or expression. Nor may government interfere with the collective autonomy of citizens by imposing unjustified restrictions on public debate.”); Strauss, *supra* note 50, at 353.

<sup>76</sup> Alexander stipulates a neutrality principle that he links expressly to liberalism, but he goes on to argue that the paradoxical nature of liberalism makes it ill-suited to sustain a right of freedom of expression. He concludes that the best foundations for such a right are “indirect-consequentialist” arguments that “content-neutrality within the circumscribed domain will lead to better consequences (however determined) than having government restrict expression in that domain to those specific tokens of expression it thinks likely to produce good consequences or unlikely to produce bad ones.” Alexander, *supra* note 2, at 186.

<sup>77</sup> See, e.g., Stone, *Content Regulation*, *supra* note 35, at 212–14 (citing anti-intolerance and anti-paternalist views of the First Amendment); Volokh, *supra* note 50, at 1304 (invoking anti-paternalism).

<sup>78</sup> See, e.g., *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994) (“At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.”); *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 791 (1978) (“[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments.”); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, relig-

## 2. *The Form and Role of Purpose Inquiry*

Conceiving of the content-discrimination principle as concerned with government purpose also triggers debates about the form and role of purpose inquiry.<sup>79</sup> The first debate regards whether the purpose inquiry should take an objective or subjective form and hence what sources (such as legislative history) it should employ.<sup>80</sup> Most First Amendment commentators set the question aside on the rationale that adherents of either view may apply their preferred conception.<sup>81</sup> To the extent that the Court expresses a view on this question, however, it has great potential ramifications for the types of information it will employ in policing for suspect purpose.

The structure of content analysis makes clear what the Court's primary sources will be: the face of a law and its "purpose," typically as expressed by the justifications offered for it in litigation. To the extent that neither of these sources attempts to capture the subjective motivations of rule-making officials, they are consistent with an objective view. As I shall argue below, the Court on occasion also draws on other sources as well.

Finally, whatever constitutes a suspect purpose, and whether it is evaluated objectively or subjectively, there is the question of what

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ion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

The Court is willing to be pluralistic on this question even in the course of one passage. See, e.g., *Mosley*, 408 U.S. at 95–96 ("To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship.").

<sup>79</sup> This discussion follows the approach and terminology used by Professor Micah Schwartzman in discussing the role and form of purpose inquiry in the free exercise context. See Micah Schwartzman, *What If Religion Isn't Special?*, 79 U. Chi. L. Rev. (forthcoming 2013).

<sup>80</sup> I recognize that the terms "objective" and "subjective" are contestable ways of describing the difference between textualist and intentionalist methodologies. See, e.g., Caleb Nelson, *What Is Textualism?*, 91 Va. L. Rev. 347, 348 (2005) (suggesting that textualists, like intentionalists, are ultimately concerned with the actual intent of legislative bodies); John F. Manning, *Textualism and Legislative Intent*, 91 Va. L. Rev. 419, 424 (2005) (endorsing the more traditional view that textualists' interest in "objectified intent" is distinct in kind from intentionalist inquiries); Caleb Nelson, *A Response to Professor Manning*, 91 Va. L. Rev. 451, 452–53 (2005) (reiterating that textualism is best described as proceeding on the premise that collective legislative intent exists but is unknowable to courts).

<sup>81</sup> See Kagan, *supra* note 45, at 426 n.40; Williams, *supra* note 2, at 699 n.313. But see Ely, *supra* note 13, at 1506 n.98 (rejecting a subjective view).

role a suspect purpose must play in governmental decision making to render a law presumptively invalid. There are several options:

1. A law is legitimate only so long as it does not have the *appearance* of a suspect purpose. The *appearance* of a suspect purpose may render a law suspect.
2. A law is legitimate only so long as it is *exclusively justified* by legitimate purposes and not by any suspect purpose. The existence of a suspect justification renders a law suspect.
3. A law is legitimate so long as it is *primarily justified* by legitimate purposes. It may have a suspect purpose, so long as that purpose is not the primary justification for the law.<sup>82</sup>
4. A law is legitimate so long as it is *sufficiently justified* by a legitimate purpose. So long as any of its legitimate purposes would have been sufficient to sustain the law, it is not suspect. It is only suspect where a suspect purpose is necessary to justify the law.<sup>83</sup>

Different doctrinal rules may embody different approaches. For example, a categorical rule against facial discrimination on the basis of certain classifications may reflect the position that even the *appearance* of a suspect purpose is suspicious. A law explicitly regulating speech, say, by subject matter, may conceivably have a neutral purpose—that is, a purpose that does not stem from hostile-

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<sup>82</sup> Cf. *City of Renton v. Playtime Theatres*, 475 U.S. 41, 48 (1986) (finding a neutral predominant intent “more than adequate” to establish a law’s neutrality).

<sup>83</sup> See, e.g., *Tribe*, supra note 18, § 12-3, at 794 (noting that a facially neutral law is content based if it “was *motivated* by (i.e., would not have occurred but for) an intent to single out constitutionally protected speech for control or penalty”); *Ely*, supra note 13, at 1497 n.59 (stating that a law is acceptable so long as one nondiscriminatory purpose may be imputed to it); see also *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285–87 (1977); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977) (suggesting that, under the Equal Protection Clause, discriminatory purpose does not render governmental action unconstitutional unless the same action would not have occurred in the absence of the discriminatory purpose).

ity toward the targeted subject matter or concern about its effects.<sup>84</sup> Treating such a law as content based may amount to a rule that the appearance of a suspect purpose is sufficient to render a law presumptively invalid.<sup>85</sup>

By contrast, where a court concludes that a law is facially neutral and proceeds to consider its justifications, the court must decide among the other possible approaches. Laws having both suspect and neutral justifications will raise questions about what role the suspect justification must play in order to render the law presumptively invalid. The doctrinal structure of content analysis necessarily embroils courts in these questions.

The concept of content discrimination, then, contains a number of ambiguities, the resolution of which ultimately depends upon principles as foundational as one's underlying conceptions of freedom of expression and governmental purpose. The question is whether the Court's view, as a descriptive matter, is as scattered as the normative possibilities. For the remainder of the Article, I shall argue that it is not. I begin with facial classifications by subject matter and viewpoint.

### III. SUSPECT CLASSIFICATIONS: SUBJECT MATTER AND VIEWPOINT

The cases reveal a stable rule that laws that facially regulate expression on the basis of subject matter or viewpoint are content based.

#### *A. A Consistent Rule*

With two exceptions, for upward of thirty years the Court has found every facial classification on the basis of subject matter or viewpoint to be content based.<sup>86</sup> It has, for example, treated as con-

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<sup>84</sup> See *infra* notes 117–124 and accompanying text.

<sup>85</sup> Cf. Strauss, *supra* note 61, at 199–200 (explaining the content-discrimination principle as a prophylactic rule against viewpoint discrimination).

<sup>86</sup> See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2723–24 (2010); *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010); *Ashcroft v. ACLU*, 542 U.S. 656, 670 (2004); *Republican Party of Minn. v. White*, 536 U.S. 765, 774 (2002); *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 811 (2000); *Reno v. ACLU*, 521 U.S. 844, 868 (1997); *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 736 (1996); *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 429 (1993); *Burson v. Freeman*, 504 U.S. 191, 197–98 (1992); *Forsyth Cnty. v. Nationalist Movement*, 505 U.S.



tentbased laws classifying expression as political,<sup>87</sup> sexual,<sup>88</sup> commercial,<sup>89</sup> labor related,<sup>90</sup> violent,<sup>91</sup> and offensive or controversial.<sup>92</sup> The same has been true of a host of more idiosyncratic subject-matter classifications, such as a ban on depictions of cruelty to animals,<sup>93</sup> an economic burden on criminals' accounts of their exploits,<sup>94</sup> and various schemes according expressive activity different treatment according to its subject matter.<sup>95</sup>

Two features of this rule are noteworthy. First, the Court has regularly treated subject-matter and viewpoint discrimination as equally suspect. This has been the Court's consistent answer to the questions of some scholars, and indeed some Justices, as to whether the two should be treated the same way. The Court has at

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123, 134 (1992); *Simon & Schuster v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991); *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 131 (1989); *Boos v. Barry*, 485 U.S. 312, 321 (1988) (plurality opinion); *id.* at 334 (Brennan, J., concurring in part and concurring in the judgment); *Ark. Writers' Project v. Ragland*, 481 U.S. 221, 229 (1987); *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 503 (1981); *Carey v. Brown*, 447 U.S. 455, 460–61 (1980); *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537 (1980).

<sup>87</sup> See, e.g., *Humanitarian Law Project*, 130 S. Ct. at 2723–24; *Republican Party of Minn.*, 536 U.S. at 774; *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995); *Burson*, 504 U.S. at 197–98.

<sup>88</sup> *Ashcroft v. ACLU*, 542 U.S. at 670; *Playboy Entm't Grp.*, 529 U.S. at 811; *Reno v. ACLU*, 521 U.S. at 868; *Denver Area Educ. Telecomm. Consortium*, 518 U.S. at 736; *Sable Commc'ns of Cal.*, 492 U.S. at 131.

<sup>89</sup> *Discovery Network*, 507 U.S. at 429 (applying commercial-speech intermediate scrutiny to ordinance banning commercial-handbill newsracks but not newspaper newsracks).

<sup>90</sup> *Carey*, 447 U.S. at 460–61; see also *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 99 (1972).

<sup>91</sup> *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011).

<sup>92</sup> *Snyder v. Phelps*, 131 S. Ct. 1207 (2011); *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *Boos v. Barry*, 485 U.S. 312, 321 (1988) (plurality opinion); *id.* at 334 (Brennan, J., concurring in part and concurring in the judgment); *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n*, 447 U.S. 530, 533, 537 (1980).

<sup>93</sup> *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010).

<sup>94</sup> *Simon & Schuster v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

<sup>95</sup> *Ark. Writers' Project v. Ragland*, 481 U.S. 221, 229–30 (1987) (magazines other than religious, professional, trade and sports journals); *Regan v. Time, Inc.*, 468 U.S. 641, 647–48 (1984) (reproduction of currency for uses other than philatelic, numismatic, educational, historical, or newsworthy purposes); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 514–15 (1981) (off-site commercial billboards and all non-commercial billboards except those communicating specified messages).

times said that viewpoint discrimination is worse,<sup>96</sup> but both are apparently bad enough to render a law content based and subject it to strict scrutiny.<sup>97</sup>

Second, the rule has held true even where the government offered a neutral justification for a subject matter or viewpoint classification.<sup>98</sup> To the extent that the Court's articulations of content analysis raise questions along these lines, its outcomes clearly resolve them.

Thus, quite clearly, facial classifications by subject matter and viewpoint constitute content-based laws. The question becomes how anyone could have thought otherwise. There is a good explanation, and it begins with the two exceptions to the rule.

### B. The Sources of Confusion

In the first years of the content-discrimination principle, the Court created two exceptions to it. One was *FCC v. Pacifica Foundation*, in which a plurality of the Court was willing to allow subject-matter restrictions on "low-value" speech, and a majority relied upon the particularly invasive character of the broadcast medium and the interest in protecting minors to uphold rules relegating profanity and other adult expression to hours outside prime time.<sup>99</sup>

The other exception was the treatment of zoning for adult entertainment venues in *Young v. American Mini Theatres*,<sup>100</sup> an exception subsequently confirmed in two other cases.<sup>101</sup> All three cases

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<sup>96</sup> See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) ("In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination."); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785–86 (1978) ("Especially where . . . the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.").

<sup>97</sup> See, e.g., *Hill v. Colorado*, 530 U.S. 703, 723 (2000) ("Regulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation.").

<sup>98</sup> See, e.g., *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 429 (1993) (discussed *infra* note 119 and accompanying text); *Simon & Schuster*, 502 U.S. at 116.

<sup>99</sup> 438 U.S. 726, 746–50 (1978).

<sup>100</sup> 427 U.S. 50, 70–73 (1976).

<sup>101</sup> *City of L.A. v. Alameda Books*, 535 U.S. 425, 436–37 (2002); *City of Renton v. Playtime Theatres*, 475 U.S. 41, 54–55 (1986).

vary in their precise rationales,<sup>102</sup> but the upshot is that adult entertainment zoning is treated as content neutral because it is justified by concern with the “secondary effects” that correlate with adult entertainment, such as crime and declining neighborhoods. The Court accepted this concern as content neutral and concluded, in a departure from its usual approach, that the existence of a neutral justification rendered a facially discriminatory law content neutral.

The secondary-effects cases and *Pacifica* are undeniably exceptions; and any unreasoned exceptions—which these are—undermine the credibility of a rule. But as a descriptive matter, it is worth placing these exceptions in context. On one hand are two exceptions created in the early years of the content-discrimination principle. On the other are decades of content analysis finding subject-matter and viewpoint classifications content based and cordoning the exceptional cases off from the rest. In fact, many of the Court’s subject-matter and viewpoint cases have involved the potential extension of *Pacifica* or the secondary-effects rationale to other forms of expression, and in every such case the Court has rejected the argument.<sup>103</sup> Meanwhile, the Court has not recognized a new exception to its approach in thirty-three years. Every other case involving a classification by subject matter or viewpoint has been deemed content based.

The real issue for critics of content analysis is not *Pacifica* and secondary effects, but how far their approaches infect the rest of

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<sup>102</sup> In *Young*, a four-person plurality stated that mere zoning (rather than prohibition) of low-value sexually explicit speech was acceptable; in passing, it noted that the city’s concern was with the “secondary effect” of high concentrations of adult venues, “not the dissemination of ‘offensive’ speech.” 427 U.S. at 71 n.34. In concurrence, Justice Powell maintained that the regulation should be given lower scrutiny, because it did not significantly restrict speakers’ ability to make adult movies or audiences’ ability to see them. *Id.* at 77–80 (Powell, J., concurring). The second case, *Renton*, was the only one in which a majority of the Court claimed that a neutral justification actually rendered the regulation content neutral. 475 U.S. at 47–48. In *Alameda Books*, only a plurality of the Court was willing to rely on the *Renton* rationale without comment. 535 U.S. at 438 (plurality opinion). Concurring, Justice Kennedy recognized that *Renton*’s content-neutral designation was “something of a fiction.” *Id.* at 448 (Kennedy, J., concurring). Nevertheless, he agreed that this type of regulation warranted an “exception” to usual content-distinction rules and should receive intermediate scrutiny so long as it was directed at secondary effects. *Id.*

<sup>103</sup> See, e.g. *Ashcroft v. ACLU*, 542 U.S. 656, 660–61 (2004); *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 815 (2000); *Reno v. ACLU*, 521 U.S. 844, 868 (1997); *Sable Commc’ns of Cal. v. FCC*, 492 U.S. 115, 127–128 (1989).

the doctrine. A significant portion of the incoherence objection begins with the second case in the secondary-effects triumvirate, *City of Renton v. Playtime Theatres*.<sup>104</sup> In *Renton*, the Court stated that content analysis should turn on a law's justifications, with apparently no regard for its face.<sup>105</sup> At the same time, the Court purported to limit this innovation to regulation of "businesses that purvey sexually explicit materials."<sup>106</sup> Soon, however, litigants sought to export *Renton's* justification-based understanding of content analysis. In *Boos v. Barry*, a plurality considering a prohibition of offensive speech in the vicinity of an embassy rejected the government's secondary-effects argument because the ordinance was obviously aimed at a "primary" effect of speech, that is, the offense it would trigger.<sup>107</sup> Although the plurality ultimately rejected the secondary-effects argument, Justices Brennan and Marshall in concurrence took it to task for even suggesting that such an argument might apply outside of the adult zoning context.<sup>108</sup>

The next year, in upholding a content-neutral sound-volume regulation in *Ward v. Rock Against Racism*, the majority invoked *Renton* in defining content analysis in justification-based terms:

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 [citing *Renton*]. Government regulation of expressive activity is content neutral so long as it is *justified* without reference to the content of the regulated speech.<sup>109</sup>

This formulation again eschewed reliance on the face of a law in favor of an inquiry into its "purpose," as expressed by its justifica-

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<sup>104</sup> 475 U.S. 41 (1986).

<sup>105</sup> *Id.* at 48.

<sup>106</sup> *Id.* at 49.

<sup>107</sup> 485 U.S. 312, 321 (1988).

<sup>108</sup> *Id.* at 334-35 (Brennan, J., concurring in part and concurring in the judgment).

<sup>109</sup> 491 U.S. 781, 791 (1989) (internal citations and quotation marks omitted).

tions. In saying that this standard applied not only to time-place-manner cases but “in speech cases generally,” the Court implied that this was an articulation of the content analysis intended to govern all inquiries.

The combined effect of *Renton*, *Boos*, and *Ward* was to suggest that justification, rather than facial classification, was to be the primary proxy on which the content inquiry turned. Thus a scholar writing shortly after *Ward* could conclude that

[u]nder the Court’s present approach, a regulation will qualify as content discriminatory only if the government purpose served by the regulation is related to the content of the speech. Neither a content-discriminatory impact . . . nor a content distinction on the face of the regulation, will suffice to make a regulation content-discriminatory in the absence of this type of government purpose.<sup>110</sup>

Critics have argued that this *Renton/Ward* reformulation of the doctrine led directly to a situation in which the Court could choose to examine a law’s face, its purpose, or both, depending on its preferences.<sup>111</sup> Doubtless the Court’s articulations of the content analysis have been convoluted ever since.<sup>112</sup> But this definitional confusion seems to have had little real effect. As I shall discuss in the next Part, it is difficult to identify a case of *any* kind in which the Court does not consider the face of a law in performing the content analysis. At the least, when it comes to facial classifications by subject matter or viewpoint, the Court has never taken up its own invitation to ignore the facial proxy in favor of justification. Instead, in these cases the Court has always followed the face of the regulation.<sup>113</sup>

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<sup>110</sup> Williams, *supra* note 2, at 622–23 (emphasis added).

<sup>111</sup> See, e.g., McDonald, *supra* note 2, at 1382.

<sup>112</sup> See *Bartnicki v. Vopper*, 532 U.S. 514, 526 & n.9 (2001); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642–43 (1994).

<sup>113</sup> See cases cited *supra* note 86. The only case in which the Court even hesitated was the next after *Ward*, *Simon & Schuster v. Members of New York State Crime Victims Board*, 502 U.S. 105 (1991). *Simon & Schuster* involved the New York “Son of Sam” law, which limited the profits criminals could receive from accounts of their exploits. *Id.* at 108. The Court said the law was obviously content-based on its face because it was “directed only at works with a specified content.” *Id.* at 116. The Court denied that the purpose of the law mattered, because “[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment.” *Id.* at 117 (quoting *Minnea-*

In some cases, it is true that the Court explains that a regulation is content based by referring *both* to its face and to its justification,<sup>114</sup> but it is not clear that this marks real confusion in the content analysis. For one thing, this generally occurs when the government has argued, or a lower court has concluded, that *Renton* should apply because the law has some purportedly neutral justification.<sup>115</sup> In such cases, perhaps it would be cleaner for the Court to say that justification is irrelevant where there is a facial classification. But the fact remains that, though the Court may discuss justifications, it *always* relies on the facial proxy and *never* deviates from the signal that it sends.<sup>116</sup>

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polis Star & Tribune Co. v. Minn. Comm’r of Revenue, 460 U.S. 575, 592 (1983)). The Court went on to apply strict scrutiny and invalidate the law. Despite this seemingly categorical rejection of the *Ward* approach, in a footnote the Court said it need not decide whether the law would be content neutral under *Renton* and *Ward*, because the law was so overinclusive that it would fail content-neutral scrutiny as well. *Id.* at 122 n.\*. This footnote is the Court’s most notable concession to the *Renton/Ward* approach with respect to facial classifications by subject matter and viewpoint.

<sup>114</sup> See McDonald, *supra* note 2, at 1402.

<sup>115</sup> See, e.g., Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2723–24 (2010) (government arguing law was neutral conduct regulation requiring *O’Brien* analysis); Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 134 (1992) (petitioner making secondary effects argument); R.A.V. v. City of St. Paul, 505 U.S. 377, 394 (1992) (respondent making secondary-effects argument); *Boos*, 485 U.S. at 320 (plurality opinion) (same); *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n*, 447 U.S. 530, 533 (1980) (state court upheld regulation as “valid time, place, and manner regulation”). Although the Court does not expressly mention it in its opinion, the United States also argued for the application of *Renton* in *United States v. Playboy Entm’t Grp.* See Brief for the Appellants at 22 & n.12, *United States v. Playboy Entm’t Grp.*, 529 U.S. 803 (2000) (No. 98-1682), 1999 WL 700620 at \*22 & n.12; Reply Brief for the Appellants at 1–2 n.1, *Playboy Entm’t Grp.*, 529 U.S. 803 (No. 98-1682), 1999 WL 1021220 at \*1–2 n.1. Note that, as *Consolidated Edison* demonstrates, this occasional tendency to address the regulation’s justification on the content analysis predates *Renton* and *Ward* and seems correlated with the arguments made by litigants or lower courts.

<sup>116</sup> The only even arguable exception I can find is *Texas v. Johnson*, 491 U.S. 397 (1989). There the Court confronted a Texas law punishing intentional or knowing desecration of a venerated object, which included public monuments and places of worship and burial, as well as state and national flags. *Id.* at 400 n.1. The statute defined “desecrate” as to “deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.” *Id.* Arguably, the Court should have found this provision content based on its face, but the Court took it to be a facially neutral regulation of conduct. *Id.* at 402–03. Thus, rather than assessing whether the statutory definition rendered the law facially content based, the Court went directly to assessing its justification, which it concluded was related to the suppression of expression and thus content based. *Id.* at 410.

The force of this assertion is particularly clear in cases that involve both a suspect facial classification and a plausibly neutral justification. The law in *United States v. Stevens* was an example: it punished certain depictions of animal cruelty on the basis that animals were actually harmed in their creation.<sup>117</sup> Yet the Court treated the law as content based on its face, without regard for its justification.<sup>118</sup> Similarly, in *City of Cincinnati v. Discovery Network*, the City's aesthetic justification for banning newsracks for commercial handbills did not render content neutral a policy which on its face distinguished commercial publications from other publications.<sup>119</sup> In *Simon & Schuster v. Members of New York State Crime Victims Board*, New York's so-called "Son of Sam law," which put revenues from criminals' chronicles of their crimes into escrow accounts for the satisfaction of suits by victims, was not rendered content neutral by the fact that it was justified by a generalized governmental concern that criminals not profit by their own wrongs.<sup>120</sup>

This is consistent with the Court's approach before *Renton. Police Department of Chicago v. Mosley* itself was such a case.<sup>121</sup> In *Mosley*, the Court invalidated a Chicago picketing regulation because its labor exemption constituted subject-matter discrimina-

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For this law, this was a justifiable approach. The Court attempted to explain its approach on the ground that a given speaker may not subjectively intend to communicate by mistreating the flag, *id.* at 403 n.3, but this argument overlooks the fact that the offense which the state seeks to prevent would still be highly likely to reside in the message which the offended onlookers read in the mistreatment. Nevertheless, the Court might reasonably have thought it possible that other forms of "desecration" covered by the statute might not be expressive, and that the offense caused by them thus might not be speech related. One could at least argue that vandalism of a grave, for instance, might be distressing for non-communicative reasons. At the very least, the Court might not have wanted to delve into this question when the justification inquiry was relatively straightforward.

<sup>117</sup> 130 S. Ct. 1577, 1582 n.1 (2010).

<sup>118</sup> *Id.* at 1584.

<sup>119</sup> 507 U.S. 410, 429 (1993). Because the distinction was between commercial and other speech, the Court subjected the law to commercial-speech intermediate scrutiny rather than strict scrutiny.

<sup>120</sup> 502 U.S. 105, 116, 119 (1991); see *supra* note 113.

<sup>121</sup> 408 U.S. 92 (1972); see also, e.g., *Ark. Writers' Project v. Ragland*, 481 U.S. 221, 229 (1987); *Carey v. Brown*, 447 U.S. 455, 459–462 (1980).

tion.<sup>122</sup> But the City's primary justification was that labor pickets were less likely to be violent than other types of pickets, an arguably neutral rationale.<sup>123</sup> The Court, however, relied entirely on the facial classification to treat the law as content based.<sup>124</sup>

Thus, despite the Court's pronouncements to the contrary, facial classifications by subject matter or viewpoint render laws content based, even when accompanied by neutral justifications. The only exceptions—*Pacifica* and secondary effects—originated early and have since been severely confined. Otherwise, across a wide array of cases, the Court has implemented its rule uniformly.

#### IV. "CONTENT-NEUTRAL" LAWS: OTHER FACIAL CLASSIFICATIONS AND THE SEARCH FOR COVERT DISCRIMINATION

Overt subject-matter and viewpoint discrimination are only two forms that "content" discrimination may take. Other cases raise questions about (1) what else counts as suspect discrimination and (2) how courts should police for whatever forms of discrimination are suspect. The first question is whether other forms of discrimination are suspect on their face. Almost universally, current case law answers with a resounding "No."

##### A. Communication-Related Discrimination

As discussed earlier, some scholars argue that serious First Amendment issues arise when a law targets a communicative enterprise.<sup>125</sup> The case law, however, rejects this view. This is apparent in cases involving facial discrimination (1) against speakers or media (that is, people who are communicating) and (2) against particular communicative activities.

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<sup>122</sup> 408 U.S. at 99, 101–02. Although the Court at times in *Mosley* suggested that content discrimination was per se impermissible, its analysis of the regulation more closely resembled the eventual strict scrutiny standard than an outright bar.

<sup>123</sup> *Id.* at 100; see also Stone, Content Regulation, *supra* note 35, at 210. Similarly, another proffered justification was that the labor exception was required for compliance with federal labor law. See *Mosley*, 408 U.S. at 102 n.9; see also Stephan, *supra* note 2, at 225. The Court also found this interest inadequate to justify the regulation at the scrutiny stage, but it did not come into play during the content analysis.

<sup>124</sup> *Mosley*, 408 U.S. at 99.

<sup>125</sup> See *supra* notes 54–60 and accompanying text.



*1. Classifications by Speaker or Medium*

At the outset, it is worth noting that “speaker” discrimination is a slippery category. All sorts of regulations can be described as speaker based: a zoning ordinance that applies to adult theaters,<sup>126</sup> a regulation that applies to publications on some topics but not others,<sup>127</sup> or a limitation on the profits criminals can earn by recounting their crimes.<sup>128</sup> The operative feature of these regulations, however, is that they define the relevant class of speakers by their subject matter or viewpoint. Content analysis rightly detects such classifications as subject-matter or viewpoint discrimination.

The concern here is with classifications that single out speakers per se, *not* by subject matter or viewpoint. The Court has sometimes said that such classifications are facially suspect. In *Citizens United v. FEC*, for instance, the Court said, “[q]uite apart from the purpose or effect of regulating content, . . . the Government may commit a constitutional wrong when by law it identifies certain preferred speakers.”<sup>129</sup> In *Turner Broadcasting System v. FCC*, the Court said that “some measure of heightened First Amendment scrutiny [was] demanded” by virtue of the fact that the challenged regulations singled out the cable medium.<sup>130</sup>

In practice, however, the Court has treated such a classification as facially suspect in only one case, *Minneapolis Star & Tribune Co.*

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<sup>126</sup> *City of Renton v. Playtime Theatres*, 475 U.S. 41, 43 (1986); *Young v. Am. Mini Theatres*, 427 U.S. 50, 52 (1976).

<sup>127</sup> *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 413 (1993) (distinguishing commercial handbills from newspapers); *Ark. Writers’ Project v. Ragland*, 481 U.S. 221, 223 (1987) (exempting “religious, professional, trade, and sports journals,” but taxing general-interest magazines).

<sup>128</sup> *Simon & Schuster v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 108 (1991).

<sup>129</sup> 130 S. Ct. 876, 899 (2010); see also *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 646 (1994) (concluding that the “overriding objective” of a cable regulation “was not to favor programming of a particular subject matter, viewpoint, or *format*,” thereby suggesting format discrimination was a cognizable wrong (emphasis added)).

After all, this idea has some pedigree: the Court presented *Mosley* as a fundamental-rights Equal Protection case, in which it offended Equal Protection principles to discriminate between labor picketers and other picketers. Granted, this case involved subject-matter discrimination, and the Court rather quickly reframed subject-matter and viewpoint discrimination as a purely First Amendment harm, but the possibility remains that discrimination among speakers *not* geared to subject matter or viewpoint could also be some sort of wrong after the *Mosley* fashion.

<sup>130</sup> 512 U.S. at 641.

*v. Minnesota Commissioner of Revenue*.<sup>131</sup> The Minnesota tax code exempted newspapers from the general sales tax but subjected them to a use tax on some quantity of the ink and paper used in the publication process.<sup>132</sup> The Court concluded that the law was facially unconstitutional. It noted that there was “no legislative history and no indication, apart from the structure of the tax itself, of any impermissible or censorial motive on the part of the legislature.”<sup>133</sup> Nevertheless, “the structure of the tax itself” was sufficient to make it suspect. At first glance, then, this appears to be a case in which facial discrimination against a communicative medium renders a law content based.

But the remaining case law, and the *Minneapolis Star* opinion itself, suggest that the case is ultimately about subject-matter and viewpoint discrimination. In concluding that it was constitutionally suspect to single out newspapers, the Court discussed a long history of concern about differential taxation of the press as a tool to suppress disfavored views and unflattering information about the government.<sup>134</sup> Although the Court held that evidence of invidious legislative intent was not necessary to render the law suspect, its reason appeared to be that facial discrimination against the press presents such a high risk of invidious intent that it is disallowed even when no evidence of such intent exists. In this, the Court’s

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<sup>131</sup> 460 U.S. 575, 581 (1983).

<sup>132</sup> *Id.* at 577–78. After previously exempting newspapers from its use and sales taxes, Minnesota amended its tax code to impose a use tax on paper and ink used in the publication process; it then amended the code again to exempt the first \$100,000 worth of paper and ink. *Id.*

<sup>133</sup> *Id.* at 580; see also *id.* at 592 (“We need not and do not impugn the motives of the Minnesota Legislature in passing the ink and paper tax. Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment.”).

<sup>134</sup> *Id.* at 582–85. The Court also considered *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), at length. *Grosjean* involved a Louisiana license tax on newspapers above a certain circulation. *Id.* at 240. Not coincidentally, most of the few newspapers in that class had been critical of then-Senator Huey Long, who along with the governor distributed a circular describing the tax as a “tax on lying.” *Minneapolis Star*, 460 U.S. at 579–80. Although the *Grosjean* Court did not clearly describe it in these terms, the *Minneapolis Star* Court concluded that the case turned on the suspicion of invidious legislative intent. *Id.* at 580. As such, the case did not directly control *Minneapolis Star*, where there was no evidence of invidious intent. *Id.* But the Court suggested that the evil associated with differential taxation is exactly that illustrated in *Grosjean*; the only difference is that the Court here concluded that the danger is strong enough that it precludes facial discrimination, even in the absence of evidence of invidious intent.

approach is consistent with its treatment of subject-matter and viewpoint classifications: they are so suspect that they render a law content based even when accompanied by a neutral justification.

*Minneapolis Star* thus suggests that a long historical association with suppression is sufficient to render a communication-based classification facially suspect. But in the absence of such a history, such classifications seem to be acceptable. In *Leathers v. Medlock*, for instance, the Court upheld as content neutral a general state sales tax with an exemption for newspapers but not for cable and satellite services.<sup>135</sup> Meanwhile, *Turner Broadcasting* involved a challenge to the “must-carry” provisions of the Cable Television Consumer Protection and Competition Act of 1992, which mandated that cable operators of a certain size had to carry a certain number of local educational and commercial broadcast stations.<sup>136</sup> In considering whether the law was discriminatory by virtue of singling out the cable medium, the Court framed the question almost entirely in terms of subject matter and viewpoint.<sup>137</sup> Finding no such discrimination, the Court concluded that the law was content neutral. And despite the discussion of speaker discrimination in *Citi-*

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<sup>135</sup> 499 U.S. 439 (1991). The Court looked at three features of the face of the law—the fact that it was a general law that did not single out the press, the fact that it did not target a small class of speakers, and the fact that it did not patently discriminate by subject matter or viewpoint—to conclude that it did not merit strict scrutiny. *Id.* at 447–49. On the third prong, the Court used the term “content-based,” but its description of this term made clear that it was primarily concerned about discrimination on the basis of the subjects covered by cable and satellite programming. *Id.* at 449.

<sup>136</sup> 512 U.S. at 630–32 (citing 47 U.S.C. §§ 534–35 (1988 & Supp. IV 1993)). The particular number of must-carry channels depended upon the cable system’s number of channels and subscribers.

<sup>137</sup> See, e.g., *id.* at 643 (“[T]he must-carry rules, on their face, impose burdens and confer benefits without reference to the content of speech.”); *id.* at 646 (“Congress’ overriding objective in enacting must-carry was not to favor programming of a particular subject matter, viewpoint, or format . . .”). The reference to “format” in the last quotation is not borne out by the rest of the opinion. The Court did at the outset say that a speaker-based classification triggered higher scrutiny, *id.* at 641, but it went on to define its concern entirely in terms of “content,” not format. See, e.g., *id.* at 645 (explaining that provisions were not suspect because they classified speakers “based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry,” thereby suggesting “format” discrimination is perfectly acceptable).

In this approach, the Court seemed to forget its three-pronged approach in *Leathers* almost entirely. See *supra* note 135. Almost as an afterthought, it did note that the provisions applied to all cable providers, with a citation to *Leathers*. *Id.* at 661.

*zens United*, to the extent that the provision at issue restricted only a certain form of *political* expression by corporations, it involved a subject-matter-related classification.<sup>138</sup>

A similar approach is reflected in two cases involving speaker-based classifications in the shape of injunctions. In *Madsen v. Women's Health Center*<sup>139</sup> and *Schenck v. Pro-Choice Network of Western New York*,<sup>140</sup> the Court reviewed injunctions imposed upon abortion-clinic protesters whose activities were deemed to interfere with patients' ability to get abortions.<sup>141</sup> In both cases, a majority found the injunction content neutral but, because of "the greater risks of censorship and discriminatory application" presented by injunctions, applied a new, mid-tier level of scrutiny.<sup>142</sup> I will discuss this custom-made level of scrutiny more fully below. For now, what

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<sup>138</sup> In any case, because it was a campaign-finance case it actually employed an effects test rather than the usual content analysis. See *supra* note 14 and accompanying text.

<sup>139</sup> 512 U.S. 753 (1994).

<sup>140</sup> 519 U.S. 357 (1997).

<sup>141</sup> Both injunctions specified distances that the protestors had to keep back from the clinic or its entrances and driveways and provided that they could not harass, intimidate, or threaten those entering or leaving the clinic or approach them uninvited. *Schenck*, 519 U.S. at 366–67; *Madsen*, 512 U.S. at 759–61. The *Madsen* injunction additionally prohibited noise that could be heard and images that could be observed within the clinic, as well as pickets within three hundred feet of workers' residences. 512 U.S. at 760.

<sup>142</sup> *Madsen*, 512 U.S. at 764–65; see also *Schenck*, 519 U.S. at 371. *Madsen* was the first of the cases. Applying mid-level scrutiny, the Court upheld a buffer zone at the front of the clinic but invalidated it as to the back and sides. It upheld the noise restriction but invalidated the images-observable restriction. It also invalidated the approach provision and the residential picketing provision. *Madsen*, 512 U.S. at 770–75.

The case was controversial. In concurrence, Justice Stevens agreed that the injunction was content neutral but believed that injunctions "should be judged by a *more lenient* standard than legislation" because they are only imposed on those who have broken the law. *Id.* at 777–78 (Stevens, J., concurring in part and dissenting in part) (emphasis added). Finally, the dissenters argued that injunctions, whether content based or content neutral, should get strict scrutiny because, like content-based laws, "they may be designed and used precisely to suppress the ideas in question rather than to achieve any other proper governmental aim." *Id.* at 792 (Scalia, J., concurring in the judgment in part and dissenting in part).

In *Schenck*, the majority, applying *Madsen* scrutiny, struck the approach provision and upheld others. 519 U.S. at 371–80. Justices Scalia, Thomas, and Kennedy again dissented to the extent that the majority upheld some parts of the injunction. *Id.* at 394–95 (Scalia, J., concurring in part and dissenting in part). Justice Breyer dissented in part, because he would have upheld the approach provision. *Id.* at 395 (Breyer, J., concurring in part and dissenting in part).

matters is that the fact that the injunctions singled out particular speakers did not itself render them content based. Instead, the entire concern was the extent to which the singling out of particular speakers posed the risk of viewpoint discrimination.

Thus, speaker- and medium-based discrimination appears not to be suspect in itself. Only when a particular classification has a high correlation with subject-matter and viewpoint discrimination does the Court conclude that it should be treated with suspicion.

## 2. Classifications by Communicative Activity

The Court has also denied that discrimination by communicative activity is inherently suspect. Here I am referring to regulations of activities such as leafleting, handbilling, demonstrations, pickets, and solicitation. (I leave aside for the moment whether the last three categories are not only communication related but also inherently message related;<sup>143</sup> at the least, they target certain communicative endeavors.) In case after case, the Court has almost universally treated such classifications as content neutral.<sup>144</sup> One important apparent exception is the Court's approach to regulation of classic communicative endeavors in the pre-*Mosley* era, as encapsulated in *Schneider v. State*.<sup>145</sup> In *Schneider*, the Court invali-

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<sup>143</sup> One could argue that both demonstrating and picketing inherently have message-related aspects. Although pickets may express solidarity or support—as for instance in Justice Stevens's example in *Frisby v. Schultz*, 487 U.S. 474, 496 (1988) (Stevens, J., dissenting) (“GET WELL CHARLIE—OUR TEAM NEEDS YOU.”)—they generally express negative messages. Moreover, both pickets and demonstrations are essentially forms of advocacy whose primary features—public presence, signs, loud noise—seek to gain attention of listeners in order to persuade them to agree. Finally, pickets and demonstrations tend to involve strong feelings: one rarely sees pickets of a “May I suggest” variety. The case is even stronger that solicitation is an obviously message-related category. See text accompanying notes 164–165 *infra*.

<sup>144</sup> See, e.g., *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 675 (1992) (solicitation); *United States v. Kokinda*, 497 U.S. 720, 736 (1990) (plurality opinion) (solicitation); *Frisby v. Schultz*, 487 U.S. 474, 482 (1988) (picketing); *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (display of signs); *United States v. Grace*, 461 U.S. 171, 181 n.10 (1983) (picketing and leafleting); *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 649 (1981) (leafleting and solicitation); see also *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 74–76 (1981) (assuming the content neutrality of a ban on “live entertainment,” which the Court struck down for other reasons).

<sup>145</sup> 308 U.S. 147 (1939); see also *Martin v. Struthers*, 319 U.S. 141, 149 (1943) (invalidating city ban on door-to-door solicitation).

dated a conviction under an ordinance prohibiting leafleting and door-to-door solicitation without a discretionary permit.<sup>146</sup> Although the approach in *Schneider* may simply differ from that of the post-*Mosley* cases, it may perhaps be explained in terms of the Court's current, more permissive approach to communication-related regulations. *Schneider* involved a discretionary permit system, which the Court has long recognized creates an unacceptable risk of subject-matter and viewpoint discrimination. The Court has itself explained *Schneider* in these terms.<sup>147</sup>

Another apparent exception is *Bartnicki v. Vopper*.<sup>148</sup> In *Bartnicki*, the Court addressed an as-applied challenge to a portion of the federal wiretapping statute penalizing the disclosure of illegally intercepted communications.<sup>149</sup> The Court said the provision was content neutral on its face insofar as it singled out communications "by virtue of the source, rather than the subject matter."<sup>150</sup> As in the other cases, then, singling out communication per se does not render a law content based.

The Court added, however, that to the extent that this portion of the law penalized *disclosure* of such communications (as opposed to other uses of them), it was a "regulation of pure speech . . . like the delivery of a handbill or a pamphlet, and as such, it [wa]s the kind of 'speech' that the First Amendment protects."<sup>151</sup> The Court concluded that this particular application of the law merited a mid-tier level of scrutiny, similar to that in *Schenck* and *Madsen*, under which it failed.<sup>152</sup>

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<sup>146</sup> 308 U.S. at 165.

<sup>147</sup> See *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 628–29 (1980).

<sup>148</sup> 532 U.S. 514 (2001).

<sup>149</sup> *Id.* at 524. The statute provided a cause of action for the willful disclosure of "the contents of any wire or oral communication," when the defendant knew or had reason to know that it was illegally intercepted. *Id.* (quoting 18 U.S.C. § 2511(c) (1994)). Respondents, who were uninvolved in the original interception, came by a cassette tape recording of an unflattering conversation between petitioners, two union supporters involved in a contentious and public negotiation. The respondents disclosed the tape—one respondent to the other, a radio host, who in turn broadcast it on his program—and petitioners sued under the Federal Act. *Id.* at 518–19.

<sup>150</sup> *Id.* at 526.

<sup>151</sup> *Id.* at 526–27.

<sup>152</sup> *Id.* at 528–29, 535.

The trouble with the Court's "pure speech" analogy, of course, is that the Court routinely treats the regulation of handbilling and pamphleting as content neutral.<sup>153</sup> To the extent that the Court relies on the handbill analogy, it would seem that disclosure of a neutrally defined category of information should be content neutral as well. And yet the Court employed a higher level of scrutiny.

It may be impossible to synthesize *Bartnicki* in any persuasive way. The Court appears to have come to its conclusion not so much because the law regulated disclosure but rather because, in application, it regulated disclosure of information on a matter of public concern.<sup>154</sup> The Court noted that most violations involved disclosure of purely private information, whereas the present application involved imposing liability on the press for disclosing a matter of public concern.<sup>155</sup> In essence, the Court found that this particular application of the law involved a regulation not just of communication but of a certain kind of subject matter: speech on a matter of public concern.<sup>156</sup> Applications of the law that risked such subject-matter regulation required a middling scrutiny. This, at least, is one possible reading. At worst, it seems no less persuasive than one which takes seriously the Court's assertions about the regulation of "disclosure" per se. If the Court were serious about the disclosure rationale, presumably all applications of the regulation would be invalid.<sup>157</sup>

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<sup>153</sup> See *United States v. Grace*, 461 U.S. 171, 181 n.10 (1983); *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 649 (1981).

<sup>154</sup> *Bartnicki*, 532 U.S. at 528–29.

<sup>155</sup> *Id.* at 533–34.

<sup>156</sup> How exactly the prohibition on content discrimination squares with the Court's solicitude elsewhere for speech on matters of public concern is something of a puzzle. See, e.g., *Snyder v. Phelps*, 131 S. Ct. 1207, 1215–16 (2011) (holding expression immune from tort liability because it addressed a matter of public concern). Distinctions between speech on matters of public and private concern would appear to be Court-generated discrimination on the basis of subject matter. The puzzle disappears if one assumes that virtually all laws reviewed under content discrimination doctrine have targeted matters of public concern. *Bartnicki*, on this reading, is a liminal law, which primarily addresses private expression outside the First Amendment, but which in some contexts reaches protected expression. Two difficulties with this resolution are that it assumes (1) that the Court is always implicitly, but never explicitly, assessing whether a regulation targets speech of public concern and (2) that the Court always, correctly, finds that it does.

<sup>157</sup> Another puzzling case, though not a direct-regulation case, is *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992). There, the Court consid-

Thus, I would argue, the Court treats regulations of communication as content neutral. The only exceptions are laws which, on their face or in application, the Court finds pose a risk of subject-matter or viewpoint discrimination.

### *B. Message-Related Discrimination*

Another possible rule would find any message-related regulation inherently suspect. Subject-matter and viewpoint classifications are subcategories of message-related classifications, but, as I mentioned earlier, they are not the exclusive ones. Other examples might include classifications that define expression according to the particular words used (e.g., vulgar speech), a particular (subject-matter and viewpoint-neutral) class of discourse (e.g., advocacy), or particular noncognitive features of the speech (e.g., excited utterances).

#### *1. Particular Choice of Words*

Interestingly, the Court has encountered very few cases involving facially message-related classifications that were not subject-matter or viewpoint based. Nevertheless, what little there is suggests a prohibition against discrimination by particular choice of words. *Cohen v. California* is the primary evidence for this proposition.<sup>158</sup> The Court rejected the application of California's disorderly conduct statute where it was clear that the offending conduct con-

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ered an airport solicitation and leafleting ban. *Id.* at 674. The Court held that the government-owned airports in question were non-public fora and thus could employ content regulation so long as it was viewpoint neutral and reasonable. *Id.* at 679. The majority concluded that the solicitation ban was reasonable, *id.* at 685, without considering content neutrality; Justice Kennedy in concurrence noted that it was content neutral. *Id.* at 706 (Kennedy, J., concurring). A different majority concluded that the leafleting ban was not reasonable, again with no reference to its content neutrality. *Id.* at 690 (O'Connor, J., concurring); see also *Lee v. Int'l Soc'y for Krishna Consciousness*, 505 U.S. 830, 831 (1992) (*per curiam*). The strange result is that the Court has upheld a leafleting ban as a matter of direct regulation, see *Heffron*, 452 U.S. at 640, while striking the same type of ban as to a non-public forum, a place where the government supposedly has a great deal more leeway.

<sup>158</sup> 403 U.S. 15 (1969); see also *Brown v. Oklahoma*, 408 U.S. 914 (1972) (vacating and remanding a case involving vulgar language for reconsideration in light of *Cohen*); *Lewis v. City of New Orleans*, 408 U.S. 913 (1972) (same); *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972) (same).



sisted entirely of the slogan “Fuck the Draft” on Cohen’s jacket.<sup>159</sup> Although this result could be rationalized as a concern with the potential for viewpoint discrimination latent in this application,<sup>160</sup> Justice Harlan’s opinion for the Court, with its famous musings on one man’s vulgarity being another man’s lyric, clearly reached further to reject governmental determinations that certain words are offensive.<sup>161</sup> Although the case involved not a facially discriminatory law, but an application of a facially neutral law that was justified in relation to the content of speech, the presumption the Court set up against governmental restrictions on choice of words would appear to apply as much to facially discriminatory laws as to the situation at hand in *Cohen*.

*McIntyre v. Ohio Elections Commission* lends some additional support.<sup>162</sup> There the Court said that, “at least in the field of literary endeavor,” an author’s decision to remain anonymous was protected by the First Amendment, “like other decisions concerning omissions or additions to the content of a publication.”<sup>163</sup> This conception of the author’s name as editorial content, the inclusion of which the government may not mandate, seems to rely on a strong background presumption against any governmental interference in editorial decisions of which words to include and which to omit. Given that the case law provides so little evidence on this score, as compared with the continual reaffirmations of the presumptions against viewpoint and subject-matter discrimination, I advance this proposition more tentatively, and I shall treat it henceforth merely as an addendum to those more secure propositions. What evidence there is, however, suggests that facial classifications according to choice of words are also inherently suspect.

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<sup>159</sup> *Cohen*, 403 U.S. at 18.

<sup>160</sup> See *Gooding v. Wilson*, 405 U.S. 518, 527 (1972) (discussing the dangers of discriminatory enforcement inherent in applications of breach-of-the-peace statutes to language).

<sup>161</sup> *Id.* at 25. The opinion does recognize that captive-audience concerns may justify such regulation in certain contexts, but this, I take it, is to say that there is a heavy presumption against such regulation that may be overcome in some extremely limited circumstances. See *id.* at 21 (“The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.”).

<sup>162</sup> 514 U.S. 334 (1995).

<sup>163</sup> *Id.* at 342.

## 2. Other Message-Related Classifications

The cases also provide relatively few instances of other message-related classifications that are not related to viewpoint or subject matter. The clearest instances are solicitation bans. Although I am willing to consider solicitation in the communication-related category to satisfy any skeptics, it is to me quite obviously a message-related category. A solicitation is a request, in this context typically for a financial contribution.<sup>164</sup> It is a facially message-related category because the classification “solicitation” is defined in terms of the message the communication is designed to express. As Justice Brennan argued in dissent in *United States v. Kokinda*, a solicitation ban

is tied explicitly to the content of speech. If a person on postal premises says to members of the public, “Please support my political advocacy group,” he cannot be punished. If he says, “Please contribute \$10,” he is subject to criminal prosecution. His punishment depends entirely on what he says.<sup>165</sup>

To the extent that one accepts solicitation as a message-related category, the treatment of that category is strong evidence that the Court does not believe all message-related classifications are inherently suspect. The Court has uniformly treated the regulation of solicitation as content neutral.<sup>166</sup> To the extent that one views classifications such as “picketing” as also message-related, this conclusion becomes even stronger.<sup>167</sup>

The Court took the same approach in *Hill v. Colorado*.<sup>168</sup> Colorado passed a statute making it unlawful, within 100 feet of the en-

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<sup>164</sup> See *Lee v. Int’l Soc’y for Krishna Consciousness*, 505 U.S. 672, 675 (1992) (noting that the regulation banned “solicitation of money”); *United States v. Kokinda*, 497 U.S. 720, 722–23 (1990) (plurality opinion) (same); *Heffron v. Int’l Soc’y for Krishna Consciousness*, 452 U.S. 640, 642 (1981) (same).

<sup>165</sup> 497 U.S. at 753 (Brennan, J., dissenting).

<sup>166</sup> See *Kokinda*, 497 U.S. at 736; *Heffron*, 452 U.S. at 649; see also *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940) (“The general regulation, in the public interest, of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection . . .”).

<sup>167</sup> See, e.g., *Frisby v. Schultz*, 487 U.S. 474, 482 (1988); *United States v. Grace*, 461 U.S. 171, 181 n.10 (1983). On the potentially message-related nature of such classifications, see *supra* note 144.

<sup>168</sup> 530 U.S. 703 (2000).

trance of a health-care facility, knowingly to approach within eight feet of a non-consenting person “for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person.”<sup>169</sup> The statute, apparently passed in response to abortion protests,<sup>170</sup> took a different approach from the injunctions in *Madsen* and *Schenck* by placing restrictions on certain modes of communication in certain places, regardless of subject matter or viewpoint.

The Court upheld the statute as content neutral. Although the Court focused largely on the purposes of the law, it also contended that it was facially neutral. It relied heavily on the fact that the law was not viewpoint- or subject-matter based.<sup>171</sup> It invoked its picketing and demonstration cases to assert that the fact that speakers’ statements might have to be examined to determine whether they constituted oral protest, education, or counseling did not make the statute content based: communication might also have to be examined to distinguish picketing or demonstrating from “pure social or random conversation,” and yet this had not prevented the Court from holding picketing and demonstration laws content neutral.<sup>172</sup>

The dissenters took the majority to task for treating an obviously facially discriminatory law as content neutral.<sup>173</sup> But *Hill* simply highlights an existing approach that had been relatively uncontroversial up to that point.<sup>174</sup> “Oral protest,” after all, is just another way to say “picketing,” a speech classification the Court has always treated as content neutral. Education and counseling are categories akin to solicitation. They are defined by the substantive function

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<sup>169</sup> Id. at 707 (quoting Colo. Rev. Stat. § 18-9-122(3) (1999)).

<sup>170</sup> Id. at 715 (“[T]he legislative history makes it clear that its enactment was primarily motivated by activities in the vicinity of abortion clinics.”).

<sup>171</sup> See id. at 719 (finding that the law’s “restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech” (quoting *Hill v. Thomas*, 973 P.2d 1246, 1256 (Colo. 1999))); see also id. at 723 (“It places no restrictions on—and clearly does not prohibit—either a particular viewpoint or any subject matter that may be discussed by a speaker.”).

<sup>172</sup> Id. at 721–22 & n.30.

<sup>173</sup> Id. at 747 (Scalia, J., dissenting); id. at 766 (Kennedy, J., dissenting).

<sup>174</sup> With respect to the dissenters specifically, Justice Scalia joined the plurality in *Kokinda*, which treated a solicitation ban as content neutral. See 497 U.S. at 736 (plurality opinion). Justice Kennedy, writing separately in *Kokinda*, said that the solicitation ban “d[id] not discriminate on the basis of content or viewpoint.” Id. at 739 (Kennedy, J., concurring in the judgment).

the speech intends to perform—to impart information to and advocate a viewpoint with the listener—but they are viewpoint- and subject-matter neutral. Even if the classifications in *Hill* seem different in degree, it is difficult to argue that they are different in kind. *Hill* may seem wrong, and it may be disingenuous, but it is consistent with the Court’s preexisting approach to facially message-related regulations.

### C. Persuasion-Related Discrimination

The same cases refute the proposition that regulation of persuasive communication is inherently suspect. Most of the message-related classifications just canvassed are also, on their face, related to persuasion. Solicitation is patently directed at persuading the listener to donate to a cause. The speech categories in *Hill*—“oral protest,” “education,” and “counseling”—are all persuasive. Pickets, protests, and demonstrations would also seem to be modes of communication inherently geared at persuasion, and yet they have always been treated as content neutral.

Thus the case law appears to permit discrimination on the basis of communicative activity, persuasive effect, and message-bearing aspects (other than subject matter, viewpoint, and perhaps also particular choice of words). But the picture may be more complex. Perhaps facial discrimination along these lines is permissible, but a governmental purpose to disadvantage speech because it is communicative, persuasive, or message bearing is wrongful. Perhaps facial discrimination on these bases is simply not sufficient evidence of illicit purpose. It is to this possibility, and the larger problems of uncovering covert purpose, that I now turn.

### D. Content-Related Justifications and the Search for Illicit Purpose

I have just suggested that perhaps in some instances facial discrimination is not a good proxy for illicit purpose. In the case of subject-matter and viewpoint discrimination, the Court has collapsed this distinction. Thus, in cases such as *City of Cincinnati v. Discovery Network* or *Simon & Schuster v. Members of New York State Crime Victims Board*, where the government offered neutral justifications for subject-matter or viewpoint classifications, the Court was unwilling to view the regulations as content neutral. In-

stead, it adhered to its rule that the fact of such differential treatment automatically renders a law content based.<sup>175</sup> One explanation for this rule is that subject-matter and viewpoint classifications have such a high probability of concealing an illicit purpose that one may confidently infer such a purpose from the fact of the classification.<sup>176</sup>

Perhaps, then, the Court is actually concerned with illicit purposes related to communication, message, or persuasive effect, but it does not believe facial classifications on these bases to be reliable indicators of suspect purpose. It could regard classifications such as “picketing,” “solicitation,” or “oral protest” as sufficiently indeterminate on their face that they may be targeting neutral features of these modes of communication, rather than their communicative, message-related, or persuasive aspects. Thus, so far, I may not have shown that communication-, message-, or persuasion-related purposes are not illicit under the Court’s conception of content discrimination. I may only have shown that regulations that discriminate along these lines on their face are not inherently suspect. To test this hypothesis requires turning from the face of regulations to their justifications.

Once a law is deemed facially neutral, the second step in content analysis is to ask whether it is “justified without reference to the content of the regulated speech,”<sup>177</sup> or “unrelated to the suppression of free expression.”<sup>178</sup> Thus, for all of the purportedly facially neutral laws discussed in this section, content analysis dictates an examination of their justifications. The proffered justifications break down into several types. The Court’s treatment of those various justifications reveals the extent to which it views certain

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<sup>175</sup> See supra notes 117–124 and accompanying text.

<sup>176</sup> Another possibility is that, whether or not they correlate sufficiently strongly with discriminatory purposes, such classifications are a wrong in and of themselves. The argument here would be that subject-matter or viewpoint classifications do some sort of expressive harm by signaling that the government countenances the classification of speakers by their ideas. This is clearly not the case for classifications related to communication, message, and persuasive effect.

<sup>177</sup> *Heffron v. Int’l Soc’y for Krishna Consciousness*, 452 U.S. 640, 648 (1981); see also *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) (“Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.”).

<sup>178</sup> *United States v. O’Brien*, 391 U.S. 367, 377 (1968); see Ely, supra note 13, at 1483–84.

types of governmental purpose as falling within its conception of content discrimination.

### 1. *Neutral Justifications*

First, in a few cases, the Court has treated as neutral justifications that do in fact appear unrelated to communication. It has done so for laws that facially target communication but are justified by interests in, for example, eliminating visual clutter<sup>179</sup> and reducing noise levels.<sup>180</sup> It has also done so for facially neutral conduct regulations that infringed speakers' ability to engage in expressive conduct. Thus, the government's interest in preserving the beauty of public parks did not render an overnight sleeping ban content based.<sup>181</sup> More controversially, a ban on all public nudity applied to would-be nude dancers was upheld as content neutral where a plurality of the Court believed that the reasons behind the general ban were unrelated to any potential communicative effect of nudity.<sup>182</sup> Thus far, the cases suggest that facially neutral regulations with exclusively non-communication-related justifications are content neutral.

### 2. *Communication-Related Justifications*

It is difficult to identify cases involving communication-related justifications that are not also message or persuasion related. Some possible candidates are cases involving "traffic flow" as a justification. To the extent that traffic flow concerns are created by the fact that a particular communicative enterprise involves a large number of people standing on the street or sidewalk, they may be entirely neutral; the same concern is presumably raised by non-communicative behavior such as loitering. But to the extent that

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<sup>179</sup> *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) (holding a sign regulation justified by an interest in reducing visual clutter).

<sup>180</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 792 (1989) (ruling bandstand regulation justified by neutral interest in regulating noise levels).

<sup>181</sup> *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295–96 (1984).

<sup>182</sup> See *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000) (plurality opinion); *Barnes v. Glen Theatre*, 501 U.S. 560, 570–71 (1991) (plurality opinion). Justice Souter's concurrence in *Barnes*, however, relied upon a "secondary effects" rationale. See 501 U.S. at 582 (Souter, J., concurring). Although Justice Souter retreated from this view in *City of Erie*, others invoked the rationale there. 529 U.S. at 291. This rationale, while questionable, is in the Court's view also unrelated to communication.

traffic-flow problems arise because the *communication* of the message slows down traffic—as in cases of leafleting and solicitation—the justification may be communication related. If so, it is notable that the Court has always treated concern about traffic flow as a neutral justification, even where it is the only, or at least the most neutral, justification offered.<sup>183</sup>

### *3. Message- and Persuasion-Related Justifications*

A number of cases have involved laws with justifications that seem obviously message related. Most of them are also clearly persuasion related. The Court has branded a few of these laws content based on the basis of their justifications. The rest it has pronounced content neutral. The differences between them help to elucidate the Court's conception of content discrimination.

In both *Texas v. Johnson*<sup>184</sup> and *United States v. Eichman*,<sup>185</sup> the Court addressed flag-burning statutes that it treated as facially neutral.<sup>186</sup> The Court found the justifications of both laws to be content based. In *Eichman*, for example, it observed that the government's proffered justification—"protect[ing] the physical integrity of the flag under all circumstances in order to safeguard the flag's identity

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<sup>183</sup> See, e.g., *United States v. Kokinda*, 497 U.S. 720, 733–34 (1990) (plurality opinion) (upholding a Post Office solicitation ban); *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 653, 656–57 (1981) (upholding state fair solicitation ban).

Another potentially communication-related justification would be the reliance on a safety concern that certain forms of communication are dangerously distracting, say, to motorists. The City of Jacksonville unsuccessfully invoked this justification for a ban on sexually explicit movies at drive-in theaters. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975). The Court found the regulation underinclusive with respect to this interest; presumably other movies could also pose a distraction. *Id.* at 214–15. A case involving a viewpoint- and subject-matter-neutral ban, say, on vehicle DVD players that can be seen by other motorists would pose a test of this interest.

<sup>184</sup> 491 U.S. 397 (1989).

<sup>185</sup> 496 U.S. 310 (1990).

<sup>186</sup> On *Texas v. Johnson*, see *supra* note 116. In *Eichman*, the Court considered the federal flag-burning law passed in the wake of *Johnson*, which punished anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States . . ." 496 U.S. at 314 (quoting 18 U.S.C. § 700(a)(1) (Supp. I 1988)). The Supreme Court noted that the law "contain[ed] no explicit content-based limitation on the scope of prohibited conduct"—in other words, it was facially neutral. *Id.* at 315.

as the unique and unalloyed symbol of the Nation”<sup>187</sup>—was “related ‘to the suppression of free expression’ and concerned with the content of such expression.”<sup>188</sup>

Although *Cohen v. California* arose prior to the Court’s pronouncement in *Mosley*, it is a product of the same general time period and remains a touchstone whose synthesis seems important to any understanding of the Court’s conception of content discrimination. As noted above, *Cohen* involved the application of a California disorderly conduct statute to a defendant who wore a jacket with the slogan “Fuck the Draft” in the hallways of a courthouse.<sup>189</sup> Although the statute was a neutral one of general applicability, the Court had no trouble concluding that the reasons for its application to Cohen were related to the message his jacket conveyed.<sup>190</sup> Its treatment of his case was thus tantamount to the treatment of a content-based law.

In contrast, a number of other laws have been declared content neutral despite their obviously message-related justifications. In *Hill v. Colorado*,<sup>191</sup> *Madsen v. Women’s Health Center*,<sup>192</sup> and *Schenck v. Pro-Choice Network of Western New York*,<sup>193</sup> the government justified the restrictions partly by an interest in enabling potential patients to avoid the unwanted messages of abortion protesters. Similar justifications supported several picketing and solicitation laws. *Frisby v. Schultz* involved a residential picketing ban supported by the state’s interest in protecting individuals from unwanted messages in their homes.<sup>194</sup> The law in *United States v.*

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<sup>187</sup> *Eichman*, 496 U.S. at 315 (quoting Brief for United States at 28–29, *Eichman*, 496 U.S. 310 (No. 89-1433) 1990 WL 10013039 at \*28–29).

<sup>188</sup> *Id.* (quoting *Johnson*, 491 U.S. at 410) (internal citation omitted).

<sup>189</sup> 403 U.S. 15, 16 (1971).

<sup>190</sup> *Id.* at 18 (“The conviction quite clearly rests upon the asserted offensiveness of the words Cohen used to convey his message to the public.”).

<sup>191</sup> 530 U.S. 703, 715 (2000) (noting interest in “the avoidance of potential trauma to patients associated with confrontational protests”).

<sup>192</sup> 512 U.S. 753, 768 (1994) (noting medical privacy and captive audience issues).

<sup>193</sup> 519 U.S. 357, 376 (1997). The Court in *Schenck* actually forbore to look specifically at medical privacy and captive audience issues because there was no contention that patients could hear protestors while inside the clinics. *Id.* at 376 n.8. The Court did, however, rely upon the interest in protecting women’s right to seek pregnancy-related services, which relates, at least in part, to the chilling effect that the protestors’ messages may have on this activity. See *id.* at 376.

<sup>194</sup> 487 U.S. 474, 481–82 (1988).



*Kokinda* sought to remove the discomfort of being solicited for donations on the way into the Post Office.<sup>195</sup> The law in *United States v. Grace*, in restricting picketing and demonstrations on the sidewalk around the Supreme Court, involved the government's interest in preventing the real and apparent influence of the Justices by outside sources.<sup>196</sup>

Meanwhile, in *Turner Broadcasting System v. FCC*, the must-carry provisions were partly explained in the statute as preserving broadcast as “an important source of local news[,] public affairs programming[,] and other local broadcast services critical to an informed electorate.”<sup>197</sup> In *Bartnicki v. Vopper*, the government asserted two message-related interests: “removing an incentive for parties to intercept private conversations” (i.e., by making publication of such messages a less attractive prospect), and “minimizing the harm to persons whose conversations have been illegally intercepted” (i.e., by reducing the likelihood that other people would hear the messages).<sup>198</sup>

In short, all of these laws involve justifications that are obviously message related. Most of them are also persuasion related: they anticipate which appeals listeners would, or would rather not, hear. Yet in all of these cases, the Court concluded that the regulations were content neutral.<sup>199</sup>

It is worth noting that, in most of these cases, the government also provided clearly neutral justifications for the laws. In the abortion cases, the government invoked interests in maintaining physical access to clinics.<sup>200</sup> In the picketing and solicitation cases, it typically relied on administrative concerns or the possibly communication-related but seemingly message-neutral concern

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<sup>195</sup> 497 U.S. 720, 736 (1990).

<sup>196</sup> 461 U.S. 171, 183 (1983).

<sup>197</sup> 512 U.S. 622, 648 (1994) (quoting Cable Television Consumer Protection and Competition Act of 1992 § 2, 47 U.S.C. § 532(a)(11) (Supp. IV 1988)).

<sup>198</sup> 532 U.S. 514, 529 (2001).

<sup>199</sup> With some of the picketing and solicitation regulations, the Court failed to perform justification analysis explicitly at all. See, e.g., *Rumsfeld v. Forum for Academic & Inst'l Rights*, 547 U.S. 47, 67–68 (2006); *Frisby*, 487 U.S. at 481–82; *Grace*, 461 U.S. at 181 n.10; *Heffron v. Int'l Soc. for Krishna Consciousness*, 452 U.S. 640, 648–49 (1981). It is nevertheless clear that these laws had message-related justifications because the Court discussed the justifications as governmental interests at the scrutiny stage.

<sup>200</sup> *Hill*, 530 U.S. at 715; *Schenck*, 519 U.S. at 376; *Madsen*, 512 U.S. at 767–68.

with traffic flow.<sup>201</sup> The exceptions are *Bartnicki*, where both justifications were message related,<sup>202</sup> and possibly *Frisby*, where the only proffered interest was in preserving residential privacy against pickets.<sup>203</sup>

In addition, the message-related justifications for most of these laws involved preserving the privacy interests of speakers or listeners. A large number addressed “captive audience” concerns, regarding the extent to which the government may protect listeners from unwanted messages in contexts where they are unable to escape them.<sup>204</sup> The Court has recognized this as a compelling interest that may justify content-based regulation.<sup>205</sup> *Bartnicki*, meanwhile, implicated the privacy interests of speakers in avoiding the divulgence of their private conversations. Such privacy interests, too, have been identified as theoretically justifying content-based regulation.<sup>206</sup>

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<sup>201</sup> See, e.g., *Kokinda*, 497 U.S. at 733–35 (plurality opinion) (noting that solicitation disrupts traffic flow and administering permits distracted postal employees from other duties); *Grace*, 461 U.S. at 182 (finding that government has interests in protecting people and property on Supreme Court grounds and maintaining “proper order and decorum”). In *Heffron*, the Court outright ignored the state’s attempts to justify its solicitation ban on the basis of (message-related) captive-audience and fraud concerns and instead analyzed it entirely on the basis of the state’s third (non-message-related) interest of maintaining traffic flow. 452 U.S. at 649–50.

<sup>202</sup> *Bartnicki*, 532 U.S. at 529.

<sup>203</sup> *Frisby*, 487 U.S. at 484. Whether one considers this message related or not depends upon whether one views the annoying or threatening part of a residential picket to be the unwelcome message or the unwelcome presence of persistent, uninvited persons at the bottom of one’s drive. See *id.* at 487 (“Whether . . . alone or accompanied by others . . . there are few of us that would feel comfortable knowing that a stranger lurks outside our home.” (quoting *Carey v. Brown*, 447 U.S. 455, 478–79 (1980) (Rehnquist, J., dissenting))).

Another arguable exception is *Turner*. 512 U.S. at 646–47. If one accepts that Congress could have a message-neutral interest in preserving the broadcast medium purely as a private good, then *Turner* also has a message-neutral purpose. Cf. *id.* at 646 (emphasizing interest in “preserv[ing] access to free television programming for the 40 percent of Americans without cable”). If one thinks that any desire to subsidize broadcast inevitably leads back to the information function of the good, then it does not.

<sup>204</sup> See *Hill*, 530 U.S. at 716–17; *Schenck*, 519 U.S. at 386–87; *Madsen*, 512 U.S. at 781; *Kokinda*, 497 U.S. at 736 (plurality opinion); *Frisby*, 487 U.S. at 487–88.

<sup>205</sup> See, e.g., *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208–09 (1975); *Cohen*, 403 U.S. at 21.

<sup>206</sup> See, e.g., *Fla. Star v. B.J.F.*, 491 U.S. 524, 530 (1989).

#### 4. Subject-Matter and Viewpoint-Related Justifications

Many of these same cases arguably involve subject-matter or viewpoint-related justifications as well. Clearly, of course, the failed restrictions in *Johnson* and *Eichman* amount to viewpoint-based restrictions, and *Cohen* could be thought to carry a risk of viewpoint discrimination, as well as discrimination against a particular choice of words.<sup>207</sup> In *Madsen* and *Schenck*, the Court is clearly concerned with potential viewpoint discrimination. Although the broader laws in *Hill* and *Frisby* allowed the interest to be framed in viewpoint-neutral terms such as “the avoidance of potential trauma to patients associated with confrontational protests,”<sup>208</sup> the abortion-related provenance of both laws was apparent.<sup>209</sup> *Turner*, meanwhile, acknowledged Congress’s emphasis on broadcast’s provision of news and public-affairs content.<sup>210</sup> In *Grace*, though no one subject is identified, the ban on picketing in the vicinity of the Supreme Court was explicitly justified by an interest in protecting the Justices from undue influences regarding cases before them. If this unwanted-messages regulation is not quite as specific as the abortion-related regulations, it arguably targets a certain *class* of subjects for regulation.

And yet only three of these regulations were treated as content based: those in *Johnson*, *Eichman*, and *Cohen*. Two others, *Bartnicki* and *Grace*, were called content neutral and yet struck down.<sup>211</sup> Two, *Madsen* and *Schenck*, were declared content neutral and yet treated to mid-tier scrutiny, under which they were largely upheld. The rest—*Turner*, *Hill*, and *Frisby*—were treated as content neutral and upheld.

The justification inquiry, then, yields puzzling results. In only three cases—*Cohen*, *Johnson*, and *Eichman*—has the Court concluded that a law was content based on the basis of its justifications. Occasionally it has subjected a law to higher scrutiny despite its purported content neutrality, and in the remainder of cases, it has upheld content-neutral laws easily. This is true despite the fact

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<sup>207</sup> See *supra* notes 184–190 and accompanying text.

<sup>208</sup> *Hill*, 530 U.S. at 715.

<sup>209</sup> *Id.* at 715, 724–25 (comparing statute at issue to that in *Frisby*).

<sup>210</sup> 512 U.S. at 648.

<sup>211</sup> *Grace*, 461 U.S. at 181 (striking down the ban on picketing around the Supreme Court, apparently under content-neutral analysis).

that many of these laws had justifications that were message or persuasion related, and indeed possibly subject matter or viewpoint related.

#### V. A SYNTHESIS AND AN ANALOGY

I have just offered a survey of the Court's "content-neutral" jurisprudence, in which many types of speech-related classifications, and many seemingly speech-related justifications, are deemed content neutral. It is possible to read these cases as a surprisingly consistent whole, which is also of a piece with the "content-based" cases. Moreover, the account I offer bears a strong resemblance to the Court's approach in the Equal Protection arena.

##### *A. Content-Based and Content-Neutral Laws: A Synthesis*

As to the types of discrimination that are suspect, the Court's content jurisprudence sends a clear message in one regard and an ambiguous one in another. First, discrimination on the basis of subject matter and viewpoint is obviously suspect. This holds true in the case of facial classifications on these bases, as well as in the case of facially neutral laws whose sole justifications are clearly subject matter or viewpoint related (for example, the flag-burning cases).<sup>212</sup>

Second, it is possible that message-related or persuasion-related purposes are also suspect under certain conditions. But those conditions are not fulfilled by the mere existence of a message- or persuasion-related facial classification, such as a solicitation ban. Nor are they fulfilled when a message- or persuasion-related justification either (1) exists alongside other, entirely neutral justifications or (2) protects privacy or captive-audience interests, which the Court has recognized as particularly compelling. It is entirely possible that, if faced with a regulation of, say, "advocacy," justified by an interest in protecting non-captive passersby, the Court would reject it as obviously message related and therefore suspect. Then again, the solicitation bans are not too far off from this, and the Court has upheld them.

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<sup>212</sup> On the regulation of particular choices of words, see *supra* notes 158–163 and accompanying text.

On the existing evidence, it is more plausible that only purposes related to subject matter and viewpoint are suspect. To the extent that the Court has defined “content” discrimination, it has often done so exclusively in terms of subject matter and viewpoint. The Court has said time and again that “[t]he First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to the prohibition of public discussion of an entire topic,” as though those two forms of discrimination exhaust the entire category.<sup>213</sup> It has described the impermissible forms of discrimination as “content or viewpoint,” where in context “content” appears to mean “subject matter,”<sup>214</sup> and as “content or subject matter,” where in context “content” appears to mean “viewpoint.”<sup>215</sup> This is consistent with its apparent pattern of finding other regulations troublesome mostly in their propensity to conceal subject-matter and viewpoint discrimination.<sup>216</sup>

<sup>213</sup> *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n*, 447 U.S. 530, 537 (1980); see *Hill v. Colorado*, 530 U.S. 703, 723 n.31 (2000) (same); *Burson v. Freeman*, 504 U.S. 191, 197 (1992) (same); *Carey v. Brown*, 447 U.S. 455, 462, n. 6 (1980) (same); see also *Hill*, 530 U.S. at 723 (“Regulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation.”). The Court in *Hill* simultaneously defined its inquiry even more narrowly, as whether the legislature “has adopted a regulation of speech because of disagreement with the message it conveys.” *Id.* at 719 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

<sup>214</sup> *United States v. Kokinda*, 497 U.S. 720, 736 (1990) (plurality opinion); see also *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 59 (1983) (Brennan, J., dissenting) (“There is another line of cases, closely related to those implicating the prohibition against viewpoint discrimination, that have addressed the First Amendment principle of subject matter, or content, neutrality.”).

<sup>215</sup> *Heffron v. Int’l Soc’y for Krishna Consciousness*, 452 U.S. 640, 648–49 (1981).

<sup>216</sup> The unprotected categories might suggest themselves as counterexamples. Again, I am not seeking to synthesize content analysis with these categories, but it is interesting to note that, upon closer inspection, most of these, too, have subject-matter limitations. The intermediate category of commercial speech is patently subject matter based, as is the unprotected category of obscenity. The incitement/advocacy dichotomy appears addressed to speech with a political component. See, e.g., *Strauss*, supra note 50, at 338 n.10. At the least, unprotected incitement is confined to speech addressing the topics of law violation or violence. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam). (My inciting someone to eat too much or buy too many shoes would not count.) Child pornography seems to lack a formal subject-matter limitation, but to the extent the category is concerned with “lewd” exhibitions of child nudity, it seems geared at sexually themed depictions. *New York v. Ferber*, 458 U.S. 747, 751, 762 (1982). Fighting words and true threats seem unconfining by reference to subject matter, but even here “true threats” are limited to those communicating dan-

At the very least, in the Court's conception of content discrimination, subject-matter and viewpoint discrimination have clear priority. A broader conception of discrimination, while possible, is de-emphasized in the case law and would appear to work by different rules, whereby facial discrimination is not categorically suspect.

As to the structure of the discrimination inquiry, facial classifications by subject-matter and viewpoint are categorically suspect. Very occasionally, other features of the face of a law will present a heightened risk of these forms of discrimination. For example, in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, the historical association of an otherwise neutral classification with viewpoint discrimination rendered it content based.<sup>217</sup> Similarly, the injunctions in *Madsen v. Women's Health Center*<sup>218</sup> and *Schenck v. Pro-Choice Network of Western New York*,<sup>219</sup> because they targeted particular speakers, presented an elevated risk of viewpoint discrimination.

But for the most part, regulations of speech that do not employ subject-matter or viewpoint classifications will be assessed by their justifications for covert discrimination of these kinds. On this score, first, the Court has allowed regulations with *multiple sufficient justifications*, so long as at least one justification is neutral (for example, the solicitation cases and abortion-related cases, with their concerns about traffic flow and physical access).

Second, it has evaluated laws with *exclusively message-related justifications* for their risk of subject-matter or viewpoint discrimination. Privacy or captive audience concerns apparently go a long way toward neutralizing such suspicions. Thus, the Court has struck down regulations with a single justification where privacy concerns were not in play (*Cohen v. California*,<sup>220</sup> *Texas v. Johnson*,<sup>221</sup> and *United States v. Eichman*.<sup>222</sup>). But in *Frisby v. Schultz*,<sup>223</sup> not only may the interest in residential privacy be construed as

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ger of physical harm. *Virginia v. Black*, 538 U.S. 343, 359–60 (2003). (A threat to blackmail someone, for example, would appear not to qualify.)

<sup>217</sup> 460 U.S. 575 (1983); see supra notes 131–134.

<sup>218</sup> 512 U.S. 753 (1994).

<sup>219</sup> 519 U.S. 357 (1997).

<sup>220</sup> 403 U.S. 15 (1969).

<sup>221</sup> 491 U.S. 397 (1989).

<sup>222</sup> 496 U.S. 310 (1990).

<sup>223</sup> 487 U.S. 474 (1988).

neutral,<sup>224</sup> but even if it was message related, it may have been permitted because it vindicated captive-audience concerns. The Court may have thought the risk of viewpoint discrimination low, because lawmakers could well have concluded that residents would be distressed by any pickets at their homes, even pickets of a positive nature.

Remaining are two cases where the Court claimed that a law was content neutral but nevertheless struck it down. I have suggested that *Bartrnicki v. Vopper*<sup>225</sup> may best be explained by the fact that the application of the law in that case amounted to a state-sanctioned penalty on disclosures on a matter of public concern; to that extent, the law as applied may have implicated a concern with subject-matter discrimination. On this view, *Bartrnicki* is a *Cohen*-like case, wherein the application of a neutral law presents a risk of discrimination. The other case, *United States v. Grace*, struck down a facially neutral picketing regulation.<sup>226</sup> But given that the government justified the regulation as preventing the appearance or reality of undue influence on the Justices in the cases before them,<sup>227</sup> its justification may have presented too high a risk of subject-matter discrimination, or the prospect of upholding it may have seemed too close to subject-matter discrimination or self-dealing on the Justices' part.<sup>228</sup>

Two features of this synthesis are worth noting. First, the Court is relying on an objective more than a subjective form of purpose. It largely constricts its inquiry to the face of a law and its proffered justifications, with a stray foray into historical patterns of discrimination (as in *Minneapolis Star*).<sup>229</sup> Legislative history, even where relied upon by the Court to explain the background of a law, is

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<sup>224</sup> See supra note 203.

<sup>225</sup> 532 U.S. 514 (2001).

<sup>226</sup> 461 U.S. 171 (1983).

<sup>227</sup> Id. at 182–83.

<sup>228</sup> *Grace* is even more exceptional in that the government also offered neutral interests in security. See id. at 182. The fact that the Court struck the regulation down despite the existence of neutral justifications suggests either that the Court was concerned about the appearance of self-dealing or that *Grace* is the rare case in which it is genuinely concerned with effects at the intermediate scrutiny stage.

<sup>229</sup> 460 U.S. at 591–92. I take *Schenck* and *Madsen* to follow this pattern, with the “face” of the law being replaced by the structure of injunctions as a legal tool. It was not the history of the litigation but the plain fact of an injunction upon speakers of a certain viewpoint that triggered mid-tier scrutiny.

typically not used as a basis for inferring suspect purpose.<sup>230</sup> Moreover, at times the Court has recognized neutral justifications that were not actually offered but could plausibly be imputed.<sup>231</sup>

Second, as to the role the suspect purpose must play, it appears that a facially neutral law is not suspect so long as it is supported by a *sufficient neutral justification*. The presence of a potentially discriminatory purpose is not worrisome so long as other, neutral purposes exist. To the extent that the questions of form and role of governmental purpose interconnect, this role for purpose seems consistent with an objective conception of its form.<sup>232</sup>

### B. An Equal Protection Analogy

I have just offered a synthesis of the case law wherein certain classifications are treated as automatically suspect, and facially neutral laws are scrutinized for evidence of covert discrimination of the same kinds. This approach is not unfamiliar: it bears a fair resemblance to Equal Protection jurisprudence. Nor should this correspondence come as a surprise. The Court in *Police Department of Chicago v. Mosley* and other early cases initially framed the content discrimination principle in Equal Protection rather than First Amendment terms.<sup>233</sup>

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<sup>230</sup> See, e.g., *United States v. O'Brien*, 391 U.S. 367, 383–84 (1968) (disavowing reliance on legislative history); see also *Hill v. Colorado*, 530 U.S. 703, 724–25 (2000).

<sup>231</sup> See *Schenck*, 519 U.S. at 375–76 (recognizing an interest in public safety which litigants had not raised).

<sup>232</sup> See Ely, *supra* note 13, at 1506 n.98 (“[N]o rational explanation capable of accounting for the law in issue can confidently be rejected by the Court as not ‘truly’ having influenced the legislative decision.”).

<sup>233</sup> 408 U.S. 92, 94–95 (1972) (“Because Chicago treats some picketing differently from others, we analyze this ordinance in terms of the Equal Protection Clause of the Fourteenth Amendment. Of course, the equal protection claim in this case is closely intertwined with First Amendment interests . . . . As in all equal protection cases, however, the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment.”); see also *Carey v. Brown*, 447 U.S. 455, 461 (1980); *Grayned v. City of Rockford*, 408 U.S. 104, 107 (1972). Unsurprisingly, given its provenance, the content discrimination principle has been compared with Equal Protection in other contexts. See Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 Cal. L. Rev. 297, 312 (1997) (discussing growing interest in purpose scrutiny in both Equal Protection and free speech doctrine); Williams, *supra* note 2, at 672–76 (noting difference between Equal Protection’s concern with facial classifications and the First Amendment’s interest in purposes in the *Ward* era).



Here, I sketch four similarities in the scope and contours of content discrimination and Equal Protection. I do not suggest point-for-point correspondence between the two doctrines, nor is this comparison the primary motivation of my project. I believe that sorting out the Court's conception of content discrimination has value apart from any correspondence with other doctrines. But to the extent that these parallels are persuasive, they may offer some ideas about why the Court's conception looks as it does—whether because the doctrines influence each other or because they respond similarly to like pressures.

### *1. Anti-Classification Priorities*

Content-discrimination law, like Equal Protection law, displays a primary commitment to an anti-classification conception of discrimination.<sup>234</sup> In both areas, the Court chooses to ask first and foremost whether a law employs a suspect classification—that is, the Court is concerned primarily with the face of a law, rather than its justification. On the Equal Protection side, this means, for example, treating all racial classifications as suspect, regardless of whether they were intended to redress the past disadvantages of a historically disenfranchised race or ethnicity.<sup>235</sup> On the First

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<sup>234</sup> For the First Amendment, see *supra* notes 86–98 and accompanying text; for Equal Protection, see, e.g., Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 *U. Miami L. Rev.* 9, 10 (2003) (characterizing as “fairly standard” the view that anti-classification values dominate Equal Protection jurisprudence before claiming that anti-subordination values have also played some role); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 *Mich. L. Rev.* 213, 214–16 (1991) (noting centrality of the rule against classifications in current Equal Protection law).

<sup>235</sup> Within Equal Protection, a justification-based approach would roughly correspond with the main competitor to the anti-classification paradigm, sometimes referred to as the “anti-subordination” paradigm. This paradigm would treat certain race-conscious classifications as permissible if designed to address the historic subordination of particular races or ethnicities. See, e.g., Tribe, *supra* note 18, § 16-21, at 1514–15; Balkin & Siegel, *supra* note 234, at 9; Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 *Phil. & Pub. Aff.* 107, 108 (1976); Samuel Issacharoff & Pamela S. Karlan, *Groups, Politics, and the Equal Protection Clause*, 58 *U. Miami L. Rev.* 35, 35 (2003). (Many terminologies have been used to distinguish between an Equal Protection jurisprudence concerned with formal distinctions drawn on suspect bases and one concerned with addressing the historic disadvantages of particular groups. I employ “anti-classification” and “anti-subordination” because they are relatively self-explanatory labels for these values.)

Amendment side, this means treating all viewpoint and subject-matter classifications as suspect, even where the government has a non-discriminatory justification for them. Thus, for example, in *Simon & Schuster v. Members of New York State Crime Victims Board*, the neutral justification for the New York law—the principle that a criminal should not profit by his wrongs—could not save a law which discriminated by subject matter on its face.<sup>236</sup> At a high level of generality, then, on both fronts, the anti-classification approach requires that certain classifications should be treated as suspect, without regard for their actual justification.

Anti-classification values are, if anything, of even higher priority in content discrimination law than in Equal Protection law. *Mosley*—which struck down a facial classification with minimal attention to the city’s purportedly neutral justification—came at a time when the Burger Court in dicta endorsed race-conscious action on the part of states to remedy past segregation.<sup>237</sup> It was only as the Burger Court evolved that it took up the longstanding idea that racial classifications were inherently suspect and applied it across the board, including to race-conscious remedial programs.<sup>238</sup> Even then, of course, compelling governmental interests left a fair amount of room for such programs,<sup>239</sup> and only more recently have

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Content discrimination offers a partial parallel to the anti-subordination conception of Equal Protection. Often, the state attempts to justify a content-based regulation as unrelated to speech values rather than facilitative of them. But sometimes the state does claim to be classifying speech in order to foster speech values. Some examples are the campaign finance cases and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254–55 (1974), where the Court has rejected this argument, and *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 400–01 (1969), where it accepted it. Cf. Owen M. Fiss, *The Censorship of Television*, 93 Nw. U. L. Rev. 1215, 1237 (1999) (arguing for content-based regulation of television to provide better information to citizens).

<sup>236</sup> 502 U.S. 105, 117 (1991).

<sup>237</sup> See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (“School authorities . . . might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities . . .”).

<sup>238</sup> See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 293–95 (1978) (opinion of Powell, J.).

<sup>239</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (holding that a state law school’s compelling interest in diversity may justify race-conscious selection criteria); *Adarand Constructors v. Peña*, 515 U.S. 200, 237 (1995) (remanding for consideration of whether any compelling governmental interest justified race-conscious decision cri-

anti-classification values appeared to become more categorical.<sup>240</sup> On the content-discrimination side, by contrast, despite the wobble embodied in *City of Renton v. Playtime Theatres*,<sup>241</sup> *Boos v. Barry*,<sup>242</sup> and *Ward v. Rock Against Racism*,<sup>243</sup> anti-classification has always dominated and has not been appreciably moderated by competing values.<sup>244</sup> But while anti-classification values have been mediated to different degrees in each doctrine, in both they have exerted a dominant force.

## 2. Indifference Toward Effects

In both doctrines, an apparent corollary of the primacy of anti-classification values is a lack of concern with facially neutral laws having disparate effects.<sup>245</sup> It is not clear that this corollary actually follows: on the First Amendment side, for example, courts could consider facial classifications particularly invidious while still analyzing facially neutral laws for disparate effects. Nevertheless, in both contexts the Supreme Court's deep hostility toward classifications has been accompanied by a generally benign attitude toward facially neutral laws.<sup>246</sup>

Granted, there is a distinction. The Court in *Washington v. Davis* disavowed any interest in effects apart from the light they shed on

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teria); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989) (plurality opinion) (allowing for the possibility of race-conscious action "to rectify the effects of identified discrimination" within a jurisdiction); *Bakke*, 438 U.S. at 311–12 (opinion of Powell, J.) (recognizing diversity as a governmental interest capable of justifying race-conscious governmental action).

<sup>240</sup> See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion); Issacharoff & Karlan, *supra* note 235, at 48 (tracing the increasing importance of anti-classification values through the evolution of Equal Protection).

<sup>241</sup> 475 U.S. 41 (1986).

<sup>242</sup> 485 U.S. 312 (1988) (plurality opinion).

<sup>243</sup> 491 U.S. 781 (1989).

<sup>244</sup> See *supra* notes 104–110 and accompanying text.

<sup>245</sup> See, e.g., Tribe, *supra* note 18, § 16-21, at 1515 (equating anti-classification and indifference toward effects); Paul Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 5 (1976) (contrasting anti-classification and concern with effects).

<sup>246</sup> For the First Amendment, see *supra* note 15 and accompanying text; for Equal Protection, see, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977); *Washington v. Davis*, 426 U.S. 229, 240 (1976).

discriminatory purpose.<sup>247</sup> By contrast, content-discrimination intermediate scrutiny expressly considers the effects of facially neutral laws by requiring narrow tailoring and ample alternative channels of communication.<sup>248</sup> Extremely rarely, the Court has invoked these criteria as a backstop against what it regards to be particularly restrictive legislation.<sup>249</sup> In the vast majority of cases, however, the Court upholds laws with no serious inquiry into their effects on protected expression.

In both areas, this approach may arise from a substantive view about the government's limited responsibility for the inequitable but incidental effects of its laws.<sup>250</sup> Alternatively, institutional concerns may explain the Court's stance. In the Equal Protection context, an effects test is likely to call a great many laws into question.<sup>251</sup> A duty to strike down laws on the basis of disparate impacts could result in the Court's attempting to remedy intractable social problems through close oversight of myriad legal rules and allocations.<sup>252</sup> Meanwhile, on the First Amendment side, a concern with effects is potentially limitless: all laws affect speech levels.<sup>253</sup> Even if one were only concerned with disparate impacts as to subject matter or viewpoint, many laws could plausibly be argued to have such effects. Once again, the result of a concern with effects could be large-scale judicial review of facially neutral rules and allocations.

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<sup>247</sup> 426 U.S. at 241; see also *Arlington Heights*, 429 U.S. at 266 (confirming the role of effects as a proxy for discriminatory purpose).

<sup>248</sup> See, e.g., *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

<sup>249</sup> See *City of Ladue v. Gilleo*, 512 U.S. 43, 54–55 (1994); cf. *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (applying heightened scrutiny in the context of possible concern with effects).

<sup>250</sup> See, e.g., *Strauss*, supra note 50, at 337 (arguing that the government must have a free hand to regulate speech for neutral reasons, because these “are not the reasons speech merits special protection”).

<sup>251</sup> See *Davis*, 426 U.S. at 248 (“[Concern with disparate impact] would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.”).

<sup>252</sup> See *Tribe*, supra note 18, § 16-20, at 1510–12.

<sup>253</sup> See *Alexander*, supra note 61, at 929 (“[A]ll laws affect what gets said, by whom, to whom, and with what effect.” (emphasis omitted)).

### 3. *The Search for Discriminatory Purpose*

With effects of little concern in their own right, facially neutral laws are scrutinized for their propensity to conceal a discriminatory purpose. Unless the Court finds sufficient evidence of illicit purpose, it will apply lower scrutiny.<sup>254</sup> In the Equal Protection context, it has struggled more vocally with what constitutes sufficient evidence,<sup>255</sup> and it has occasionally concluded that a facially neutral law concealed a discriminatory purpose.<sup>256</sup> But in both contexts, the Court has been extremely reluctant to base an inference of discriminatory purpose on anything but evidence of the clearest sort.

There are also similarities in the structure of the purpose inquiry. As to the *role* which discriminatory purpose must play, both doctrines primarily endorse the position that an inference of discriminatory purpose is only sufficient to render governmental action suspect if the same action would not have occurred absent the discriminatory purpose.<sup>257</sup> As to the *form* of the purpose inquiry, the Court has expressed more willingness to consider legislative history and historical context in the Equal Protection arena than *United States v. O'Brien* apparently allows.<sup>258</sup> It is not clear, however, how far apart the two approaches really are. In the Equal

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<sup>254</sup> For the First Amendment, see, e.g., *Johnson*, 491 U.S. at 407; for Equal Protection, see, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977); *Davis*, 426 U.S. at 240–41.

<sup>255</sup> See, e.g., *Hernandez v. New York*, 500 U.S. 352, 363–64 (1991); *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979); *Arlington Heights*, 429 U.S. at 266–68.

<sup>256</sup> See, e.g., *Miller v. Johnson*, 515 U.S. 900, 920 (1995); *Hunter v. Underwood*, 471 U.S. 222, 233 (1985).

<sup>257</sup> See *supra* note 232 and accompanying text; *Underwood*, 471 U.S. at 232; *Arlington Heights*, 429 U.S. at 270 n.21; *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

There is also some slippage in both areas, most of it more apparent than real. The Court in *Renton* appeared to endorse a predominant-purpose test, but in fact what it held was that the district court's finding of a neutral predominant purpose was "more than adequate" to establish the law's neutrality. 475 U.S. 41, 48 (1986). On the Equal Protection side, the Court has also sometimes used the language of predominant purpose, see, e.g., *Miller*, 515 U.S. at 916, but elsewhere it has defined "substantial factor" as "motivating factor" and has said that evidence of such a purpose may be rebutted by defendant's evidence that the same result would have occurred in its absence. See *Mt. Healthy*, 429 U.S. at 287.

<sup>258</sup> Compare *Arlington Heights*, 429 U.S. at 267–68, with *United States v. O'Brien*, 391 U.S. 367, 383–84 (1968).

Protection context, the Court at times seems fairly indifferent to context and legislative history;<sup>259</sup> on the First Amendment side, it is not clear that the Court would ignore particularly blatant evidence of this kind.<sup>260</sup>

These decisions about the structure of the purpose inquiry, as well as the Court's general reluctance to impute illicit purpose, suggest a deferential stance toward the other branches of government and concerns about an expansive judicial role. As others have noted, possibly implicit in this deferential stance is the awareness that finding a discriminatory purpose amounts to accusing other governmental officials of acting for improper reasons.<sup>261</sup> Whatever the reason, both doctrines show some reluctance to look too deeply behind facially neutral laws.

#### 4. Constraining the Scope of Equality

In addition, both doctrines have limited what types of discrimination are categorically suspect. The Burger Court added subject-matter discrimination to a preexisting principle against viewpoint discrimination.<sup>262</sup> It also originated heightened scrutiny for sex discrimination, a notable expansion of Equal Protection.<sup>263</sup> Outside of those expansions, that Court and subsequent ones have been cautious about the notion of equality. This hesitation affects content discrimination as well as Equal Protection. One may see the content-discrimination principle as concerned primarily with equal

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<sup>259</sup> See, e.g., *City of Memphis v. Greene*, 451 U.S. 100, 142 (1981) (Marshall, J., dissenting) (criticizing the majority for ignoring the social and procedural context of the challenged state action).

<sup>260</sup> Some evidence for this arises in *Minneapolis Star*, 460 U.S. at 580, where the Court recharacterized its decision in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), as primarily informed by the political context and contemporaneous official statements.

<sup>261</sup> See, e.g., Tribe, *supra* note 18, § 16-20, at 1509 (“What distinguishes *Underwood* . . . is that the facts of the case allowed the Court to find a racially motivated government actor without pointing the finger at anyone who was alive.”); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *Stan. L. Rev.* 1111, 1137 (1997).

<sup>262</sup> See Stephan, *supra* note 2, at 233.

<sup>263</sup> See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).

treatment of expression.<sup>264</sup> The question then becomes along what dimensions expression must be treated equally. The conceptual struggle over whether to include certain forms of discrimination—such as message-related, persuasion-related, and communication-related discrimination—is a struggle over the scope of equality in the expressive sphere. The Court’s consistent limitation of equality to the fields of subject matter and viewpoint may bespeak concern with the potential expansiveness of equality.

Here, I am hypothesizing a dynamic which is not explicit in the First Amendment but is documented within the realm of Equal Protection. Perhaps most notably, the Warren Court’s embrace of fundamental-rights equal protection led both judges and commentators to warn about the open-ended nature of this commitment.<sup>265</sup>

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<sup>264</sup> See *Mosley*, 408 U.S. at 95; Kenneth L. Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20, 21 (1975) (arguing that equality is of central importance to the First Amendment); Stone, Content Regulation, *supra* note 35, at 201 (identifying equality as one concern).

<sup>265</sup> Compare *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969) (invoking Equal Protection in invalidating a one-year residency requirement for welfare benefits), *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966) (invalidating poll tax as Equal Protection violation), *Douglas v. California*, 372 U.S. 353, 355 (1963) (relying on Equal Protection for right to counsel claim for indigent defendants on first appeal), and *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (plurality opinion) (invoking Equal Protection and Due Process in requiring free transcripts for indigent defendants on appeal), with *Shapiro*, 394 U.S. at 661 (Harlan, J., dissenting) (“I think [fundamental rights analysis] particularly unfortunate and unnecessary. It is unfortunate because it creates an exception which threatens to swallow the standard equal protection rule. Virtually every state statute affects important rights.”), Archibald Cox, Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91, 91 (1966) (“Once loosed, the idea of [e]quality is not easily cabined.”), Gerald Gunther, *supra* note 14, at 8–9, Klarman, *supra* note 234, at 285, and Ralph K. Winter, Jr., Poverty, Economic Equality, and the Equal Protection Clause, 1972 Sup. Ct. Rev. 41, 58.

Klarman, while documenting the historical concern with open-endedness, argues that it is not a convincing explanation for the Burger Court’s Equal Protection retrenchment, which coincided with its embrace of an equally open-ended conception of Substantive Due Process in cases such as *Roe v. Wade*, 410 U.S. 113 (1973), and *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). Instead, Klarman argues, the Court’s real concern was specifically with the economic realm and the potential of fundamental rights Equal Protection to create “entitlement[s] to affirmative governmental assistance.” *Id.* at 289–90. The reliance on Equal Protection in *Eisenstadt v. Baird*, 405 U.S. 438 (1972)—and indeed in *Mosley*—offers further support for Klarman’s claim that it was not the open-endedness of equality, per se, which troubled the Justices, but its application in particular arenas. For my purposes, whatever the contours of the specific concerns, the important point is that courts and commentators

The Burger Court largely halted its expansion, and, where it did invalidate state action in the name of the Fourteenth Amendment, favored due-process rather than equal-protection grounds.<sup>266</sup>

Content discrimination opens a similarly wide prospect. If it reaches all message-related classifications, it could bring into doubt some fairly routine police-power tools, such as restrictions on solicitation and begging. If it encompasses all communication-related classifications, it could reach a great deal of regulation which, in the modern regulatory state, might seem routine, and indeed necessary. Localities must regulate public expression in order to allocate public space fairly and account for considerations such as traffic flow and safety. State tax codes differentiate among various forms of media; federal communications regulations distinguish broadcast and cable operations as a matter of course. The notion of equality, extended across a broad communicative sphere, could undermine a wide expanse of routine lawmaking and thrust the judiciary into a sizable role as regulatory overseer. Judicial reluctance to embrace this role could encourage a narrow interpretation of the sphere in which equality is required.

At the same time, rejecting a broader interpretation still leaves the Court with flexibility to address discrete instances of message-related, persuasion-related, or communication-related discrimination as it sees fit. It did so in *Minneapolis Star*,<sup>267</sup> possibly other laws might produce similar results. A far-reaching ban on advocacy, for example, or a prohibition on all speech by certain speakers (say, corporations) might trigger higher scrutiny on an ad hoc basis, without committing the Court to viewing all communication-based or speaker-based classifications as suspect. Such a case-by-case approach, should it become more dominant, would also have Four-

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believed that the concept of equality led further than they were prepared to go, casting into doubt well-accepted legal rules and distributions.

<sup>266</sup> See, e.g., *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973) (rejecting an Equal Protection challenge to school funding based upon property taxes); *Dandridge v. Williams*, 397 U.S. 471, 486–87 (1970) (rejecting an Equal Protection challenge to state's limitation on welfare benefits for large families); see also *Boddie v. Connecticut*, 401 U.S. 371, 380–81 (1971) (upholding indigent person's challenge to divorce fees on procedural due process grounds). But see *Eisenstadt*, 405 U.S. at 447 (striking down a ban on distribution of contraceptives to unmarried persons on Equal Protection grounds).

<sup>267</sup> 460 U.S. at 580.



teenth Amendment analogues in the rational-basis-with-bite cases<sup>268</sup> and in the occasional tendency to articulate successful claims in the language of due process rather than equality.<sup>269</sup> These approaches insulate the Court's decisions from the unwelcome ramifications of a more categorical commitment to equality within a certain realm.

Thus, content-discrimination law resembles Equal Protection in its emphasis on anti-classification values, its relative unconcern with the effects of regulation, its deferential approach to questions of discriminatory purpose, and its constraint in identifying suspect forms of discrimination.

If these similarities are persuasive, then questions arise about their source. It seems possible, perhaps even likely, that the two doctrines have informed each other in certain ways, and that courts performing similar inquiries in the two fields may gravitate toward similar approaches.<sup>270</sup> But establishing the existence and direction of such influence would be a scholarly undertaking unto itself. For just one example, at least one Justice has claimed strict scrutiny originated in free speech law and migrated to Equal Protection; another has claimed that it was the other way around.<sup>271</sup> Although the case law may well provide clear answers to some such questions, finding them is a complex endeavor of its own.

Another possibility is that the two doctrines may resemble each other because the Court faces similar pressures and difficulties in both. Along the way, I have suggested that institutional concerns

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<sup>268</sup> See, e.g., *Romer v. Evans*, 517 U.S. 620, 632 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985); *Reed*, 404 U.S. at 76.

<sup>269</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 574–75 (2003); *Boddie*, 401 U.S. at 380–81.

<sup>270</sup> In exploring Equal Protection, I do not suggest that the same relationship could not also exist among multiple constitutional doctrines, including, for example, Free Exercise. The regime made explicit in *Employment Division v. Smith*, 494 U.S. 872, 878–79 (1990), resembles both content discrimination and Equal Protection in its indifference toward effects and concern with discriminatory purpose. The purpose inquiry in that context also raises the same dilemmas I have explored. See Schwartzman, *supra* note 79, at 9–12.

<sup>271</sup> Compare *McLaughlin v. Florida*, 379 U.S. 184, 197 (1964) (Harlan, J., concurring) (arguing for First Amendment origins), with *Simon & Schuster*, 502 U.S. at 125 (Kennedy, J., concurring in the judgment) (arguing for Equal Protection origins). See generally Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 *UCLA L. Rev.* 1267, 1274–75 (2007) (noting this dispute and arguing that the doctrine developed simultaneously in a number of areas).

may drive the indifference to effects and the deferential approach to purpose, as well as the overall constraint in defining discrimination. This theory of causation, too, must remain speculative, but it is worth noting that both Equal Protection and content discrimination plausibly raise institutional concerns of the kind that could result in these particular doctrinal features.

In tracing these parallels, I am not endorsing the Court's approach in either realm. Nor am I arguing that its approach is normatively acceptable (or unacceptable) to the same extent in each. Although I have focused on similarities between the two doctrines, there are important differences as well. For example, in each context a strong anti-classification view may be justified either by the view that classifications constitute strong evidence of invidious purpose, or by the belief that certain classifications themselves represent expressive wrongs.<sup>272</sup> Such convictions may be of varying accuracy in different substantive areas of law. My aim here is not to explore these normative questions but simply to argue that not only does content-discrimination law have a relatively coherent shape, but that shape is recognizable from another realm of constitutional law.

#### CONCLUSION

Under the Supreme Court's conception of content discrimination, subject-matter and viewpoint discrimination are inherently suspect, to the point that laws employing these classifications are automatically content based. When analyzing laws that do not employ these classifications, the Court still seems primarily concerned with searching out subject-matter and viewpoint discrimination. It does this through a largely objective purpose inquiry, which relies primarily on the face of the law and its proffered justifications. Where both suspect and neutral justifications are present, it tends to give the government the benefit of the doubt. Although it is possible that certain other forms of message- or persuasion-related

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<sup>272</sup> Compare *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) ("Certain classifications, however, in themselves supply a reason to infer antipathy."), with *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 745-46 (2007) ("[D]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people . . . ." (quoting *Adarand Constructors v. Peña*, 515 U.S. 200, 214 (1995))).

discrimination are also suspect, the case law thus far does not offer much opportunity to test this hypothesis. Its stance upon subject-matter and viewpoint discrimination, however, is clear and consistent.

Given the ambiguities inherent in the idea of content discrimination,<sup>273</sup> the Court's conception is hardly incontestable. On one hand, some may think it overinclusive. A particularly notable aspect of the Court's conception is that it treats subject-matter and viewpoint discrimination as equally suspect. Some critics have argued that subject-matter discrimination is inherently less wrongful and should be treated accordingly.<sup>274</sup> I find this objection unpersuasive, both because the two forms of discrimination are difficult to untangle and because I am not persuaded that a coherent conception of wrongful governmental discrimination could distinguish them.<sup>275</sup>

On the other hand, some may find the principle underinclusive. To the extent that many have argued against discrimination on the basis of "message," "communicative impact," or "persuasion," the Court's principle singles out the most salient of these forms of discrimination to the exclusion of other, equally wrongful forms. I have more sympathy with this criticism. It is difficult to see why the transitivity between viewpoint and subject matter does not also extend to other message-related forms of discrimination, and thus why a law singling out "education" or "advocacy" should not raise serious First Amendment concerns.

But I do not defend the Court's content discrimination principle as normatively supreme. My point, first and foremost, is that the Court has such a principle and, second, that it is normatively plausible. A number of critics have concluded that heightened scrutiny cannot apply to all message-related aspects of messages.<sup>276</sup> They say so in part because they recognize that this conception has the potential to erode the distinction between content-based and content-

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<sup>273</sup> See *supra* Part II.

<sup>274</sup> See, e.g., Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 *Geo. L.J.* 727, 736–37 (1980); Stephan, *supra* note 2, at 206; Stone, *Content Regulation*, *supra* note 35, at 239–42.

<sup>275</sup> See Schauer, *supra* note 38, at 285.

<sup>276</sup> See, e.g., Farber, *supra* note 274, at 743–45; Redish, *supra* note 2, at 140; cf. Chemerinsky, *supra* note 3, at 51 (treating the concept of content discrimination as extending to subject-matter and viewpoint discrimination).

neutral laws. Many more may have the intuition that “advocacy” is a suspect classification than are willing to say the same about “solicitation.” Similarly, protecting the emotive features of speech may necessarily mean subjecting facially neutral communication and conduct laws to higher scrutiny: if high volumes or in-person contact is essential to the non-cognitive force of a message, regulation on those bases may be suspect.<sup>277</sup> And yet such regulations seem essential to modern-day living. It may be possible to develop an account of message-related discrimination that deals with these problems,<sup>278</sup> but it is not a fatal objection that the Court has not attempted one.

Finally, the Court may be criticized for the particular approach it has taken in implementing its conception. Perhaps the problem with the Court’s approach to advocacy in *Hill* is not so much that it should have relied on a message-related conception as that it should have been more suspicious that the law was viewpoint discriminatory. One could make the same case for regulations of picketing and protest, which the Court upholds on the basis of their physical attributes while overlooking risks of viewpoint discrimination.

A related formulation of the same objection might note the stark contrast between the Court’s treatment of facially content-based laws and facially neutral laws. Facially content-based laws are treated with suspicion, even where the only justification offered for them is neutral. Facially neutral laws are given deference even where the government offers a patently suspect justification, so long as a neutral justification is also in evidence.

Here, too, I have some sympathy. But the objection transcends the content-discrimination arena to implicate foundational legal debates over governmental purpose. Moreover, the Court’s approach to those quandaries here is consistent with its approach in other areas, most notably Equal Protection. True, the Court seems

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<sup>277</sup> See, e.g., Williams, *supra* note 2, at 661–62 (arguing that some neutral laws must be given higher scrutiny for their ability to affect the substance of certain messages).

<sup>278</sup> For an attempt, see *id.* (distinguishing between regulations that interfere with facilitation of a message and those that interfere with aspects that are constitutive of a message and arguing for more scrutiny of the latter). But see Alexander, *supra* note 2, at 16 (criticizing Williams’s distinction as “theoretically difficult and practically impossible”).

to have taken a more uniformly objective approach to content discrimination than it has toward Equal Protection.<sup>279</sup> But on some normative accounts this is itself a virtue, and, at the least, here is an area where content-discrimination jurisprudence is actually *more* consistent than its analogues.

Primarily, however, my concern has been not with justifying the Court's content-discrimination principle but with showing that it has one. Regarding the endeavor of normative criticism, my work here is a useful first step. But regarding the incoherence objection, I hope it is a last word. There are reasons to criticize the Court's approach, including that it has utterly failed to articulate it clearly. The order I have uncovered here is, as I have said, latent rather than patent. Nor would doctrinal articulations of the precepts I have identified necessarily make hard cases any more predictable; hard cases are unpredictable precisely because they are hard. The Court's rules at least make a great number of cases easy, including cases involving facial viewpoint and subject-matter classifications. Not all such cases are innately simple. In some instances their simplicity is a virtue of the Court's approach, one that the multi-pronged tests favored by its critics would not share. Imagine a system in which the Court decided how much scrutiny to give a law based upon its "content," "character," "context," "nature," and "scope,"<sup>280</sup> or one which asked "whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences."<sup>281</sup> I doubt many cases would look easy or predictable under either approach.

There may be many reasons to reconsider the content-discrimination principle, but incoherence is not a good one. Tracing the contours of the principle clears the way for more informed normative criticism. It also illustrates, for those who see some virtue in rules, that the Court's conception of content discrimination, if substantively suboptimal, has proved surprisingly coherent in

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<sup>279</sup> See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977) (finding that "[t]he legislative or administrative history may be highly relevant" to an Equal Protection inquiry).

<sup>280</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 429–31 (1992) (Stevens, J., concurring in the judgment) (proposing five factors for use in determining when speech regulations are permissible); Huhn, *supra* note 3, at 808 (proposing a multi-factor "constitutional calculus" based upon Justice Stevens's *R.A.V.* concurrence).

<sup>281</sup> *Bartnicki v. Vopper*, 532 U.S. 514, 536 (2001) (Breyer, J., concurring).

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both aim and approach. Overhauling it would risk upending this coherence.