Content-Based, Secondary Effects, and Expressive Conduct: What in the World Do They Mean (and What Do They Mean to the United States Supreme Court)?

Ofer Raban *

INTRODUCTION

Much has been written about the proper form of constitutional doctrines. The issue achieved prominence with the famous categorizers/balancers debate,[1] and has only gained in significance since. Kathleen M. Sullivan, in a recent article, suggests that one meaningful way to understand the divisions among United States Supreme Court Justices is not through the liberal/conservative dichotomy, but rather through the rules/standards debate, a debate concerning the form of doctrinal articulations.[2] Simply put, both the categorizers/balancers and the rules/standards debates pit the proponents of bright-line constitutional doctrines against those advocating flexible and malleable constitutional standards.

This Article is an examination of three constitutional doctrines from the perspective of the bright-line/flexible-standard opposition. The Article takes a strong stance against the conversion of the bright-line content-based/content-neutral First Amendment doctrine into a more flexible standard. This position is in no way an ideological one; it is not a position that embraces bright-line rules or flexible standards as "always the right choice." Instead, the position is based solely on considerations relating to the correctness of judicial

* B.A., City College of New York, 1994; J.D., Harvard Law School, 1999. Mr. Raban is currently pursuing a doctorate in legal philosophy at Oxford University.

[1] The "categorizers" and "balancers" debated whether First Amendment jurisprudence should employ rigid categories or flexible balancing tests. The former opposed balancing as unprincipled and discretionary, while the latter saw in First Amendment adjudication a necessary balancing among competing values. *See generally* Wallace Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr. Franz*, 17 VAND. L. REV. 479 (1964).

[2] *See* Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 69 (1992).

reasoning. It derives its criticism solely from habitual inconsistencies plaguing the Supreme Court's elaboration of the analyzed doctrines. The analysis reveals that, in the examined instances, judicial reasoning purporting to justify a move from a bright-line rule into a flexible standard is deeply flawed. Hence, the call for the preservation of the bright-line is less a call for judicial formalism than a belief that the move to a flexible standard is unjustified.

This analysis and criticism employs purpose-oriented interpretation — an interpretation directed and constrained by the purpose behind a directive's words. For example, whether a golf cart is to be allowed in the park is determined by considering the purpose behind the directive "no vehicles in the park." The directives highlighted in this Article are not statutes, but constitutional doctrines. Analysis of these doctrines is therefore based on an interpretation of the purposes behind them. Consequently, the "purposes" guiding this interpretation derive not from an independent legislature, but from the very institution whose interpretation is criticized in this Article, the United States Supreme Court. It follows that the criticism must be based on the charge of inconsistency on the part of the Court.

The Article provides an examination of three principal doctrines in First Amendment jurisprudence: the content-based doctrine, the doctrine of secondary effects, and the doctrine of expressive conduct. The three doctrines are related. The content-based doctrine requires courts to apply strict constitutional scrutiny to speech regulations enacted by the government that are based on the content of the speech. For example, a law regulating "communist" publications must be examined with strict scrutiny. The secondary effects doctrine exempts from strict scrutiny government regulations of speech that are indeed based on the speech's content, but are not aimed at suppressing speech. For example, a law regulating "pornographic" movie theaters in an attempt to eliminate adjacent prostitution would not be subject to strict scrutiny. Finally, the expressive-conduct doctrine creates a constitutional test for regulations of conduct that burden speech, but are not aimed at suppressing speech. For example, the expressive-conduct doctrine would apply to the prohibition of overnight stays in municipal parks when the prohibition is applied to demonstrators seeking to present the plight of the homeless through an overnight vigil in the Mall at Washington, D.C.

The secondary-effects and the expressive-conduct doctrines are conceptually equivalent, the former operating in the realm of

"speech," the latter in the realm of "conduct." Both define the appropriate constitutional tests for government regulations that burden speech, but are not *aimed* at burdening it.

This Article advances two principal arguments. First, the doctrine of secondary effects obliterates the content-based doctrine, the doctrine to which the doctrine of secondary effects was meant to be a mere exception. Second, the doctrine of expressive conduct has been misinterpreted by the Supreme Court.

I. CONTENT-BASED: DEFINITION

The content-based/content-neutral distinction emerged in its clearest form during the eras of the Vietnam War and the civil rights movement. This distinction came as a judicial response to the growing social pressures of these eras and the mounting legislative efforts to stem them. The basic idea underlying the distinction was expressed in one of the earlier and oft-quoted formulations of the content-based/content-neutral doctrine, *Police Department of Chicago v. Mosley*.[3] In *Mosley*, the Court stated that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[4]

The content-based/content-neutral distinction gave rise to different constitutional standards of review for regulations that fell within the two categories. In principle, content-based regulations receive more rigorous constitutional scrutiny than do content-neutral regulations. The determination of what constitutes a content-based regulation is, therefore, of considerable importance. Among those laws determined to be content-based are a law requiring the surrender of royalties due a criminal for a work describing the crime,[5] a law forbidding the posting of real estate "For Sale" signs,[6] and a law prohibiting corporate political expenditures on issues not directly related to the corporation.[7] Laws recognized as content-neutral include an ordinance forbidding the distribution and sale of literature from unlicensed booths at a state fair,[8] an ordinance prohibiting all

---

[3] 408 U.S. 92 (1972).

[4] *Id.* at 95.

[5] *See* Simon & Schuster v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991).

[6] *See* Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 96 (1977).

[7] *See* First Nat'l Bank of Boston v. Belotti, 435 U.S. 765, 784-85 (1978).

[8] *See* Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 648-49 (1981).

unauthorized posting of signs on public property,[9] and a New York City ordinance requiring the use of city-provided sound systems and technicians for performances in Central Park.[10]

What distinguishes content-based laws from content-neutral laws is not entirely clear. The Supreme Court has not articulated a definition for the distinction, though various commentators have attempted to formulate one. Professor Laurence Tribe describes the distinction as one hinging on whether the regulation is "aim[ed] at ideas or information," or, stated differently, whether the regulation is "aimed at communicative impact."[11] A content-based regulation is aimed at the "communicative impact" of speech, while a content-neutral regulation is aimed at the "noncommunicative" impact. What exactly "aimed at" refers to is, however, unclear. In determining whether a regulation is content-based or content-neutral, the Supreme Court consistently has refused to investigate the legislature's purpose in enacting it.[12] In any case, as shall be addressed in greater detail, all laws regulating speech may purport to be "aimed," ultimately, at noncommunicative impact.[13]

Professor John Hart Ely, discussing a Supreme Court opinion categorizing a regulation as content-based, states: "[T]he critical point in *Cohen* . . . is that the dangers on which the state relied were dangers that flowed entirely from the communicative content of Cohen's behavior. Had his audience been unable to read English,

---

[9] *See* Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984).

[10] *See* Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989).

[11] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 789, 790 (2d ed. 1988).

[12] *See* United States v. O'Brien, 391 U.S. 367, 382-83 (1968) (refusing to inquire into legislative motive for law banning the destruction of army draft card). In refusing to speculate as to why Congress enacted the statute, the Court stated:

> What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

Id. at 384; *see also* Renton v. Playtime Theaters, Inc., 475 U.S. 41, 47 (1986) (declining to refer to a powerful showing by the dissent indicating that a zoning ordinance was, at least in part, motivated by a desire to restrict pornography).

[13] For a more detailed criticism of this definition, see Part III, *infra*. It appears that this exact definition is the one adopted by the Supreme Court in its secondary-effects analysis. As discussed below, the Court sought to characterize certain facially content-based regulations as content-neutral on the grounds that they were not aimed at the speech's communicative impact.

there would have been no occasion for the regulation."[14] This is an illuminating statement. Unfortunately, the "danger" to which the statement alludes is the conceptual equivalent of Professor Tribe's "aimed at" inquiry. Moreover, "speech" need not be verbal to qualify as content-based. The focus on verbal communication, however, is telling. Most ideas likely to be recognized as "content" are verbal.

Content-based regulations of speech are those based on the speech's content, that is, based on that which the speech is about — its substance or its subject matter. The question of what constitutes "content" is so all-encompassing as to elude any definition not equally general. For any given book, the question "What is this book 'about'?" may be answered in almost an infinite number of ways. Each of these ways corresponds to one meaningful aspect of our lives. Content-based regulations of speech are those based on the substance of the speech: its subject matter, its topic, or its meaning. Content-neutral regulations of speech are all other regulations. These regulations are not based on the speech's subject matter, but rather on accidental attributes with which one can tamper without altering the meaning being conveyed.

Given that the content-neutral/content-based classification involves the attribution of meaning, the classification may apply differently in different social environments. Additionally, because content-based regulations of speech classify speech by reference to its subject matter or conveyed meaning, to the extent that a certain subject matter is identified with specific speakers, places, times, or objects, a regulation may be classified as content-based if it classifies speech by reference to such specific speakers, places, times, or objects. Thus, a regulation prohibiting speeches by union leaders, speeches in churches, speeches on the date of the Bolshevik Revolution, or speeches by people donning military uniform, is, presumably, content-based.

Content-based distinctions purport to identify the subject matter upon which the regulation is based. Thus, a law exempting labor disputes from a ban on residential picketing is content-based because the law treats picketing differently based on the subject matter of the demonstration (here, whether the picketing does or does not pertain

---

[14] John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1498 (1975) (discussing Cohen v. California, 403 U.S. 15 (1971) (reversing conviction of man who walked through hallways of Los Angeles County Courthouse wearing jacket bearing the words "Fuck the Draft")).

to labor disputes).[15] A law banning the distribution of printed materials at a state fair, on the other hand, is content-neutral, as it is not based on the subject matter of the distributed material.[16]

Such determinations, although for the most part obvious, may be subject to controversy. A regulation setting a maximum decibel level for music in a concert hall may strike most of us as content-neutral. For most of us, the content of music consists of its tones, duration, and tempo. Heavy metal music fans, however, may disagree. For them, the meaning being conveyed consists, at least in part, of the large number of decibels being used. Therefore, the regulation arguably may be based on the music's subject matter. This attribution of meaning, however, is not likely to receive acceptance. The expression contained in the use of large numbers of decibels is considered to be devoid of content.[17]

Whether a regulation classifies speech by reference to its subject matter may, at times, be open to dispute. As a general rule, however, the content-based/content-neutral distinction is not subject to much controversy. The distinction is intuitively clear — or *was* intuitively clear until the Court launched the doctrine of "secondary effects."

II. THE DOCTRINE OF SECONDARY EFFECTS: DESCRIPTION

Thus far, this Article has defined the meaning of the term content-based by reference to the meaning of the word "content." The modern secondary-effects doctrine defines content-based by shifting the focus to the word "based." In *Young v. American Mini Theaters, Inc.*[18] and *Renton v. Playtime Theaters, Inc.*,[19] the Supreme Court held that regulations that are facially content-based are to be classified as content-neutral if they are not aimed at the communicative effect of the speech, but rather at its secondary effects. *Young*, the case introducing this secondary-effects analysis, upheld a zoning ordinance that required the dispersing of adult theaters.[20] The Court recognized the ordinance, which identified adult movie theaters by reference to

---

[15] *See* Carey v. Brown, 447 U.S. 455, 460 (1980).

[16] *See Heffron*, 452 U.S. at 648-49.

[17] *See Ward*, 491 U.S. at 803 (finding that a New York City ordinance regulating noise levels for performances in Central Park was content-neutral).

[18] 427 U.S. 50 (1976).

[19] 475 U.S. 41 (1986).

[20] *See Young*, 427 U.S. at 72-73. The ordinance in question stated that "[s]pecifically, an adult theater may not be located within 1,000 feet of any two other 'regulated uses' or within 500 feet of a residential area." *Id.* at 52 (Stevens, J., plurality opinion).

the content of the films exhibited, as facially content-based.[21] The city, however, justified the ordinance as a means to combat the high concentration of crime and the accompanying depreciation in property values that, arguably, resulted from the presence of such establishments. Justice Stevens's plurality opinion analyzed the ordinance under a standard of scrutiny appropriate for content-neutral regulations, explaining that "the regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical message the film may be intended to communicate."[22] The Justice elaborated:

> The Common Council's determination was that a concentration of "adult" movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films. It is this secondary effect which these zoning ordinances attempt to avoid, not the dissemination of "offensive" speech.[23]

Justice Stevens relied, in part, on the sexual nature of the speech.[24]

Justice Powell agreed with the majority's standard of constitutional scrutiny,[25] but refused to rely on the sexual nature of the speech.[26] In a concurrence often quoted by subsequent secondary-effects opinions, the Justice stated: "We have here merely a decision by the city to treat certain movie theaters differently because they have markedly different effects upon their surroundings."[27] The opinions of both Justice Stevens and Justice

---

[21] *See id.* at 71-72. The ordinance was content-based because

> [t]he classification of a theater as "adult" is expressly predicated on the character of the motion pictures which it exhibits. If the theater is used to present 'material distinguished or characterized by an emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas," it is an adult establishment.

Id. at 53.

[22] *Id.* at 70.

[23] *Id.* at 71 n.34.

[24] *See id.* at 70-71. Justice Stevens stated:

> [E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate.

Id. at 70.

[25] *See id.* at 79 (Powell, J., concurring). Justice Powell noted: "In these circumstances, it is appropriate to analyze the permissibility of Detroit's action under the four-part test of *United States v. O'Brien*." *Id.*

[26] *See Young*, 427 U.S. at 73 n.1 (Powell, J., concurring).

[27] *Id.* at 82 n.6.

Powell relied on the purpose of the legislature to hold that the ordinance was aimed at noncommunicative elements of the speech.[28]

Renton involved a zoning ordinance similar to the one in *Young*. The Court upheld the ordinance, reiterating the secondary-effects analysis.[29] The dissent, reviewing the legislative history of the ordinance, adduced strong evidence showing that the ordinance was meant to suppress the expression of sexual speech.[30] The Court refused to invalidate the ordinance because of "an alleged illicit legislative motive."[31] Instead, the majority relied on a finding by the district court that the "predominant intent" behind the ordinance was "unrelated to the suppression of free expression."[32] The

---

[28] *See id.* at 55, 75. In the plurality opinion, Justice Stevens noted:

> In the opinion of urban planners and real estate experts who supported the ordinances, the location of several such businesses in the same neighborhood tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere.

Id. at 55 (Stevens, J., plurality opinion). In concurrence, Justice Powell declared that "[t]he purpose of preventing the deterioration of commercial neighborhoods was certainly within the concept of the public welfare that defines the limits of the police power . . . . The Common Council did not inversely zone adult theaters in an effort to protect citizens against the content of adult movies." *Id.* at 75, 82 (Powell, J., concurring).

[29] *See Renton*, 475 U.S. at 47. The Court determined that "the *Renton* ordinance is aimed not at the content of the films shown at 'adult motion picture theaters,' but rather at the secondary effects of such theaters on the surrounding community." *Id.*

[30] *See id.* at 58-59, 61 (Brennan, J., dissenting). Justice Brennan, in dissent, recognized:

> Shortly after this lawsuit commenced, the Renton City Council amended the ordinance, adding a provision explaining that its intention in adopting the ordinance had been "to promote the City of Renton's great interest in protecting and preserving the quality of its neighborhoods, commercial districts, and the quality of urban life through effective land use planning." . . . .
>
> . . . In addition to the suspiciously coincidental timing of the amendment, many of the City Council's "findings" do not relate to legitimate land-use concerns. As the Court of Appeals observed, "[b]oth the magistrate and the district court recognized that many of the stated reasons for the ordinance were no more than expressions of dislike for the subject matter."
>
> . . . .
>
> In sum, the circumstances here strongly suggest that the ordinance was designed to suppress expression . . . .

Id. (Brennan, J., dissenting) (citations omitted).

[31] *Id.* at 48.

[32] *Id.* In making the determination that the ordinance was not intended to suppress free speech, but rather to prevent the effects that such speech (the showing of adult films) has on the surrounding community, the Court stated:

> The District Court's finding as to "predominant" intent, left

ordinance was thus classified as content-neutral.[33] This content-neutral classification resonated oddly. In addition to the legislative history being rather contradictory to the district court's finding that the predominant intent of the ordinance did not relate to the restraint of free expression, the Court specifically eschewed the "guesswork" involved in investigating legislative motives. Thus, the Court refused to consider legislative motives while clearly relying on them.

Quite predictably, the claim of secondary effects subsequently has proven popular with government lawyers defending allegedly content-based regulations of speech.[34] *Boos v. Barry*[35] involved an ordinance that prohibited the display of signs that tended to bring "public disrepute" to a foreign government. The ordinance also

---

> undisturbed by the Court of Appeals, is more than adequate to establish that the city's pursuit of its zoning interests here was unrelated to the suppression of free expression. The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally "protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life," not to suppress the expression of unpopular views.

Id.

[33] *See id.* The Supreme Court often refers to content-neutral regulations as time, place, and manner regulations. On their terms, these regulate the circumstances surrounding the speech rather than the speech itself. Accordingly, a law prohibiting speaker-carrying vehicles from emitting loud and raucous sounds, as in *Kovacs v. Cooper*, 336 U.S. 77 (1949), or a law prohibiting the posting of signs on utility polls, as in *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), are both time, place, and manner regulations because they merely regulate the *means* of expression. That so-called time, place, and manner regulations must be content-neutral is clear. Almost all of the regulations implicating First Amendment protections are regulations regulating the time, place, or manner of the speech. *See, e.g.*, Police Dep't of Chicago v. Mosley, 408 U.S. 92, 92 (1972) (forbidding picketing from taking place within a specified distance of a school during school hours, except that picketing in connection with a school labor dispute is allowed); FCC v. Pacifica Foundation, 438 U.S. 726, 731 (1978) (limiting the broadcasting of "sensitive language" to after-hours); Schacht v. United States, 398 U.S. 58, 59-60 (1970) (banning the "unauthorized wearing of American military uniforms in a manner calculated to discredit the armed forces"). This did not prevent all three from being recognized as content-based. To categorize a regulation as one of time, place, or manner is to state that it is based *only* on the time, place, or manner in which the speech is conveyed; that it is, in other words, content-neutral. The Court has stated on numerous occasions that time, place, and manner regulations must be content-neutral. It is conceivable that this explicit requirement has prevented the Court from characterizing the secondary-effects ordinances as time, place, and manner regulations.

[34] *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 867-68 (1997); Ladue v. Gilleo, 512 U.S. 43, 53 n.11 (1994); Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 430 (1993); R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992).

[35] 485 U.S. 312 (1988).

prohibited the congregation of three or more persons within five-hundred feet of a foreign embassy.[36] The government claimed that the ordinance was content-neutral because it was aimed at the secondary effects of the speech and not at its expression.[37] In the course of its opinion, the Court categorized the "public disrepute" provision as content-based, and the "congregation" provision as content-neutral.[38]

In *Boos*, six Justices implied that the secondary-effects analysis is appropriate outside the context of sexual speech.[39] Justice O'Connor, joined by Justices Stevens and Scalia, stated, in a passage often quoted in subsequent cases, that "[l]isteners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*."[40] A regulation targeting "the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech," is not a regulation of secondary effects.[41] In subsequent cases, the Court has repeatedly reaffirmed its commitment to the doctrine of "secondary effects."[42]

---

[36] *See id.* at 315.

[37] *See id.* at 319.

[38] *See id.* at 321.

[39] *See id.* at 320-21, 339.

[40] *See id.* at 321.

[41] *Boos*, 485 U.S. at 321. The "direct impact" standard was attacked by the partial concurrence as untenable. *See id.* at 335 (Brennan, J., concurring in part and concurring in judgment). The Court previously adopted a "direct-indirect impact" distinction in the context of the Commerce Clause and eventually abandoned that proposition as unsound. *See id.* at 336 (Brennan, J., concurring in part and concurring in judgment) ("[T]he *Renton* approach saddles courts with a fuzzy distinction between the secondary and direct effects of speech, a distinction that is likely to prove just as unworkable as other direct/indirect distinctions in constitutional jurisprudence have proved."); *see also* Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 630 n.55 (1991). Williams writes:

> The number of intermediate links in the causal chain connecting speech to any type of harm is almost infinitely malleable; the number is entirely a matter of how one chooses to describe them. In addition, unless there is some qualitative difference in the type of causal connection, there is no reason — in terms of the purposes of free speech or the dangers of content discrimination — why a longer causal chain should leave the government freer to regulate based on the resulting harm than would a shorter one.

Id.

[42] *See, e.g., R.A.V.*, 505 U.S. at 377, 389 ("Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech, so that the regulation is 'justified without reference to the content of the . . . speech'") (internal citations omitted); *Reno*, 521 U.S. at 868 ("'Regulations that focus on the direct impact of speech on its audience' are not properly analyzed

III. SECONDARY EFFECTS: EXPLANATION I

The Court made clear in *Boos* and in subsequent opinions that the basic requirement of the secondary-effects classification is that the regulation involved does not target the communicative element of the speech. Secondary-effects regulations are "regulations that apply to a particular category of speech because the regulatory targets happen to be associated with that type of speech."[43] Such regulations, even if their operation hinges on the content of the speech, are not content-based, but instead are content-neutral. Thus, "based" is not the equivalent of "in reference to." Rather, "based" is the equivalent of "aimed at." Content-*aimed* regulations are the so-called content-based regulations.

Who, then, must aim the regulation at the content of speech? Apparently not the legislature, for the Court has specifically rejected inquiry into legislative purpose. Regardless, it is of little help to know that secondary-effects regulations are those aimed at noncommunicative evils. All laws regulating speech are, to some extent, aimed at noncommunicative evils — or at least may claim to be as such. A regulation prohibiting the showing of a film glorifying adultery is, ultimately, aimed at preventing the act of adultery.[44] Likewise, a law forbidding criticism of the government is ultimately aimed at preventing the replacement of that government.

The government itself rarely, if ever, attempts to justify its regulation by reference to the "communicative impact" of the speech. In *Police Department of Chicago v. Mosley*,[45] the city claimed that the ordinance, which exempted labor picketing from a ban on picketing in the vicinity of schools, was aimed at preventing violent picketing from disrupting school operations.[46] Labor picketing, it was claimed, was not likely to turn disruptive.[47] Similarly, in *Erznoznik v. Jacksonville*,[48] the city claimed that an ordinance banning the display of nudity in drive-in theaters with screens visible from public streets was a traffic regulation.[49] In *Simon & Schuster v. Members of New York State Crime*

---

under Renton.") (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)).

[43] *Boos*, 485 U.S. at 320.

[44] *See* Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959) (invalidating a New York film-licensing law pursuant to which a license was denied for the distribution of "Lady Chatterley's Lover").

[45] 408 U.S. 92 (1972)

[46] *See id.* at 100.

[47] *See id.*

[48] 422 U.S. 205 (1975).

[49] *See id.* at 214.

Victims Board[50] the invalidated law, which required the surrender of royalties due a criminal for a work describing the crime, was aimed at preventing criminals from further benefiting from their crimes.[51] And in *Arkansas Writer's Project Inc. v. Ragland*,[52] a tax on general-interest magazines, with exemptions for magazines dealing with religious issues and sports (among certain other topics), was aimed at increasing revenues.[53] What, then, distinguishes secondary effects from all other noncommunicative effects?

One explanation argues that secondary effects are those harms that flow from the regulated expression without having the causal chain between the speech and its effect pass through the mind of the audience.[54] Professor Susan H. Williams writes:

> In what sense is economic and physical deterioration a "secondary" effect distinct from the effect of offense to viewers or listeners? Secondary effects are, in fact, noncommunicative effects arising from the speech as a physical event in the world, not from the communicative aspect of the speech. That is, the causal chain connecting speech to a secondary effect does not include a link that takes place in the mind of a recipient of the speech. Communication involves the transmission of a message of some kind from one person to another. If the harm at which the government is aiming will only come about if some message is in fact received by a listener, then the harm is a communicative one. Offense is, of course, a communicative harm. The harm of offense can only occur if someone in fact receives a message from the speech. A drop in property values is, however, a noncommunicative harm. Even if all of the people who actually entered the "adult" theater were deaf and blind, and therefore unable to receive any message from the speech, the property values in the neighborhood of the theater would still drop as long as the business continued to operate.[55]

Somewhat similar is Professor Ely's discussion of a comparable requirement in the *O'Brien* test,[56] that the "government interests [be] unrelated to the suppression of free expression" in regulations of

---

[50] 502 U.S. 105 (1991).

[51] *See id.* at 108.

[52] 481 U.S. 221 (1987).

[53] *See id.* at 231.

[54] *See* Williams, *supra* note 41, at 631.

[55] *Id.*

[56] The *O'Brien* test appeared in *United States v. O'Brien*, 391 U.S. 367, 382 (1968). The test articulates a standard of review for regulations of "expressive conduct." *See* text accompanying notes 56-57 *infra* for an explanation of the *O'Brien* test.

expressive conduct:[57]

> The reference of *O'Brien*'s second criterion is therefore not to the ultimate interest to which the state is able to point, for that will always be unrelated to expression, but rather to the causal connection the state asserts. If, for example, the state asserts an interest in discouraging riots, the Court will ask why that interest is implicated in the case at bar. If the answer is (as in such cases it will likely have to be) that the danger was created by what the defendant was saying, the state's interest is not unrelated to the suppression of free expression within the meaning of *O'Brien*'s criterion . . . . The critical question would therefore seem to be whether the harm that the state is seeking to avert is one that grows out of the fact that the defendant is communicating, and more particularly out of the way people can be expected to react to his message, or rather would arise even if the defendant's conduct had no communicative significance whatever.[58]

Thus, if a regulation is aimed at remedying evils that are not the consequence of the audience's absorption of the idea, then the regulation is one of secondary effects. These explanations are derived directly from the articulations of the Supreme Court.

IV. CRITICISM OF EXPLANATION I

One problem with these formulations is that it is not clear how, and by whom, the "purpose," "aim," "interest," "justification,"[59] or "harm that the state is seeking to avert" is to be determined. Professor Ely's formulation appears to dodge this difficulty by focusing on the interest claimed by the government. Such an approach has much to commend it, for a clearly bogus or pretextual government claim is likely to fail even a lax constitutional test. It must still be determined, however, what harms grow out of the communicated ideas and what harms do not. *O'Brien* involved the prosecution of a man accused of the willful destruction of an army draft card. O'Brien burned his draft card in a demonstration protesting the Vietnam War.[60] The government claimed that the law was meant to ensure the efficiency of

---

[57] *See infra* Section IX for a definition of "expressive conduct."

[58] Ely, *supra* note 14, at 1497. The similarity of the issues and the nearness of the terms the Court used in both cases suggest that the Court saw in its secondary-effects cases the "speech" equivalent of *O'Brien*'s "incidental effects."

[59] The *R.A.V.* Court noted that "[a]nother valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech, so that the regulation is 'justified without reference to the content of the . . . speech.'" *R.A.V.*, 505 U.S. at 389 (citations omitted).

[60] *See O'Brien*, 391 U.S. at 369.

drafting operations.[61] Professor Ely adduces this claim as a paradigmatic justification unrelated to the suppression of expression:

> The interests upon which the government relied were interests, having mainly to do with the preservation of selective service records, that would have been equally threatened had O'Brien's destruction of his draft card totally lacked communicative significance — had he, for example, used it to start a campfire for a solitary cookout or dropped it in his garbage disposal for a lark.[62]

Professor Ely's characterization of the government interest in *O'Brien* may be accurate, but it tells us nothing of the causal chain between the act of communication and the harm that the state seeks to remedy. For example, the state could have been faced with drafting difficulties caused by the destruction of draft cards *only because* a great number of draft cards were burned in mass demonstrations. Could we then say that the harm did not grow out of the communicative impact of O'Brien's expression? In *Young* and *Renton*, the Court apparently believed that the harms the government sought to remedy did not grow out of the communicated ideas. Thus crime, prostitution, and property devaluation in the vicinity of adult theaters were not the effects of conveying a sexual idea to an audience. This determination, however, must have involved an impossible investigation into the mind of the audience. Was the patron attending the theater because he was sexually excited, or was he sexually excited because he was attending the theater? This same investigation would be required in our hypothetical *O'Brien* case: Were people burning their draft cards because of the message conveyed by O'Brien, or were they attending the demonstration in order to burn their draft cards in the first place?

An additional problem with the noncommunicative impact analysis and its "causal chain" formulation is that it flies in the face of Supreme Court decisions such as *Simon & Schuster v. Members of the New York State Crime Victims Board*.[63] That case involved a law ordering the surrender of royalties paid to a criminal for a work describing the crime. The Court recognized several purposes that the law meant to serve, including the prevention of criminals benefiting from crime, and providing compensation for crime victims.[64] The government disavowed any interest in suppressing descriptions of crime, and the

---

[61] *See id.* at 369-70, 386.
[62] Ely, *supra* note 14, at 1498.
[63] 502 U.S. 105 (1991).
[64] *See id.* at 108, 116.

Court accepted this disavowal.[65] Thus, neither of the law's purposes were aimed at the so-called "communicative impact" of the burdened speech, yet the law was held to be content-based.[66]

V. SECONDARY EFFECTS: EXPLANATION II

What, then, makes one regulation a regulation of secondary effects and another a regulation of primary effects? The answer may be simple. The Justices of the Supreme Court take it upon themselves to decide what government purpose underlies the law and then to determine whether such government purpose is acceptable. Perhaps the most straightforward secondary-effects analysis is found in Justice Souter's concurrence in *Barnes v. Glen Theatre, Inc.*,[67] in which Justice Souter opted to uphold the prosecution of nude-dancing establishments under public-nudity laws. The Justice asserted (1) that the purpose of the challenged regulation may be determined by the Court without reference to the legislature's motive; (2) that, in the Justice's opinion, the purpose involved was not the suppression of sexual speech, but rather the control of crime-related secondary effects; and (3) that this purpose was sufficient for upholding the statute under the standard appropriate for content-neutral regulations.[68] Indeed, this is the gist of the secondary-effects analysis for regulations of speech. With little ceremony, the Justices transformed the challenged regulations from the grim realm of the content-based into the merry universe of the content-neutral. This explanation may also account for the curious correlation between the recognition of an ordinance as one of secondary effects and its survival of content-neutral constitutional scrutiny — a level of

---

[65] *See id.* at 117.

[66] *See id.* at 108.

[67] 501 U.S. 560 (1991).

[68] *See id.* at 582-83. Justice Souter asserted:

> It is, of course, true that this justification has not been articulated by Indiana's Legislature or by its courts . . . . I think that we need not so limit ourselves in identifying the justification for the legislation at issue here . . . .
>
> . . . Our appropriate focus is not an empirical inquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional . . . . In my view, the interest asserted by petitioners in preventing prostitution, sexual assault, and other criminal activity, although presumably not a justification for all applications of the statute, is sufficient under *O'Brien* to justify the State's enforcement of the statute against the type of adult entertainment at issue here.

Id.

scrutiny proven fatal for numerous less fortunate regulations.[69]

VI. WHAT IS WRONG WITH THE DOCTRINE OF SECONDARY EFFECTS

Facially content-based, secondary-effects regulations of the type upheld in *Renton* and *Young* purport to identify a harm that, as a rule, accompanies but is not caused by the expression of a certain subject matter.[70] Arguably, this is not impossible — but it is highly unlikely. Imagine a regulation barring conventions addressing the financial markets, on the assumption that such conventions draw violent crime due to the affluence of those attending. We still must assume that the attendees' affluence is not itself causally related to the subject matter of the conventions.

That the Court attempts to identify secondary-effects regulations and assign them a different level of scrutiny is understandable in view of the principle underlying the content-based/content-neutral distinction. That principle is best explained as follows: "[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."[71] The distinction expresses hostility toward government control of public opinion; yet as long as the government's purpose is unrelated to the suppression of the communicated ideas, no occasion for the distinction arises.

This claim is misleading for two reasons. First, the claim is meaningless for First Amendment purposes. The government is, without doubt, more willing to regulate secondary effects at the expense of speech it does not favor than at the expense of speech that it does. (Also, the idea that a regulation has but one "purpose," let alone an identifiable one, is highly questionable.) Second, the claim that facially content-based regulations of secondary effects, as the Court defines them, are in any way distinguishable from other content-based regulations, is mistaken.

The secondary-effects doctrine suffers from two serious defects. First, the doctrine obliterates and is hostile toward the very purpose

---

[69] *See, e.g.*, United States v. National Treasury Employees Union, 513 U.S. 454 (1995) (finding that a subsection of the Ethics in Government Act that prohibited receipt of honoraria by government employees was content-neutral and violated the First Amendment); United States v. Grace, 461 U.S. 171 (1983) (declaring that a statute prohibiting protests in the Supreme Court building or on its grounds to be content-neutral and unconstitutional).

[70] The harm identified by certain speech in secondary-effects regulations is best described as a secondary feature that "happen[s] to be associated with that type of speech." *Boos*, 485 U.S. at 320 (O'Connor, J., concurring).

[71] Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972).

of the content-based/content-neutral distinction. Second, the secondary-effects doctrine has no adequate explanation and is therefore judicial reasoning at its weakest. Subsection A elaborates on the former claim; subsection B on the latter.

A. Defect One: Hostility Toward the Purpose of the Content-Based/Content-Neutral Distinction

The content-based/content-neutral distinction is meant to encumber government attempts to suppress speech that the government does not favor. The distinction absolves courts of the risky burden of separating the ideas that the government attempts to regulate for the common good from those that the government attempts to regulate to control public opinion — or, still worse, from regulation of ideas that courts refuse to accept as supporting the common good. Thus, when the regulation is content-based, strict scrutiny applies. The substance of the content itself is irrelevant. The facially content-based, secondary-effects analysis eliminates this virtue.

The facially content-based, secondary-effects analysis forces courts to inquire into the purpose of the regulation. Presumably, if the purpose is to control the exposure of the public to ideas, the regulation is content-based. If the purpose is unrelated to the communicative effects of the speech, the regulation is content-neutral. But this is the same investigation into the purpose behind regulations that the content-based/content-neutral distinction sought to avoid. The secondary-effects analysis simply eliminates the essence of this distinction.

Yet the criticism need not stop here. That courts are absolved from determining whether a regulation advances the common good is significant. The doctrine of content-based characterization escapes an investigation into both the consciousness and the *subconsciousness* of the government agents effecting the regulation. Courts may implement regimes of oppression as effectively as any other government body. It is little comfort, if any comfort at all, that the judiciary, and not the legislature, is now free to allow content-based legislation to stand with only cursory constitutional scrutiny.

The Supreme Court's secondary-effects analysis not only disembowels the content-based doctrine, but the Court uses the analysis to bring about the very menace that the doctrine sought to prevent. While the doctrine was adopted as a manifestation of the widely accepted idea that the government may not suppress speech merely because the government disapproves of it, the government now uses the doctrine to do just that. Legislation "liked" by the courts

receives more lenient constitutional scrutiny and is deemed not content-based, while regulation "disliked" by the courts receives exacting scrutiny and is deemed content-based.[72]

B. *Defect Two: Lack of Adequate Explanation and Flawed Judicial Reasoning*

One reason for the existence of judicial review is that courts, unlike legislative or executive bodies, are explicitly bound by purported "rational principles." A "rule of law" is, by definition, neither arbitrary nor capricious. This means that the law must be knowable. That the law is knowable allows it, among other things, to change through the legislative process. All of these propositions, so fundamental to the system of representative government, depend on the rationality of the adjudication process. Courts do not merely issue verdicts. Courts are obliged to explain those verdicts. Court opinions are meant to guarantee the rationality of the system. Thus when the explanation accompanying a verdict is faulty or untenable, the rule of law is undermined at its very foundation.

When the Supreme Court uses distinctions or classifications that lack adequate explanation, the Court fails to fulfill its institutional obligations. The secondary-effects doctrine suffers from such a flaw. It attempts to draw an inexplicable distinction between various regulations of speech.[73]

---

[72] It is true, of course, that the Supreme Court is the ultimate arbiter, whether the Court applies strict or nominal constitutional scrutiny. But if the idea underlying the content-based doctrine still holds true — and it is possible to believe that it does not — then the Court (as the cat in charge of the milk) should not have unbridled discretion to ignore the practical implications of that idea. And if the Court does decide to ignore these implications, the Court should, at the very least, explain why the idea should be applicable to one set of cases but not to another.

[73] The "balancers" in the categorizers/balancers debate maintained that doctrinal categorizations in First Amendment jurisprudence would lead to a less rational process. *Compare* Mendelson, *supra* note 1, at 481 ("The need for judicial balancing, I suggest, results from the imperfection of mundane law. In a better world, no doubt, clear and precise legal rules would anticipate all possible contingencies.") *with* Ely, *supra* note 14, at 1501 ("[B]alancing tests inevitably become intertwined with the ideological predispositions of those doing the balancing — or if not that, at least with the relative confidence or paranoia of the age in which they are doing it . . . ."). When Mendelson, in his vehement defense of balancing, asserts that "[s]urely the choice is simply this: shall the balancing be done 'intuitively' or rationally; covertly or out in the open?," he adduced that *Di Santo v. Pennsylvania*, 273 U.S. 34 (1927), is "a classic example of covert, and probably 'intuitive,' balancing." Mendelson, *supra* note 1, at 481-82. It is interesting that the distinction on which *Di Santo* was decided is identical with the one that the Court has recently articulated in its secondary-effects opinions:

> There [in *Di Santo v. Pennsylvania*] the Court held invalid a state

The plurality opinion in *Young v. American Mini Theatres, Inc.*[74] characterized sexually explicit speech as entitled to less-than-full First Amendment protection and, hence, accounted for the absence of strict scrutiny by referring to the sexual nature of the burdened speech.[75] As a result, several commentators and at least two Justices believed that the secondary-effects analysis was, or ought to have been, restricted to sexually explicit speech.[76] The Supreme Court, however, rejected this claim in subsequent cases. This rejection had two consequences. First, the rejection impaired the prospects of legislative action aimed at protecting sexually explicit speech. Second, the rejection opened the door for minimal scrutiny of mysteriously chosen, facially content-based regulations of speech.

This is the point at which both lines of criticisms merge: The secondary-effects analysis offered by the Court is, in fact, an unprincipled exception and nothing more. If it were capable of being explained, then both critiques would be misdirected. In other words, if regulations not aimed at the speech's communicative element were both distinguishable from other regulations of speech and characterized by a reduced danger of government oppression, then the secondary-effects doctrine was an admirable refinement of the manifestation of the idea that governments are predisposed to suppress speech that they find unfavorable, yet which may be valuable. But, as it stands today, the secondary-effects doctrine has no such adequate explanation. Nothing more than a bare determination by nonelected government officials that the purpose of a particular regulation is acceptable distinguishes secondary-effects regulations from other regulations of speech.

An underlying assumption in this Article is that certain doctrinal distinctions, the content-based/content-neutral distinction among

---

> regulation of commerce as a "direct burden" — and that is virtually all there was in the opinion. No observer could tell what interests were weighed against what. Ostensibly the Court merely applied a well-known rule of law. But who outside the Court could know, and thus appraise, the decisive considerations that marked the burden in question as "direct" rather than "indirect"?

Id. at 482.

[74] 427 U.S. 50 (1976).

[75] *See id.* at 70.

[76] *See, e.g.*, TRIBE, *supra* note 11, § 12-3, at 798-99 n.17 ("[T]he Renton view will likely prove to be an aberration limited to the context of sexually explicit materials."); *Boos*, 485 U.S. 312, 334-35 (1988) (Brennan, J., dissenting) ("I write separately . . . to object to Justice O'Connor's assumption that the Renton analysis applies not only outside the context of businesses purveying sexually explicit materials but even to political speech.").

them, flow from propositions that may be articulated. If one agrees with those propositions, the use of such distinctions can be more or less correct. The proposition underlying the content-based characterization is that the "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."[77] This proposition, in turn, flows from other propositions, such as the proposition that government control over public opinion may be inimical to the public good.

The Supreme Court's recent use of the content-based/content-neutral distinction is incorrect; in other words, it does not accord with the Court's own understanding of the foundation for that distinction.

As defined above, content-based regulations are those that classify speech by reference to its subject matter or conveyed meaning.[78] Given the above analysis, the term "content-based" should be restored to its clear meaning. "Based" is neither "aimed" nor "justified." A regulation that is *based* on the content of the speech is a regulation that classifies speech by reference to the speech's content. There is, of course, nothing new in this understanding. As the dissent in *Boos v. Barry* notes, this was understood, at least by some, as the very meaning of the term before the secondary-effects doctrine made its debut.[79]

In *Turner Broadcasting System Inc. v. FCC*,[80] four Justices supported the argument that a regulation requiring television cable operators to carry local television stations is content-based.[81] Applying the

---

[77] *Mosley*, 408 U.S. at 95-96.

[78] *See supra* Part I.

[79] *See Boos*, 485 U.S. at 336 (Brennan, J., dissenting). The dissent noted:

> The traditional approach sets forth a bright-line rule: any restriction on speech, the application of which turns on the content of the speech, is a content-based restriction regardless of the motivation that lies behind it. That, to my mind, has always been implicit in the fact that we term the test a "content-based" test rather than a "motivation-based" test.

Id.

[80] 520 U.S. 180 (1997).

[81] *See id.* at 233-34 (O'Connor, J., dissenting). In determining that the regulation at issue was content-based, Justice O'Connor stated:

> Indeed, the only justification advanced by the parties for furthering this interest is heavily content based. It is undisputed that the broadcast stations protected by must-carry are the "marginal" stations within a given market . . . . [A]ppellees emphasize that the must-carry rules are necessary to ensure that broadcast stations maintain "diverse," "quality" programming that is "responsive" to the needs of the local community . . . . Must-carry is thus justified as a way of preserving viewers' access to a Spanish or Chinese language station or of preventing an independent station from adopting a home-shopping

definition of the term "content-based" to the must-carry provision challenged in *Turner*, the Justices' assertion appears difficult to sustain. The regulation makes no reference to the subject matter of the broadcasts. Nor is the peculiarly local nature of these stations linked to such certain subject matter.

Earlier, in *Forsyth County, Georgia v. National Movement*,[82] the Court classified as content-based an ordinance adjusting parade licensing fees to the expected costs of policing the parade.[83] The decision is, in fact, an endorsement of disparate-impact analysis in content-based classifications.[84] The *Forsyth County* decision is another departure from the facial meaning of the term "content-based." This is not to say that regulations with disparate impact warrant an easily surmountable constitutional analysis. But if facially content-neutral regulations that have a disparate impact constitute a danger to freedom of speech, then the Court should develop a doctrine to address such danger and should give that doctrine a name. Naming that doctrine "content-based" is not only linguistically wrong, but also misleading. I do not suggest that the Supreme Court should abandon the content-based/content-neutral doctrine altogether. The only suggestion is that the Justices subvert the Court's institutional role when it does away with a doctrine while purporting to uphold it.

VII. EXPRESSIVE CONDUCT: DEFINITION

Implicit in the Court's First Amendment analyses, and at times made explicit through the expressive-conduct test, is the dichotomy between actions[85] regarded as "communicative" and those regarded as "pure conduct." This dichotomy excludes a large variety of actions (car theft, for example) from the kindly protections of the First Amendment. A second dichotomy, which draws a distinction *within* the realm of communicative action, exists between "speech" and "expressive conduct." As discussed above, a further division taking

---

format.

Id.

[82] 505 U.S. 123 (1992).

[83] *See id.* at 126-27, 137.

[84] The disparate-impact analysis concerns regulations that, although facially content-neutral, have a greater impact on a particular type of speech or speakers. Thus, a law prohibiting the distribution of leaflets in public streets may particularly burden indigent speakers and may therefore, under a disparate-impact analysis, be classified as "content-based." *See* Williams, *supra* note 41, at 705-14, for a commentator advocating the categorization of disparate impact regulations as content-based.

[85] The term "actions," as used here, includes the use of language.

place within the realm of speech is the content-based/content-neutral division.[86]

Once an action is deemed communicative (a decision that this Article does not investigate), it is classified as either speech or expressive conduct, and further analysis depends on this classification.[87] To classify a regulation as a regulation of expressive conduct does not mean that it regulates nonverbal expression. This has been recognized in a variety of cases that analyzed regulations of nonverbal communications under a strict scrutiny standard, a standard different from and more exacting than the one designed for expressive conduct. For example, in *Erznoznik v. Jacksonville*[88], the Court, treating the ordinance as a restriction on speech, invalidated a ban on the display of nudity in drive-in theaters.[89] Likewise, in *R.A.V. v. City of St. Paul*[90], the Court categorized the burning of a cross as speech.[91] In *Buckley v. Valeo*[92], the Court recognized political expenditures as a form of speech.[93]

Regulations of expressive conduct are distinguishable from other regulations of speech because the government is likely to have legitimate reasons for the regulations of expressive conduct that are unrelated to regulating expression. This parallels the secondary-effects rationale. Therefore, a regulation of expressive conduct must be (1) a regulation regulating activity not used predominantly for expression, and (2) a regulation that is not aimed at the conduct *because* it is used for expression. Laws regulating communicative action that fail to accord with the above requirements should be classified as regulations of speech. Subsection A of this discussion analyzes the first prong of this test, while subsection B analyzes the second.

---

[86] Speech refers to the prosecuted action; expressive conduct and the content-based/content-neutral division implicates the directive under which the action is prosecuted.

[87] The standard test for so-called "regulations of expressive conduct" was announced in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). This test requires that the purpose of the scrutinized regulation be unrelated to the suppression of expression. *See id.* at 384-85.

[88] 422 U.S. 205 (1975).

[89] *See id.* at 206-07.

[90] 505 U.S. 377 (1992).

[91] *See id.* at 379-81.

[92] 424 U.S. 1 (1976).

[93] *See id.* at 14-15.

A. *Regulations of Activity Not Used Predominantly for Expression*

The first requirement, which is only implicit in the Court's reasoning, deals with the basic distinction between speech and expressive conduct. The requirement draws our attention to the fact that speech is not merely verbal and that verbal activities are not always speech. All activities that are used predominantly for expressive or communicative purposes, such as speaking and writing, should be classified as speech. Individuals engage in such activities predominantly for expressive purposes, but they are undertaken for nonexpressive purposes as well. I may, for example, speak in order to check my recording equipment, sing in the shower for the sheer pleasure of hearing my voice, or write to remind myself of the groceries I need.[94] But, again, speaking and writing are *predominantly* used for expressive purposes.

This definition of "speech" obviously includes the use of symbols. Symbols, like words, are used primarily for the purpose of expressing ideas. Thus, laws regulating the displaying of the swastika,[95] the use of a red flag,[96] or the playing of national anthems[97] are regulations of speech. Speech also includes such activities as picketing and parading. Speech does *not* include activities engaged in primarily for nonexpressive purposes, such as sleeping in the park. In short, when the regulation regulates activity that is engaged in predominantly for communication purposes, the danger of government control over public opinion is sufficient to justify its further categorization into content-based or content-neutral, and, in the former case, subjecting it to strict constitutional scrutiny. This "predominantly expressive" test is not entirely unambiguous. Assuming the intelligibility of the expressive conduct/pure conduct distinction, however, such a distinction is a relatively clear measure of categorization.[98]

B. *Regulations Not Aimed at Conduct*

The second requirement, that the regulation not be aimed at the conduct merely because it is used for expression, classifies a regulation

---

[94] Communication with oneself is, arguably, excluded from First Amendment protection.

[95] *See R.A.V.*, 505 U.S. at 380.

[96] *See* Stromberg v. California, 283 U.S. 359, 361, 368-69 (1931).

[97] *See* Williams, *supra* note 41, at 644 n.12 (hypothesizing that the playing of a national anthem is an act of expression).

[98] It is necessary, of course, to define the term "communicative" or "expressive" in clearer terms. As noted above, however, this definition is beyond the scope of this Article, although much in this Article depends on it.

as a regulation of speech if it regulates conduct (or an activity engaged in predominantly for noncommunicative purposes) *because* that conduct is used for communicative purposes. If the law is aimed at regulating expression, it matters little whether the expression is conveyed through means not predominantly used for expression. The First Amendment's lenient treatment of rules regulating conduct, in contrast to rules regulating speech, has no justification when the conduct is regulated because it is used for the expression of ideas. This requirement appears, in a version different from the one proposed here, in *O'Brien*'s requirement that the regulation not be related to the suppression of expression.

This definition, however, appears to entangle the observer in the same purpose inquiry vehemently criticized above. Because such purpose inquiries tend to dissolve into unworkable investigations of motivation, or, worse, into unreasoned discretionary decisions, a determination that the regulation is aimed at the conduct merely because it is used for expression must be limited to two possibilities. Therefore, a regulation is said to be aimed at the conduct *because* it is used for expression if (1) it explicitly refers to such expression or, stated differently, is facially aimed at expression; or (2) selective enforcement is shown so that the regulation against the conduct is enforced only when it is used as a means of expression. Any regulation that accords with the above criteria must be classified as a regulation of speech and not a regulation of expressive conduct.

Under possibility one, a law prohibiting the destruction of army draft cards *in anti-war demonstrations* is not a regulation of conduct, but a regulation of speech.[99] Under possibility two, if a law banning overnight sleep in the park is enforced only against those wishing to convey the plight of homelessness through such overnight sleep, then the law should be scrutinized as a regulation of speech.

A law prohibiting the donning of red shirts on the First of May is a law that will not fail the first prong of the expressive-conduct test, but will fail the second prong of the test. Such a law will be classified as a regulation of speech, and will further qualify as content-based. In contrast, a law prohibiting parading in public streets after one o'clock in the morning will not fail the second prong of the expressive-conduct test, but will fail the first prong. Such a law will be classified as speech, and will qualify as content-neutral. A regulation could fail prong two of the test, yet still qualify as content-neutral. For example, an ordinance prohibiting demonstrators from entering the White House

[99] For an analogous case, see generally *Stromberg*, 283 U.S. at 359.

while allowing tourists to enter will qualify as content-neutral.

Note that under the existing expressive-conduct analysis used by the Court, a regulation that is facially content-based, or a regulation that is based on the subject matter of the expression, may, in principle, be classified as a regulation not aimed at the expressive element of the conduct. Thus, a law prohibiting sleeping in the park for purposes of expressing the plight of the homeless may, arguably, not be aimed at expression. This odd result is a derivative of the Court's secondary-effects analysis. Thus, the ban on sleeping in the park may be characterized as not aimed at the expressive element of the conduct so long as a correlation may be shown between, for example, excessive littering and park sleepers expressing the plight of the homeless.

The definitions this Article offers of both content-based and expressive-conduct regulations require that, whether the regulated activity is predominantly engaged in for communicative purposes or not, a regulation that is facially content-based receive exacting constitutional scrutiny. This, to reiterate, is not because it is inconceivable that a regulation may be facially content-based yet aim at noncommunicative activities. Rather, exacting scrutiny is warranted, among other reasons, because of the improbability of such government claims, whether made by government officials appraising them or by government lawyers.[100]

In *United States v. O'Brien*, the case announcing the standard test for regulations of expressive conduct, the Court upheld a regulation forbidding the willful destruction of army draft cards.[101] If *O'Brien* were analyzed under the definition of expressive conduct proffered in this Article, the first question to be asked, one that was never asked by the Court, is whether the willful destruction of army draft cards is an activity engaged in predominantly for the purpose of communication. The answer does not call for an inquiry into the government's purpose, an inquiry into which the Court explicitly refused to engage.[102] Instead, the inquiry involves empirical statistical data.[103] If the willful destruction of draft cards were a widespread

---

[100] There are two additional reasons for an exacting constitutional scrutiny of facially content-based regulations that are supposedly aimed at noncommunicative impact: (1) The distinction between regulations aimed at noncommunicative impact and those regulations that are not is untenable; and (2) even if a distinction between regulations aimed at noncommunicative impact and those that are not were tenable, the government's willingness to suppress speech that it does not favor renders the distinction irrelevant.

[101] *See O'Brien*, 391 U.S. at 386.

[102] *See id.* at 383.

[103] If, however, the challenged regulation is already on the books, the inquiry

activity engaged in for noncommunicative purposes, such as ridding oneself of extraneous paper, then the regulation forbidding such willful destruction is a regulation of expressive conduct.[104] If, on the other hand, the willful destruction of army draft cards is engaged in predominantly for purposes of communication, then the regulation is a regulation of speech. It does not matter how the purpose of a regulation is determined, or even what that purpose is determined to be. If the regulation addresses activity predominantly engaged in for communicative purposes, then there is a danger that the government is seeking to control, or is controlling, public opinion. Such a danger justifies further classification of the regulation as either content-based or content-neutral.[105]

CONCLUSION

The definitions proposed in this Article for three First Amendment doctrines derive from an understanding of the doctrines' underlying rationales. A doctrinal rationale may be explicitly articulated by courts, as in the case of the content-based/content-neutral distinction, or a rationale may form a doctrine's implicit raison-d'être, as in the case of the expressive-conduct doctrine. Once a rationale is proposed, a critique of the use of judicial doctrines may proceed not on policy grounds, but on an analytical basis, assuming that the formulations of the underlying rationale and the derived definitions are accepted.

One might object that the discovery of such rationale resembles the discovery of a law's purpose, and the Article mentioned the difficulties associated with such an inquiry. There are a number of responses to this argument, mostly derived from the different institutional roles and methodologies employed by courts and by legislatures. Courts arguably are required to reason as one, and then justify, or explain, their doctrines. Legislatures, apart from often vague statements of intent, are not required to explain their laws. This may not only mean that the existence of such purpose, a questionable

---

would necessitate conjecture as to activity levels in the absence of the regulation.

[104] Such a regulation is not a regulation of "pure" conduct because O'Brien's conduct was already classified by the Court as "expressive." *See O'Brien*, 391 U.S. at 376.

[105] In the former case, this regulation will be further classified as content-based, as it refers to the subject matter of the regulated expression: "Army draft cards" are objects clearly identified with a certain subject matter, particularly at a time of war, as to warrant a content-based classification. This does not mean that the regulation is doomed. If the government can show a compelling interest and a narrowly drawn law, then the regulation will be upheld.

matter in the context of a legislative body, is more likely to be found in the context of the judiciary, but also that the question of whose purpose to look at, so problematic in the legislative context, is much less so in the context of a judicial opinion. An additional difference is that judicial purposes, unlike legislative purposes, cannot be ideologically controversial. The judiciary cannot operate upon highly contestable premises because it cannot overly politicize itself.

But these answers dance around the correct retort: In articulating doctrinal rationales, unlike statutory purposes, no discovery at all is involved. This, one might say, is the prerogative of having both the promulgator and the interpreter residing in one body. Such articulations derive legitimacy not from a claim to truth, such as a statement that "the purpose of the legislator in enacting this law was . . .," but from the rigor of their own form. The process of adjudicating is supposed to consist precisely of such reasoned propositions. Thus, the rationales here offered for the three doctrines are not the purported bearers of doctrinal truths. Rather, they are one way of making sense of these doctrines, one interpretation that is open for public debate. Alternative propositions, carrying with them different and potentially opposing implications, are to compete under the standards of coherence and consistency with those proposed in this Article. If the secondary-effects doctrine can be rationally reconciled with the content-based/content-neutral doctrine, let the marketplace of ideas do so. New substance cannot be legitimized by old form: It must withstand public scrutiny and be adopted, or abandoned, on its own virtues or vices.