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ARTICLES

CLARIFYING VIEWPOINT DISCRIMINATION IN FREE SPEECH DOCTRINE

R. RANDALL KELSO*

I. INTRODUCTION

The preliminary decision that must be made in First Amendment free speech cases is what level of review to apply.[1] As discussed in Part II of this article, a critical part of this inquiry is whether the government action involves viewpoint discrimination, content-based subject-matter regulation, or content-neutral regulation.[2] Whether some government action—either statute, administrative regulation, or other official conduct—involves viewpoint discrimination is thus a critically important issue in First Amendment free speech doctrine. As discussed in Part III of this article, the Supreme Court has not done as good a job as it could in clarifying when, in general, government action involves viewpoint discrimination or instead involves content-based, subject-matter regulation.[3] Particular areas of concern involve issues of decency and respect for the diverse beliefs and values of the American public, vulgar speech, speech that might disparage others, or speech viewed as offensive by some members of the public, even if not by the government itself.[4] Part III provides some guidance on how all these issues should be resolved.

Once that approach is described, Part IV of this article provides an overview of free speech doctrine in terms of the various standards of scrutiny when viewpoint discrimination either is or is not occurring.[5] Part V address how to make the overall doctrine more predictable in various areas of free speech doctrine: government funding, school context, commercial speech, and speech by government workers on matters of public concern.[6] While the Supreme Court has done an adequate job in making standards clear, the Court has left some holes in

* Spurgeon E. Bell Distinguished Professor of Law, South Texas College of Law Houston. B.A, 1976, Univ. of Chicago; J.D., 1979, Univ. of Wisconsin-Madison.

1. *See infra* text accompanying notes 7-81 (discussing the range of preliminary decisions that must be made to determine what standard of review applies in free speech doctrine).
2. *See infra* text accompanying notes 82-99.
3. *See infra* text accompanying notes 114-159.
4. *See infra* text accompanying notes 160-202.
5. *See infra* text accompanying notes 202-277.
6. *See infra* text accompanying notes 278-397.

the analysis prompting unnecessary confusion at state court, federal district court, and federal court of appeals levels. Part VI provides a brief conclusion.

II. OVERVIEW OF MODERN FIRST AMENDMENT FREE SPEECH DOCTRINE

As discussed below, viewpoint discrimination appears to trigger strict scrutiny in every context in which it occurs (public forum, nonpublic forum, government funding of speech, speech in the context of schools, commercial speech, or speech otherwise not protected by the first amendment, such as advocating illegal conduct, true threats, fighting words, or obscenity).[7] In contrast, if the government action involves only a regulation of conduct, not speech, or if the government's action involves only the government's own speech, viewpoint discrimination does not trigger any First Amendment free speech concerns.[8]

A. Regulations That Do Not Trigger First Amendment Free Speech Doctrine

1. Regulations of Conduct.—By its terms, the First Amendment proscribes only government action "abridging the freedom of speech," not conduct.[9] Governmental regulations of conduct, therefore, are outside of the ambit of the First Amendment.[10] In determining whether the regulation is one of speech or conduct, the Court has noted that "symbolic speech" is fully protected by the First Amendment.[11] "Symbolic speech" exists where conduct is not "pure speech"—such as talking or writing—but nevertheless conveys an expressive message reasonably likely to be understood.[12] Classic examples of symbolic speech include burning a draft card or cross, or wearing a jacket, to convey a particular message.[13] On the other hand, speech "integral to criminal conduct" has no First Amendment protection.[14]

Sometimes, whether the regulation is one of speech or conduct may not be so clear. For example, the Court held in *Dallas v. Stanglin*[15] that "recreational

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7. *See infra* text accompanying notes 82-85 (public/nonpublic forum), 115-25 (speech otherwise not protected), 278-81 (funding), 290-301 (schools), 387 (commercial speech).

8. *See infra* text accompanying notes 9-42.

9. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press.").

10. *See* Diahann DaSilva, *Playing a "Labeling Game": Classifying Expression as Conduct as a Means of Circumventing First Amendment Analysis*, 56 B.C. L. REV. 767, 770-79 (2015).

11. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 404-07 (1989), and cases cited therein.

12. *See* Joshua Waldman, *Symbolic Speech and Social Meaning*, 97 COLUM. L. REV. 1844, 1846-62 (1997).

13. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 380 (1992) (burning a cross); Cohen v. California, 403 U.S. 15 (1971) (wearing a jacket with words on it); United States v. O'Brien, 391 U.S. 367 (1968) (burning a draft card to protest the Vietnam War).

14. *See, e.g.*, United States v. Hobgood, 868 F.3d 744 (8th Cir. 2017) (speech used to support conviction of interstate stalking and extortion not entitled to free speech protection).

15. 490 U.S. 19, 24-25 (1989); *see also* Willis v. Town of Marshall, 426 F.3d 251, 257-64

dancing" by patrons of a dance hall was not expressive activity, but mere conduct, and thus a city ordinance that restricted admission to certain dance halls to persons between fourteen and eighteen to protect teenagers did not raise First Amendment issues concerning the freedom of association rights of persons between fourteen and eighteen to associate with persons outside that age group. In contrast, in *Barnes v. Glen Theatre, Inc.*,[16] the Court held that a statute barring public nudity applied to nude dancing by performers at an adult entertainment establishment was expressive activity because part of the purpose of the performance was "erotic expression." Focused more on literal action than purpose, Justice Scalia said concurring in the judgment that the First Amendment did not apply, since nude dancing was not symbolic speech, but conduct.[17]

Lower federal courts have disagreed about whether laws banning state-licensed mental health providers from treating patients under eighteen years old with "sexual orientation change efforts" are regulations of conduct or speech.[18] Lower state courts have disagreed about whether anti-discrimination laws requiring bakers to make cakes, florists to prepare floral displays, or making wedding invitations for same-sex couples' weddings involve regulations of conduct or expression.[19] There has also been an issue whether laws which permit retailers to give discounts for cash purchases, but prevent surcharges for credit

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(4th Cir. 2005) ("lewd recreational dancing" at a community center not "symbolic speech" entitled to First Amendment protection, but discriminatory enforcement may trigger Equal Protection complaint even if a regulation of conduct).

16. 501 U.S. 560, 565-66 (1991). *But see* Tagami v. City of Chicago, 875 F.3d 375 (7th Cir. 2017) (public nudity law which banned women, but not men, from walking around topless in public held a regulation of conduct, not expression; in any case, even if "symbolic speech," the law is constitutional under the intermediate review of *O'Brien* or intermediate review for gender discrimination under *Craig v. Boren*, 429 U.S. 190 (1976)).

17. *Barnes*, 501 U.S. at 572 (Scalia, J., concurring in the judgment).

18. *See, e.g.*, Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014) (regulation of conduct); King v. Governor of New Jersey, 767 F.3d 216 (3d Cir. 2014) (ban valid as content-based regulation of licensed professional speech; the *King* court's view that such speech is entitled to only intermediate review under the commercial speech doctrine of *Central Hudson Gas & Electric Co. v. Public Service Commission of New York*, 447 U.S. 557 (1980), not strict scrutiny as a content-based regulation of speech, was rejected in dicta by the Supreme Court in *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371-76 (2018)).

19. *See, e.g.*, Brush & Nib Studio, LC v. City of Phoenix, 418 P.3d 426, 436-40 (Ariz. Ct. App. 2018) (anti-discrimination law applied to wedding invitation and other wedding design business is a regulation of conduct, not speech), and cases cited therein; *see also* Dep't of Fair Emp't & Hous. v. Cathy's Creations, Inc., 2018 WL 747835 (Cal. Super. Ct., Bakersfield Dep't, Feb. 5, 2018) (baking a wedding cake is artistic expression, and regulation unconstitutional under strict scrutiny). The Supreme Court dodged this issue in *Craig v. Masterpiece Cakeshop, Inc.*, 138 S. Ct. 1719 (2018), by holding that application of the anti-discrimination law in *Craig* was tainted by religious intolerance, and thus violated the Free Exercise Clause, rendering unnecessary consideration of any free speech issues in the case.

card purchases, regulates how merchants may communicate their prices, and thus is a regulation of commercial speech, or merely an economic regulation of conduct.[20]

2. The Government's Own Speech.—In *Rosenberger v. Rector and Visitors of the University of Virginia*,[21] the Supreme Court noted: "we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." This applies not only to core examples of government speech, such as government public service announcements,[22] but also, as stated in *Rosenberger*, citing an earlier case, *Rust v. Sullivan*, "when the government appropriates public funds to promote a particular policy of its own."[23] As the *Rosenberger* Court noted, "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee."[24] Thus, in this context, viewpoint discrimination is permissible and free speech doctrine does not apply.[25]

A similar result was reached in 2009 in *Pleasant Grove City, Utah v. Summum*.[26] In *Summum*, a religious organization filed a Section 1983 action against various local officials, asserting that they had violated the Free Speech Clause by rejecting a proposed Seven Aphorisms monument for a local park that

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20. *See* Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1146-49 (2017) (concluding it is a regulation of commercial speech).

21. 515 U.S. 819, 833 (1995).

22. *See, e.g.*, Walker v. Texas Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2246 (2015) (giving an example of a public service announcement "designed to encourage and provide vaccinations" which does not trigger free speech analysis, and thus the government does not have to "voice the perspective of those who oppose this type of immunization.").

23. *Rosenberger*, 515 U.S. at 833 (citing Rust v. Sullivan, 500 U.S. 173, 194 (1991)).

24. *Id.*

25. *Id.* It should be noted that this understanding of *Rust v. Sullivan* is different than the actual language in *Rust*. In *Rust*, the Court held that requiring grantees to adopt the government's position–in *Rust*, a family planning clinic receiving federal funds could not mention abortion as a family planning option–was not viewpoint discrimination. *Rust*, 500 U.S. at 193. The Court said:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another.

Id. Faced with the logical absurdity of this position, as noted by dissenting Justices in *Rust*, *id.* at 207-11 (Blackmun, J., joined by Marshall & Stevens, JJ., dissenting), the majority in *Rosenberger* properly reconceptualized the *Rust* holding to make it consistent with standard free speech doctrine by acknowledging that *Rust* involved viewpoint discrimination, but that is was constitutional as an example of government speech. *Rosenberger*, 515 U.S. at 833.

26. 555 U.S. 460 (2009).

already contained a donated Ten Commandments monument.[27] The Court held, unanimously, that permanent monuments displayed on public properly typically represent government speech and, although the Free Speech Clause restricts government regulation of private speech, it does not regulate government speech.[28] Justice Alito stated that the government need not maintain viewpoint neutrality in the selection of donated monuments, while noting that there are other restraints on government speech, such as the Establishment Clause, and the involvement of government officials in advocacy may be limited by law, regulations, or practice.[29]

In general, in deciding whether particular speech is government speech or the speech of a private individual, the courts have examined: (1) the central "purpose" of the program in which the speech in question occurs; (2) the degree of "editorial control" exercised by the government or private entities over the content of the speech; (3) the identity of the "literal speaker"; and (4) whether the government or the private entity bears the "ultimate responsibility" for the content of the speech, in circumstances where both government and a private entity are claimed to be speaking.[30] Under this approach, government speech

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27. *Id.* at 464-67.

28. *Id.* at 467-68, 470-72.

29. *Id.* at 468-69. Justice Stevens, concurring with Justice Ginsburg, added that government speakers are bound by the Equal Protection Clause and so do not have free license to communicate offensive or partisan messages. *Id.* at 481-82 (Stevens, J., joined by Ginsburg, J., concurring). Justice Breyer, concurring, said the First Amendment might well be violated if the city were to discriminate in the selection of permanent monuments on grounds unrelated to the display's theme, say, solely on political grounds. *Id.* at 484 (Breyer, J., concurring). Justice Souter, also concurring in the judgment, said that the test should be "whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land," and noted such a "reasonable observer" test is "of a piece with the one for spotting forbidden governmental endorsement of religion in Establishment Clause cases." *Id.* at 487 (Souter, J., concurring in the judgment). Justice Scalia, concurring with Justice Thomas, said that under *Van Orden v. Perry*, 545 U.S. 677 (2005), the park displays would not likely violate the Establishment Clause because in *Van Orden* the Court rejected an Establishment Clause challenge of a virtually identical Ten Commandments monument donated by a private group. *Id.* at 482-83 (Scalia, J., joined by Thomas, J., concurring.).

30. *See generally* R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and "Reasonableness" Balancing*, 8 ELON L. REV. 291, 318 & n.65, (citing*, inter alia*, Wells v. City & Cty. of Denver, 257 F.3d 1132, 1140-41 (10th Cir. 2001); *and* Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085, 1093, 1095 (8th Cir. 2000). *See also* Eagle Point Educ. Ass'n/SOBC/OEA v. Jackson Cty. Sch. Dist. No. 9, 880 F.3d 1097 (9th Cir. 2018) (school district policy banning picketing or picketers from entering school facilities triggers regular free speech analysis, as a reasonable observer would not view the striking public school teachers as engaged in government speech; even if nonpublic forum analysis applied, the absolute ban—which even banned striking teachers from entering school to visit their

occurs when the government is sufficiently involved in crafting a generic advertising campaign for an industry—such as "Beef. It's What's for Dinner"—that the ad represents government speech.[31]

In *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*,[32] a 5-4 Court adopted the view that specialty license plates (plates where the individual chooses a message for their license plate from a list of messages pre-approved by the government) are government speech. So the government, in refusing to approve a plate featuring the Confederate battle flag, was not subject to free speech review. The Court probably erred in this analysis. As the dissent correctly noted:

> Suppose you sat by the side of a Texas highway and studied the license plates on the vehicles passing by. . . . As you sat there watching these plates speed by, would you really think that the sentiments reflected in these specialty plates are the views of the State of Texas and not those of the owners of the cars? If a car with a plate that says "Rather Be Golfing" passed by at 8:30 am on a Monday morning, would you think: "This is the official policy of the State – better to golf than to work? If you did your viewing at the start of the college football season and you saw Texas plates with the names of the University of Texas's out-of-state competitors in upcoming games – Notre Dame, Oklahoma State, the University of Oklahoma, Kansas State, Iowa State – would you assume that the State of Texas was officially (and perhaps treasonously) rooting for the Longhorns' opponents?[33]

Instead, the speech should be viewed as private speech. Because the case involved a government-provided license plate, the case probably should trigger nonpublic forum analysis, which would trigger strict scrutiny for viewpoint discrimination and reasonableness analysis for subject-matter regulation.[34] This is consistent with what lower courts were doing prior to the Court's decision in *Walker*.[35]

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children—was unreasonable).

31. *See* Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 553-63 (2005).

32. 135 S. Ct. 2239, 2244-46 (2015).

33. *Id.* at 2255 (Alito, J., joined by Roberts, C.J., and Scalia & Kennedy, JJ., dissenting). Thus, the dissent in *Walker* properly observed that individual-chosen specialty plates are not "government speech," but private speech. The dissent applied viewpoint discrimination, strict scrutiny to hold the Texas ban invalid. *Id.* at 2255-56.

34. *See infra* text accompanying notes 72-74 (public/nonpublic forum analysis); 82-99 (strict scrutiny if viewpoint discrimination, reasonableness for subject-matter regulation).

35. While the Sixth Circuit had held in *ACLU of Tennessee v. Bredesen*, 441 F.3d 370 (6th Cir. 2006), that license plates are government speech, other circuit courts ruled differently. *See, e.g.*, ACLU of N.C. v. Tata, 742 F.3d 563 (4th Cir. 2014) (if state permits pro-life plate, failure to create pro-choice plate viewpoint discrimination); Arizona Life Coal., Inc. v. Stanton, 515 F.3d 956 (9th Cir. 2008) (rejection of "Choose Life" plates viewpoint discrimination); Choose Life Illinois, Inc. v. White, 547 F.3d 853, 865 (7th Cir. 2008) (rejection of "Choose Life" plate was subject-matter regulation since it excluded the "entire subject of abortion" from its program, triggering

A better approach to reach the same result in *Walker* might have been to hold the ban was nonpublic forum, subject-matter regulation related to "decency and respect for the diverse beliefs and values of the American public," as in *National Endowment for the Arts v. Finley*.[36] As it was reasonable in *Finley* for the government to take into account "decency" in deciding whether to fund certain art projects,[37] it is reasonable for the government not to want to be associated with certain messages on government-issued license plates—in this case the symbol of the confederate battle flag, which an objective observer might well view as supporting rebellion or racism or both. In contrast, for totally individual-generated speech in a public forum, where such subject-matter content discrimination would trigger strict scrutiny,[38] the government would not have a compelling interest to regulate such speech.[39] The majority's approach in *Walker* permits viewpoint discrimination in license plate regulation, such as permitting a state to promote one side of the abortion debate on its license plates, but not the other side.[40]

Lower courts have disagreed with whether the *Walker* approach to specialty license plates applies to vanity license plates, where the motorist themselves tailor numbers and messages to form a personalized message.[41] Cases of compelled speech concerning whether an individual can object to the state chosen motto on a license plate always involve viewpoint discrimination and trigger strict scrutiny even if the license plate is a nonpublic forum.[42]

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reasonableness review in nonpublic forum).

36. 524 U.S. 569, 572 (1998).

37. *Id.* at 583-84. *Finley* is discussed more fully at *infra* text accompanying notes 160-66.

38. *See infra* text accompanying note 85 (standards of review in public forum discussed).

39. *See e.g.*, West Virginia 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, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."). *Barnette* is discussed more fully, *infra*, in the text accompanying note 266.

40. *See, e.g.*, ACLU of N.C. v. Tennyson, 815 F.3d 183, 184-85 (4th Cir. 2016) (deciding that, after *Walker*, states can allow motorists to promote anti-abortion agenda on license plates, while denying plates to pro-choice views).

41. *Compare* Vawter v. Abernathy, 45 N.E.3d 1200, 1204-07, 1209 (Ind. 2016) (holding an Indiana law granting Bureau of Motor Vehicles broad discretion to accept or reject vanity license plates cannot be challenged for vagueness given plates are government speech) *with* Mitchell v. Maryland Motor Vehicle Admin., 148 A.3d 391, 325-28 (Md. 2016) (holding vanity license plates, where individuals tailor numbers and letters to form a personalized message, still subject to nonpublic forum analysis after *Walker*).

42. *See* Wooley v. Maynard, 430 U.S. 705, 715-17 (1977) (holding an individual may cover up "Leave Free or Die" message on New Hampshire plate as long as compelling government interest to permit police to identify car from license plate numbers not compromised); *see also* Cressman v. Thompson, 719 F.3d 1139, 1147-53 (10th Cir. 2013) (finding a motorist alleging

B. Is Speech Fully Protected or Limited in Some Way

If resolution of this first question indicates that standard free speech doctrine applies, the next question to ask is whether the speech is regarded as fully protected (e.g., the classic categories of literary, artistic, political, or scientific speech[43] or conduct which qualifies as symbolic speech[44]) or is not fully protected.

There are a number of categories of speech which do not get full free speech protection. While these categories of speech were traditionally viewed as completely unprotected,[45] all are entitled to some free speech protection today. In the classic cases of unprotected speech (e.g., advocacy of illegal conduct, speech involving true threats, fighting words, and obscene speech or indecency involving children),[46] viewpoint discrimination today triggers strict scrutiny, as in *R.A.V. v. City of St. Paul*.[47] In the case of libelous or defamatory speech, the *Sullivan* free speech doctrine applies.[48] In case of rights of government workers to speak on matters of public concern, those workers get the *Pickering v. Board of Education of Will County, Illinois* balancing test, as is discussed in Part V.D.2 of this article.[49] For commercial speech, content-based subject-matter regulations trigger the "intermediate plus" standard of review of *Central Hudson Gas & Electric Corp. v. Public Service Commission* test, as discussed in Part V.D.1 of this

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Oklahoma statute prohibiting him from covering image on license plate of Native American shooting arrow toward the sky stated a First Amendment, strict scrutiny claim).

43. *See, e.g.*, Miller v. California, 413 U.S. 15, 24-25 (1973) (holding otherwise unprotected, obscene speech is protected by the First Amendment if it has "serious literary, artistic, political, or scientific value").

44. Symbolic speech is discussed *supra* at text accompanying notes 12-14.

45. *See, e.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942), where the Court said:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

46. For in-depth discussion of these examples of unprotected speech, see Kelso, *supra* note 30, at 325-30 (advocacy of illegal conduct); at 331-36 (true threats); at 341-42 (fighting words); at 342-49 (obscene speech); at 349-59 (indecency involving the use of children).

47. 505 U.S. 377, 383 (1992). *R.A.V.* is discussed more fully *infra* at text accompanying notes 115-39.

48. New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964). *Sullivan* and its progeny are discussed more fully in Kelso, *supra* note 30, at 358-66.

49. 391 U.S. 563, 568 (1968). *See infra* text accompanying notes 388-97.

article.[50]

C. Content-Based or Content-Neutral Government Action

The third question asked under First Amendment review is whether the regulation of speech is content-based or content-neutral. The distinction between content-based and content-neutral regulations of speech is well illustrated by the famous and leading case of *United States v. O'Brien*.[51] In this 1968 case, the Court upheld the conviction of a protester who had violated federal law by burning his draft card on the steps of a courthouse as part of a demonstration against the Vietnam war. The statutorily defined crime was destroying a draft certificate.[52] Chief Justice Warren stated:

> [A] regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[53]

The government interest in *O'Brien* that was unrelated to the suppression of free expression was the harm that burning the draft card would have to the effective functioning of the Selective Service System.[54] The Court concluded in *O'Brien* that the secondary effect of burning the draft card was what concerned the government, not the protest activity itself.[55]

The *O'Brien* principle, although framed in the context of a regulation of symbolic speech that had a problematic secondary effect, was extended in *Members of the City Council of Los Angeles v. Taxpayers for Vincent*[56] to time, place, and manner regulations applied in a public forum. This was done with little detailed consideration, but was based on the common-sense observation that a time, place, or manner regulation also involves a case where the government is not concerned about the content of the speech, but only the time, place, or manner of the speech's delivery.[57] Thus, under current doctrine, either a regulation is content-based or it is content-neutral, with no distinction made between whether the regulation is content-neutral because it is based upon secondary effects or is a time, place, and manner regulation.[58]

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50. 447 U.S. 557, 566 (1980). *See infra* text accompanying notes 362-87.
51. 391 U.S. 367 (1968).
52. *Id.* at 369-72.
53. *Id.* at 377.
54. *Id.* at 376.
55. *Id.* at 377-82.
56. 466 U.S. 789, 803-05 (1984).
57. *Id.* at 804-05.
58. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 797-98 (1989) (holding a

For this reason, intermediate review would be appropriate for a complete ban on speech based on secondary effects reasons, even though a complete ban cannot easily be viewed as a time, place, or manner regulation. *City of Erie v. Pap's A.M.*[59] is instructive. *Pap's A.M.* involved a regulation completing banning totally nude dancing in adult entertainment establishments in Erie, Pennsylvania.[60] Dissenting, Justice Stevens, with Justice Ginsburg, objected that never before had the Court used the "secondary effects" test to justify a total ban on expression.[61] In response, Justice O'Connor said that the ordinance did not enact a total ban. It merely limited one means of expressing the erotic message being conveyed, and this was not a case where "banning the means of expression so interferes with the message that it essentially bans the message."[62] In any event, even if viewed as a total ban on completely nude dancing, to the extent Justice O'Connor was right that there was a secondary effect justification for the regulation, concerned with increased drugs and prostitution around adult entertainment establishments,[63] intermediate review would be proper to apply in any case.

It is important to note that under the intermediate review standard the government bears the burden to make a sufficient evidentiary showing that the regulation meets the intermediate review test of being substantially related to a substantial government interest and is not substantially more burdensome than necessary.[64] In *Pap's A.M.*, Justice Souter rightly questioned whether the

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regulation limiting decibel levels of rock performance in New York City's Central Park to prevent secondary effect of disturbing residents in nearby apartment buildings triggers *O'Brien*'s intermediate standard of review). In the 2002 case of *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 455-58 & n.2 (2002) (Souter, J., joined by Stevens & Ginsburg, J.J., dissenting), Justice Souter made an argument a distinction should be made between these two kinds of content-neutral regulations, with secondary effects cases triggering a higher standard of intermediate review than time, place, or manner cases. As discussed in CHARLES D. KELSO & R. RANDALL KELSO, THE PATH OF CONSTITUTIONAL LAW § 29.4.4.3 nn.154-59 (2007) (with 2019 Supplement) http://libguides.stcl.edu/kelsomaterials [https://perma.cc/YLJ3-PU5E] [hereinafter KELSO & KELSO, THE PATH OF CONSTITUTIONAL LAW], any attempt to draw clear, bright lines between secondary effects and time, place, or manner regulations is problematic. For example, in *Ward v. Rock Against Racism*, cited above, the *manner* regulation was adopted to guard against *secondary effects* on neighbors. A majority of the Court has never drawn a distinction between the two kinds of content-neutral regulations.

59. 529 U.S. 277 (2000).

60. *Id.* at 289-91.

61. *Id.* at 317-18 (Stevens, J., joined by Ginsburg, J., dissenting).

62. *Id.* at 293 (O'Connor plurality opinion, joined by Rehnquist, C.J., and Kennedy & Breyer, JJ.). Justices Scalia and Thomas concurred in the result upholding the regulation on the ground that erotic dancing is not "expression," but mere "conduct," and thus free speech doctrine did not apply. *Id.* at 307-08 (Scalia, J., joined by Thomas, J., concurring).

63. *Id.* at 291.

64. *See supra* note 205 and accompanying text. These points are also discussed in KELSO & KELSO, THE PATH OF CONSTITUTIONAL LAW, *supra* note 58, § 29.4.4.2 nn.160-75; *see also* Kelso, *supra* note 30, at 293-95 & n.15.

government had met its burden to prove that banning totally nude dancing, but permitting erotic dancing with pasties and a G-string, really would have a substantial impact on reducing the secondary effects of increased drugs and prostitution around the adult entertainment establishment.[65]

If the regulation is instead based on the content of the speech, the question then becomes whether the regulation involves viewpoint discrimination or subject-matter discrimination. While both trigger free speech concerns, at a conceptual level viewpoint discrimination occurs when government action is triggered depending on which side of a topic the individual supports, while subject-matter discrimination occurs when government action is triggered whenever a topic/subject-matter is discussed, without regard to the person's views on that topic/subject-matter.[66] As discussed in Part III, it is in applying this conceptual idea in practice that has caused the Court some trouble.[67]

D. Public Forum, Nonpublic Forum, or Other Forum

The fourth question asked in modern First Amendment free speech doctrine is whether the speech being regulated occurs in a public forum or on an individual's private property; in a nonpublic forum owned by the government; or in another kind of forum. Classic examples of public fora are places like public streets and public parks, which "have immemorially been held in trust for the use

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65. *Pap's A.M.*, 529 U.S. at 311-17 (Souter, J., concurring in part and dissenting in part). For additional discussion of how much evidence the government needs to meet its burden in these kind of cases, see *Entertainment Products, Inc. v. Shelby County*, 721 F.3d 729, 736 & 739 (6th Cir. 2013) (rejecting argument that governments may only rely on evidence satisfying scientific validity standards of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993); instead governments may rely on "land-use studies, prior judicial opinions, surveys of relevant professionals (such as real-estate appraisers), anecdotal testimony, police reports, and other direct and circumstantial evidence"). *See also* Annex Books, Inc. v. City of Indianapolis, 740 F.3d 1136 (7th Cir. 2014) (holding that a city cannot force adult bookstores to close overnight, if other businesses can remain open, because justification of fewer armed robberies was not statistically significant); Foxxxy Ladyz Adult World, Inc. v. Village of Dix, 779 F.3d 706, 708 (7th Cir. 2015) (holding the village must present evidence that nude dancing has adverse secondary effects on "health, welfare, and safety of its citizens"); Reynolds v. Middleton, 779 F.3d 222 (4th Cir. 2015) (holding the city must present evidence that ban on soliciting funds at intersections is not substantially too burdensome response to traffic safety and traffic flow concerns).

66. *See, e.g.,* Consol. Edison Co. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 537 (1980) ("The prohibition [on discussion of nuclear power in bill inserts], the Commission contends, is [constitutional because it is] related to subject matter rather than to the views of a particular speaker. . . . The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.").

67. *See infra* text accompanying notes 114-202.

of the public."[68] Classic examples of government-owned nonpublic fora are places like prisons or military bases.[69] The Court has also discussed what are called "designated" or "limited" public forums. Where the forum has been "designated" as opened to the public for some purposes, speech regulations relating to those purposes trigger public forum standards.[70] If the forum has been "limited" to the public, and thus closed for other purposes, nonpublic forum standards apply.[71]

In deciding whether a government-owned forum is a public forum or nonpublic forum, some Justices tend to focus on (1) whether the forum has been viewed historically or traditionally as a public forum, and (2) the government's intent, i.e., whether the government has expressly opened the forum for public use or is the government acting more as a proprietor managing operations. This approach of considering both (1) and (2) was adopted in Chief Justice Rehnquist's majority opinion in *International Society for Krishna Consciousness v. Lee*,[72] which concluded that the walkways in a public airport were a nonpublic forum. In contrast, in addition to those two considerations, other Justices also focus on (3) whether the objective nature of the forum is "compatible" with free speech uses, as in Justice Kennedy's concurrence in *Lee*, which concluded such walkways in a public airport were a public forum.[73]

Most cases are clear under either Rehnquist's or Kennedy's approaches.[74] In

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68. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (quoting Hague v. Comm. For Indus. Org., 307 U.S. 496, 515 (1939)).

69. *See, e.g.*, Adderley v. Florida, 385 U.S. 39, 47-48 (1966) (prison case); *see also* Greer v. Spock, 424 U.S. 828, 836-40 (1976) (military base).

70. *Perry*, 460 U.S. at 45-46 ("The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. . . . Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum.").

71. *Id.* at 46 ("[T]he state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.").

72. 505 U.S. 672, 677-83 (1992).

73. *Id.* at 698 (Kennedy, J., joined by Blackmun, Stevens & Souter, JJ., concurring in the judgments). The same standards apply to privately-owned property if sufficiently entwined with the state that they trigger First Amendment analysis under the state action doctrine. For an overview of the state action doctrine, see KELSO & KELSO, *supra* note 58, § 15.1. This could apply to private airports built with state funds; privately-run prisons performing the public function of incarceration; charter schools with sufficient connections to the state; or otherwise. *See, e.g.*, Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 80-88 (1980) (holding a privately-owned shopping center, held to be state actor by the California Supreme Court, treated as public entity for First Amendment free speech analysis, not treated as a private party).

74. Numerous case examples triggering either public or nonpublic forum analysis appear in Kelso, *supra* note 30, at 303-07. For additional cases finding an area is a nonpublic forum, see *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1886-87 (2018) (polling place is nonpublic forum). *See also* NAACP v. City of Phila., 834 F.3d 435, 441-42 (3d Cir. 2016) (holding that access

some cases, the Court has made it relatively easy for a state to create a forum that will be characterized as a nonpublic forum, in which case under standard First Amendment doctrine non-viewpoint discriminatory regulations will be given only reasonableness review. For example, in *Arkansas Educational Television Commission v. Forbes*,[75] the Court held that a state agency that operated TV stations had opened a nonpublic forum rather than a designated public forum when it sponsored a political debate among candidates for Congress. Justice Kennedy said that the government does not create a designated public forum when it does no more than reserve eligibility for access to a particular class of speakers whose members must then, as individuals, obtain permission, and thus it was valid to exclude candidate Forbes for lack of public interest because this was not based on the speaker's viewpoint and was otherwise reasonable in light of the purpose to which the property was being put.[76] Justice Stevens, dissenting with Justices Souter and Ginsburg, said that the importance of avoiding viewpoint-based decisions relating to political debates indicates that the state agency should be required to use and adhere to pre-established, objective criteria for determining who among qualified candidates may participate.[77]

In addition, the Court has considered free speech cases involving other kinds of fora not explicitly defined as public or nonpublic fora. This includes cases involving regulating speech in schools,[78] cases involving regulations of speech pursuant to government spending grants or subsidies,[79] or regulations of speech

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to advertising space at Philadelphia International Airport should be examined under nonpublic forum analysis, as city had not opened up advertising for all kind of messages); Am. Freedom Def. Initiative v. King Cty., 796 F.3d 1165 (9th Cir. 2015) (holding refusal to display "Faces of Global Terrorism" ad valid as "reasonable" under nonpublic forum analysis); Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp., 698 F.3d 885 (6th Cir. 2012) (holding a state transportation agency's refusal to display an anti-jihad advertisement on city buses was reasonable and viewpoint-neutral based on its policy against political advertisements, applying nonpublic forum analysis as in *Lehman v. City of Shaker Heights*, 418 U.S. 298, 299-302 (1974)); Am. Freedom Def. Initiative v. Metro. Transit Auth., 109 F. Supp. 3d 626, 631-33 (S.D.N.Y. 2015), *aff'd* 815 F.3d 105 (2d Cir. 2016) (holding that by rejecting all political ads, government changed forum from public to nonpublic, making it a subject-matter regulation subject to reasonableness review, not strict scrutiny); Powell v. Noble, 36 F. Supp. 3d 818, 833-36 (S.D. Iowa 2014) (finding state fairgrounds are a nonpublic forum). For cases finding the area is a public forum, see *United Church of Christ v. Gateway Economic Development Corp.*, 383 F.3d 449, 451-53 (6th Cir. 2004) (holding area adjacent to a sports arena public forum); *N.Y. Magazine v. Metropolitan Transit Authority*, 136 F.3d 123, 129-30 (2d Cir. 1998) (holding exterior of bus public forum because city accepted commercial and political ads).

75. 523 U.S. 666, 676 (1998).

76. *Id.* at 677-83.

77. *Id.* at 683-84, 692-95 (Stevens, J., joined by Souter & Ginsburg, JJ., dissenting).

78. *See infra* text accompanying notes 290-361.

79. *See infra* text accompanying notes 278-89.

involving obtaining government trademark protection.[80] As discussed in Part V, instead of the Court's somewhat *ad hoc* decision-making in these areas, a more predictable, structured approach to free speech doctrine would simply apply the public/nonpublic forum analysis to each of these cases.[81]

E. Ordinary First Amendment Doctrine

1. Standards of Review.—In terms of ordinary First Amendment review today, regulations of fully protected speech that involve viewpoint discrimination are typically viewed as being given strict scrutiny review, no matter where the speech occurs.[82] As discussed in Part IV.D., recent dicta in Supreme Court opinion suggests that in a public forum perhaps viewpoint discrimination is categorically prohibited, not subject to even strict scrutiny review.[83] Strict scrutiny also applies in a public forum or on private property for content-based, subject-matter regulations of speech, i.e., those content-based regulations that do not involve viewpoint discrimination.[84] Thus, in a public forum, while viewpoint discrimination may be a more egregious form of content discrimination, the distinction between viewpoint and subject-matter regulation is not that critical, since both trigger strict scrutiny protection.[85]

In contrast, regulations of speech in a public forum or on private property that are content-neutral are given only intermediate review. This intermediate standard was stated in *Ward v. Rock Against Racism*,[86] where Justice Kennedy said for the Court:

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80. *See infra* text accompanying notes 192-202.

81. *See infra* text accompanying notes 200-02 (trademarks); *see also infra* notes 280-84 (government grants and subsidies); *infra* notes 290-329 (school cases).

82. *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393-94 (1993) (finding strict scrutiny in limited public forum opened to public); *see also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 48-49 (1983) (finding strict scrutiny for viewpoint discrimination even in a nonpublic forum); R.A.V. v. City of St. Paul, 505 U.S. 377, 385-92 (1992) (holding viewpoint discrimination triggers strict scrutiny even in a case involving regulation of fighting words).

83. *See infra* text accompanying notes 262-77.

84. *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2548-51 (2012); *see also* Boos v. Barry, 485 U.S. 312, 321-22 (1988).

85. *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination."); *see also* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victim Bd., 502 U.S. 105, 116, 118 (1991) ("[T]he government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace. . . . In order to justify such differential treatment, 'the State must show that is regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.'" (quoting Ark. Writers' Project v. Ragland, 481 U.S. 221, 231 (1987)).

86. 491 U.S. 781, 791 (1989). For discussion of how this standard follows standard intermediate review, see Kelso, *supra* note 30, at 296-98.

> Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of information."

Because it is as intrusive, if not more intrusive, to regulate speech on an individual's own private property as opposed to regulating speech in public fora, government action regulating speech on an individual's own private property trigger the same heightened scrutiny as regulating speech on public fora.[87]

For government action in a nonpublic forum, free speech review is much different. While viewpoint discrimination still triggers strict scrutiny, subject-matter regulations of speech or content-neutral regulations of speech are given only some version of reasonableness review. As the Court stated in 2018 in *Minnesota Voters Alliance v. Mansky*[88]—quoting the classic 1983 nonpublic forum case of *Perry Educational Ass'n v. Perry Local Educators' Ass'n*—"The government may reserve such a [nonpublic] forum 'for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.'"

While it may not have been completely clear in 1983 when this quote was written in *Perry*, cases since then have made clear that this "reasonableness" test is not minimum rationality review, such as under the Equal Protection Clause,[89] but what can instead be called a "2nd-order reasonableness review" or "reasonableness balancing" test.[90] The difference between the two approaches is

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87. *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 48-51 (1994) (holding an ordinance regulating signs on private property triggers same free speech review as regulation of signs on public property in *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789 (1984)).

88. 138 S. Ct. 1876, 1885 (2018) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983)).

89. *See, e.g.*, Nordlinger v. Hahn, 505 U.S. 1, 10 (1992) (holding that unless a classification "jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest"); *see also* Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1948) (same).

90. The discussion *infra* at the text accompanying notes 91-99 follows Kelso, *supra* note 30, at 307-11. That discussion is reprised here so the reader will not have to look up that article to understand this important point about free speech doctrine. For general discussion of minimum rationality review, 2nd-order reasonableness review, and 3rd-order reasonableness review (in 3rd-order reasonableness review the government has the burden to prove reasonableness), see R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court*

the following. Under minimum rationality review, as used under the Equal Protection Clause, the legislation must (1) advance legitimate government ends, (2) be rationally related to advancing these ends (not be irrationally *underinclusive*), and (3) not impose irrational burdens (not be irrationally *overinclusive*). This test only ensures that the government is not engaged in illegitimate or arbitrary/irrational action. As the Court stated in the Equal Protection case of *Heller v. Doe*:

> A classification "must be upheld [under minimum rationality review] if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." . . . "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." A statute is presumed constitutional . . . and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," whether or not the basis has a foundation in the record.[91]

Under 2nd-order reasonableness balancing, the challenger still has the burden to prove the regulation is unconstitutional.[92] However, as the Court said in *Burdick v. Takushi*:

> A court . . . must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."[93]

Under this review, the Court makes its own independent judgment on the strengths of the government's legitimate interests and the burden on the individual, and then weighs the two to determine if the burden, even if not irrational, is nevertheless "unreasonableness" or "excessive" because the burden

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Practice, 4 U. PA. CONST. L.J. 225, 230-33, 258-59 (2002). *See also* KELSO & KELSO, THE PATH OF CONSTITUTIONAL LAW, *supra* note 58, § 7.2.1.

91. 509 U.S. 312, 320-21 (1993) (citations omitted). A similar minimum rationality review test is used under the Due Process Clause. *See, e.g.*, Williamson v. Lee Optical, Inc., 348 U.S. 483, 489-91 (1955); *see also* United States v. Carolene Products, Inc., 304 U.S. 144, 154 (1938).

92. *See, e.g.*, Burdick v. Takushi, 504 U.S. 428, 434, 441-42, 437-38 (1992) (noting the burden of proof on challenger, as Court rejected the petitioner's argument). For use of this 2nd-order reasonableness balancing test in cases involving less than substantial burdens on the fundamental right to vote, freedom of association, right to marry, right to travel, and right of access to courts, see R. Randall Kelso, *The Structure of Planned Parenthood v. Casey Abortion Rights Law: "Strict Scrutiny" for "Substantial Obstacles" on Abortion Choice and Otherwise "Reasonableness Balancing,"* 34 QUINNIPIAC L. REV. 75, 97-111 (2015).

93. *Takushi*, 504 U.S. at 433-34 (quoting Anderson v. Celebrezze, 460 U.S. 780, 788-89 (1983)).

is too great given the minimal interests supporting the regulation.[94]

The standard language in nonpublic forum free speech cases refers to the regulation having to be "reasonable," suggesting this higher reasonableness balancing test, rather than mere minimum rationality review. For example, in *Hazelwood School District v. Kuhlmeier*,[95] the Court stated that "[e]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." In the nonpublic forum context of a prison, the Court has been clear that under *Turner v. Safley*[96] and *Beard v. Banks*,[97] review is not "toothless" minimum rationality review, but involves a full reasonableness balancing analysis. Additional cases of this kind of review confirm this reasonableness balancing approach.[98] This reasonableness balancing standard of review is appropriate. As Justice Scalia noted for the Court in *District of Columbia v. Heller*,[99] whatever level of review might be appropriate for burdens on the fundamental Second Amendment right to keep and bear arms, it has to be higher than minimum rationality review because a fundamental right is involved. So, too, a fundamental right—free speech—is involved here.

Table 1 may help make these levels of review clearer:

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94. *See generally* Kelso, *supra* note 30, at 308-09 (citing Randall v. Sorrell, 548 U.S. 230, 249 (2006); quoting N.Y. Times v. Sullivan, 376 U.S. 254, 285 (1964)); *see also* Sable Commc'ns, Inc. v. FCC, 492 U.S. 115, 129 (1989) ("whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law"), cited with approval in Christian Legal Soc'y Chapter of the Univ. of Hastings. Coll. of Law v. Martinez, 561 U.S. 661, 721 (2010) (Alito, J., joined by Roberts, C.J., and Scalia & Thomas, JJ., dissenting). As noted at Kelso, *supra* note 30, at 309 & n.109, although the Court exercises independent judgment, some deference is given to the government under this standard of review where "a legislature is likely to have greater expertise and greater institutional factfinding capacity," *District of Columbia v. Heller*, 554 U.S. 570, 690 (Breyer, J., dissenting), or the case involves "good-faith judgments of the individuals charged by Congress with the administration of . . . programs," *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976).

95. 484 U.S. 260, 273 (1988).

96. 482 U.S. 78, 89-91 (1987). *See also* Thornburgh v. Abbott, 490 U.S. 401, 412-19 (1989).

97. 548 U.S. 521, 528-530 (2006) (plurality opinion of Breyer, J., joined by Roberts, C.J., and Kennedy & Souter, JJ.), citing *Turner*, 482 U.S. at 89; *Beard*, 548 U.S. at 542-43 (Stevens, J., joined by Ginsburg, J., dissenting).

98. *See, e.g.*, Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1886-92 (2018) (full inquiry made into "reasonableness" of the regulation); *see also* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez, 561 U.S. 661, 683-90 (2010) (making a similar inquiry and discussed *infra* in the text accompanying notes 357-61); Morse v. Frederick, 551 U.S. 393, 396-400, 408 (2007) (same and discussed *infra* at nn.317-23); NAACP v. City of Phila., 834 F.3d 435, 443-44 (3d Cir. 2016) (discussing how reasonableness review in a nonpublic forum is higher than traditional rational review).

99. 554 U.S. 570, 628 & n.27 (2008).

Table 1
Levels of Review for Protected Speech

	Public Forum or Private Property	**Non-Public Forum Owned by Gov't**	**Speech with Limited Free Speech Protection***
Content-Based Regulation of Speech			
Viewpoint Discrimination	Strict Scrutiny	Strict Scrutiny	Strict Scrutiny
Subject-Matter Discrimination	Strict Scrutiny	Reasonableness Balancing**	No Free Speech Review***
Content-Neutral Regulation of Speech	Intermediate Review	Reasonableness Balancing**	No Free Speech Review

* *See supra* text accompanying notes 44-46, this category includes advocacy of illegal conduct, true threats, fighting words, obscenity, and indecency involving children.

** *See infra* text accompanying notes 89-99, this level of review appears to be, and should be, reasonableness balancing, not minimum rationality review.

*** Whether this category triggers no free speech review, or whether there is some review based on *R.A.V. v. City of St. Paul* is discussed *infra* at text accompanying notes 115-29.

2. Burden of Proof to Determine What Standard of Review to Apply.—In deciding whether some government action takes places in a public forum or nonpublic forum, or whether the action represents content-based viewpoint discrimination, content-neutral subject-matter discrimination, or is a content-neutral regulation either based on secondary effects or a time, place, or manner considerations, the Court has not been clear who has the burden of proof to establish these categories. That is, does the challenger have to prove the regulation is content-based to trigger the higher standard of scrutiny that typically applies? Or if the government wants to avoid that higher standard, does the government have to prove the regulation is content-neutral or takes place in a nonpublic forum? In many cases, of course—like for clear content-based regulations applied to public parks—the answer will be obvious, and thus who has the burden of proof is irrelevant.[100] In other cases, the Court merely concludes

100. *See, e.g.*, Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victim Bd., 502 U.S. 105, 108, 116 (1991) (holding New York's "Son of Sam" law—which requires "that an accused or convicted criminal's income from works describing his crime be deposited in an escrow account" for distribution to "victims of the crime and criminal's other creditors"—was clearly a

the forum is public or nonpublic, or the regulation is content-based or content neutral, without specifying who had the burden of proof.[101]

Because the standards of review in First Amendment free speech doctrine track the standards of review used in Equal Protection and Due Process cases,[102] one way to think about this issue comes from considering burdens of proof in Equal Protection and Due Process doctrine. In cases where discrimination is not clear on the face of a government action, and the issue is one of whether the government action was done with discriminatory intent, once the government comes forward with a neutral, non-discriminatory justification for the action, the challenger bears the burden to prove discriminatory intent in order to trigger heightened review (*e.g.,* strict scrutiny if discriminatory intent based on race; intermediate review if discriminatory intent based on gender).[103] Similarly, in Due Process Clause doctrine—where substantial or severe burdens on fundamental liberty rights trigger strict scrutiny, but less than substantial or severe burdens trigger only reasonableness balancing[104]—the cases seem to indicate that the challenger has the burden to establish the substantial/severe burden to trigger strict scrutiny review.[105] A similar approach appears to apply in lower courts regarding whether a substantial burden exists to trigger strict scrutiny under the Second Amendment, or only a lesser burden triggering intermediate review,[106] or

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content-based statute as "the statute plainly imposes a financial disincentive only on speech of a particular content.").

101. *See, e.g.*, Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679-83 (1992) (airport terminal is nonpublic forum); *but cf. id*. at 694-702 (Kennedy, J., joined by Blackmun, Stevens & Souter, JJ., as to Part I, concurring in the judgment) (airport terminal a public forum).

102. *See infra* text accompanying notes 203-35.

103. *See, e.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 (1977) (holding the challengers "simply failed to carry their burden of proving that discriminatory purpose was a motivating factor" in the government's decision).

104. A full listing of these kind of cases appears in Kelso, *supra* note 92, at 97-114 (discussing, *inter alia*, right to vote, First Amendment freedom of association, right to travel, access to courts, and abortion rights cases).

105. *See, e.g.*, Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 452-58 (2008) (rejecting plaintiff's arguments that requiring candidates to identify themselves on the ballot by a self-designated party preference was a severe burden on the party's associational rights; thus, a strict scrutiny, compelling government interest test did not apply); *see also* Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 885-96 (1992) (joint opinion of Justices O'Connor, Kennedy & Souter) (noting the findings in the record did not establish that a 24-hour waiting period would be a substantial obstacle to abortion choice, while findings in the record do establish that a spousal notification requirement for an abortion would be a substantial obstacle to abortion choice). *But see Wash. State Grange*, 552 U.S. at 469 (Scalia, J., joined by Kennedy, J., dissenting) (concluding that "it is not incumbent on the political parties to adduce 'evidence'" and that the Court should generally "accept their own assessments of the matter.").

106. *See, e.g.*, Binderup v. Attorney Gen., 836 F.3d 336, 350-53 (3d Cir. 2016) (finding defendants had met their burden to show misdemeanor convictions were not sufficiently serious

whether a search or seizure exists to trigger protection under the Fourth Amendment.[107]

For this reason, the better approach would seem to be that once the government comes forward with a plausible argument that the regulation is content-neutral, or occurs in a nonpublic forum, or both, then the challenger would bear the burden of proving the action is content-based, or in a public forum, or both, to trigger, if appropriate, a higher level of review.[108] One exception to this principle might be if the regulation is content-based on its face. Consistent with a concern for regulations which are content-based on their face, as expressed in the 2015 case of *Reed v. Gilbert*,[109] discussed in Part IV.C.2 of this article, one might put the burden on the government always to prove content-neutral reasons in circumstances where the regulation uses content-based criteria on its face.

For speech outside normal free speech analysis—such as speech getting little free speech protection (advocacy of illegal conduct, true threats, fighting words, obscene speech, indecency involving children),[110] or where no free speech analysis applies because the speech is government speech[111]—it would seem appropriate for the government to have to prove that those exceptions to normal free speech doctrine are implicated in the case. Placing that burden on the government seems consistent with what the Court has been doing in practice, to the extent one can infer that from the language of Court opinions.[112]

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and thus intermediate review applied).

107. *See, e.g.*, Florida v. Jardines, 569 U.S. 1, 11 (2013) (seeming to place the burden on the challenger to prove a search occurred when noting, "[t]hat the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred.").

108. *See, e.g.*, DFW Vending, Inc. v. Jefferson Cty., 991 F. Supp. 578, 592-93 (E.D. Tex. 1998) (holding once the government alleged plausible content-neutral secondary effects reasons for regulation of a sexually oriented business, it was up to the challenger to prove these reasons were a mere "pretext" for content-based discrimination)). *See also* Perry Ed. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 47 (1983) (concluding "[n]either of these arguments is persuasive," therefore the Court implicitly placed the burden on the challenger to establish the forum was a public forum, triggering a higher standard of review).

109. 135 S. Ct. 2218 (2015). *See also infra* text accompanying notes 250-61. As noted in *Reed*, when a facial content-based regulation is used, the government should have to show no "realistic possibility that official suppression of ideas is afoot." *Id*. at 2237.

110. *See infra* text accompanying notes 45-46.

111. *See infra* text accompanying notes 21-42.

112. *See, e.g.*, Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 561 (2005) (holding government speech found where "the record demonstrates that the Secretary exercises final approval authority over every word used in every promotional campaign."); *see also* Virginia v. Black, 538 U.S. 343, 360 (2003) ("Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."); New York v. Ferber, 458 U.S. 747, 764 (1982) (limiting the decision to "works that *visually* depict sexual conduct by children

The Court clearly placed the burden on the government to avoid standard free speech analysis in a recent commercial speech case. In *National Institute of Family and Life Advocates (NIFLA) v. Becerra*,[113] the Court placed the burden on the government to show "possibility of consumer confusion" to trigger the lower level of scrutiny *Zauderer* test, rather than the normal commercial speech test of *Central Hudson Gas.*

III. PROBLEMS WITH VIEWPOINT DISCRIMINATION ANALYSIS

As noted in Part II.C.,[114] the Court distinguishes between two kinds of content-based regulations: (1) viewpoint discrimination, which occurs when government action is triggered depending on which side of a topic the individual supports; and (2) subject-matter discrimination, which occurs when government action is triggered whenever a topic/subject-matter is discussed without regard to the person's views on that topic/subject-matter. Most of the time this distinction is clear, but occasionally categorizing a regulation has given the Court some problems.

A. Viewpoint Versus Subject-Matter Regulation as a Conceptual Matter

The starting point for confusion in modern Supreme Court doctrine is *R.A.V. v. City of St. Paul*.[115] Decided in 1992, *R.A.V.* involved the St. Paul Bias-Motivated Crime Ordinance, which provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.[116]

Under the interpretation of this statute given by the Minnesota Supreme Court, the statute only reached words that could be viewed as "fighting words."[117]

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below a specified age"); Miller v. California, 413 U.S. 15, 24 (1973) (holding that to be obscene the speech "must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appear to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."); Brandenburg v. Ohio, 395 U.S. 444, 448 (1969) (holding the government may not proscribe advocacy of force in violation of law unless such advocacy is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

113. 138 S. Ct. 2361, 2377 (2018). *See also infra* notes 376-83.

114. *See supra* text accompanying notes 66-67.

115. 505 U.S. 377 (1992).

116. *Id.* at 380 (quoting ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).

117. *Id.* at 381.

Under basic free speech doctrine, the Court has identified certain categories of speech that are not protected by the First Amendment. The four basic categories of such speech involve advocacy of illegal conduct; fighting words; obscenity; and indecency involving use of children.[118] The Court has sometimes stated that all these categories of "unprotected" speech are not protected at all by the First Amendment. For example, in a case involving fighting words, the Court noted in *Chaplinsky v. New Hampshire*[119] that:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

That perspective was clarified in *R.A.V. v. City of St. Paul*.[120] Speaking for 5 Justices, Justice Scalia noted that such statements are not literally true. He stated:

> What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* . . . – not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.[121]

Noting that viewpoint-based regulations are presumptively invalid, Justice Scalia said that this principle applied to impose upon even these kinds of proscribable speech a viewpoint discrimination limit.[122]

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118. *See* Kelso, *supra* note 30, at 325-36 (advocacy of illegal conduct, including by other parties or oneself ("true threats")), 341-42 (fighting words), 342-49 (obscenity), 349-58 (indecency involving the use of children). While libel was also historically viewed as an additional category of "unprotected" speech, libelous speech has been entitled to some First Amendment protection since *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964). In addition, while historically commercial speech received no First Amendment protection, since 1976, truthful, lawful representations involving commercial speech are provided First Amendment protection under the *Central Hudson Gas* test for commercial speech. *See infra* notes 362-75 and accompanying text.

119. 315 U.S. 568, 571-72 (1942).

120. 505 U.S. 377, 383 (1982).

121. *Id.* at 383-84 (emphasis in original).

122. *Id.* at 384-92. In dissent, three Justices rejected this position and held that prior opinions should be held to mean what they literally said, that those categories of speech should raise no free speech issue at all. Citing *Chaplinsky*, they noted in Part I-A of their concurrence:

> All of these categories are content based. But the Court has held that the First Amendment does not apply to them because their expressive content is worthless or of

In deciding that this ordinance was unconstitutional, Justice Scalia noted two problems. He wrote:

> [W]e conclude that, even as narrowly construed by the Minnesota Supreme Court, the ordinance is facially unconstitutional. . . . Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects. *See Simon & Schuster*, 502 U.S., at 116; *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229-230 (1987).
>
> In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination. Displays containing some words–odious racial epithets, for example–would be prohibited to proponents of all views. But "fighting words" that do not themselves invoke race, color, creed, religion, or gender–aspersions upon a person's mother, for example–would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents. One could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion." St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring

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> *de minimis* value to society. *Chaplinsky*, *supra*, 315 U.S., at 571-572. . . . We have not departed from this principle, emphasizing repeatedly that, "within the confines of [these] given classification[s], the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required." *Ferber*, *supra*, 458 U.S., at 763-764 . . . ; *Bigelow v. Virginia*, 421 U.S. 809, 819 . . . (1975). This categorical approach has provided a principled and narrowly focused means for distinguishing between expression that the government may regulate freely and that which it may regulate on the basis of content only upon a showing of compelling need.

Id. at 400 (White, J., joined by Blackmun & O'Connor, J., and with whom Stevens, J., joins except as to Part I-A, concurring in the judgment). The Justices, along with Justice Stevens, concurred in the judgment on grounds that in any event the statute was overbroad, reaching not only fighting words, but merely words that cause "hurt feelings." *Id*. at 411-14. As they stated, "[t]he mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected. *See United States v. Eichman*, 496 U.S. 310, 319 . . . (1990); *Texas v. Johnson*, 491 U.S. 397, 414 . . . (1989)." *Id*. at 414 (some citations omitted).

the other to follow Marquis of Queensberry rules.[123]

The language in the second paragraph above regarding "actual viewpoint discrimination" is fine and not problematic. Government action proscribing only fighting words that involved messages of racial, gender, or religious intolerance, but did not ban the very same fighting words used in favor of racial, gender, or religious tolerance, is a classic example of viewpoint discrimination. Permitting the government to regulate one, but not the other, is unquestionably viewpoint discrimination.

In contrast, covering only fighting words using "race, gender or religious" intolerance, but not "political affiliation, union membership or homosexuality" is subject-matter discrimination, since it discriminates based on the subject or topic of the speech, not which view you take on that topic. To the extent Justice Scalia's language in the first paragraph above on "those speakers who express views on disfavored subjects"[124] suggests Justice Scalia viewed this aspect of the statute as viewpoint discrimination, that would be an error.

On the other hand, if the language referring to "disfavored subjects" recognized this aspect of the statute as subject-matter discrimination, then the cites to the strict scrutiny cases of *Simon & Schuster* and *Ragland* is misplaced. Those cases involved subject-matter, content-based regulation in a public forum, where strict scrutiny is triggered for both subject-matter and viewpoint discrimination.[125] In nonpublic forum cases, as noted in Part II, subject-matter regulation is permissible as long as it is "reasonable."[126] Speech otherwise completely unprotected by the First Amendment, like fighting words, should trigger no greater review, and probably even less review, than nonpublic forum analysis, and certainly not the strict scrutiny review suggested by Justice Scalia's language.[127] This issue has not been readdressed by the Court, since in virtually all cases involving proscribable speech no such subject-matter or viewpoint discrimination has appeared. As noted in Table 1, the best understanding of the doctrine is that absent viewpoint discrimination, no further free speech review exists for speech in the proscribable categories.[128] That does not mean no

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123. *R.A.V.*, 505 U.S. at 391-92.

124. *Id.* at 391.

125. Simon & Schuster v. Members of the N.Y. State Crime Victim Bd., 502 U.S. 105, 116 (1991); Ark. Writers' Project Inc. v. Ragland, 481 U.S. 221, 229-30 (1987). On such cases triggering strict scrutiny, see *supra* text accompanying notes 84-85 & Table 1.

126. *See supra* text accompanying notes 88, 95-99.

127. Because the speech deserves less protection than speech in a nonpublic forum, Table 1 states that unless the speech involves viewpoint discrimination, there should be no further free speech review. This seems consistent with Court doctrine, as the Court has never conducted any review for speech involving these limited areas of free speech review except in the rare case like *R.A.V.*, which did involve viewpoint discrimination.

128. Under this doctrine, even Justice Scalia noted in *R.A.V.* that the government can regulate where the discrimination is based entirely on the same reason that the category of speech is proscribable, that is, the regulation is not an example of viewpoint discrimination. For example,

constitutional review exists, as peculiar subject-matter discrimination would still be subject to minimum rationality review under the Equal Protection and Due Process clauses.[129]

One example of the potential negative impact of *R.A.V.* is suggested by the Seventh Circuit Court of Appeals opinion in *American Booksellers Association, Inc. v. Hudnut*.[130] *Hudnut* involved an Indianapolis city ordinance that, in part, banned pornography that depicted "the graphic sexually explicit subordination of women," such as in sadomasochistic imagery.[131] Because the ordinance applied even to pornography that was not obscene under *Miller*,[132] regular free speech doctrine applied, which would trigger strict scrutiny whether the regulation was held to be viewpoint or subject-matter discrimination.[133] The Seventh Circuit actually held the regulation was viewpoint discrimination,[134] but this seems to be in error. If the regulation only banned sadomasochistic imagery in the context of

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Justice Scalia noted that the law could bar the most lascivious displays of sexual activity, but could not prohibit only obscenity which includes offensive political messages. *R.A.V.*, 505 U.S. at 388. The federal government can treat differently threats of violence against the President because the "reasons why threats of violence are outside the First Amendment (protecting individuals from fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President." *Id*. Justice Scalia also noted the government can regulate where the defined subclass of proscribable speech is associated with particular "secondary effects" of the speech so that the regulation is justified on a content-neutral basis without reference to the content of the speech. Justice Scalia noted that a case of this kind is *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986), where adult movie theaters could be zoned because of their secondary effects on the surrounding neighborhood. *R.A.V.*, 505 U.S. at 389.

129. As Justice Scalia noted, free speech doctrine would not apply where the nature of the discrimination is such that there is no realistic possibility that official suppression of ideas is afoot. *Id.* at 390. As an example, Justice Scalia said, "We cannot think of any First Amendment interest that would stand in the way of a State's prohibiting only those obscene motion pictures with blue-eyed actresses." *Id.* Of course, such a law, if not rationally related to any legitimate interest, would probably violate the Equal Protection Clause or Due Process Clause as being "irrational," "arbitrary," or "capricious" under standard minimum rational review. *See supra* note 90 and accompanying text.

130. 771 F.2d 323 (7th Cir. 1985).

131. *Id.* at 324.

132. *See id.* at 324-25 (suggesting the ordinance made no attempt to meet the *Miller* test, cited *supra* note 112).

133. *See supra* note 85, Table 1, and accompanying text. Under strict scrutiny, the Seventh Circuit then invalidated the ordinance on the ground that the government does not have a compelling government interest in barring information it thinks harmful, even if such depictions, like racial bigotry or anti-Semitism, "influence the culture and shape our socialization." *Hudnut*, 771 F.2d at 330. Any other approach, the court said, would leave the government "in control of all of the institutions of culture, the great censor and director of which thoughts are good for us." *Id.*

134. *Hudnut*, 771 F.2d at 327-28.

coerced behavior, but permitted sadomasochistic imagery where both parties consented, such as in the erotic romance novel *Fifty Shades of Grey*,[135] that would be viewpoint discrimination. The regulation would then be based on the view one had about sadomasochism. To the extent the regulation banned all depictions of the subject of sadomasochism, that would be subject-matter regulation.[136]

Even if properly viewed as subject-matter regulation, if a state wanted to ban only constitutionally obscene speech that involved sadomasochism, that would still appear to trigger strict scrutiny under Justice Scalia's approach in *R.A.V.* and be unconstitutional, since it would not be regulating because that pornography is more "lascivious,"[137] but rather because the content involved sadomasochism. That makes little sense. As long as the pornography is constitutionally obscene under *Miller*, absent viewpoint discrimination, regulators should not be disabled as a constitutional manner from being able to choose which kind of constitutionally obscene pornography to ban. Any regulator's discretion is not unlimited, of course, as minimum rationality review would still apply under the Equal Protection and Due Process clauses.[138] In this case, the government should be able to show that singling out sadomasochistic pornography as particularly harmful is rationally related to a legitimate government interest, just as it should have been permittable to single out racial, religious, and gender slurs in *R.A.V.*, and not regulate fighting words on the basis of union membership, as long as viewpoint discrimination was avoided.[139]

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135. E.L. JAMES, FIFTY SHADES OF GREY (2011).

136. The court of appeals recognized that the ordinance banned all sadomasochistic imagery but concluded that such a ban "establishes an 'approved' view of women, of how they may react to sexual encounters." *Hudnut*, 771 F.2d at 328. In fact, the ordinance took no position on how individual women may react to certain kind of sexual encounters, since it banned all sadomasochistic imagery. Perhaps it would have been viewpoint discrimination had the challenger proved that the subject-manner ban was a mere "pretext" for an approved view of women, *cf. supra* note 108 and accompanying text, but that was not discussed—or proved—by anything in the court's opinion.

137. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1982); *see also supra* note 128 and accompanying text.

138. *See supra* notes 91, 129 and their accompanying text.

139. In Part I-B of his concurrence in *R.A.V.*, Justice White wrote:

> The ordinance proscribes a subset of "fighting words," those that injure "on the basis of race, color, creed, religion or gender." This selective regulation reflects the city's judgment that harms based on race, color, creed, religion, or gender are more pressing public concerns than the harms caused by other fighting words. In light of our Nation's long and painful experience with discrimination, this determination is plainly reasonable.

R.A.V., 505 U.S. at 407 (White, J., joined by Blackmun & O'Connor, J., and with whom Stevens, J., joins except as to Part I-A, concurring in the judgment).

B. Attention to Facts in Determining Viewpoint versus Subject-Matter Regulation

In *Rosenberger v. Rector and Visitors of the University of Virginia*,[140] the Supreme Court held that the University of Virginia, which paid the printing costs for a wide variety of student publications, could not withhold payments "for the sole reason" that a student paper "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality." The university did not exclude religion as a subject matter, said Justice Kennedy, but engaged in viewpoint discrimination by selecting for disfavored treatment those student journalistic efforts with religious editorial viewpoints.[141] Justice Kennedy said that when the state is the speaker or when it enlists private entities to convey its own message, it is entitled to say what it wishes. But here it spent funds to encourage a diversity of views from private speakers. When doing that, it may not silence the expression of selected viewpoints.[142]

Justice Souter, dissenting with Justices Stevens, Ginsburg, and Breyer, agreed that viewpoint discrimination was a pernicious distinction based on content, but he found no viewpoint discrimination as he understood the facts.[143] Justice Souter concluded that the university's guidelines did not involve viewpoint discrimination because they denied "funding for hortatory speech that 'primarily promotes or manifests' any view on the merits of religion."[144] By "limit[ing] funding to activities promoting or manifesting a particular belief not only 'in' but 'about' a deity or ultimate reality, it applies to agnostics and atheists as well as it does to deists and theists."[145] Under this view, the guidelines denied funding for the entire subject matter of religious or non-religious apologetics, and were a non-viewpoint, subject-matter regulation, not viewpoint discrimination. Justice Souter noted that funding was not denied for those who "discuss issues in general from a religious viewpoint, but to those engaged in promoting or opposing religious conversion and religious observances as such."[146] If Justice Souter is right about the facts of how this university regulation operated, it would be subject-matter regulation. If the regulation actually did deny funding for those "who discuss issues in general from a religious viewpoint" it would be viewpoint discrimination, as even Justice Souter admitted.[147]

Another case where careful attention to the facts is necessary is *Legal*

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140. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 822-23 (1995).

141. *Id.* at 831-32.

142. *Id.* at 832-34.

143. *Id.* at 894-96 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting).

144. *Id.* at 896.

145. *Id.* at 895.

146. *Id.* at 898.

147. *Id.* at 897-98 (discussing Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393-94 (1993)).

Services Corp. v. Velazquez,[148] where Justice Kennedy wrote for a majority comprised of himself and Justices Stevens, Souter, Ginsburg, and Breyer. In *Velazquez*, the Court held that the First Amendment was violated by a restriction in the Legal Services Corporation Act that barred lawyers funded through that Act from engaging in an effort to amend or otherwise challenge existing welfare law in effect on the date of the initiation of the representation.[149] Justice Kennedy held that the government can make viewpoint-based funding decisions when the government itself is the speaker or, as in *Rust*, where the government uses private speakers to transmit information pertaining to government programs.[150] However, an LSC-funded attorney speaks on behalf of the client, not the government.[151] Further, the restriction distorts the legal system by altering the traditional role of attorneys and, thus, is inconsistent with separation-of-powers principles. The Court must be vigilant, he said, when Congress imposes rules and conditions which insulate its laws from legitimate judicial challenge.[152]

Justice Scalia dissented, joined by Chief Justice Rehnquist, and Justices O'Connor and Thomas.[153] Regarding the issue of viewpoint discrimination, Justice Scalia concluded that the law did not discriminate on the basis of viewpoint since the government "funds neither challenges to nor defenses of existing welfare law."[154] Because, when the issue arises, legal aid attorneys representing defendants are overwhelmingly likely to challenge welfare law, not adopt the government's position to defend existing law, Scalia's presumed non-viewpoint neutrality of the existing law is not really reflective of the facts in practice. The more logical argument to reach the result Justice Scalia wished, and which is reflected in the remainder of Justice Scalia's dissent, would be to convince a majority of the Court that this spending program should be viewed as government speech, as was the spending program in *Rust v. Sullivan*, and that *Rust* should not be limited to when the government is using private speakers to transmit information about government programs. Thus, viewpoint discrimination would be permissible because there should be no free speech review at all.[155]

In other cases, the Court has done a better job of distinguishing viewpoint from subject-matter government action. Cases involving regulations that permit some groups to use public school facilities after school hours, while banning other groups from such use of public facilities, often trigger a question of whether the ban involved viewpoint discrimination. Many of these cases have involved regulations banning the use of school facilities by individuals or groups for religious purposes. Often such regulations are viewed as involving viewpoint

148. Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001).

149. *Id.* at 546-49.

150. *Id.* at 540-42.

151. *Id.* at 542-43.

152. *Id.* at 544-46.

153. *Id.* at 549 (Scalia, J., joined by Rehnquist, C.J., and O'Connor & Thomas, JJ., dissenting).

154. *Id.* at 553.

155. *Id.* at 553-59 (citing Rust v. Sullivan, discussed *supra* at notes 23-25 and accompanying text).

discrimination, triggering a strict scrutiny approach.[156] A similar finding of viewpoint discrimination was made in the context of a public law school's clinical education program which allegedly refused to represent a particular plaintiff because of plaintiff's past criticism of the program, its director, and its suit challenging public display of the Ten Commandments. That court concluded that if the allegations were true that would constitute viewpoint discrimination under the First Amendment.[157]

In contrast, a county policy barring use of community centers for home schooling or other private courses intended to meet state educational requirements, while allowing informal community educational activities, was held to be viewpoint neutral, and based only on a subject-matter distinction between formal private education and informal educational activities.[158] Similarly, public schools can limit use of their facilities to "educational, cultural, or community issues," and bar use of the subject-matter of religious services within their buildings.[159]

C. Decency, Respect for Diverse Values, Vulgarity, and Recognized Standards of the Profession as Subject-Matter or Viewpoint Discrimination

Viewpoint discrimination was also the focal point in *National Endowment for the Arts v. Finley*.[160] This case upheld a provision in the National Foundation on the Arts and Humanities Act of 1965 that requires the Chairperson of the National Endowment for the Arts to ensure that "artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[161] The "decency and respect" provision was challenged on the

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156. *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392-97 (1993) (holding where public school facility opened for community service meetings, including meetings related to family matters and child-rearing, viewpoint discrimination to exclude a group that addresses that subject-matter from a religious perspective); *see also* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106-20 (2001) (holding where public school facility opened for community service meetings, including groups that promote moral and character development of children, viewpoint discrimination to exclude a group that addresses that subject-matter from a religious perspective).

157. Wishnatsky v. Rovner, 433 F.3d 608, 609-13 (8th Cir. 2006).

158. Goulart v. Meadows, 345 F.3d 239, 251-55, 257-59 (4th Cir. 2003).

159. *See, e.g.*, Faith Ctr. Church Evangelistic Ministries v. Glover, 462 F.3d 1194, 1198 (9th Cir. 2006) (holding a county library may refuse to allow religious services in the library, as the library was a limited public forum for "educational, cultural, or community issues" , not the subject-matter of religious worship); *see also* Bronx Household of Faith v. Bd. of Educ., 750 F.3d 184 (2d Cir. 2014) (holding a public school was not required to permit religious organizations to use their facilities for worship services).

160. 524 U.S. 569 (1998).

161. *Id.* at 572.

ground, among others, that it constituted viewpoint discrimination. For the Court, Justice O'Connor said that the provision imposes no categorical requirement and that it seems unlikely that the provision would introduce any greater element of selectivity than the determination of "artistic excellence" itself.[162] *Rosenberger* is distinguishable, she said, because here there is a competitive process in the allocation of grants, and the content-based "excellence" threshold is merely a subject-matter type of standard. This is not a case like *Rosenberger*, she said, where in the context of subsidizing a diversity of viewpoints, viewpoint discrimination occurred.[163] Until the law is applied in a manner that raises concerns about disfavored viewpoints the Court will uphold the provision's constitutionality.[164] As the Court noted:

> [T]he "decency and respect" criteria do not silence speakers by expressly "threaten[ing] censorship of ideas." Thus, we do not perceive a realistic danger that § 954(d)(1) will compromise First Amendment values. As respondents' own arguments demonstrate, the considerations that the provision introduces, by their nature, do not engender the kind of directed viewpoint discrimination that would prompt this Court to invalidate a statute on its face. . . .
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> . . . .
>
> The NEA's enabling statute contemplates a number of indisputably constitutional applications for both the "decency" prong of § 954(d)(1) and its reference to "respect for the diverse beliefs and values of the American public." Educational programs are central to the NEA's mission. . . . And it is well established that "decency" is a permissible factor where "educational suitability" motivates its consideration. *Bd. of Ed., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 871 (1982); *see also Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) ("Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse").[165]

The Court also noted:

> Permissible applications of the mandate to consider "respect for the diverse beliefs and values of the American public" are also apparent. In setting forth the purposes of the NEA, Congress explained that "[i]t is vital to a democracy to honor and preserve its multicultural artistic heritage." § 951(10). The agency expressly takes diversity into account, giving special consideration to "projects and productions . . . that reach,

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162. *Id.* at 581-84.
163. *Id.* at 586.
164. *Id.* at 586-87.
165. *Id.* at 583-84.

> or reflect the culture of, a minority, inner city, rural, or tribal community," § 954(c)(4), as well as projects that generally emphasize "cultural diversity," § 954(c)(1). Respondents do not contend that the criteria in § 954(d)(1) are impermissibly applied when they may be justified, as the statute contemplates, with respect to a project's intended audience.
>
> . . . Any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding. The NEA has limited resources, and it must deny the majority of the grant applications that it receives, including many that propose "artistically excellent" projects.
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> . . . If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case. We have stated that, even in the provision of subsidies, the Government may not "ai[m] at the suppression of dangerous ideas," *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 550 (1983) (internal quotation marks omitted), and if a subsidy were "manipulated" to have a "coercive effect," then relief could be appropriate. . . .
>
> Finally, although the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake. So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities.[166]

In contrast to *Finley*, a district court held in *Brooklyn Institute of Arts and Sciences v. City of New York*[167] that New York City's withholding appropriated funds for a museum that displayed "The Holy Virgin Mary" by Chris Ofili, which was made in part by using elephant dung and deemed offensive to Catholics, was unconstitutional viewpoint discrimination, distinguishing *Feeley*.

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166. *Id*. at 584-85, 587-88. In their concurrence, Justices Scalia and Thomas concluded that the regulation did possibly constitute "viewpoint discrimination" because "to the extent a particular applicant exhibits disrespect for the diverse beliefs and values of the American public or fails to comport with general standards of decency, the likelihood that he will receive a grant diminishes." *Id.* at 592 n.1. In their view this was simply a government funding/government speech case like *Rust v. Sullivan* where viewpoint discrimination is permissible. *Id*. at 597-600. Justice Souter dissented in *Finley*, contending that the statute itself makes clear that Congress' purpose was viewpoint based, i.e., to prevent the funding of art that conveys an offensive message in Congress' judgment, as implemented by the NEA. *Id*. at 600-01 (Souter, J., dissenting).

167. 64 F. Supp. 2d 184, 202-05 (E.D.N.Y. 1999).

The result in *Finley* was similar to the result in *Bethel School District No. 403 v. Fraser*.[168] There, the Court held that the First Amendment does not prohibit a school district from disciplining a high school student for a "lewd" speech at a high school assembly.[169] As part of supporting a candidate for a student government office, the speaker used phrases like, "he's firm in his pants, he's firm in his shirt, his character is firm," and he "doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds."[170] Chief Justice Burger wrote that the freedom of students to advocate unpopular and controversial views must be balanced against society's interest in teaching students the boundaries of socially appropriate behavior. Under that reasonableness balancing inquiry, it was "perfectly appropriate" for the school to prohibit the use of vulgar terms in public discourse, especially in an assembly where students as young as fourteen were in attendance.[171]

Consistent with the analysis of *Fraser*, the Supreme Court held in *Morse v. Frederick*[172] that reasonableness review would be applied to student speech made in the context of the nonpublic forum of a "school-sanctioned and school-supervised" event—here, students being led out of the classroom to watch the Olympic Torch Relay pass by their school—even though the speech could not be said to be "vulgar," as in *Fraser*. In *Morse*, the school had a legitimate interest in regulating speech when that speech "is reasonably viewed as promoting illegal drug use."[173] The majority acknowledged that this "reasonableness" standard was different than the higher standard for regulating student-generated speech in *Tinker v. Des Moines Independent Community School District*.[174] A concurrence by Justices Kennedy and Alito, whose votes were critical to make up the majority, indicated that if the speech is not so connected to the school curriculum or school-sponsored event, then student generated speech, even if in conflict with the educational mission of the school, should trigger *Tinker*—an intermediate standard of review requiring a reasonable fear of material and substantial

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168. 478 U.S. 675 (1986).

169. *Id.* at 677, 685-86.

170. *Id.* at 786 (Brennan, J., concurring).

171. *Id.* at 683-85. Justice Brennan concurred only in the judgment, saying that the speech may well have been protected were it delivered elsewhere than the assembly hall, but that the speech could be viewed as disruptive under the *Tinker* standard of review given the school's educational mission on how to conduct civil and effective public discourse. *Id.* at 687-88 (Brennan, J., concurring). Justice Blackmun concurred only in the result without explanation. *Id.* at 678 (Blackmun, J., concurring). Justice Marshall dissented on the ground that the Court should have applied the *Tinker* standard of review, and the school had failed to demonstrate that the student's remarks were disruptive. *Id.* at 690 (Marshall, J., dissenting). Justice Stevens doubted that the student could have known from the school's rule that his speech was punishable, and thus to punish him absent such notice violated his due process rights. *Id.* at 691 (Stevens, J., dissenting).

172. 551 U.S. 393, 396-97, 408-10 (2007) (the "Bong Hits for Jesus" case).

173. *Id.* at 403.

174. *Id.* at 396-97, 403-05. *Tinker* is discussed more fully *infra* at notes 282-93 and accompanying text.

disruption, as discussed in Part V.B.[175]

A dissent by Justices Stevens, Souter, and Ginsburg viewed the schools' reaction in this case as viewpoint discrimination.[176] They noted:

> Even in high school, a rule that permits only one point of view to be expressed is less likely to produce correct answers than the open discussion of countervailing views. . . . In the national debate about a serious issue, it is the expression of the minority's viewpoint that most demands the protection of the First Amendment.[177]

Another case applying a similar standard of review is *Keefe v. Adams*.[178] In this case, the Eighth Circuit Court of Appeals held "college administrators and educators in a professional school [here, a nursing school] have discretion to require compliance with recognized standards of the profession, both on and off campus, 'so long as their actions are reasonably related to legitimate pedagogical concerns [here, sexually offensive and threatening Facebook posts about other class members].'"[179] Another case is *Pompeo v. Board of Regents of New Mexico*.[180] In this case, the Tenth Circuit Court of Appeals held that a professor cannot be sued for allegedly pressuring a student to revise anti-gay language in a class assignment, as educators can restrict school-sponsored speech having inflammatory or offensive views if "reasonably related to legitimate pedagogical concerns" and not a "sham pretext for an impermissible ulterior motive" such as viewpoint discrimination; qualified immunity applies as any greater right the student had was not clearly established.[181]

D. Disparagement Based on Other's Views, Not Government's View

In *Boos v. Barry*,[182] the Supreme Court analyzed a statute which prohibited the display of any sign within 500 feet of a foreign embassy if that sign tends to bring that foreign government into "public odium" or "public disrepute." The

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175. *Id.* at 422-25 (Alito, J., joined by Kennedy, J., concurring).

176. *Id.* at 448 (Stevens, J., joined by Souter & Ginsburg, JJ., dissenting). In any event, the dissent believed the student speech should be analyzed under *Tinker*, presumably viewing the speech as student generated outside the school-sponsored activity. *Id.* at 438-39, 445-47. Justice Breyer would have avoided all these issues by holding that, in any event, under *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), the principal had qualified immunity for the disciplinary action taken. *Morse*, 551 U.S. at 429-30 (Breyer, J., concurring in the judgment in part and dissenting in part). The dissenting Justices agreed the principal had qualified immunity under *Harlow*. *Id.* at 434 (Stevens, J., joined by Souter & Ginsburg, JJ., dissenting).

177. *Morse*, 551 U.S. at 448 (citations omitted).

178. 840 F.3d 523 (8th Cir. 2016).

179. *Id.* at 531 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)).

180. 852 F.3d 973, 984-86 (10th Cir. 2017).

181. *Id.* at 984-86.

182. 485 U.S. 312 (1988).

Court stated:

> [W]e agree the provision is not viewpoint based. The display clause determines which viewpoint is acceptable in a neutral fashion by looking to the policies of foreign governments. While this prevents the display clause from being directly viewpoint based, a label with potential First Amendment ramifications of its own, . . . it does not render the statute content neutral. Rather, we have held that a regulation that "does not favor either side of a political controversy" is nonetheless impermissible because the "First Amendment's hostility to content-based regulation extends . . . to prohibition of public discussion of an entire topic." Here the government has determined that an entire category of speech—signs or displays critical of foreign governments—is not to be permitted.[183]

In *Boos*, it did not matter as to standard of review, because in a public forum viewpoint discrimination or subject-matter discrimination trigger the same strict scrutiny test, which the Court applied in *Boos*.[184] Although the Court was skeptical, the Court was willing to assume that protecting the dignity of foreign diplomatic personnel was a compelling interest, but the Court held the regulation was not narrowly tailored to focus on displays undertaken to "intimidate, coerce, threaten, or harass."[185]

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183. *Id.* at 319 (quoting Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 537 (1980).

184. The Court stated:

> Our cases indicate that as a *content-based* restriction on *political speech* in a *public forum*, § 22-1115 must be subjected to the most exacting scrutiny. Thus, we have required the State to show that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S., at 45. . . *Accord*, *Board of Airport Comm'rs of LosAngeles v. Jews for Jesus*, 482 U.S. 569, 572-573. . . (1987); *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 800. . . (1985); *United States v. Grace*, 461 U.S., at 177. . . .

Boos, 485 U.S. at 321-22 (emphasis original).

185. The Court explained:

> We first consider whether the display clause serves a compelling governmental interest in protecting the dignity of foreign diplomatic personnel. Since the dignity of foreign officials will be affronted by signs critical of their governments or governmental policies, we are told, these foreign diplomats must be shielded from such insults in order to fulfill our country's obligations under international law.
>
> . . . .
>
> . . . Even if we assume that international law recognizes a dignity interest and that it should be considered sufficiently "compelling" to support a content-based restriction on speech, we conclude that § 22-1115 is not narrowly tailored to serve that interest.
>
> . . . .

The conclusion in *Boos* that the regulation did not involve viewpoint discrimination because the government was "looking to the policies of foreign governments" is probably in error.[186] Under Equal Protection and Due Process doctrines, the same impermissible animus analysis applies whether it is the government's own view that is illegitimate,[187] or the government is merely deferring to the illegitimate views of the community.[188] The same doctrine should apply here. Whether it is the government's own viewpoint, or the government is regulating one side of a message because they are pandering to the viewpoints of another government or private actors, the regulation still constitutes viewpoint discrimination, and should be so treated.[189]

The government tried to avoid strict scrutiny in *Boos* by arguing that a content-neutral, secondary effect was the real reason for the regulation, which in a public forum would trigger intermediate review.[190] That secondary effects argument did not work. As the Court explained:

> Respondents attempt to bring the display clause within *Renton* by arguing that here too the real concern is a secondary effect, namely, our international law obligation to shield diplomats from speech that offends their dignity. We think this misreads *Renton*. We spoke in that decision only of secondary effects of speech, referring to regulations that apply to a particular category of speech because the regulatory targets happen to be associated with that type of speech. So long as the justifications for regulation have nothing to do with content, i.e., the desire to suppress crime has nothing to do with the actual films being shown inside adult movie theaters, we concluded that the regulation was properly analyzed as content neutral.

> . . . § 112, unlike § 22-1115, does not prohibit picketing; it only prohibits activity undertaken to "intimidate, coerce, threaten, or harass."

Id. at 321-26.

186. *Id.* at 312, 319.

187. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 6-7, 11-12 (1967) (holding government animus against interracial marriage not a legitimate interest); *see also* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (holding government purpose to discriminate against hippie communes an illegitimate interest).

188. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (holding community prejudice against interracial marriage not a legitimate interest); *see also* Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985) (holding community prejudice against mentally impaired not a legitimate interest).

189. On this analysis, the language in *Boos v. Barry* about that regulation being subject-matter only is in error. Since the regulation occurred in a public forum, the regulation was subjected to strict scrutiny analysis anyway, which is the proper standard of review. *See supra* notes 83-84, 183 and accompanying text.

190. *See Boos*, 485 U.S. at 320.

> Regulations that focus on the direct impact of speech on its audience present a different situation. Listeners' reactions to speech are not the type of "secondary effects" we referred to in *Renton*. To take an example factually close to *Renton*, if the ordinance there was justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate. The hypothetical regulation targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech.[191]

In *Matal v. Tam*,[192] the Court held a provision of federal law prohibiting registration of trademarks that may "disparage . . . or bring . . . into contemp[t] or disrepute" any "persons, living or dead" was unconstitutional as applied to an Asian-American band wishing to call themselves "The Slants." Four Justices held provision failed even *Central Hudson Gas*' intermediate review regulation of commercial speech.[193] Four Justices held that because the regulation was an example of viewpoint discrimination it triggered strict scrutiny even if a regulation of commercial speech.[194] None of the Justices mentioned the argument that under the existing precedent of *Boos v. Barry* the regulation would be an example of subject-matter regulation since the regulation was triggered not by the government's own view about disparagement, but by whether the speech refers to "identifiable persons, institutions, beliefs or national symbols" and, if so, would it be viewed as disparagement by a "substantial composite of the referenced group."[195] The Court noted that the government agency involved in the

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191. *Id.* at 320-21. The Court continued in *Boos*:

> The clause is justified *only* by reference to the content of speech. Respondents and the United States do not point to the "secondary effects" of picket signs in front of embassies. They do not point to congestion, to interference with ingress or egress, to visual clutter, or to the need to protect the security of embassies. Rather, they rely on the need to protect the dignity of foreign diplomatic personnel by shielding them from speech that is critical of their governments. This justification focuses only on the content of the speech and the direct impact that speech has on its listeners. The emotive impact of speech on its audience is not a "secondary effect." Because the display clause regulates speech due to its potential primary impact, we conclude it must be considered content-based.

Id. at 321.

192. 137 S. Ct. 1744, 1751 (2017) (Gorsuch, J., not participating).

193. *Id*. at 1749 (Alito, J., joined by Roberts, C.J., and Thomas & Breyer, JJ.) ("preventing speech expressing ideas that offend . . . strikes at the heart of the First Amendment" and is viewpoint discrimination, not a "substantial interest"; provision not narrowly drawn to drive out trademarks supporting invidious discriminatory conduct).

194. *Id.* at 1767 (Kennedy, J., concurring, joined by Ginsburg, Sotomayor & Kagan, JJ.) ("speech burden based on audience reactions is simply government hostility . . . long prohibited [to justify] a First Amendment burden").

195. *Id.* at 1753-54.

case—the Patent and Trademark Office—had held that the term "Slants" referred to "Asian-Americans" and a "substantial composite" of Asian-Americans would view the term "Slants" as disparaging.[196]

With regard to viewpoint discrimination analysis, the four-Justice opinion holding that the case, on its precise facts, involved a strict scrutiny analysis triggered by viewpoint discrimination has the better of the argument. To the extent one rejects the conclusion in *Boos v. Barry* that regulation there was only subject-matter discrimination, and adopts the argument made above,[197] then even if justified by reference to other persons' view of disparagement, not the government's own view, it would be viewpoint discrimination. If viewpoint discrimination triggers strict scrutiny even for speech not otherwise protected by the First Amendment, like for fighting words in *R.A.V.*,[198] then viewpoint discrimination should certainly trigger strict scrutiny for commercial speech, which receives the intermediate review *Central Hudson Gas* protection for subject-matter content regulation—the typical commercial speech case, as discussed in Part V.C.[199]

This, however, should not end the analysis. Assume that instead of deferring to other persons' views of disparagement, the government had instead adopted a regulation saying the government would not grant trademarks if, in the government's view, the trademark would represent a lack of "decency and respect for the diverse beliefs and values of the American public," as in the *Finley* case.[200] In *Finley*, the government was concerned about being complicit in granting to individuals the financial benefit of government money being spent on such art. Here, in *Tam*, the government could raise the same concern about being complicit in granting individuals the financial benefit of trademark protection. As discussed in Part V.A.,[201] cases involving government spending, grants, subsidies, tax breaks, or financial benefits like trademarks, all raise similar issues of government complicity in benefits being provided, and thus all should trigger—like the government spending cases—a nonpublic forum analysis on the ground that the government has opened up the financial benefit only for particular purposes. This would permit the government to deny trademarks which, unlike *Tam*, really do involve lack of "decency and respect."[202]

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196. *Id*. at 1754.

197. *See supra* text accompanying notes 182-91.

198. *See supra* text accompanying notes 115-23.

199. *See infra* text accompanying notes 365-75.

200. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998). *See also* notes 160-66, *supra*, and accompanying text.

201. *See infra* text accompanying notes 278-86.

202. For example, based on the Supreme Court opinions in *Tam*, a court held in *In re Brunetti*, 877 F.3d 1330, 1335 (Fed. Cir. 2017), that a federal trademark ban on "immoral" or "scandalous" matter was unconstitutional. The mark in this case was "FUCT." *Id.* Under the analysis presented above based on *Finley*, the government refusing to grant trademark protection to "FUCT" should have been constitutional. In contrast, in *Tam*, given the rock group's stated intent to "reclaim" and

IV. STANDARDS OF REVIEW IN USED IN FREE SPEECH CASES

A. Standards Track Doctrine under Equal Protection and Due Process

As noted in Part II,[203] the basic free speech standards in a public forum track strict scrutiny and intermediate review under Equal Protection and Due Process Clause doctrine. To be clear about what that means in practice, it is important to understand precisely what those standards of review involve. The Court has not always been as clear about this as one would like.[204]

Under intermediate review, the government must prove the government action: (1) advances important/significant/substantial government ends; (2) is substantially related to advancing those ends; and (3) is not substantially more

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"take ownership" of the term "Slant," their trademark should have been granted since their use of the term did not involve a lack of "decency or respect for the diverse beliefs and values of the American public." *Finley*, 524 U.S. at 569.

In *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019), the Court affirmed the lower court holding in *Brunetti* by reading the relevant federal statute's ban on "immoral" or "scandalous" material to go beyond mere subject-matter regulation of marks that use a "mode of expression" that is "'vulgar – meaning, 'lewd,' 'sexually explicit or profane'" – to include viewpoint discrimination based on whether the marks "accord with, but not when their messages defy, society's sense of decency or propriety." *Id*. at 2299-2301. The majority implied that a statute limited to banning registration of "profane" trademarks would be constitutional, *id*. at 2301-02, and three Justices in dissent indicated that in their view the existing statute could be read to be so limited and thus constitutional given that limitation. *Id*. at 2303-04 (Roberts, C.J., concurring in part and dissenting in part); *id*. at 2308-09 (Sotomayor, J., joined by Breyer, J., concurring in part and dissenting in part). Left unanswered by all the Justices was whether it would be constitutional for regulation going beyond regulating "vulgar" "modes of expression" as in *Fraser*, *see supra* text accompanying notes 168-71, to regulation of "decency and respect for the diverse beliefs and values of the American public," as in *Finley*, *see supra* text accompanying notes 160-66, or speech "reasonably viewed as promoting illegal drug use," as in *Morse*, *see supra* text accompanying notes 172-77. The majority's statement in *Brunetti* that not registering messages that "defy" society's "sense of decency or propriety" is viewpoint discrimination, *id*. at 2300, suggests the *Brunetti* majority no longer views the regulation in *Finley* as not involving viewpoint discrimination. The majority's statement that the Patent Trademark Office decision not to register a mark saying "BONG HiTS 4 JESUS," but to register a mark saying "D.A.R.E. TO RESIST DRUGS AND VIOLENCE" was an example of viewpoint discrimination, *id*., suggests the majority no longer views the regulation in *Morse* as subject-matter regulation, but instead unconstitutional viewpoint discrimination. At some point, the Court will have to confront the tension regarding findings of viewpoint discrimination in *Tam* and *Brunetti* versus no viewpoint discrimination found in *Finley* and *Morse*.

203. *See supra* text accompanying notes 82-87.

204. The discussion *infra* notes 205-209 and accompanying text is based on Kelso, *supra* note 30, at 293-95 & nn.15-18. It is reproduced here so the reader will not have to consult that discussion to understand these important points about intermediate and strict scrutiny review.

burdensome than necessary to advance those ends.[205] Under strict scrutiny, the statute must: (1) advance compelling/overriding government ends; (2) be directly and substantially related to advancing those ends; and (3) be the least restrictive effective means to advance the ends.[206] The Court often phrases the last two parts

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205. *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 713-14 (4th ed. 2011) ("Under intermediate scrutiny, a law is upheld if it is substantially related to an important government purpose. . . . The means used need not be necessary, but must have a 'substantial relationship' to the end being sought."). *See also* CHARLES D. KELSO & R. RANDALL KELSO, AMERICAN CONSTITUTIONAL LAW: AN E-COURSEBOOK VOLUMES 1 & 2, § 20.1 nn.12-15, 22-24, 28 (2018 Orig. Ed. 2014), http://libguides.stcl.edu/ld.php?content_id=32389692 [hereinafter KELSO & KELSO, AMERICAN CONSTITUTIONAL LAW].

To clarify the Court's understanding of the requirement of an "important/significant/substantial" interest at intermediate review, higher than a mere "legitimate/permissible" interest at minimum rationality review or reasonableness balancing, *see* United States v. Virginia, 518 U.S. 515, 533 (1996) (In discussing intermediate review used for gender discrimination, the Court noted, "[t]he State must show 'at least that the [challenged] classification serves "*important* governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives."'") (citations omitted) (emphasis added); *see also* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (discussing intermediate review applicable to content-neutral time, place, or manner regulations under the First Amendment free speech doctrine, the Court noted, "restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a *significant* governmental interest, and that they leave open ample alternative channels for communication of the information.") (emphasis added); *id*. at 294 ("Symbolic expression of this kind may be forbidden or regulated if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a *substantial* governmental interest, and if the interest is unrelated to the suppression of free speech.") (emphasis added); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (discussing the intermediate review level of interest necessary in commercial speech cases, the Court stated, "[w]e ask whether the asserted government interest is *substantial*.") (emphasis added).

206. *See* CHEMERINSKY, *supra* note 205, at 713 ("Under strict scrutiny a law is upheld if it is proved necessary to achieve a compelling government interest. The government . . . must show that it cannot achieve its objective through any less discriminatory alternative."); *see also* KELSO & KELSO, AMERICAN CONSTITUTIONAL LAW, *supra* note 205, § 20.1 nn.1-11, 15-22, 25-28. For discussion of the strict scrutiny requirement of a "compelling/overriding" interest to regulate, see *Fisher v. University of Texas*, at Austin, 133 S. Ct. 2411, 2419 (2012) ("Strict scrutiny is a searching examination, and it is the government that bears the burden to prove . . . [its] 'classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.'") (emphasis added) (citations omitted). *See also* Loving v. Virginia, 388 U.S. 1, 11 (1967) (applying strict scrutiny to a ban on interracial marriage, the Court noted "There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.") (emphasis added).

Because the regulation must be "necessary" to advance the government's ends under strict scrutiny, this means "unnecessary" under-inclusiveness will render the regulation unconstitutional.

of strict scrutiny as requiring the statute or regulation be "precisely tailored" or "necessary"; for intermediate review, the last two prongs are often phrased as the statute or regulation must be "narrowly drawn."[207] But sometimes the Court uses the phrase "narrowly drawn" even under strict scrutiny.[208] Predictability would be aided, of course, if the Court would reserve the term "narrowly drawn" for intermediate review, and consistently use the term "necessary" or "precisely tailored" for strict scrutiny. Under either intermediate or strict scrutiny review, there is no presumption of constitutionality, and the government bears the burden to satisfy the standard of review by evidence in the record.[209]

The Court has sometimes not clearly applied these rigorous forms of scrutiny in every case. For example, in *City of Erie v. Pap's A.M.*,[210] Justice O'Connor said that the *O'Brien* test requires only that the regulation "further the interest" in combating secondary effects, not the normal intermediate requirement that it "substantially further" the interest. The *O'Brien* opinion specifically talked about

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Phrased in the affirmative, the regulation must adopt, to the extent possible, means that "directly advance" the government ends, not merely "substantially advance" those ends, as at intermediate review. Otherwise, the regulation is not "precisely tailored" enough. It is clear that this requirement of a "direct relationship" exists at strict scrutiny. Commercial speech cases involve a less rigorous form of scrutiny than strict scrutiny, as *discussed infra* text accompanying notes 355-80. Yet the Court has stated that for commercial speech regulation, under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980), the regulation must "directly advance the governmental interest asserted." Although a "direct relationship" is required in commercial speech cases, *a fortiori* such a requirement exists at strict scrutiny. *See generally* United States v. Alvarez, 132 S. Ct. 2537, 2549 (2012) (Kennedy, J., plurality opinion) ("The First Amendment requires that the Government's chosen restriction on the speech at issue be 'actually necessary' to achieve its interest. There must be a direct causal link between the restriction imposed and the injury to be prevented.") (citation omitted).

207. *Compare* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 666 (1990) ("precisely tailored to serve [a] compelling state interest"); *and* Palmore v. Sidoti, 466 U.S. 429, 432 (1984) ("necessary"); *and* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978) (Powell, J., announcing the judgment of the Court) ("precisely tailored") *with* Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) ("narrowly drawn" at intermediate review).

208. *See* Boos v. Barry, 485 U.S. 312, 317 (1988) ("narrowly drawn"); *see also* United States v. Grace, 461 U.S. 171, 177 (1983) (same).

209. United States v. Virginia, 518 U.S. 515, 533 (1996) ("The burden of justification [at intermediate review] is demanding and rests entirely on the State. The State must show 'at least that the [challenged] classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives."'") (citations omitted). The burden is also on the government at strict scrutiny. Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2419 (2012) ("Strict scrutiny is a searching examination, and it is the government that bears the burden . . . .'") (citations omitted). The burden is on the challenger to prove government action is unconstitutional under minimum rationality review or reasonableness balancing. *See supra* text accompanying notes 91-92.

210. 529 U.S. 277, 300-01 (2000) (plurality opinion of O"Connor, J., joined by Rehnquist, C.J., and Kennedy & Breyer, JJ.).

how "the continuing availability to each registrant of his Selective Service certificates *substantially furthers* the smooth and proper functioning of the system that Congress has established to raise armies."[211] The *O'Brien* Court spent a number of pages discussing how the requirement of a certificate *substantially furthers* the government's interest, thus giving the government a "*substantial* interest in preventing their wanton and unrestrained destruction."[212] While the Court did ultimately phrase the *O'Brien* test as whether the government "furthers an important or substantial governmental interest,"[213] given the text and context of the rest of the Court's opinion using "substantially furthers" language, the Court in *O'Brien* clearly intended the test to be whether the regulation "substantially furthers" an important or substantial government "interest."[214] This reflects ordinary intermediate scrutiny review.[215]

Justice O'Connor similarly watered-down the *O'Brien* content-neutral test in *City of Los Angeles v. Alameda Books, Inc.*,[216] when she wrote that under *O'Brien*, a city only needs to show that "it is rational for the city to infer that reducing the concentration of adult operations in a neighborhood . . . will reduce crime rates." As he did in *Pap's A.M.*,[217] Justice Souter properly criticized Justice O'Connor's opinion for its watered-down approach.[218] In recent cases, lower courts seem to be adopting a proper intermediate scrutiny inquiry, as suggested by Justice Souter in *Pap's A.M.* and *Alameda Books*.[219] A similar "rational" or "reasonable" version of the *Central Hudson Gas* test for commercial speech in *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*[220] was ultimately recognized by a majority of the Court to be watered-down and rejected, even by Justice O'Connor, in *44 Liquormart, Inc. v. Rhode Island*.[221]

B. All Four Issues Involved in Free Speech Cases

In applying strict scrutiny and intermediate review in First Amendment free

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211. United States v. O'Brien, 391 U.S. 367, 381 (1968) (emphasis added).

212. *Id.* at 378-81 (emphasis added).

213. *Id.* at 377.

214. *Id.* at 381.

215. *See supra* note 205 and accompanying text.

216. 535 U.S. 425, 436 (2002) (plurality opinion of O'Connor, J., joined by Rehnquist, C.J., and Scalia and Thomas, JJ.).

217. *See supra* text accompanying note 65.

218. *Alameda Books*, 535 U.S. at 458-64 (Souter, J., joined by Stevens & Ginsburg, JJ., and Breyer, as to Part II, dissenting).

219. *See supra* note 65 and accompanying text.

220. 478 U.S. 328, 340-48 (1986).

221. 517 U.S. 484, 505-10 (1996) (Stevens, J., announcing the judgment of the Court, in Part IV of which was joined by Kennedy & Ginsburg, JJ) (rejecting the "rationally further" and "reasonableness" language in *Posadas*); *id.* at 531-32 (O'Connor, J., joined by Rehnquist, C.J., and Souter & Breyer, JJ., concurring in the judgment) (same).

speech cases, it is useful to note that there are four questions regarding benefits and burdens that can be asked about any statute. Two relate to Equal Protection Clause issues (*underinclusiveness* and *overinclusiveness*)[222] and two relate to Due Process Clause issues (*service* and *oppressiveness/restrictiveness*).[223] Because First Amendment scrutiny does the jobs of both Equal Protection and Due Process concerns when applied to free speech issues, both questions of benefits (*underinclusiveness* and *service*) and both questions of burdens (*overinclusiveness* and *oppressiveness*) are necessary for free speech analysis.[224]

More precisely, in analyzing how the government is advancing its interests under the second prongs of strict scrutiny and intermediate review, the Court considers both the Equal Protection Clause question of the extent to which the government action fails to regulate all individuals who are part of some problem (*underinclusiveness* inquiry),[225] and the Due Process Clause question of how the government action serves to achieve its benefits on those whom the action does regulate (*service inquiry*).[226] Similarly, under the third prongs of strict scrutiny and intermediate review, the Court considers both the Equal Protection question of the extent to which the government action burdens individuals not intended to be regulated (*overinclusiveness* inquiry),[227] and the Due Process question of the amount of burden on individuals who are the focus of the action (*oppressiveness* inquiry).[228]

For example, as the Court noted in *City of Ladue v. Gilleo*,[229] "the notion that a regulation of speech may be impermissibly *underinclusive* is firmly grounded in basic First Amendment principles." As Justice Kennedy noted in *Ward v. Rock Against Racism*,[230] a content-neutral regulation of speech cannot burden substantially more speech than necessary to further the interest (the *overinclusiveness* inquiry), nor can it place a substantial burden on speech that fails to leave open ample alternative channels for communication (the *oppressiveness* inquiry) or that do not serve to advance its goals (the *service* inquiry). Thus, in *City of Los Angeles v. Alameda Books, Inc.*,[231] Justice Kennedy correctly observed that free speech analysis must consider both benefits and burdens on the speech. He stated, "the necessary rationale for applying

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222. *See generally* KELSO & KELSO, THE PATH OF CONSTITUTIONAL LAW, *supra* note 58, § 26.1.1.1 nn.25-27.

223. *See generally id.* § 27.1.2 nn.43, 45.

224. For general discussion of these points, see R. Randall Kelso, *Considerations of Legislative Fit Under Equal Protection, Substantive Due Process, and Free Speech Doctrine: Separating Questions of Advancement, Relationship, and Burden*, 28 U. RICH. L. REV. 1279 (1994).

225. *See generally* KELSO & KELSO, THE PATH OF CONSTITUTIONAL LAW, *supra* note 58, § 26.1.1.1 nn.25-27.

226. *Id.* § 27.1.2 nn.43, 45.

227. *Id.* § 26.1.1.1 nn.28-31.

228. *Id.* § 27.1.2 nn.44-45.

229. 512 U.S. 43, 51 (1994) (emphasis in original).

230. 491 U.S. 781, 798-99 (1989).

231. 535 U.S. 425, 449-50 (2002) (Kennedy, J., concurring).

intermediate scrutiny is the promise that zoning ordinances like this one may reduce the costs of secondary effects [the *service* inquiry] without substantially reducing speech [the *oppressiveness/restrictiveness* inquiry]."[232] While Justice Souter was correct in placing the burden on the government to justify content-neutral regulations under intermediate review,[233] he was not correct in *Alameda Books* in stating that the government's burden on speech "must simply be no greater than necessary to further that interest,"[234] an *overinclusiveness* inquiry. As stated in *Ward v. Rock Against Racism*, the regulation cannot also be too substantially burdensome that it fails to "leave open ample alternative channels for communication,"[235] the *oppressiveness* inquiry.

C. Content Based v. Content Neutral Government Action

1. Traditional Dual Purpose & Pretext Analysis.—Consistent with the standards of review under Equal Protection and Due Process, under strict scrutiny, the content-based reasons must be *actual* government purposes to be considered by a court.[236] Under intermediate review, the content-neutral reasons must be *actual or plausible* government purposes.[237] For restrictions on free

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232. *Id.* at 450.

233. *See supra* notes 64-65 and accompanying text.

234. *Alameda Books*, 535 U.S. at n.8 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting).

235. *Ward*, 491 U.S. at 789-99.

236. *See generally* KELSO & KELSO, THE PATH OF CONSTITUTIONAL LAW, *supra* note 58, § 26.1.3 nn.85-86 (2007), citing, *inter alia*, Edwards v. Aguillard, 482 U.S. 578, 594 (1987) (holding actual purpose only used at strict scrutiny).

237. *See generally* KELSO & KELSO, THE PATH OF CONSTITUTIONAL LAW, *supra* note 58, § 26.1.3 nn.92-99, citing, *inter alia*, Michael M. v. Superior Court, 450 U.S. 464, 470 (1981) (holding actual purpose or purpose which "could have plausibly motivated an impartial legislature" can be used at intermediate review). A few cases have suggested that as long as the interest was "put forward by the government in litigation" it should be able to be considered at intermediate review. *See* Edenfield v. Fane, 507 U.S. 764, 768 (1993); Califano v. Goldfarb, 430 U.S. 199, 223 & n.9 (1977) (Stevens, J., concurring). In practice there may not be much difference between a "put forward" approach and a "plausible" approach, because the government will not likely "put forward" interests which are not "plausible." *See* R. Randall Kelso, *Three Years Hence: An Update on Filing Gaps in the Supreme Court's Approach to Constitutional Review of Legislation*, 36 S. TEX. L. REV. 1, 8-9 (1995). Further, the "put forward" approach has the advantage of not requiring the Court to second-guess the plausibility of proffered reasons for a regulation. *Id.* at 8. However, the Court's more recent cases of intermediate review have seemed to use an "actual" or "plausible" approach. Nguyen v. INS, 533 U.S. 53, 62-65 (2001) (listing two purposes for the statute without regard to whether they were actual or plausible); *id.* at 79-80 (O'Connor, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting) (noting that one of the purposes used by the Court to uphold the statute was not "rel[ied] on" or "proffered" by the government at all in the litigation). On reflection, requiring the government interest at intermediate review to be "actual" or at least

speech in a non-public forum that trigger reasonableness review, any *conceivable* content-neutral reason for regulation can be used.[238] Naturally, *illegitimate interests* for regulation cannot be used at strict scrutiny, intermediate review, reasonableness review, or minimum rationality review, nor can *illegitimate pretexts* be a permissible basis for regulation.[239]

It has been argued that the Court in dual motive cases (i.e., there is both a content-neutral and content-based justification for the regulation) should embrace a suggestion by Justice Stevens and determine what is the predominant motive of the regulation considering the "content, character, context, nature, and scope" of the regulation.[240] However, the better approach is to recognize that the discussion in the Court's dual motive cases regarding the content-neutral aspect of the regulation is focused on whether the content-neutral reason is an *actual or plausible* purpose of the government action, or merely a *pretext* to justify content-based discrimination.[241] If it is a *pretext*, then only strict scrutiny will be applied

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"plausible" seems the best approach, as it prevents implausible, but conceivable *post hoc* rationalizations from being used. *See* KELSO & KELSO, THE PATH OF CONSTITUTIONAL LAW, *supra* note 58, § 26.1.3 nn.94-89; *see also* R. Randall Kelso, *Filling Gaps in the Supreme Court's Approach to the Constitutional Review of Legislation: Standards, Ends, and Burdens Reconsidered*, 33 S. TEX. L. REV. 493, 508-09, 535-36 (1992). Of course, any conceivable interest, even if implausible, can be used to justify government action under rationality review. *See infra* text accompanying note 235.

238. KELSO & KELSO, THE PATH OF CONSTITUTIONAL LAW, *supra* note 58, § 26.1.3 nn.81-82, 87-91 (citing*, inter alia,* Heller v. Doe, 509 U.S. 312, 320 (1993); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980)).

239. KELSO & KELSO, THE PATH OF CONSTITUTIONAL LAW, *supra* note 58, § 26.1.1.1 nn.16-21 (illegitimate interests) (citing, *inter alia*, Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (holding prejudice against interracial marriage not a legitimate interest); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (holding a purpose to discriminate against hippie communes was an illegitimate interest); KELSO & KELSO, THE PATH OF CONSTITUTIONAL LAW, *supra* note 58, § 18.1.2 nn.31-34 (illegitimate pretexts) (discussing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819))). *See also* J. Randy Beck, *The Heart of Federalism: Pretext Review of Means-End Relationships*, 36 U.C. DAVIS L. REV. 407, 412-22 (2003).

240. 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, 804-09 (2004) (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 429-31 (1992) (Stevens, J., concurring in the judgment)).

241. *See* Hill v. Colorado, 530 U.S. 703, 719-25 (2000) (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("principal inquiry" is whether the regulation was adopted "because of disagreement with the message it conveys")); *see also* Reed v. Gilbert, 135 S. Ct. 2218, 2237 (2015) (Kagan, J., joined by Ginsburg & Breyer, JJ., concurring in the judgment) ("This Court's decisions articulate two important and related reasons for subjecting content-based speech regulations to the most exacting standard of review. The first is 'to preserve an uninhibited marketplace of ideas in which the truth will ultimately prevail.' *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 . . . (2014). . . . The second is to ensure that the government has not regulated speech 'based on hostility – or favoritism – towards the underlying message expressed.' *R.A.V. v. St. Paul*,

to the content-based reason for regulating. If the content-neutral reason is an *actual* or *plausible* purpose, then intermediate review will be applied to that content-neutral reason for regulating, while strict scrutiny will be applied to the content-based reason. As with all constitutional cases, if the government has one reason to act that makes the government action constitutional—typically the content-neutral reason—the act is constitutional, even if the content-based reason cannot survive constitutional scrutiny.[242]

A famous example of a dual motive case is *Texas v. Johnson*.[243] In this case, the majority held that a state flag desecration statute was invalid as applied to defendant, who had burned a flag as part of a political protest. The majority noted that one of the state's interests in banning flag burning was to prevent breaches of the peace.[244] Although preventing breaches of the peace might be a content-neutral reason for the regulation,[245] because no breach of the peace was imminent, there was no substantial interest involved in the case.[246] The Court concluded that the state's second interest—preserving the flag as a symbol of nationhood and national unity—was related to the suppression of expression and, thus, was content-based.[247] Therefore, strict scrutiny was applied to the consideration of that interest, and the ban on flag burning was unconstitutional because "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[248] A proper, less burdensome, effective alternative would be counterspeech to support the flag as a symbol of

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505 U.S. 377, 386 . . . (1992).").

242. It is well-established law that the government only needs one reason to make a statute constitutional, even if other reasons for the statute fail. *See, e.g.*, Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 447-50 (1985) (rejecting all four reasons proffered to justify the government action before declaring the action unconstitutional).

243. 491 U.S. 397, 399 (1989).

244. *Id.* at 406.

245. *Id.* at 408-09, citing, *inter alia*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (concerning whether forbidden conduct would "materially or substantially interfere with . . . appropriate discipline in the operation of the school").

246. *Johnson*, 491 U.S. at 407-10. The Court also noted in *Texas v. Johnson* that merely because the speech might be viewed as offensive by the audience is not grounds for prohibiting the speech. As the Court noted, free speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.' *Terminiello v. Chicago*, 337 U.S. 1, 4 . . . (1949)." *Id.* at 408-09. Not since *Feiner v. New York*, 340 U.S. 315, 321 (1951), has the Court permitted an individual to be punished merely because of negative audience reaction to his speech. The contemporary view regarding *Feiner* is that it only permits government regulation meeting the *Brandenburg* test for advocating illegal conduct by others, cited *supra* note 112, or the *Chaplinsky* test for fighting words, cited *supra* note 122. *See* Bible Believers v. Wayne Cty., 805 F.3d 228, 243-46 (6th Cir. 2015) (10-5 en banc decision).

247. *Johnson*, 491 U.S. at 410-12.

248. *Id.* at 414.

national unity.[249]

2. Reed v. Gilbert v. Traditional Renton Analysis.—With regard to whether a regulation is content-neutral or content-based, the Court muddied the waters a bit in 2015 in *Reed v. Gilbert, Arizona*.[250] *Reed* involved an sign code regulation that provided different sizes and lengths of posting times for signs based upon whether the sign was an "Ideological Sign," "Political Sign," or "Temporary Directional Sign Relating to a Qualifying Event."[251] Under traditional doctrine, use of intermediate review would depend on the town proving they had actual or plausible content-neutral substantial government interests (e.g., visual clutter, aesthetics, etc.) to justify the regulation. Concurring in the judgment, Justice Kagan noted that in this case the town provided "no reason at all" and "no coherent justification" for the distinctions they drew among signs, and thus the regulation "does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test."[252]

Contrary to this analysis, the majority in *Reed* adopted a rigid rule that if a regulation is content-based "on its face," then strict scrutiny is automatically triggered.[253] As Justice Kagan's opinion noted, this is inconsistent with traditional doctrine, such as in *Renton v. Playtime Theatres, Inc.*, where zoning regulations employing "on their face" content-based regulation of adult motion picture theaters trigger only intermediate review because the regulation is justified, in part, by the actual or plausible secondary effects concerned with increased crime around such theaters, particularly prostitution and drug trafficking, and the impact such theaters have on retail trade and maintaining property values.[254] It seems unlikely the majority in *Reed* would adopt strict scrutiny in a *Renton*-like case,[255] although that is the logic of their opinion. The Court's reluctance to adopt this logic was evident in *Packingham v. North Carolina*.[256] *Packingham* involved a ban on registered sex offenders accessing commercial social network sites that permit minors to be members, like Facebook or Twitter.[257] The Court dodged the issue raised here by failing to consider if the law's facial content-based member criteria should trigger strict scrutiny under *Reed*, or was it content-neutral time, place, or manner regulation to protect minors, as might be found under *O'Brien*/*Renton*, by holding the law was unconstitutional even under intermediate

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249. *Id.* at 418-20.

250. 135 S. Ct. 2218 (2015).

251. *Id.* at 2224-25.

252. *Id.* at 2239 (Kagan, J., joined by Ginsburg & Breyer, JJ., concurring in the judgment).

253. *Id.* at 2228.

254. *Id.* at 2238 (Kagan, J., joined by Ginsburg & Breyer, JJ., concurring in the judgment) (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)).

255. For further discussion of review in a *Renton*-like case, see 3 CHARLES D. KELSO & R. RANDALL KELSO, AMERICAN CONSTITUTIONAL LAW: AN E-COURSEBOOK: THE FIRST AMENDMENT § 7.2 (Orig. Ed. 2014), http://libguides.stcl.edu/kelsomaterials [hereinafter KELSO & KELSO, THE FIRST AMENDMENT].

256. 137 S. Ct. 1730 (2017).

257. *Id.* at 1733-34.

review by being substantially overbroad in limiting total access to Facebook and Twitter.[258]

Even in *Reed* itself, the breadth of the dicta was mitigated by a separate concurrence listing a number of ways sign ordinances could avoid strict scrutiny.[259] Consistent with such caution, hopefully *Reed*'s approach that any use of a content distinction on its face triggers strict scrutiny, even where actual or plausible substantial content-neutral reasons exists, will not be extended widely.[260] The majority opinion does counsel cities and towns to phrase any sign regulation in explicit content-neutral terms.[261]

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258. *Id*. at 1736-37. The Court noted that a less burdensome effective alternative to protect minors would be focusing on "conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor." *Id*. at 1737. *See also* People v. Minnis, 67 N.E.3d 272, 287-91 (Ill. 2016) (illustrating that a state court has upheld under intermediate review monitoring access to the sites by convicted sex offenders to ensure such conduct does not occur).

259. *Reed*, 135 S. Ct. at 2233 (Alito, J., joined by Kennedy & Sotomayor, JJ., concurring) (regulating size for all signs, lighted versus unlighted signs, signs on public versus private property, commercial versus residential property, total number of signs, or signs advertising one-time events). *See also* Muslim Am. Soc'y Freedom Found. v. District of Columbia, 846 F.3d 391, 403-09 (D.C. Cir. 2017) (ruling that requiring event-related signs on city lampposts to be removed within 30 days after the event content-neutral and constitutional under intermediate review).

260. *See, e.g.*, BBL, Inc. v. City of Angola, 809 F.3d 317, 326 (7th Cir. 2015) (applying *Renton*, not *Reed*, to regulation of sexually explicit entertainment). *But see* March v. Mills, 2016 WL 2993168 (D. Me. 2016) (law prohibiting noise with intent to disrupt medical care, such as abortion, content-based under *Reed*; invalid); Free Speech Coal., Inc. v. Att'y Gen., 825 F.3d 149, 163-64 (3d Cir. 2016) (requiring adult film producers to verify and keep records of identity and age of every performer to stop child pornography triggers strict scrutiny after *Reed*), *on remand*, Free Speech Coal., Inc. v. Sessions, 314 F. Supp. 3d 678, 708-15 (E.D. Pa. 2018) (holding verification requirement valid; holding record keeping requirement invalid); Champion v. Kentucky, 520 S.W.3d 331, 334-39 (Ky. 2017) (holding law prohibiting solicitation from public streets/intersections content-based after *Reed* invalid); Survivors Network of Those Abused by Priests, Inc. v. Joyce, 779 F.3d 785, 791-94 (8th Cir. 2015) (holding Missouri law criminalizing profane, rude, or indecent behavior outside any house of worship content-based, and fails strict scrutiny as not least burdensome alternative to advance interest in protecting free exercise of religion).

261. *See generally* Norton v. City of Springfield, 768 F.3d 713, 717-18 (7th Cir. 2014) (holding city ordinance against spoken requests for donations, while allowing signs, content-neutral based on greater coercive effect of spoken request); *id*. at 718-20 (Manion, J., dissenting) (noting other circuits have held such ordinances are content-based since regulation triggered by speaking), *rev'd on motion for rehearing*, 806 F.3d 411, 411-13 (7th Cir. 2015) (regulation fails strict scrutiny, now required post-*Reed v. Town of Gilbert*, since regulation distinguishes on its face based on whether content of speech is sign or verbal speech). *But see* Herson v. City of Richmond, 631 F. App'x 472, 473 (9th Cir. 2016) (holding Richmond's sign height and size restrictions meet strict scrutiny); Saint John's Church in the Wilderness v. Scott, 296 P.3d 273, 281-85 (Colo. App. 2012) (holding injunction prohibiting use of posters depicting gruesome images of mutilated fetuses or

D. Viewpoint Discrimination as Strict Scrutiny or Categorically Barred

As noted in Table 1, strict scrutiny is used by the Court for content-based regulations of speech imposed by the government in a public forum. Given the difficulty meeting the strict scrutiny test, particularly for cases of viewpoint discrimination, the Court occasionally will phrase the doctrine in more absolutist terms. For example, in *Rosenberger v. Rector and Visitors of the University of Virginia*, Justice Kennedy wrote for the Court, "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."[262] Justice Scalia said in *R.A.V. v. City of St. Paul*, "[c]ontent-based regulations are presumptively invalid."[263] This more presumptive phrasing usually appears in cases like *Rosenberger* or *R.A.V.* which involve government regulations of speech that are held to constitute viewpoint discrimination. It is clear, however, from these and other cases of viewpoint discrimination, that there is no per se rule of unconstitutionality for viewpoint discrimination, but that strict scrutiny applies to cases of viewpoint discrimination.[264]

While dicta in recent Supreme Court cases has taken the view that in a public forum viewpoint discrimination is absolutely prohibited, and that dicta may reflect majority doctrine on the Supreme Court today, that dicta does not accurately reflect the cases on which they rely.[265] However, this anomaly makes little difference in practice, since the Court has never found strict scrutiny satisfied in a public forum, viewpoint discrimination case. As the Court stated in a famous compelled speech case requiring school children to recite the Pledge of Allegiance in school, *West Virginia State Board of Education v. Barnette*:

> 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,

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dead bodies in a manner reasonably likely to be viewed by children attending church services constitutional under strict scrutiny).

262. 515 U.S. 819, 828 (1995).

263. 505 U.S. 377, 382 (1992).

264. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 112-13 (2001) (holding a compelling interest, such as avoiding an Establishment Clause violation, can justify content-based discrimination, and perhaps even viewpoint discrimination). *See also* Hill v. Colorado, 530 U.S. 703, 735-36 (2000) (Souter, J., joined by O'Connor, Ginsburg & Breyer, JJ., concurring) (applying strict scrutiny to both subject-matter and viewpoint discrimination); Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 800 (1996) (Kennedy, J., joined by Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("strict scrutiny is the baseline rule for reviewing any content-based discrimination against speech"); Boos v. Barry, 485 U.S. 312, 318-22 (1988) (applying strict scrutiny).

265. *See, e.g.*, Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018) (Roberts., C.J., for the Court) (finding an absolute prohibition) (citing Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009) (Alito, J., for the Court) (finding an absolute prohibition)) (citing Carey v. Brown, 447 U.S. 455, 463 (1980) (Brennan, J., for the Court) (holding strict scrutiny applied in the case, not an absolute prohibition)).

> nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[266]

The *Barnette* phrasing, however, which leaves open the possibility of a circumstance where a narrowly tailored statute could advance a compelling government interest, is probably more prudent. However, as long as the categorical prohibition is limited to public forum cases, it probably does little harm, as no such circumstances have occurred to courts since *Barnette* in 1943. On the other hand, if extended to nonpublic forum, government funding, school cases, or speech otherwise unprotected by the First Amendment (advocacy of illegal conduct, true threats, fighting words, obscene speech, indecency involving children), it might cause greater problems. As Justice Stevens acknowledged in *Morse v. Frederick*, "it might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting [of schools.]"[267]

The dangers of a categorical approach are apparent when comparing free speech doctrine with Establishment Clause doctrine. Under the Establishment Clause, if government action is found to violate whatever standard is used by the Justice to determine Establishment Clause violations, then it is categorically barred.[268] Justices from Justice Souter to Justice Scalia have noted this has distorted Establishment Clause analysis, with sometimes tortured reasoning to reach what the Justice views as the correct result.[269]

The metaphor of a marketplace of ideas, first popularized on the Court by

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266. 319 U.S. 624, 642 (1943).

267. 551 U.S. 393, 439 (Stevens, J., joined by Souter & Ginsburg, JJ., dissenting).

268. *See generally* KELSO & KELSO, THE FIRST AMENDMENT, *supra* note 255, § 12.1-12.2 (discussing the four different approaches to the Establishment Clause in recent cases: (1) the *Lemon* test, after *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); (2) the no endorsement/government neutrality test, used in *McCreary County, Kentucky v. ACLU of Kentucky*, 545 U.S. 844, 860-61 (2005); (3) coercion or proselytizing test, used in *Lee v. Weisman*, 505 U.S. 577, 587-90 (1992); and (4) the history and traditions test, used in *Marsh v. Chambers*, 463 U.S. 783, 786-92 (1983)).

269. McCreary Cty. v. ACLU of Ky., 545 U.S. 844, 859 (2005) (Souter, J., opinion) ("In special instances we have found good reason to hold governmental action legitimate even where its manifest purpose was presumably religious."); *see also* Marsh v. Chambers, 463 U.S. 783, 792-95 (1983) (upholding legislative prayer despite its religious nature); *id.* at 891-92 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting); Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 338 (1987) (discussing exemption from federal prohibition of religious discrimination by employers); Walz v. Tax Comm'n of N.Y.C., 397 U.S. 664, 673 (1970) (discussing property tax exemption for church property); Zorach v. Clauson, 343 U.S. 306, 308 (1952) (discussing law permitting students to leave public school to receive religious education). To promote principled decision making, it might be better if Establishment Clause doctrine were phrased, as in *Larson v. Valente*, 456 U.S. 228 (1982), as a strict scrutiny approach, and the evident religious benefit in the case was justified by a narrowly tailored compelling government interest. *See generally* KELSO & KELSO, THE FIRST AMENDMENT, *supra* note 255, § 32.1.4.

Justice Holmes, is strong within the context of free speech doctrine.[270] Viewpoint discrimination is always very suspect.[271] Perversions of the marketplace of ideas, however, represented by manipulation of modern social media raise questions about an ivory tower approach towards ideas. Although reasonable persons can debate whether, based upon the precise facts of that case, Justice Jackson was correct to dissent in *Terminiello v. City of Chicago*,[272] his general warning about categorical approaches to free speech doctrine is still a useful reminder today. In *Terminiello*, he wrote:

> But I would not be understood as suggesting that the United States can or should [suppress] free, open and public speaking on the part of any group or ideology. Suppression has never been a successful permanent policy; any surface serenity that it creates is a false security, while conspiratorial forces go underground. . . .
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> . . . .
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> But if we maintain a general policy of free speaking, we must recognize that its inevitable consequence will be sporadic local outbreaks of violence, for it is the nature of men to be intolerant of attacks upon institutions, personalities and ideas for which they really care. In the long run, maintenance of free speech will be more endangered if the population can have no protection from the abuses which lead to violence. . . .
>
> This Court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds and that all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.[273]

This reminder from Justice Jackson suggests that even where the speech might not rise to the level of advocating illegal conduct (violence) under the current

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270. *See* McCullen v. Coakley, 573 U.S. 464, 476 (2014) ("the First Amendment's purpose 'to preserve an uninhibited marketplace of ideas in which the truth will ultimately prevail'") (citing FCC v. League of Women Voters, 468 U.S. 364, 377 (1984)); *see also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting):

> [T]he ultimate good desired is better reached by free trade in ideas–that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

271. *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 829 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination.").

272. 337 U.S. 1, 35 (1949) (Jackson, J., joined by Burton, J., dissenting).

273. *Id.* at 35-37.

Brandenburg test,[274] or represent a true threat under *Virginia v. Black*,[275] or represent fighting words under *Chaplinsky*,[276] there may be compelling interests in some narrow set of cases where a viewpoint discrimination limitation might be appropriate and consistent with the Constitution's background set of moral principles.[277]

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274. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

275. *See* 538 U.S. 343, 359-60 (2003).

276. *See* Chaplinsky v. Ohio, 315 U.S. 568, 573-74 (1942).

277. To be faithful to the original intent of the Framers and ratifiers of the Constitution, one should follow their understanding of rights derived from an 18th century Enlightenment natural law tradition. *See* R. Randall Kelso, *Contra Scalia, Thomas, and Gorsuch: Originalists Should Adopt a Living Constitution*, 72 U. MIAMI L. REV. 112, 129-56 (2017). Under this tradition, morality is informed by both religious and secular philosophies emphasizing "love of neighbor as thyself"; "treat other as you would have them treat you"; and Adam Smith's "impartial spectator" taking others in account as well as oneself." *Id*. at 167-72 & n.226. Such a living Constitution adds additional weight to this background moral basis of the Constitution. *Id.* at 174. This includes, among other things, Ronald's Dworkin's modern phrasing of "equal concern and respect for others" as long as they are tolerant as well. *See* R. Randall Kelso, *Modern Moral Reasoning and Emerging Trends in Constitutional and Other Rights Decision-Making Around the World*, 29 QUINNIPIAC L. REV. 433, 434-40 (2011). What is not moral under this tradition is self-centered narcissism, which leads to intolerance, bigotry, and hate. *Id.* at 441-54.

A specific example of the problem with a categorical approach to viewpoint discrimination may be *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). In that case, the Court majority applied a strict scrutiny approach to uphold a section of the Patriot Act that banned giving "material support or resources to a foreign terrorist organization" in the form of "expert advice or assistance." *Id*. at 28-39. In that case, the majority acknowledged that the ban on "expert advice" was a form of "content-based" regulation of speech, *id*. at 28, but the majority's failure to consider whether it was viewpoint discrimination or subject-matter discrimination was irrelevant, since in a public forum traditional free speech doctrine triggers a strict scrutiny approach in either case. *See* Table 1, text *supra* following n. 98. To the extent one adopts the view that viewpoint discrimination is categorically banned, then if the regulation were viewed as an example of viewpoint discrimination the provision would be unconstitutional even if it could survive strict scrutiny. In the 2019 case of *Brunetti* on viewpoint discrimination, 139 S. Ct. 2294 (2019), *discussed supra* note 202, the majority indicated that it was viewpoint discrimination for the Patent Trademark Office to reject marks "reflecting support for al-Qaeda (BABY AL QAEDA)" while granting a mark stating "WAR ON TERROR MEMORIAL." *Id*. at 2300-01. By the same logic, it would seem regulating advocacy that provides "material support or resources to a foreign terrorist organization," but not advocacy providing "material support or resources to a humanitarian organization" would be viewpoint discrimination. At some point the Court will have to confront this tension between *Brunetti* and *Holder*, and either explain why *Holder* only involves subject-matter discrimination even given the language in *Brunetti*; or make clear that viewpoint discrimination does not involve a categorical ban but only a strict scrutiny approach, as was used in *Holder*; or overrule *Holder* as inconsistent with the modern categorical approach to viewpoint discrimination suggested in *Brunetti*; *Mansky*, *cited supra* note 265; and *Tam*, *discussed supra* text accompanying notes 192-

V. SPECIALIZED AREAS OF FREE SPEECH INVOLVING VIEWPOINT DISCRIMINATION ISSUES

A. Government Aid (Grants, Subsidies, Trademark Protection) as Nonpublic Forum

When making grants, subsidies, or other aid to individuals or groups to develop their own message, rather than requiring individuals be conduits for the government's message, the Court has held that viewpoint discrimination triggers strict scrutiny. As noted at Part III.B., in *Rosenberger v. Rector and Visitors of the University of Virginia*, the Court applied strict scrutiny "when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers."[278] On the other hand, when grants or subsidies to aid individuals in developing their own message involve subject-matter discrimination, or content-neutral regulations, the Court adopts a reasonableness analysis, as in *National Endowment for the Arts v. Finley*.[279] The Court said the regulation did not involve viewpoint discrimination, because "merely [taking] 'decency and respect' into consideration . . . undercut respondents' argument that the provision inevitably will be utilized as a tool for invidious viewpoint discrimination."[280] The Court concluded that decency and respect for diverse beliefs are permissible factors, citing, in passing, *Fraser*'s reasonableness balancing approach and its discussion of "vulgar and offensive terms in public discourse."[281]

This reasonableness standard tracks the Court's analysis in classic nonpublic forum cases, such as for prisons and military bases.[282] Each of these cases do not involve regulation of purely private activity either in a public forum or on individual private property. In each case, the government is involved with the activity, whether providing funding to run the prison or military base, or providing funding to individuals for their activities. In each case, some government imprimatur exists with the on-going activities, and the government has a concern with not being complicit in speech that the government views as undesirable.[283]

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278. 515 U.S. 819, 834 (1995) (discussed *supra* in the text accompanying notes 140-42).

279. 524 U.S. 569, 580-87 (1998), discussed *supra* in the text accompanying notes 160-66.

280. *Id.* at 582.

281. *Id.* at 583-86 (citing, *inter alia*, Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986), discussed *supra* in the text accompanying notes 168-71).

282. *See, e.g.*, Adderley v. Florida, 385 U.S. 39, 47-48 (1966) (holding it reasonable to prohibit demonstrators from prison property as part of even-handed enforcement of general trespass statute); *see also* Greer v. Spock, 424 U.S. 828, 838-40 (1976) (holding it reasonable to prohibit distribution of political campaign literature on military base as part of tradition of a politically neutral military establishment under civilian control).

283. This argument is the flip side of arguments made under the Free Exercise and RFRA

While it is standard and proper doctrine that mere offensiveness does not provide grounds to regulate private speech in a public forum or on private property,[284] it does seem appropriate for the government to be granted the same flexibility in government funding cases as in classic nonpublic forum cases of being able to pass regulations reasonably related to legitimate government interests, absent viewpoint discrimination.[285] Under such doctrine, as is standard under nonpublic forum analysis, the burden of proof should be placed on the challenger to have to prove the government action is unreasonable, rather than the government having to prove reasonableness in the first instance.[286]

Of course, in cases where the government attempts to regulate speech but not in the context of a government spending program, subsidy, or other economic benefit, then regular public forum standards should apply. A case in point is *Agency for International Develop. v. Alliance for Open Society International, Inc*.[287] In this case, the Court concluded that since a federal requirement that a group receiving federal funds in the fight against AIDS have a policy explicitly opposing prostitution was not related to the government program—which was about fighting HIV/AIDS—regular public forum doctrine applied.[288] By requiring the group to adopt a particular view on the topic of prostitution, the regulation constituted viewpoint discrimination.[289]

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cases involving health care where religious organizations do not want to be complicit in providing insurance they view as immoral. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 724 n.34 (2014) (quoting T. HIGGINS, MAN AS MAN: THE SCIENCE AND ART OF ETHICS 353, 355 (1949) ("The general principles governing cooperation" in wrongdoing—i.e., "physical activity" (or its omission) by which a person assists in the evil act of another who is the principal agent"—"present troublesome difficulties in application.")). The Court has said it is a substantial burden on religious rights to be forced to be complicit in providing such health care. *Burwell,* 573 U.S. at 722-727. Where the government is providing funding, or otherwise giving individuals' economic benefits, it is even a greater burden than the acquiescence in individual contraceptive use at issue in *Burwell*.

284. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 408-09 (1989) stating:

> Our precedents . . . recognize that a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.' *Terminiello v. Chicago*, 337 U.S. 1, 4 . . . (1949).

285. *See supra* text accompanying notes 88-99.

286. *See supra* text accompanying notes 92, 282.

287. 570 U.S. 205 (2013).

288. *Id.* at 217-20.

289. *Id.* at 220-21. Even if viewed as a public funding case, a 2-1 panel of the Second Circuit ruled that compelling speech is not permissible under *Rust*, because here the speaker had to take a position, not just remain silent. *See* All. for Open Soc'y Intern., Inc. v. U.S. Agency for Intern. Develop., 651 F.3d 218, 237-38 (2d Cir. 2011). Under Justices Scalia and Thomas' approach to government funding, viewpoint discrimination would have been permissible in this case, as in *Rust*. Their dissent concluded the restriction was part of the government program involving choosing suitable agents to eradicate HIV/AIDS; *Rust* should apply. *Agency for Int'l Dev.,* 570 U.S. at 221-

B. School Cases as Implicitly Using Public/Nonpublic Forum Analysis

Although the initial set of cases involving the government as educator did not use precise strict scrutiny, intermediate review, or reasonableness review terminology, the cases have all been decided consistent with standard free speech doctrine.

The foundational case in the modern era regarding the constitutional rights of students in school is *Tinker v. Des Moines Independent Community School District*, decided in 1969.[290] In that case, several students had been disciplined for wearing black armbands in violation of a school policy against wearing such bands. The Court said that wearing black bands in protest of the Vietnam war was symbolic speech, and since the speech did not involve school work, the school could not sanction the behavior unless it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others," i.e., whether school authorities could reasonably forecast "material and substantial interference with schoolwork or discipline."[291]

By requiring material or substantial disorder, the Court was requiring a substantial government interest to be involved, which tracks the level of scrutiny under intermediate review.[292] This is appropriate under public forum analysis for a content-neutral regulation concerned with disruption of on-going activities.[293]

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23 (Scalia, J., joined by Thomas, J., dissenting).

290. 393 U.S. 503 (1969).

291. *Id.* at 508-14. Applying its material disruption test, the Court noted that only a few of the 18,000 students in the school system wore armbands, and there was no indication that work of any class was substantially disrupted. Outside classes only a few students made hostile remarks to children who wore the armbands, and there was no evidence of any threats or acts of violence on school premises. *Id.* at 508.

292. *See supra* note 205 and accompanying text.

293. *See supra* text accompanying notes 86-87 & Table 1; *see also infra* text accompanying notes 298-301. Two Justices dissented in *Tinker*. Justice Black said the record showed that the armbands did divert students' minds from their regular lessons and diverted them to thoughts about the highly emotional subject of the Vietnam war. *Tinker,* 393 U.S. at 517-18 (Black, J., dissenting). Also, he seemed to view *Tinker* as applying its approach even to aspects of regulation in the classroom, and thus was concerned that the Court might apply the heightened *Tinker* standard, and not a reasonableness standard, to those kinds of regulations. In Justice Black's view, this case could subject all public schools to "the whims and caprices of their loudest-mouthed, but maybe not their brightest, students." *Id.* at 525. As noted in the cases discussed *infra* at the text accompanying notes 296-341, Justice Black's fears on this score have not materialized, and reasonableness review is applied to school regulations of matters in the curriculum and, typically, to matters of school dress codes or school uniforms to be worn in school classrooms. Justice Harlan, also dissenting, would have cast on the challengers the burden of showing that a particular school measure was motivated by other than legitimate school concerns, e.g., a desire to prohibit the expression of a particular point of view, while allowing a dominant view to be expressed, *i.e.*, viewpoint discrimination. *Id.* at 526 (Harlan, J., dissenting). This view is inconsistent with the general rule that for cases at

Some lower courts have viewed *Tinker* as only applicable to viewpoint discrimination,[294] or as a less vigorous form of the *Brandenburg* exception to free speech doctrine for advocacy of illegal conduct.[295] Those views are mistaken. The Court's holding in *Tinker* was not based on a finding of viewpoint discrimination because the Court made clear the same material or substantial interference test would apply to a regulation "forbidding discussion of the Vietnam conflict."[296] The *Brandenburg* exception for advocacy of illegal conduct, like the other exceptions for limited speech for true threats, fighting words, obscenity, and indecency involving children,[297] are exceptions because they involve very problematic speech deserving of limited free speech protection. The speech involved in *Tinker* is standard protest activity. The better view, therefore, is to use normal free speech analysis, and use the same intermediate review for student protests on public forum school property disrupting school activities as is used for too loud sound disrupting neighborhood privacy in *Ward v. Rock Against Racism*,[298] or protests outside a home affecting residential privacy in *Frisby v. Schultz*,[299] or protests outside a cemetery disrupting the proper ability to conduct a funeral in *Phelps-Roper v. Koster*.[300] Of course, if a school did engage in viewpoint discrimination in regulating student activity, then strict scrutiny should apply.[301]

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intermediate scrutiny the government bears the burden of defending its action, rather than the challenger bearing the burden of establishing that the action is unconstitutional. *See supra* note 205 and accompanying text.

294. *See, e.g.*, T.A. v. McSwain Union Elementary Sch., 2010 WL 2803658 (E.D. Cal. 2010).

295. *See, e.g.*, Joyner v. Whiting, 477 F.2d 456, 461 (4th Cir. 1973).

296. *Tinker*, 393 U.S. at 513. There was some evidence of viewpoint discrimination because the school did not ban a range of other "symbols of political or controversial significance." *Id.* at 510. But the opinion was not based on any finding of viewpoint discrimination. *Id.* at 510-14.

297. *See supra* notes 45, 46, and 112 and accompanying text.

298. 491 U.S. 781, 791-92 (1989).

299. 487 U.S. 474, 481-84 (1988).

300. 713 F.3d 942, 950-53 (8th Cir. 2013). Although in some older free speech cases the Court used the term "reasonable" to justify the regulation, in each of these cases it is better to note the government interest that made the regulation valid was substantial, and thus the regulation could be upheld under intermediate review applicable today. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 115-20 (1972) (holding interest in preventing disruption around schools justifies anti-noise ordinance during school hours); *see also* Cox v. Louisiana, 379 U.S. 559, 564 (1965) (banning demonstration near a courthouse valid as punishing "specific conduct that infringes a substantial state interest in protecting the judicial process").

301. *See generally* John E. Taylor, *Tinker and Viewpoint Discrimination*, 77 U.M.K.C. L. REV. 569 (2009). For a good discussion of the relationship between *Tinker* and viewpoint discrimination, and why *Tinker*-kind of regulation typically does not involve viewpoint discrimination, see *Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426, 442-44 (4th Cir. 2013) (involving ban on wearing clothing to school that, in pertinent part, would "distract others [or] interfere with the instructional programs, or otherwise cause disruption" as applied to a student wishing to wear t-

Where school cases involve activities focused more on curricular matters or school-sponsored events, they are properly viewed as nonpublic forum cases, because schools have not opened classrooms or school-sponsored events for generic free speech, but for speech related to the school-directed curriculum or school-directed events.[302] Thus, a reasonableness balancing approach is appropriate to apply.[303] The Court's opinions are consistent with this analysis.

For example, in 1986, in *Bethel School District No. 403 v. Fraser*,[304] the Court held that the First Amendment does not prohibit a school district from disciplining a high school student for a "lewd" speech at a high school assembly. Chief Justice Burger wrote that the freedom of students to advocate unpopular and controversial views must be balanced against society's interest in teaching students the boundaries of socially appropriate behavior and it was appropriate for the school to prohibit the use of vulgar terms in public discourse, particularly in an assembly where students as young as fourteen were in attendance.[305]

In *Hazelwood School District v. Kuhlmeier*,[306] Justice White said that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[307] Although not completely adopting public forum versus nonpublic forum analysis, Justice White did note that the student paper was not a public forum because it was developed within the school curriculum and the evidence did not show a clear intent to create a public forum.[308] The test for being within the curriculum was whether there was supervision by faculty members and whether the activity was designed to impart particular knowledge or skills to student participants and audiences.[309] Despite the fact that the school had reserved this forum for its purposes, and, consistent with this, all articles were submitted to the principal prior to publication, school officials were nonetheless entitled to regulate the contents in any reasonable manner.[310]

Applying that doctrine to the facts, the Court stated that educators are entitled to exercise control to assure that participants learn whatever lessons the activity is designed to teach, that the audience is not exposed to material inappropriate for

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shirt to school depicting the Confederate flag).

302. *See infra* notes 304-27 and accompanying text. Even in *Tinker*, the Court "emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control the conduct in the schools." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969).

303. Reasonableness balancing is the appropriate standard for regulation in nonpublic forums, as discussed *supra* notes 88-99 and accompanying text.

304. 478 U.S. 675, 677-78 (1986), discussed *supra* notes 168-71 and accompanying text.

305. *Id.* at 683-86.

306. 484 U.S. 260 (1988).

307. *Id.* at 273.

308. *Id.* at 269-70.

309. *Id.* at 270-71.

310. *Id.* at 269-70.

their level of maturity, and that the views of speakers are not erroneously attributed to the school.[311] The two main concerns in light of which the censorship was exercised were: (1) that the name of a pregnant student might be identifiable from the text, and (2) that references to sexual activity and birth control were inappropriate for some of the younger students in the school.[312] The principal believed that there was no time to make other changes. Thus, he eliminated the two pages on which the articles appeared, resulting in several other stories being excluded.[313] Justice White concluded that the principal had acted reasonably because of (1) respect for student anonymity, since there were so few pregnant students, and (2) the publication was distributed to fourteen-year-olds, and might be taken home to be read by even younger siblings.[314] Accordingly, the principal might reasonably have concluded that the students had not sufficiently mastered principles of journalism pertaining to the treatment of controversial issues, personal attacks, and the restrictions imposed on journalists within a school community, and, in view of time constraints, the principal acted reasonably in deleting the two pages.[315] In dissent, Justice Brennan characterized the subject-matter action of protecting students from sensitive topics as a mere pretext for viewpoint discrimination.[316]

Consistent with the analysis of *Fraser* and *Hazelwood*, in *Morse v. Frederick*,[317] the Supreme Court indicated reasonableness review would be applied to student speech made in the context of a "school-sanctioned and school-supervised" event—here, students being led out of the classroom to watch the Olympic Torch Relay pass by their school—even though the speech could not be said to bear the "imprimatur" of the school, as in *Hazelwood*, or was "vulgar," as in *Fraser*. In all three cases—*Morse*, *Hazelwood*, and *Fraser*—the speech occurred in a nonpublic forum—the school curriculum—and thus reasonableness review should be applied absent viewpoint discrimination. In *Morse*, the majority concluded that the school had a legitimate interest in regulating speech "at a school event, when that speech is reasonably viewed as promoting illegal drug

311. *Id.* at 271.

312. *Id.* at 274-75.

313. *Id.* at 275.

314. *Id.* at 275-76.

315. *Id.* at 276.

316. *Id.* at 286-88 (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting). Inconsistent with public forum versus nonpublic forum analysis, Justice Brennan also would have applied the standard of *Tinker* to the facts, rejecting any distinction between school-sponsored speech versus incidental student speech separate from the school's curriculum. *Id.* at 280-83. Regarding concerns about school sponsorship, a published disclaimer would have been sufficient. *Id.* at 288-89. In addition, even under a reasonableness review standard, Justice Brennan concluded that it was unreasonable simply to withdraw the pages rather than make deletions or additions, rearrange the layout, or delay publication. *Id.* at 290.

317. 551 U.S. 393, 396-400 (2007), discussed *supra* notes 172-77 and accompanying text.

use."[318]

In *Morse*, the speech that was reasonably viewed as promoting drug use was a student unfurling a banner which read "BONG HiTS 4 JESUS" while the Olympic Torch Relay runner passed the school.[319] As the dissent indicated, it is not clear that such a banner actually can be reasonably viewed as promoting drug use, and thus advances a content-neutral reason satisfying reasonableness review.[320] Absent such a content-neutral argument, regulating only speech in favor of drug use, but not speech against drug use, would be viewpoint discrimination, which even in a nonpublic forum should trigger strict scrutiny, as the dissent noted.[321] For this reason, a more prudent approach for the school would have been to restrict any banners at the event, or any banner on the subject-matter of drugs. On the other hand, since to satisfy reasonableness review the challenger has the burden to establish unreasonableness,[322] the precise question is whether the challenger can show it was unreasonable for the school to conclude such a banner would have a reasonable likelihood of promoting drug use. The majority did conclude in *Morse* that the "danger here" was not "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" but rather was "far more serious and palpable," particularly given policies "of Congress and myriad school boards, including [this school]," concerned with "prevent[ing] student drug abuse."[323]

A concurrence by Justices Kennedy and Alito, whose votes were critical to make up the *Morse* majority, indicated that where the speech is not so connected to the school curriculum and is student generated, even if in conflict with the educational mission of the school, the *Tinker* test would still apply.[324] This is also consistent with public forum/nonpublic forum analysis. Where the regulation involves an aspect of school life viewed as occurring in a nonpublic forum, such as government control over school sponsored events, reasonableness review should apply.[325] Where the regulation involves an aspect of school life on playgrounds or in a school lunchroom, which are viewed more as places designated for free speech, and thus public fora analysis applies, student generated comments should trigger—as Justices Kennedy and Alito indicated in *Morse*—the intermediate scrutiny of *Tinker* for content-neutral regulations

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318. *Id.* at 403.

319. *Id.* at 396-97.

320. *Id.* at 434-35 (Stevens, J., joined by Souter & Ginsburg, JJ., dissenting).

321. *Id.* at 435, 437-38.

322. *See supra* note 92 and accompanying text.

323. *Morse*, 551 U.S. at 408.

324. *Id.* at 422-23 (Alito, J., joined by Kennedy, J., concurring). For discussion of recent school cases struggling with whether to invoke *Tinker*'s intermediate standard of review, or the reasonableness balancing approach of *Fraser/Hazelwood/Morse*, and then how to apply each to various fact patterns involving regulations of the school curriculum or school-sponsored events, see KELSO & KELSO, THE FIRST AMENDMENT, *supra* note 255, § 3.4.4 nn.36-48.

325. *See supra* notes 88-99 and accompanying text.

concerned with disruption at school.[326] If the student speech occurs in a public forum and is regulated without regard to any content-neutral concern, but is content-based, then strict scrutiny should be triggered.[327]

It would be better if the Supreme Court would acknowledge that all these cases follow standard free speech public forum/nonpublic forum analysis. As in *Fraser*, *Hazelwood*, and *Morse*, aspects of the school curriculum or school-sponsored events should constitute nonpublic forums.[328] Public forum analysis should apply for student speech on school grounds if not connected to the school curriculum or at school-sponsored events, such as speech on playgrounds and cafeterias for elementary and secondary schools, or campus quads or student unions at college and universities.[329]

Such explicit acknowledgement would provide better guidance to lower courts that have sometimes made misguided choices in school cases. For example, the Ninth Circuit Court of Appeals held in *Chandler v. McMinnville School District*[330] that the goal of teaching students the boundaries of appropriate behavior applies throughout the school grounds to any "vulgar, lewd, obscene, or plainly offensive . . . speech," and thus *Fraser* applies to any such speech anywhere in the school. This is inconsistent with the doctrine as stated above.

With respect to non-vulgar speech, courts have struggled with the question of when speech is sufficiently connected with on-campus activities that it can be regulated under *Hazelwood* versus when the speech is sufficiently unconnected to the school that *Tinker* applies. The easy cases involve off-campus student speech later brought on-campus by persons other than the speaker. These cases have dealt with such things as underground student newspapers distributed off-campus, student-run websites created on off-campus computers, and various writings brought on-campus by students other than their original author. In these

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326. *Morse*, 551 U.S. at 422-25 (Alito, J., joined by Kennedy, J., concurring).

327. *See, e.g.,* Burnside v. Byars, 363 F.2d 744, 747-49 (5th Cir. 1966) (using compelling government interest analysis to uphold right of students to wear freedom buttons supporting civil rights where no content-neutral concern existed with disruption).

328. *See supra* notes 304-27 and accompanying text.

329. *See, e.g.*, Ctr. for Bio-Ethical Reform, Inc. v. Black, 234 F. Supp. 3d 423, 434-36 (W.D.N.Y. 2017) (holding complaint brought by students who allege their protest against abortion outside student union of their school was hampered when school officials allowed counter demonstrators to use signs, umbrellas, and bed sheets to block their photo-murals containing images equating abortion to genocide; court denied motion to dismiss noting student had some free speech rights whether grounds were a designated public forum or a limited nonpublic forum). For non-students, campus quads and student unions are typically viewed as nonpublic forums for those individuals, since the school has not opened up those facilities for general public use. *See, e.g.*, Gilles v. Garland, 281 F. App'x 501, 508-11 (6th Cir. 2008). *But see* Spartacus Youth League v. Bd. of Trs. of the Ill. Indus. Univ., 502 F. Supp. 2d 789, 798-99 (N.D. Ill. 1980) (given the facts in this case student union a public forum, even as to non-students).

330. 978 F.2d 524, 528-29 (9th Cir. 1992) (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988)).

cases, *Tinker* usually applies.[331]

In harder cases of on-campus speech by students, a number of courts have suggested, consistent with language in the Ninth Circuit's opinion in *Chandler*, that *Hazelwood* only applies to speech or speech-related activities that "students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[332] While this was true of the student newspaper in *Hazelwood*, the better reasoning is that the Court's opinion in *Hazelwood* focused on any activity "supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."[333] It is this context to which the nonpublic forum analysis of *Hazelwood* should apply.

Faced with a possible limitation on *Hazelwood* as in *Chandler*, some lower courts have suggested that for on-campus speech *Tinker* should be limited to political speech of the students, and that other forms of student speech should never be entitled to the *Tinker* intermediate standard of review, even if the speech is not being regulated under *Hazelwood* as school sponsored or school generated, or otherwise part of the school's curriculum or educational mission.[334] Although such an approach may reflect the Meiklejohn view that the First Amendment is principally about political speech,[335] it is inconsistent with modern doctrine where literary, artistic, political, or scientific speech are all entitled to the same level of First Amendment scrutiny, even in the school context.[336] The better approach would be faithful to *Hazelwood*, where reasonableness review applies to speech not merely school sponsored or school generated, and thus bearing the imprimatur of the school, but also to speech connected to the school's curriculum, while *Tinker* applies to student-generated speech, both speech that occurs off-campus but may have effects on campus, or even on-campus speech if in the public forum part of the school, like the playground or cafeteria or non-instructional aspect of home room.[337]

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331. *See, e.g.*, Porter v. Ascension Parish Sch. Bd., 393 F.2d 608, 619 (5th Cir. 2004).

332. *Hazelwood*, 484 U.S. at 271; *see also* Guiles *ex. rel.* Guiles v. Marineau, 461 F.3d 320, 325-26 (2d Cir. 2006) (citing Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992)).

333. *Hazelwood*, 484 U.S. at 271.

334. *See, e.g.*, Guiles *ex rel*. Lucas v. Marineau, 349 F. Supp. 2d 871, 879 (D. Vt. 2004); *see also* Pinard v. Clatskanie Sch. Dist., 319 F. Supp. 2d 1214, 1217-19 (D. Or. 2004).

335. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

336. *See, e.g.*, LaVine v. Blaine Sch. Dist., 257 F.3d 981, 988-90 (9th Cir. 2001); *see also supra* notes 43-44 and accompanying text (holding "literary, artistic, political, or scientific" speech protected).

337. *See, e.g.*, Taylor v. Roswell Indep. Sch. Dist., 713 F.3d 25 (10th Cir. 2013) (holding a New Mexico school district's decision to halt a group of religious students from distributing thousands of rubber fetus dolls at high schools constitutional under *Tinker* and not a violation of student's Free Exercise rights under the rational basis review standard of *Employment Division v. Smith*, 494 U.S. 872, 878-81 (1990)). *But see* K.A. *ex rel*. Ayers v. Pocono Mountain Sch. Dist., 710 F.3d 99 (3d Cir. 2013) (holding a Pennsylvania school district cannot ban a fifth grader from

This is consistent with most lower court decisions of these issues. For regulation of student behavior off-campus, but which can have impacts on-campus, courts tend to use the *Tinker* test under one of two theories: (1) a sufficient nexus exists so the student's off-campus speech is tied closely enough to the school or (2) it is reasonably foreseeable that off-campus speech would reach the school.[338] A number of lower courts have similarly applied *Tinker* to the issue of schools disciplining students for inappropriate material posted outside of school on the Internet, whether the postings involved statements made against the school administration or bullying of other students. In most cases the school prevailed, satisfying the *Tinker* standard of advancing substantial content-neutral concerns with teaching students appropriate communication, preventing vulgar speech, or dealing with bullying of other students.[339] For content-based regulations of student speech which go beyond content-neutral concerns about impacts in school, strict scrutiny applies.[340]

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handing out invitations to a church Christmas party because the distribution would not materially and substantially disrupt activities at the school; the school routinely allowed students to hand out invitations during non-instructional time.).

338. *See, e.g.*, C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1149 (9th Cir. 2016) (holding that under either approach the school can discipline student for close-to-the-school, but off-campus sexually harassing speech), citing Kowalski v. Berkeley Cty. Sch., 652 F.3d 565 (4th Cir. 2011) (nexus test); S.J.W. v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771 (8th Cir. 2012) (reasonably foreseeable test).

339. *See, e.g.*, Doninger v. Niehoff, 642 F.3d 334 (2d Cir. 2011) (holding school could properly discipline student who, after a concert at the high school was cancelled, posted on her blog a statement that the concert was cancelled "due to douchebags in central office" and "if you want to write something or call her to piss her off more"); *see also* J.S. *ex rel*. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (holding school could properly discipline student for creating fake internet profile of principal alleging he was a sex addict and pedophile); Layshock *ex rel*. Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (holding school could properly discipline student for creating fake internet profile of principal alleging drug and alcohol use and shoplifting); Kowalski v. Berkeley Cty. Sch., 652 F.3d 565 (4th Cir. 2011) (holding school could properly discipline student for creating a false internet page called "S.A.S.H."; noting student claimed the acronym was for "Students Against Sluts Herpes," but the school concluded, based on posts by other students in response, that it really stood for "Students Against Shay's Herpes," which referred to another student at the school, and was an example of internet bullying); Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015) (12-4 en banc) (holding school could discipline student for posting threatening rap lyrics against two male teachers accused of sexually harassing minor students under Tinker). *See generally* Morrow v. Balaski, 719 F.3d 160 (3d Cir. 2013) (holding that, absent creating or enhancing danger, schools have no constitutional duty under *Deshaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989), to protect bullied students from the bully, and could tell two bullied students they could not ensure their safety and they should find another school).

340. *See, e.g.*, State v. Bishop, 787 S.E.2d 814 (N. C. 2016) (evaluating law making it a crime to post on the Internet "private, personal, or sexual information pertaining to a minor" with the

Although the Supreme Court has not ruled on the issue, many lower courts have upheld various school dress codes or uniform policies at the elementary and secondary school levels as reasonable exercise of control over student appearance in the classroom as it is related to the school's educational mission.[341] This would appear to be a sound approach. In contrast, in *Canady v. Bossier Parish School Board*,[342] the Fifth Circuit upheld a school dress code by viewing the dress code as a content-neutral time, place, or manner restriction, but concluded that this form of intermediate scrutiny, which the court associated with the draft-card burning case of *O'Brien*, is less vigorous than the *Tinker* form of intermediate scrutiny. Such a view, creating different kinds of intermediate review is similar to Justice Souter's flawed analysis in *Alameda Books*, discussed earlier.[343] Also questionable is *Guiles v. Marineau*,[344] where a Second Circuit panel applied *Tinker* to hold that a seventh-grade student had a constitutional right to wear a T-shirt that depicted President Bush as a drug and alcohol abuser absent a showing of disruption or confrontation in the school.[345]

The better analysis would be to recognize that the same level of basic intermediate review is represented in content-neutral time, place, or manner regulations like *Ward v. Rock Against Racism*, the *O'Brien* test for content-neutral secondary effects cases, and *Tinker*.[346] However, without regard to this aspect of intermediate scrutiny, school uniform cases should be analyzed under the *Hazelwood/Fraser* line of reasonableness review cases, as involving regulation of student appearance as part of the nonpublic forum aspect of school control over the school's educational program and appearance in class, at least for elementary and secondary school cases.[347] Naturally, cases involving students over eighteen in the college or university setting raise different considerations regarding the school's educational mission, particularly for dress on campus

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intent to "intimidate or torment" overbroad; holding that law invalid under strict scrutiny).

341. *See generally* Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 664-75 (2002).

342. 240 F.3d 437, 442-44 (5th Cir. 2001).

343. *See supra* note 58 and accompanying text.

344. 461 F.3d 320, 330-31 (2d Cir. 2006).

345. *Id.*

346. On these various cases, *see supra* notes 51-65, 298-301 and accompanying text.

347. Even when analyzed under *Tinker*, as most courts do, schools tend to win these cases. *See, e.g.*, Dariano v. Morgan Hill Unified Sch. Dist., 745 F.3d 354 (9th Cir. 2014) (holding California high school may require students not to wear shirts showing the American Flag during school-sanctioned Cinco de Mayo celebration) (en banc) *rehearing denied*, 767 F.3d 764 (9th Cir. 2014); Hardwick *ex rel*. Hardwick v. Heyward, 711 F.3d 426, 438 (4th Cir. 2013) (holding South Carolina school district may prohibit students from wearing shirts displaying the Confederate Flag when wearing them would "materially and substantially disrupt the work and discipline of the school"). *But see* B.H. *ex rel*. Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 323 (3d Cir. 2013) (holding categorical ban on middle school students wearing bracelets saying "I [heart] boobies" as part of breast awareness campaign unconstitutional as not lewd under *Fraser* or disruptive under *Tinker*).

grounds outside the classroom, where an intermediate approach like that adopted in *Guiles v. Marineau* might well be appropriate.[348] Of course, if the school uniform policy does not merely involve generic design and colors, like plain-colored tops and bottoms, but requires a specific message, then it is a form of compelled speech triggering public forum standards.[349]

An additional issue regarding the First Amendment and schools is the recent practice at some colleges and universities to designate official free speech zones dedicated to the advocacy of ideas, but then to limit the making of speeches on other parts of the university campus. The university typically justifies such zones on content-neutral grounds, such as "regulating competing uses . . . in order to ensure that diverse viewpoints are heard" and "ensuring safety and order on campus."[350] Such free speech zones are typically viewed as content-neutral regulations in a public forum, triggering intermediate review, and requiring that the regulations ensure that meaningful communication with intended audiences can take place, as part of ensuring, under the last prong of *O'Brien*, that ample alternative channels of communication exist.[351]

Another issue regarding free speech and schools is a growing number of school districts that have expanded their curriculum to include service learning initiatives.[352] Also known as "mandatory community service programs," such service learning initiatives require that students devote a specified number of hours over their high school careers to preparing for placement at a community service organization, performing the various types of labor required at such organizations, and discussing and reflecting upon their experiences.[353] These

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348. *See supra* note 344. Of course, if the restriction involves viewpoint discrimination, it would trigger strict scrutiny in either a public or nonpublic forum. *See., e.g.*, Gerlich v. Leath, 2017 WL 2543363 (8th Cir. 2017) (evaluating Iowa State University's restrictions on student group selling t-shirts with marijuana logo on back viewpoint discrimination; holding the restriction invalid under strict scrutiny).

349. *See, e.g.*, Frudden v. Pilling, 742 F.3d 1199 (9th Cir. 2014) (holding school uniform policy mandating "Tomorrow's Leaders" be displayed on shirt, but making exemption for uniforms of nationally recognized youth organization such as Boy Scouts or Girl Scouts on regular meeting days, compelled speech and content-based triggering strict scrutiny).

350. Bloedorn v. Grube, 631 F.3d 1218, 1238 (11th Cir. 2011).

351. *Id.* at 1234. On issues surrounding campus "free speech zones," *see generally* Carol L. Zeiner, *Zoned Out! Examining Campus Speech Zones*, 66 LA. L. REV. 1 (2005). When speakers outside the university wish to speak on campus without administration or student-organization support, courts more typically apply nonpublic forum analysis on the ground that the university has not opened its facilities to the general public for such use. *See, e.g,* Keister v. Bell, 879 F.3d 1282, 1288-91 (11th Cir. 2018), *citing Bloedorn*, 631 F.3d at 1234-35 (applying nonpublic forum analysis to generic member of the public wishing to speak on Georgia State University campus).

352. ALEXANDER W. ASTIN ET AL., HIGHER EDUC. RES. INST., UCLA, HOW SERVICE LEARNING AFFECTS STUDENTS (2002), https://heri.ucla.edu/PDFs/HSLAS/HSLAS.PDF [https://perma.cc/632P-X53S].

353. *Id.*

programs are alleged to develop teamwork, communication, and problem-solving skills by placing the student in a real-world setting; instill a sense of civic obligation; advance an understanding of the student's links to his or her community; and generate lasting pro-social behavioral inclinations.[354] Either as an aspect of reasonableness review under *Hazelwood* as part of the school's curriculum, or even if viewed as regulating off-campus activities for the content-neutral reasons alleged to support such programs under *Tinker*, such service learning initiatives would appear to be constitutional under the First Amendment, although arguments have been made reaching the opposite conclusion.[355]

As discussed in Part V.A.,[356] areas of government funding should trigger nonpublic forum analysis, which applies reasonableness review unless viewpoint discrimination exists which triggers strict scrutiny. In *Christian Legal Society Chapter of the University of California, Hastings College of Law v. Martinez*,[357] the Court considered a state law school policy that student organizations must open membership to all students to obtain school recognition and financial assistance, as applied to Christian Legal Society (CLS) that wanted to exclude those engaging in "unrepentant homosexual conduct." Since under the stipulated facts the policy was applied equally to all student organizations, the Court held it was viewpoint neutral.[358] For this reason, reasonableness review applied and the Court held that the school's policy was reasonable for many reasons, including ensuring that leadership, educational, and social opportunities are available to all students; the open-to-all-policy brings together persons of different backgrounds encouraging toleration, cooperation, and learning among students; and ensuring no student is forced to fund a group that would reject that student as a member.[359] The dissent noted when the school originally refused to register CLS it did so on the basis that CLS discriminated on basis of religion and sexual orientation in their membership policy, and thus was viewpoint discriminatory.[360] In response, the majority noted that factual stipulations are "formal concessions . . .

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354. *Id.*

355. *See generally* Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 89 F.3d 174 (4th Cir. 1996) (upholding school district's mandatory community service program); James C. Farrell, *Johnny Can't Read or Write, But Just Watch Him Work: Assessing the Constitutionality of Mandatory High School Community Service Programs*, 71 ST. JOHN'S L. REV. 795 (1997) (noting such programs violate the First Amendment freedom of speech). *See also* Bradley H. Kreshek, *Comment, Students or Serfs? Is Mandatory Community Service a Violation of the Thirteenth Amendment?*, 30 LOY. L.A. L. REV. 809 (1997) (characterizing mandatory community service as a form of involuntary servitude).

356. *See supra* notes 278-89.

357. 561 U.S. 661, 672 (2010).

358. *Id.* at 694-96.

359. *Id.* at 683-90. The Court had already formally reached the conclusion that the program did trigger nonpublic forum analysis, as it "fit[] comfortably within the limited-public-forum category" as "effectively a state subsidy." *Id.* at 682.

360. *Id.* at 723-27 (Alito, J., joined by Roberts, C.J., and Scalia & Thomas, JJ., dissenting).

withdrawing a fact from issue."[361]

C. Commercial Speech Doctrine

Commercial speech relates to economic transactions, including promotional advertisements as well as offers.[362] Until 1975, commercial speech received no free speech protection. Thus, under Equal Protection and Due Process Clause analysis, only minimum rationality review was given to such economic regulation of advertisements, as in 1942 in *Valentine v. Chrestensen*.[363] Similar treatment was given to offers made by door-to-door magazine sellers, and a ban on ads for optical appliances.[364] The result was that barriers to commercial speech were easily erected.

In 1976, the Court granted commercial speech substantial, but not full, free speech protection, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.[365] The analytic approach to commercial speech adopted in *Virginia State Board* was summarized in 1980 by Justice Powell in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[366] In that case, he wrote:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquires yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[367]

Four aspects of the *Central Hudson* test are important. First, under this approach, minimum rational review would be given to regulations of advertisements that are unlawful, false, or misleading, since without any special First Amendment protection they would be viewed as standard economic regulations subject to minimum rationality review under the Equal Protection and Due Process Clauses.[368] Second, as phrased, the test for commercial speech is

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361. *Id.* at 677-78.

362. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561-64 (1980).

363. 316 U.S. 52, 54-55 (1942).

364. Breard v. City of Alexandria, 341 U.S. 622 (1951) (door-to-door sellers); Williamson v. Lee Optical, 348 U.S. 483 (1955) (optical appliances).

365. 425 U.S. 748, 758-70, 773 (1976). For fuller treatment of the Court's post-1976 approach to commercial speech, see KELSO & KELSO, THE FIRST AMENDMENT, *supra* note 255, § 9.2.

366. 447 U.S. 557 (1980).

367. *Id.* at 566.

368. *See, e.g.*, Alexander v. Cahill, 598 F.3d 79, 89-90 (2d Cir. 2010) (emphasizing that the

more stringent than regular intermediate scrutiny because the test requires that the regulation directly advance the government's interest (the strict scrutiny requirement of direct relationship), rather than merely substantially advance the government's interest (the normal intermediate review requirement). This increase in review is what makes the *Central Hudson* test an example of intermediate review with bite.[369] Third, commercial speech cases involve a less rigorous form of scrutiny than traditional free speech doctrine for content-based regulations of speech, which ordinarily trigger strict scrutiny. The Court made clear in *Board of Trustees of the State University of New York v. Fox*[370] that the final prong of the *Central Hudson* test does not involve the least restrictive alternative aspect of strict scrutiny, but only that "the regulation not 'burden substantially more speech than is necessary.'" This tracks an intermediate standard of review, just as the requirement of a substantial government interest in *Central Hudson*, and not a compelling interest, tracks intermediate review.[371] Fourth, for regulations of commercial speech doctrine there is not the same substantial overbreadth doctrine as exists under standard free speech review. As the Court noted in *Bates v. State Bar of Arizona*,[372] if a person has standing to challenge the application of a commercial speech regulation to himself or herself, that person can naturally also challenge the facial validity of the regulation insofar as it might apply to noncommercial speech in which that person is also engaged. But an individual cannot use the overbreadth doctrine to challenge overbreadth as to other individuals engaging in speech. The Court explained that because commercial speech is hardy, and since individuals have an economic incentive to engage in such speech, the overbreadth doctrine is not needed to ensure such speech is not chilled.[373]

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advertisements must actually be "false, deceptive, or misleading" to trigger no further free speech review; holding advertisements that are "only *potentially* misleading" still trigger *Central Hudson Gas* analysis).

369. On the *Central Hudson* test as reflecting a heightened kind of intermediate review, called in Table 2 at the end of this article as an "intermediate with bite" standard of scrutiny, *see generally* Kelso, *supra* note 90, at 234-35.

370. 492 U.S. 469, 477-78 (1989) (citing Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)). *See also* United States v. Edge Broad. Co., 509 U.S. 418, 426 (1983). Justice Thomas has indicated a desire to overrule the less-than-strict-scrutiny review of regulations of commercial speech. *See* Thompson v. W. States Med. Ctr., 535 U.S. 357, 377 (2002) (Thomas, J., concurring) (citing 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 523 (1996) (Thomas, J., concurring in part and concurring in the judgment) (noting *Central Hudson* test should not be used; noting strict scrutiny should apply)).

371. *See supra* notes 205-06 and accompanying text.

372. 433 U.S. 350, 380-81 (1977).

373. *Id.* at 380-81. The substantial overbreadth doctrine in free speech cases is discussed in Kelso, *supra* note 30, at 395-98. Other aspects of commercial speech doctrine, including the more relaxed application of commercial speech doctrine under *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328 (1986), and more vigorous use of the *Central Hudson* test since *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), is discussed in KELSO

In applying *Central Hudson*, care must be taken to distinguish commercial from non-commercial speech. For example, it was held in *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*[374] that a state may not bar a utility from including a politi *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York* cal message with its bills. Justice Powell distinguished *Central Hudson* because the speech here involved a political message, rather than commercial speech. Thus, under standard free speech doctrine, a restriction on the content of noncommercial speech, i.e., a content-based restriction, triggered strict scrutiny. In *Board of Trustees of the State University of New York v. Fox*,[375] the Court concluded that those aspects of university regulations that banned corporations from doing product demonstrations in campus dormitory rooms, such as tupperware parties, were targeting commercial speech. Both the majority and the dissent noted, however, that to the extent the regulation also prohibited a wide range of fully protected speech, e.g., speech in a dormitory room, such as consultation with a lawyer or doctor, even though it was speech for which the speaker received a profit, standard First Amendment doctrine would apply to that part of the regulation. The majority remanded the case for determination of whether the statute could be held constitutional as applied to non-commercial speech, while the dissent concluded that the statute was unconstitutional on that ground.

In 1985, the Court decided in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*,[376] that where the government could show the "possibility of consumer confusion or deception," even though the commercial speech could not be proven to be unlawful, false, or misleading, then the government could require uncontroversial, factual disclosures as long as they were "reasonably related to the state's interest in preventing deception of consumers" because "disclosure requirements trench much more narrowly on an advertiser's interest than do flat prohibitions on speech." As phrased in *Zauderer*, this was an example of a standard nonpublic forum 2nd-order reasonableness balancing test, as the Court phrased the issue as whether the challenger could show the government regulation was unreasonable.[377]

In contrast, in *National Institute of Family and Life Advocates (NIFLA) v. Becerra*,[378] the Court placed the burden on the government not only to show the possibility of consumer confusion to trigger the *Zauderer* test, which is

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& KELSO, THE FIRST AMENDMENT, *supra* note 255, §§ 9.2-9.4.

374. 447 U.S. 530, 537-40 (1980).

375. 492 U.S. 469, 482-86 (1989); *id*. at 487-88 (Blackmun, J., joined by Brennan & Marshall, JJ., dissenting).

376. 471 U.S. 626, 651 (1985).

377. *Id*. at 651 n.15.

378. 138 S. Ct. 2361, 2377-78 (2018) (California law requiring unlicensed "pregnancy-related clinics" to post notices they are not state-licensed, at clinics and on ads, including billboards, in English, Spanish, or any other language spoken by a named percentage of residents in the county (for Los Angeles County, 13 languages), unreasonably overbroad).

appropriate, as discussed in Part I.E.2.,[379] but also to prove the disclosure requirement was "reasonable." Some other lower courts had similarly so ruled.[380] The Court did not acknowledge in *NIFLA* this shift in burden from *Zauderer*, and cited *Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy*, which cited *Edenfield v. Fane*, to support placing the burden on the government, despite both *Ibanez* and *Edenfield* being cases of regular *Central Hudson Gas* review where the burden is properly on the government, as is usual under intermediate review.[381] Despite being a departure from pre-existing doctrine, and not following the usual approach under reasonableness review where, as part of some deference to government, the challenger must prove the regulation is unreasonable;[382] this *NIFLA* reasonableness balancing test—with the burden on the government to prove reasonableness—may well reflect the Court's current view. This level of review can be called 3rd-order reasonableness review, since review is slightly more rigorous than 2nd-order reasonableness given the shift in burden to the government and is consistent with the Court's increased commercial speech scrutiny.[383]

On when to apply *Zauderer/NIFLA*, there is an issue whether it applies only to required disclosures to prevent consumer fraud, the precise facts in *Zauderer,* or any required disclosure for any legitimate governmental reason.[384] The Court

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379. *See supra* note 112. *But see* POM Wonderful v. FTC, 777 F.3d 478 (D.C. Cir. 2015) (adopting deferential "substantial evidence" standard, not de novo review, to review FTC's finding statements are "deceptive and misleading").

380. *See* CTIA-The Wireless Ass'n v. City of Berkeley, 854 F.3d 1105, 1117-19 (9th Cir. 2017) (also placing burden on the government).

381. *Becerra*, 138 S. Ct. at 2377, citing *Ibanez*, 512 U.S. 136, 142-46 (1994) (applying standard *Central Hudson Gas* analysis), citing Edenfield v. Fane, 507 U.S. 761, 767-70 (1993) (applying standard *Central Hudson Gas* analysis).

382. *See supra* notes 92-95.

383. For discussion of that increased scrutiny, see KELSO & KELSO, THE FIRST AMENDMENT, *supra* note 255, § 9.4. For discussion of 3rd-order reasonableness as a slightly higher level of review than 2nd-order reasonableness, see generally KELSO &. KELSO, THE PATH OF CONSTITUTIONAL LAW, *supra* note 58, § 7.2.1. A similar case of a court increasing scrutiny from 2nd-order reasonableness balancing to 3rd-order reasonableness balancing occurred in *NAACP v. City of Philadelphia*, 834 F.3d 435, 441-42 (3d Cir. 2016) (access to advertising space at Philadelphia International Airport examined under nonpublic forum analysis, as the city had not opened up advertising for all kind of messages; in applying its analysis, the Third Circuit departed from normal nonpublic forum analysis and placed the burden on the city to show reasonableness).

384. *See* R.J. Reynolds Tobacco v. FDA, 696 F.3d 1205, 1213-15 (D.C. Cir. 2012) (only required disclosure to prevent consumer deception triggers *Zauderer*), overruled by, Ame. Meat Inst. v. U.S. Dept. of Agric., 760 F.3d 18 (D.C. Cir. 2104) (required disclosure of purely factual information, such as to prevent consumer deception, triggers *Zauderer*); CTIA-The Wireless Ass'n v. Berkeley, Cal., 854 F.3d 1105, 1116-17 (9th Cir. 2017) (joining First, Second, Sixth Circuits in holding that *Zauderer* applies to any factual disclosure requirement, including information or health, safety, and welfare concerns, and is not limited to preventing consumer deception).

did not address this issue directly in *NIFLA*, but did phrase the *Zauderer* test in terms of any "factual, noncontroversial information."[385]

As a final matter, the *Central Hudson Gas* test should be restricted to subject-matter regulations of commercial speech, the typical kind of commercial speech regulation. Content-neutral restrictions of commercial speech, like content-neutral regulations of fully protected speech, should still be tested under intermediate review.[386] Viewpoint discrimination in commercial speech cases should trigger strict scrutiny, as for public forum, nonpublic forum, or speech with limited free speech protection.[387]

D. Government Workers Doctrine

A final area where tension exists between standard viewpoint discrimination doctrine and free speech rights concerns the free speech rights government employees at work. To handle these cases, the Court has developed the *Pickering* balancing test, based on the foundational case of *Pickering v. Board of Education of Will County, Illinois*.[388] As developed in cases after *Pickering*, to establish a claim of unlawful First Amendment retaliation a public employee must show that he or she suffered an adverse employment action that was causally connected to participation in a protected activity, i.e., speaking out on an issue of public concern.[389] Once the employee satisfies this initial burden, the burden shifts to the

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385. Zauderer v. v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 138 S. Ct. 2361, 2372 (2018).

386. This follows since commercial speech gets less protection than traditional free speech, not more. For discussion of intermediate review for content-neutral regulations of speech (time, place, or manner or secondary effects), see *supra* text accompanying notes 86-87.

387. *See, e.g.,* Matal v. Tam, 137 S. Ct. 1744, 1767 (2017) (Kennedy, J., joined by Ginsburg, Sotomayor & Kagan, JJ.).

388. 391 U.S. 563, 568-75 (1968).

389. *See, e.g.*, Duffy v. McPhillips, 276 F.3d 988, 991 (8th Cir. 2002). Note that *Pickering* only applies if the speech is as a citizen on a matter of public concern. If the government worker is speaking as an employee under *Garcetti v. Ceballos*, 547 U.S. 410, 417-25 (2006), or otherwise is not speaking on a matter of public concern, such as office management or morale, there is no further free speech review.

For cases finding the speech was as a citizen on a matter of public concern, see, e.g., *Howell v. Town of Ball*, 827 F.3d 515 (5th Cir. 2016) (officer's speech while assisting FBI in fraud allegation against his department not within scope of his duties and on a matter of public concern); *Lane v. Franks*, 573 U.S. 228 (2014) (director's testimony at former program employee's corruption trial on a matter of public concern, although information learned in the course of employment); *Matthews v. City of New York*, 779 F.3 167 (2d Cir. 2015) (police officer compliant about arrest quota policy a matter of public concern); *Garcia v. Hartford Police Department,* 706 F.3d 120 (2d Cir. 2013) (police sergeant speaking on matter of public concern when he complained of other officers' bias against Hispanics); *Jackler v. Byrne*, 658 F.3d 225 (2d Cir. 2011) (probationary police officer's refusal to follow the alleged orders of his supervisors to withdraw his

government employer to show a legitimate nondiscriminatory reason for the action, e.g., that the interest of the government in the efficient delivery of its services outweighs the interest of the employee in speaking out, or that the adverse action would have been taken even without the employee's speech having been made. If the government meets this burden, the burden shifts back to the employee to show that the employer's actions were in fact a pretext for illegal retaliation.[390]

Because the government has the primary burden under this approach to justify any employment action taken pursuant to employee speech on a matter of public concern, this test is another example of a 3rd-order reasonableness balancing test.[391] Unlike the situation in *Zauderer*, however, viewpoint discrimination in this context will not trigger a strict scrutiny approach. It is often precisely the individual's view on a topic that raise the government's concern that the speech is interfering with the government's efficient delivery of its services.[392]

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report confirming that another officer used excessive force was on a matter of public concern); *Westmoreland v. Sutherland*, 662 F.3d 714 (6th Cir. 2011) (city firefighter and former dive rescue team leader was speaking on a matter of public concern when he said a drowned 7-year-old boy could have been saved if the city had not disbanded the dive team for budgetary reasons).

For cases not applying the *Pickering* balancing test, see *Kennedy v. Bremerton School District*, 869 F.3d 813 (9th Cir. 2017) (holding a high school coach who prayed at midfield following football game could be fired as his speech was in the course of employment as defined in *Garcetti*). *See also* Nubiak v. City of Chicago, 810 F.3d 476 (7th Cir. 2016) (holding a female officer complaint about sexual harassment against her at work employee related under *Garcetti*); Quint v. Univ. of Or., 2013 WL 363782 (D. Oregon 2013) (holding an instructor who asked students if they wanted him to shoot them for violating no-talking rule did not show speech related to matter of public concern about tolerance of other's rules); Lincoln v. Maketa, 880 F.3d 533 (10th Cir. 2018) (holding qualified immunity applied since not clearly established that speech was as a citizen on a matter of public concern, and not work-related, when lieutenant did not follow Sheriff's orders to give a false account to the media stating that an Internal Affairs document had been stolen by political opponents); Crouse v. Town of Moncks Corner, 848 F.3d 576 (4th Cir. 2017) (holding qualified immunity applied since not clearly established that speech was on a matter of public concern, and not work-related, when officers encouraged a citizen to file a complaint of excessive force against their lieutenant). *Cf.* Montero v. City of Yonkers, 890 F.3d 386 (2d Cir. 2018) (asking whether union official who criticizes employer is acting within the scope of employment should be considered case-by-case, rejecting the Sixth, Seventh, and Ninth Circuits which held union official always speaks as a private citizen, and never as an employee under *Garcetti*).

390. *Duffy*, 276 F.3d 988 at 991. For in-depth discussion of the *Pickering* balancing test, see KELSO & KELSO, THE FIRST AMENDMENT, *supra* note 255, § 8.3.

391. *See generally* KELSO &. KELSO, THE PATH OF CONSTITUTIONAL LAW, *supra* note 58, § 7.2.1 (discussing 3rd-order reasonableness balancing as a slightly higher level of review than 2nd-order reasonableness balancing). *See also supra* note 383.

392. *See, e.g.*, Rankin v. McPherson, 483 U.S. 378, 379-92 (1987) (5-4 opinion concluding that under *Pickering* balancing a deputy constable was not properly discharged even though she remarked, after hearing of the attempted assassination of President Reagan, "If they go for him again, I hope they get him."; there was no evidence any members of the public heard the remark,

As noted earlier, the government cannot avoid a finding of viewpoint discrimination, and claim a content-neutral reason, such as with efficiency, if it is precisely the content of the speech that raises the efficiency concern.[393] Thus, in these cases, the burden on the speaker from this viewpoint discrimination is weighed against the government's interests to determine if the speech is protected or not. In some of these cases, the government cannot meet their burden and the individual wins.[394] In other cases, the government's interests prevail and outweigh the individual's interest in free speech.[395]

This treatment of viewpoint discrimination is peculiar to *Pickering* balancing cases. That *Pickering* test also applies to regulations of government workers in political campaigns.[396] For cases involving limiting patronage practices in employment decisions, based on interfering with government workers' First Amendment freedom of association, ordinary First Amendment doctrine applies, with discrimination based on the individual's viewpoint on which, if any, political party to affiliate triggering strict scrutiny review.[397]

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and no evidence of interference in disrupting the work or mission of the office).

393. *See supra* notes 190-91.

394. *See, e.g.,* Moonin v. Tice, 868 F.3d 853 (9th Cir. 2017) (policy against officers discussing canine program with "anyone" outside the department unreasonably overbroad); Liverman v. City of Petersburg, 844 F.3d 400 (4th Cir. 2016) (department policy that prohibits essentially all speech critical of the department overbroad under *Pickering*).

395. *See, e.g.,* Graziosi v. City of Greenville, 775 F.3d 731 (5th Cir. 2015) (police officer's interest in posting on mayor's public Facebook page comments critical of police chief for not allowing police officers to use police cars to attend slain police officer's funeral outweighed by city's interest in good working relationships, justifying firing); Lalowski v. City of Des Plaines, 789 F.3d 784 (7th Cir. 2015) (police officer's off-duty verbal altercation with anti-abortion protestor, as well as history of using profane language against citizens, justified firing); Rock v. Levinski, 791 F.3d 1215 (10th Cir. 2015) (school district interest in good working relationships justified firing principal who spoke at public meeting in opposition to plan to close her school); Grutzmacher v. Howard Cty., 851 F.3d 332 (4th Cir. 2017) (workplace disruption caused by inflammatory Facebook posts, such as suggesting "beating a liberal to death with another liberal" to get liberals outlawed like guns, justified firing of fire department battalion chief). *Cf.* Oyama v. Univ. of Haw., 813 F.3d 850 (9th Cir. 2015) (student teacher candidate who was denied application to become a student teacher in part because of his views that online child predation should be legal, and real life child predation should be legal after puberty begins, involves aspects of *Tinker*, *Pickering*, and professional "certification"; court adopts hybrid test of whether government action was "related directly to defined and established professional standards, was narrowly tailored to serve the [school's] mission of evaluating [candidate's] suitability for teaching, and reflected reasonable professional judgment").

396. *See* U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 564-67 (1973).

397. *See* Rutan v. Republican Party of Ill., 497 U.S. 62, 68-71 (1990).

VI. CONCLUSION

Whether some government action involves viewpoint discrimination is a critically important issue in First Amendment free speech doctrine. The Supreme Court has not done as good a job as it could in clarifying when government action involves viewpoint discrimination or instead involves content-based, subject-matter regulation. Nor has the Court done as good a job as it could in providing an overview of free speech doctrine in terms of the various standards of scrutiny when viewpoint discrimination either is or is not occurring. This article has attempted to fill in some of these missing pieces. The overall doctrine for First Amendment issues, as reflected in this Article, appears in Table 2 below.

Table 2: First Amendment Doctrine*

Level of Scrutiny	Gov't Ends or Interests to be Advanced	Statutory Means to Ends: Relationship To Benefits	Statutory Means to Ends: Relationship to Burdens	Typical Areas Where Used
I. "Base" Minimum Rational Review (Three Requirements are Separate Elements to Meet)				
Minimum Rational Review": Burden on challenger to prove unconstitutionality	Legitimate (substantial deference to government)	Rational (substantial deference to government)	Not Irrational (substantial deference to government)	If No Free Speech Review,** then only *Williamson v. Lee Optical* review under Due Process Clause or *Heller v. Doe* review under the Equal Protection Clause
	[Does government have "rational basis" to act]			
II. The "Plus Six" Standards of Increased Scrutiny				
A. Heightened Rational Review (Reasonableness Balancing of Means & Ends, Not Separate Elements)				
"Second-Order Reasonableness Review": Burden on challenger to prove unconstitutionality	Legitimate Ends "Reasonableness" Given Means (no substantial deference to government)	(no substantial deference to government)	(no substantial deference to government)	Non-Public Forum: Subject-Matter or Content-Neutral Regulations of Speech Gov't Grants, Subsidies, or Trademark Defamation and other Related Torts*** Less than Substantial Burdens on Freedom of Assembly/Association*** Commercial Speech: *Zauderer*
	[Balance government interests & availability of less burdensome alternatives v. burdens on persons] [some deference to government, *see supra* notes 91-93 herein this article]			

* This Table 2 is based on a similar Table 2 in Kelso, *supra* note 30, at 405.

** As discussed in this article, the categories of "No Free Speech Review" include regulation of conduct only, not speech (*Dallas v. Stanglin*); government funding own speech (*Summum or Johanns*) or enlisting private parties to convey government message (*Rust v. Sullivan*); false or misleading commercial speech, as stated in *Central Hudson Gas*; or non-viewpoint discrimination involving advocacy of illegal conduct (*Brandenburg*), true threats (*Virginia v. Black*), fighting words (*Chaplinsky*), obscenity (*Miller*), or use of a child in production of indecent images (*Ferber*).

*** This placement of Defamation and Other Related Torts is addressed at C. KELSO & R. KELSO, *supra* note 255, §§ 8.1-8.2. This placement of Less Than Substantial Burdens on Freedom of Assembly/Association is addressed at *id.* §§ 11.1-11.2.

Level of Scrutiny	Gov't Ends or Interests to be Advanced	Statutory Means to Ends Relationship To Benefits	Statutory Means to Ends Relationship to Burdens	Typical Areas Where Used
B. Intermediate Review Standards (Three Requirements are Separate Elements to Meet)				
Intermediate Review	Substantial/ Important/ Significant	Substantially Related	Not Substantially More Burdensome Than Necessary	Public Forum: Content-Neutral Regulations of Speech: *O'Brien* Content-Based Regulations of Broadcast TV and Radio: *Red Lion v. FCC* (2003)*** Campaign Finance: Contributions: *McConnell* v. *FEC* (2003)*** Campaign Finance: Disclosure Regs.: *John Doe No. 1 v. Reed****
Intermediate Review with Bite	Substantial/ Important/ Significant	Directly Related	Not Substantially More Burdensome Than Necessary	Commercial Speech: *Central Hudson Gas*
C Strict Scrutiny Standards (Three Requirements are Separate Elements to Meet)				
Loose Strict Scrutiny	Compelling/ Overriding	Directly Related	Not Substantial More Burdensome Than Necessary	Content-Based Regulations of Cable/Satellite TV and Radio: *Denver Area Educ. Telecomm.**** (Breyer, J., plurality opinion) Campaign Finance: Contributions: *Shrink Missouri* (2000)***
Strict Scrutiny	Compelling/ Overriding	Directly Related	Least Restrictive. Effective Alternative	Public Forum: Content-Based Regulations of Speech All Viewpoint Discrimination Campaign Finance: Expenditures: *Citizens United* (2010) *** Substantial Burdens on Freedom of Assembly/ Association***
Free Exercise: Strict Scrutiny for discrimination against religion; for hybrid cases involving Free Exercise and other fundamental rights; or the precise facts concerning unemployment in *Sherbert v. Verner*, as held in *Employment Division v. Smith*.*** Otherwise, minimum rationality review (or no further Free Exercise review, but minimum rationality review under Due Process and Equal Protection, which amounts to much the same thing).				

III. Categorical Barrier to Constitutionality: Establishment Clause Doctrine***

*** This placement of *Red Lion v. FCC* is addressed at KELSO & KELSO, THE FIRST AMENDMENT, *supra* note 255, § 9.1. The placements of *Mc*Connell *v. FCC*, *John Doe No. 1 v. Reed*, *Shrink Missouri*, and *Citizens United* is addressed at *id*. § 10.3. The placement of *Denver Area Educ. Telecomm.* is addressed at *id.* § 10.1. The placement of *Sherbert v. Verner* and *Employment Division v. Smith* is addressed at *id.* §§ 14.2-14.3. The placement of Establishment Clause Doctrine is addressed at *id.* §§ 12.1-12.2.