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NEUTRAL NO MORE: SECONDARY EFFECTS ANALYSIS AND THE QUIET DEMISE OF THE CONTENT-NEUTRALITY TEST

Mark Rienzi & Stuart Buck***

When the Supreme Court introduced the "secondary effects" doctrine to allow for zoning of adult businesses, critics fell into two camps. Some, like Justice William Brennan, predicted dire consequences for the First Amendment, particularly if the doctrine was used in political speech cases. Others, like Professor Laurence Tribe, predicted secondary effects analysis would be limited to sexually explicit speech and would not threaten the First Amendment. The modern consensus is that the doctrine has, in fact, been limited to cases about sex.

Recent cases demonstrate, however, that the impact of the secondary effects doctrine on the First Amendment has been broader and more insidious than is generally understood. It is true that courts usually avoid expressly invoking the doctrine outside the adult speech context, instead applying the standard content-neutrality analysis. But that "standard" neutrality analysis has actually been quietly warped over the past three decades by the influence of the secondary effects doctrine. These doctrinal distortions have occurred without anything like the outcry generated by the prospect of express use of the doctrine in political speech cases.

The results of this doctrinal shift are striking, with some courts treating as "neutral" laws that deliberately discriminate among speakers and messages on public sidewalks, in issuing parade permits, and even in what political messages can be worn on T-shirts.

This Article (1) describes the manner in which the standard neutrality analysis has been warped by the secondary effects doctrine, (2) demonstrates the dangerous First Amendment effects of those changes by examining several recent cases in which courts have allowed content-based or even viewpoint-based speech restrictions to stand, and

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(3) explains how the U.S. Supreme Court and lower courts can and should correct this serious First Amendment problem.

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INTRODUCTION

Nearly three decades ago, in *City of Renton v. Playtime Theatres, Inc.*, the U.S. Supreme Court introduced the "secondary effects" doctrine into the First Amendment's content-neutrality analysis.[1] Under this doctrine, the Court upheld a law imposing zoning requirements on an adult-themed movie theater as "content neutral," even though application of the law turned entirely on the content of movies shown.[2]

The decision was greeted with sky-is-falling pronouncements of the danger to the First Amendment. Justice William Brennan wrote that the "dangers and difficulties posed by the *Renton* analysis are extensive" because "secondary effects offer countless excuses for content-based suppression of political speech."[3] Geoffrey Stone observed that the doctrine "threaten[ed] to undermine the very foundation of the content-based/content-neutral distinction" and "in turn erode the coherence and predictability of first amendment doctrine."[4]

Renton offered a possible silver lining—perhaps the secondary effects doctrine would be limited to sexually explicit speech, and therefore not endanger the political speech that lies at the core of the First Amendment's protections. At the time, Laurence Tribe wrote, "The *Renton* view will likely prove to be an aberration limited to the context of sexually explicit materials."[5] Kathleen Sullivan expressed the same view years later, explaining that the secondary effects doctrine is used in the context of sexually explicit speech to "uphold otherwise content-based statutes whose political counterparts would readily be struck down."[6] Modern commentary suggests most scholars agree that the secondary effects doctrine has been largely cabined to sexually explicit speech.[7]

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1. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986).

2. *See id.* at 54–55.

3. Boos v. Barry, 485 U.S. 312, 335 (1988) (Brennan, J., concurring).

4. Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 116–17 (1987); *see also* Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261, 293 n.145 (1987) ("[I]f taken seriously as a statement of first amendment law, [*Renton*] would effectively eviscerate the concepts of 'time, place and manner,' 'content neutrality,' and 'narrow tailoring.' It is reasonable to hope that the distortions introduced in that opinion will apply only to the category of 'sexually explicit materials' . . . ."); Andrea Oser, *Motivation Analysis in Light of* Renton, 87 COLUM. L. REV. 344, 350 (1987) (noting that commentators "fear that *Renton* marks a gutting of the first amendment").

5. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-3, at 799 n.17 (2d ed. 1988); *see also* Alan E. Brownstein, *Illicit Legislative Motive in the Municipal Land Use Regulation Process*, 57 U. CIN. L. REV. 1, 95 (1988) ("Although the Court never explicitly affirms the view that sexually explicit expression is a generally less valuable form of speech (and that the plurality position in *American Mini Theatres* now commands a majority of the Court), no other explanation of *Renton* is plausible. The protection provided the regulated speech in *Renton* is so limited and so easily circumscribed that the case's holding must be narrowly construed.").

6. Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 PEPP. L. REV. 723, 730 (2001).

7. *See, e.g.*, Joshua P. Davis & Joshua D. Rosenberg, *The Inherent Structure of Free Speech Law*, 19 WM. & MARY BILL RTS. J. 131, 137 (2010) ("[T]he 'secondary effects' test is best understood as a way to give sexual speech less protection than more highly valued

The core claim of this Article is that this dominant view is wrong. Although courts have generally avoided *express* use of the secondary effects doctrine in political speech cases, the doctrine has had a powerful distorting effect on the traditional content-neutrality analysis that lies at the heart of much of the Court's free speech analysis. These changes to the traditional neutrality test have created precisely the First Amendment problems feared by *Renton*'s early critics. Yet they have done so rather stealthily, without anything like the attention initially attracted by *Renton* itself, and without any of the outcry that would have accompanied the widespread express use of the secondary effects doctrine in political speech cases.

The result is that courts today are more likely to uphold expressly content-based restrictions on core political speech—and even *viewpoint*-based[8] restrictions on such speech—than they were before *Renton*. In the past few years, this has resulted in federal courts deeming "neutral" government attempts to discriminate among speakers based on their messages on public streets and sidewalks, in parade permitting schemes, and even in which political T-shirts they may wear.[9]

We believe three doctrinal developments are responsible for this shift. First, the very existence of the secondary effects doctrine suggests to courts and governments that, at least in some instances, a law can be deemed neutral and acceptable if it has a neutral purpose, even if the application of the law itself is actually content based. This occurs primarily, but not exclusively, in cases concerning sex-related speech.

Second, courts historically required a law to be "justified without reference to the content of the regulated speech" before it could be treated as content neutral.[10] When properly applied, this inquiry requires a critical review of the government's asserted interest to determine whether that interest is related to content in any way.[11] Over time, and in reliance on *Renton*, courts have largely deemed the "justification" inquiry satisfied any time a government even *names* a neutral interest, regardless of whether the justification is triggered only by speech of a particular content. This change makes the "justified without reference" prong of content analysis virtually powerless to protect against selective government regulation of speech, even in the realm of political speech.

speech."); John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, 293 (2009) ("The good news . . . is that courts generally do not apply the secondary effects doctrine to most forms of protected speech.").

8. As the Supreme Court has explained, viewpoint discrimination is "an egregious form of content discrimination." Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination." (citing R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992))).

9. *See infra* Part III.B.

10. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

11. *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 298 (1984).

Third, relying on *Renton*, the Supreme Court has declared on several occasions that the search for an illicit governmental motive is the "principal inquiry" in content-neutrality analysis.[12] Lower courts have taken this claim quite seriously. This often results in courts treating a law as neutral unless and until a litigant proves that the legislature acted with an improper motive—an exceedingly difficult standard for plaintiffs to satisfy.

Together, these three developments in neutrality analysis have at times transformed the First Amendment from a meaningful command about the effects of a law—"make no law . . . abridging the freedom of speech"[13]—to a shallow and easily evaded inquiry into whether the government can name just one neutral purpose served by the law.

We say "at times" because, while this transformation is real and, in our view, quite dangerous, it is not yet complete or universal. There are still examples of cases, both at the Supreme Court and in the lower courts, that do not make this error. This is welcome news for the health of the First Amendment, because it means there is still room for courts to correct the problem. Doing so, however, requires understanding how the neutrality analysis was traditionally employed, how the secondary effects doctrine has gradually warped that analysis over time, and how existing precedents and current cases offer the Supreme Court a path back to the original test.

Parts I and II of this Article set forth our doctrinal argument about the influence of the secondary effects doctrine. Part I briefly describes the content-neutrality inquiry that lies at the heart of First Amendment analysis and how the Court has traditionally applied this standard to require neutrality in three respects: the law's application, the asserted government justification, and the governmental motive. Part II explores how the three doctrinal changes set out above have quietly distorted the standard content-neutrality doctrine over the past three decades, frequently turning it into a much weaker and less speech-protective inquiry than is generally understood.

Part III looks at some post-*Renton* decisions both at the Supreme Court and in the federal courts of appeals to demonstrate how this doctrinal shift has caused precisely the changes to First Amendment law feared by *Renton*'s early critics, even where courts do not expressly embrace or apply the secondary effects doctrine. Indeed, in several recent cases, different federal courts of appeals have relied on these doctrinal shifts to declare even openly viewpoint-discriminatory laws—laws the courts themselves recognized as designed to "singl[e] out . . . favored messages"[14] in public forum speech regulation—to be "content neutral."

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12. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."); *see also* Hill v. Colorado, 530 U.S. 703, 711 (2000) (citing *Ward*, 491 U.S. at 791).

13. U.S. CONST. amend. I.

14. *See, e.g.*, Int'l Women's Day March Planning Comm. v. City of San Antonio, 619 F.3d 346, 361 (5th Cir. 2010); *see also infra* Part III.B.4.

Finally, Part IV discusses some suggested ways in which both the Supreme Court and the lower courts can act to restore the content-neutrality test to its intended strength, and therefore to its role as "the keystone of First Amendment law."[15]

I. THE TRADITIONAL CONTENT-NEUTRALITY ANALYSIS: THREE TYPES OF NONNEUTRALITY

The content-neutrality inquiry has been deemed "[p]erhaps the most intriguing feature . . . [and] the most pervasively employed doctrine in the jurisprudence of free expression."[16] The Court has repeatedly indicated that the content inquiry is designed to prohibit government efforts to discriminate among ideas.[17] Ultimately, the content inquiry helps identify those laws that are most likely to arise from discriminatory motives and are most susceptible to abuse.[18] As Justice Elena Kagan has explained, the goal of the content distinction is "to identify a set of improper motives, which themselves may give rise to untoward consequences."[19]

The differences in treatment of content-based and content-neutral restrictions make the content distinction almost dispositive on the issue of a statute's constitutionality.[20] In order to protect against government discrimination among different messages,[21] courts apply strict scrutiny to content-based laws,[22] under which the legislature must be found to have

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15. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 443 (1996).

16. Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST 110 (1980); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 113 (1981). Professor Redish has argued that the distinction "is both theoretically questionable and difficult to apply," and has suggested that we do away with it. Redish, *supra*, at 114.

17. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 387 (1992) ("The rationale of the general prohibition, after all, is that content discrimination 'raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'" (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991))).

18. *See* Kagan, *supra* note 15, at 451–52.

19. *Id.* at 451.

20. *See* Stone, *supra* note 16, at 196 (noting that the scrutiny used for content-based regulations "approaches absolute protection").

21. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 318 (1988) ("[T]he First Amendment reflects a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open,' and [the Supreme Court] ha[s] consistently commented on the central importance of protecting speech on public issues." (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964))); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 66 (1983) ("[V]iewpoint discrimination implicates core First Amendment values . . . .").

22. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 660 (1994) (noting that, even absent evidence of illicit motive, strict scrutiny is also employed when the government regulates in a manner that "raise[s] suspicions that their objective [is], in fact, the suppression of certain ideas"); *Perry*, 460 U.S. at 66 (agreeing that "no case has applied any but the most exacting scrutiny to a content or speaker restriction that . . . tended to favor the advocacy of one point of view on a given issue" (internal quotation marks omitted) (quoting Perry Local Educators' Ass'n v. Hohlt, 652 F.2d 1286, 1296 (7th Cir. 1981))).

crafted a narrowly tailored restriction that is necessary to serve a compelling state interest.[23] Many commentators have noted—and the Court's opinions demonstrate—that this test is nearly impossible to satisfy.[24]

Content-neutral restrictions, on the other hand, generally receive more deferential treatment.[25] Not only is the government interest held to a lower standard—the interest need be merely "significant" or "substantial" rather than "compelling"[26]—but the Court has also explicitly rejected a strict "least restrictive means" test, requiring instead that the means be narrowly tailored and leave ample alternative outlets.[27] In addition to receiving this more relaxed standard of review, content-neutral laws may be treated as "time, place, and manner" restrictions,[28] and may even impose differential burdens on speakers so long as they are "incidental."[29]

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23. *See Turner*, 512 U.S. at 660–61. There is also a strain within the First Amendment cases that suggests that a content-based law should be considered per se unconstitutional, at least in certain circumstances. For example, the Court has declared, "The government *must abstain* from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) (emphasis added). This language suggests that, in some circumstances, the targeting of particular content might not even be eligible for the compelling interest test. This view of content-based laws was also endorsed by Justice Kennedy in his concurrence in *Simon & Schuster, Inc. v. New York State Crime Victims Board*, 502 U.S. 105, 124–25 (1991) (Kennedy, J., concurring).

24. *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011) (noting that strict scrutiny "is a demanding standard. 'It is rare that a regulation restricting speech because of its content will ever be permissible.'" (quoting United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 818 (2000))); City of Boerne v. Flores, 521 U.S. 507, 534 (1997) (noting that strict scrutiny is "the most demanding test known to constitutional law").

25. *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 312–13 (1984) (Marshall, J., dissenting) ("[T]he Court has dramatically lowered its scrutiny . . . once it has determined that such regulations are content-neutral[,] . . . [applying] only a minimal level of scrutiny."); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 654 (1991) (noting that content neutral regulations receive more lenient treatment because they "do not pose the type of threat with which the Court is primarily concerned").

26. *See* Williams, *supra* note 25, at 640 ("A significant state interest represents a type of lowest common denominator . . . ."); *see also* Redish, *supra* note 16, at 127 ("[I]t is practically inconceivable that an asserted governmental purpose will not qualify."). Although the content-neutrality tests discussed herein have developed in varied circumstances, most notably in symbolic speech and time, place, and manner restrictions, these tests have essentially merged. *See* Williams, *supra* note 25, at 650–54 (noting that there is "little, if any" difference between the tests (quoting *Clark*, 468 U.S. at 298)).

27. *See* Ward v. Rock Against Racism, 491 U.S. 781, 797 (1989); *see also id.* at 803 (Marshall, J., dissenting) (criticizing the Court's substitution of "mandatory deference" in place of the previous narrow-tailoring requirement).

28. *See* Redish, *supra* note 16, at 114–15 (citing regulations, such as the ordinance at issue in *Mosley*, which limited only the time, place, or manner of expression but did so based on content and thus did not receive deferential review). "Time, place, and manner" restrictions are allowed because the Court has recognized that

> expressive activity, even in a quintessential public forum, may interfere with other important activities for which the property is used. Accordingly, this Court has held that the government may regulate the time, place, and manner of the expressive activity, so long as such restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication.

In order to understand fully the ways in which the neutrality test has been warped, it is helpful to think of three aspects of content-neutrality, all of which were traditionally required before the Court would deem a law neutral. First, to qualify as neutral, a law must be neutral in its *application*: the law must apply equally to speech regardless of its message.[30] Second, the law must also be content neutral in its *justification*: the government must prove that the interests asserted to support the law are implicated regardless of the content of speech.[31] This justification analysis asks whether it is *something about the content of the speech itself* that raises the government's interest or makes the government think the interest needs protecting in the particular context at issue.[32] Third, the legislature must not have acted with the *motive* of favoring or disfavoring a particular viewpoint or content.

A. The Application Inquiry

A court will deem a law content based, and therefore almost certainly invalid, if its application is determined by the content of expression.[33] *Police Department of Chicago v. Mosley*[34] provides a classic example. The City of Chicago had enacted a municipal ordinance banning all picketing within 150 feet of a school building while school was in session, except "the peaceful picketing of any school involved in a labor dispute."[35]

Burson v. Freeman, 504 U.S. 191, 197 (1992) (plurality opinion).

29. *See Ward*, 491 U.S. at 791; *see also* Redish, *supra* note 16, at 126–27.

30. *See, e.g.*, United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 811 (2000) ("Section 505 applies only to channels primarily dedicated to 'sexually explicit adult programming or other programming that is indecent.'"); United States v. Eichman, 496 U.S. 310, 315 (1990) ("The Government contends that the Flag Protection Act is constitutional because . . . the Act does not target expressive conduct on the basis of the content of its message."); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972).

31. *See, e.g.*, *Eichman*, 496 U.S. at 315 ("Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted *interest* is related 'to the suppression of free expression,' and concerned with the content of such expression." (quoting Texas v. Johnson, 491 U.S. 397, 410 (1989))).

32. *See id.* at 315–17. Flag-burning cases provide the clearest example of the Supreme Court using this type of analysis. In both *Texas v. Johnson* and *United States v. Eichman*, the Court evaluated the constitutionality of laws against burning the American flag. The government each time asserted interests in preserving the flag as a national symbol and preventing onlookers from being offended or starting a confrontation. Because the Court ruled that these interests were dependent on the intended message of the flag burning—that these interests were only harmed by someone who burned the flag to criticize the United States but not by a Marine who performed the exact same burning but did so to dispose respectfully of the flag—the laws had content-based justifications. Because the asserted interests were only threatened by burnings with a certain message, the Court applied strict scrutiny. *See Eichman*, 496 U.S. at 318. *See generally Johnson*, 491 U.S. at 412.

33. *See, e.g.*, *Mosley*, 408 U.S. at 95.

34. *Id.*

35. *Id.* at 93. As will be discussed *infra*, the statute in *Mosley* technically does not state an application-based exception. Rather, the statute simply identifies the location of the protested event—here a labor problem—and the Court treated the law as containing the additional requirement that the protesting outside the school involved in the labor dispute had to concern the labor dispute to qualify for the special treatment. Because *Mosley*

Striking down the law, the Court noted that, because of the explicit exception for labor picketing, "the ordinance itself describes impermissible picketing not in terms of time, place, and manner, but in terms of subject matter. The regulation 'thus slip[s] from . . . neutrality . . . into a concern about content.'"[36] Thus, because one must know the content of the speech in order to determine whether the speech violates the law—i.e., in order to *apply* the law—the ordinance is content based.

The flag-burning case of *Texas v. Johnson*[37] provides another example. There, the Supreme Court invalidated a Texas law prohibiting the "desecration of venerable objects" using a typical application-based analysis. The Court struck down the law because it defined the crime as requiring that the actor know it "will seriously offend" others.[38] The law thus sorted legal from illegal flag burning based on whether it was likely to offend others. As the Court found, "Whether Johnson's treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct."[39] The Court found the law to be content based in its application and thus unconstitutional.[40]

Thus far, the content inquiry is straightforward. If a law *applies* only to speech of a particular content or viewpoint, it will be deemed content based and will likely be struck down. This makes sense because any law that applies only to certain content is overwhelmingly likely to arise from an illegitimate governmental objective, whether it be aiding speakers with a favored viewpoint or burdening speakers with a disfavored one.

As we shall see, though, few legislatures are foolish (or honest) enough to admit they are attempting to burden speech of a particular content. Rather, most legislatures can accomplish the same end by: (a) broadening the restriction to apply, at least in theory, to a wider range of speech; or (b) by claiming that the true objective is to address some *other* problem not directly tied to speech. Thus, the traditional content-neutrality test necessarily focused not only on the law's application, but also on the law's *justification*.

B. The Justification Inquiry

The Court has repeatedly stated that in order to be considered content neutral, a law must be "justified without reference" to the content of speech.

When properly employed, this "justified without reference" test requires (1) the government to offer a neutral interest supporting the law, and (2) the court to test that neutral interest to determine whether it is only threatened

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traditionally is treated as the quintessential example of discrimination in application based on content, we will treat it as such for the time being. *But see infra* notes 117–20 and accompanying text.

36. *Mosley*, 408 U.S. at 99 (alteration in original) (quoting Henry Kalven, Jr., *The Concept of Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 29).

37. 491 U.S. at 397.

38. *Id.* at 400 n.1.

39. *Id.* at 411.

40. *See id.* at 420.

by speech of a particular content. Thus, unlike the application inquiry—which focuses on how the law actually *applies*—the justification inquiry focuses instead on the interests the law serves, and whether it serves those interests *regardless* of the content of the speech involved.

Three cases in particular demonstrate how rigorous this justification inquiry can be: *United States v. O'Brien*,[41] *Clark v. Community for Creative Non-Violence*,[42] and *United States v. Eichman*.[43]

In symbolic speech cases beginning with *O'Brien*, the Court indicated that a law prohibiting expressive conduct is only "sufficiently justified . . . if it furthers . . . a substantial governmental interest [and] if the governmental interest is unrelated to the suppression of free expression."[44] The statute at issue in *O'Brien* prohibited destruction of a draft card.[45] The Court began by stating that the law was content neutral in its application; it did not distinguish among those who burned the draft card for different messages or between those who destroyed draft cards for no expressive purpose at all and those who did so for its communicative value.[46]

But this finding of content-neutral application did not end the First Amendment inquiry. Instead, the Court went on to examine the statute to determine whether it was content neutral in its *justification* as well.[47] The Court began this analysis by focusing on the government interests supporting the law. The Court found that Congress had a "legitimate and substantial" interest in preserving draft cards because the cards serve purposes such as proving that an individual has registered for the draft, facilitating communication between registrants and local boards, and demonstrating availability for induction in times of national crisis.[48] These interests, at least in theory,[49] were implicated by *all* destruction of draft cards, not merely destruction performed in order to express certain views.[50] Because the government interest was implicated by any destruction,

41. 391 U.S. 367 (1968).

42. 468 U.S. 288 (1984).

43. 496 U.S. 310 (1990).

44. *O'Brien*, 391 U.S. at 377.

45. *See id.* at 370.

46. *See id.* at 375 ("[The statute] prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct. The [statute] does not distinguish between public and private destruction, and it does not punish only destruction engaged in for the purpose of expressing views.").

47. *See id.* at 377.

48. *See id.* at 378–79.

49. One might argue, however, that the law really was content based because hardly anyone ever burned draft cards except for precisely the purpose of communicating opposition to the draft. In other words, it is very unlikely that the law was motivated by a wish to punish the "odd soul who burns a draft card just to stay warm or to light up his campsite." Laurence H. Tribe, *The Mystery of Motive Public and Private: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1, 34.

50. *See O'Brien*, 391 U.S. at 382 ("When O'Brien deliberately rendered unavailable his registration certificate, he wilfully frustrated this governmental interest. For th[e] noncommunicative impact of his conduct, and for nothing else, he was convicted. [This case] is therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful.").

regardless of the presence or content of expression, the Court found the government interest to be "unrelated to the suppression of free expression."[51] The law was justified without reference to the content of speech.

The Court also has used a strong justification inquiry in cases involving time, place, and manner restrictions. In *Clark*, for example, a group called Community for Creative Non-Violence sought to participate in a round-the-clock demonstration on the National Mall and in Lafayette Park in Washington, D.C.[52] Pursuant to an Interior Department regulation, the National Parks Service denied permission for the portion of the demonstration that called for sleeping overnight in the park.[53] In analyzing the First Amendment challenge, the Court first reiterated the requirement that a law not only be content neutral in its application, but also must be "justified without reference to the content of the regulated speech."[54]

The Court found this justification inquiry satisfied because the government's asserted interest was implicated by any overnight sleeping in the park, not just that with a certain message: "Damage to the parks as well as their partial inaccessibility to other members of the public can as easily result from camping by demonstrators as by nondemonstrators."[55] Thus, as in *O'Brien*, the Supreme Court's content inquiry asked not whether the state had merely asserted an interest that did not mention content, but whether that interest would be threatened by *all* the prohibited conduct regardless of its message, or only by conduct with a particular message. As in *O'Brien*, the law at issue was justified without reference to the content of speech.

The best example of the Court rejecting a statute through this justification-based content analysis occurs in the second of the flag-burning cases, *Eichman*. In response to the Court's decision in *Johnson*, Congress enacted its own flag-burning prohibition, this time eliminating the "offense" requirement, presumably in hopes of being deemed content neutral because of its new, broader application.[56] The Court made clear, however, that a legislature cannot simply create content neutrality by enacting a broader law to serve the same content-driven interests. When the new law was challenged, the Court held that although the law would indeed survive an application-based analysis, it remained content-based because it failed a justification-based inquiry: "Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct,"—i.e., it was content neutral in application—"it is nevertheless clear that the Government's asserted *interest* is 'related to the suppression of free expression,' . . . and concerned with the content of such expression."[57] In explaining this finding, the Court indicated that Congress's asserted

51. *Id.* at 377.
52. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 291–92 (1984).
53. *Id.*
54. *Id.* at 293.
55. *Id.* at 298.
56. *See* United States v. Eichman, 496 U.S. 310, 314 (1990).
57. *Id.* at 315 (quoting Texas v. Johnson, 491 U.S. 397, 410 (1989)).

interest—preserving the flag as a national symbol—was implicated only by certain acts of burning the flag, based on their communicative content.[58] Thus, because the government's interest was threatened only by flag burning with a particular content, the law's justification was content based, and the Court rejected the law as unconstitutional.[59] Simply put, the law was not justified without reference to the content of speech.

Together, *O'Brien*, *Clark*, and *Eichman* demonstrate that the test for content-neutrality treatment is not limited merely to a law's application, but must also include an analysis of whether the government's asserted justification depends on content. The government's asserted interest must be one that is implicated by the prohibited act without regard to communicative content.

C. The Motivation Inquiry

Beyond looking at a law's application and justification, the neutrality test has also historically considered the government's purpose or motive, at least to some extent. The Court's approach in this area has always been somewhat confusing. On one hand, the Court famously proclaimed in *O'Brien* that "this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[60] Yet the Court has also declared that "a content-based purpose may be sufficient in certain circumstances to show that a regulation is content-based."[61]

Despite these tensions, it is clear that the Court has historically considered whether a law was enacted for the purpose of restricting speech with which the government disagrees as part of its neutrality test. For example, in *Members of the City Council v. Taxpayers for Vincent*,[62] the Court analyzed an ordinance that prohibited the posting of signs on public property.[63] The Court explained that there could be some asserted government interests "such as a desire to suppress support for a minority party or an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas," that are "so plainly illegitimate that they would immediately invalidate the rule."[64] Yet the Court found the law neutral because it saw "not even a hint of bias or censorship in the City's enactment or enforcement of this ordinance," and there was "no claim that the ordinance was designed to suppress certain ideas that the City finds distasteful or that it has been applied to appellees because of the views that they express."[65]

58. *See id.* at 316–17.
59. *See id.*
60. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 383 (1968).
61. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994).
62. 466 U.S. 789 (1984).
63. *Id.* at 804.
64. *Id.*
65. *Id.*

The Court recently confirmed that it will consider governmental purpose or motive in its content analysis in *Sorrell v. IMS Health Inc.*[66] In *Sorrell*, the Court considered the constitutionality of a Vermont law regulating the use and dissemination of pharmacy records that reveal the prescribing practices of individual doctors. The Court explained, "Just as the 'inevitable effect of a statute on its face may render it unconstitutional,' a statute's stated purposes may also be considered."[67] The Court found that the legislature had "designed [the statute] to target [certain] speakers and their messages for disfavored treatment," and found the law content based.[68]

To be sure, this is an inquiry that most laws survive—it is clear that only the rare legislature would be honest or ill-advised enough to expressly design a law for improper purposes. Yet it is equally clear that, should such a motive be actually discovered, the Court will deem a law to be unconstitutional.

Justice Kagan has suggested that the content-neutrality analysis itself appears to be designed to ferret out improper government motives.[69] As she put it, the application of First Amendment law is best understood and explained "as a kind of motive-hunting,"[70] with courts looking to invalidate laws based on an impermissible legislative motive, namely government disagreement with certain messages.[71] Yet, because direct inquiries into motive would be easy for governments to avoid, Justice Kagan argues that the content-neutrality test functions as a "tool[] to flush out illicit motives and to invalidate actions infected with them."[72] In this way, the content-neutrality inquiry "serves as the keystone to First Amendment law."[73]

We agree with Justice Kagan's assessment of First Amendment doctrine in general, the neutrality test in particular, and the dangers of building the

66. 131 S. Ct. 2653, 2663–64 (2011).

67. *Id.* at 2663 (quoting United States v. O'Brien, 391 U.S. 367, 384 (1968)).

68. *Id.* at 2663–64 ("Given the legislature's expressed statement of purpose, it is apparent that [the law] imposes burdens that are based on the content of speech and that are aimed at a particular viewpoint."); *see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 392 (1992) ("The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech."); Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

69. *See* Kagan, *supra* note 15, at 414.

70. *Id.*

71. *Id.*

72. *Id.* Kagan further explains:

> Let us accept that the First Amendment prohibits restrictions on speech stemming, even in part, from hostility, sympathy, or self-interest. And let us accept that the difficulty of proving this impermissible motive—resulting, most notably, from the government's ability to invoke pretextual reasons—gives rise to a set of rules able to flush out bad motives without directly asking about them. What would these rules look like?
>
> The first rule would draw a sharp divide between content-based and content-neutral restrictions.

Id. at 443.

73. *Id.*

doctrine around direct inquiries that governments can easily manipulate to restrict speech. As set forth in the next section, however, we believe that the neutrality test has become—in a way that could not have been apparent at the time of Justice Kagan's article—a much more direct inquiry into motive, and thus precisely the sort of easily avoidable and manipulable test Justice Kagan criticized.

II. How the Secondary Effects Doctrine Has Warped the Neutrality Inquiry

When courts employ all three aspects of the traditional neutrality analysis—the application test, the "justified without reference" analysis, and a motivation inquiry—the content-neutrality test can act as a relatively effective mechanism for screening out improper speech restrictions. As set forth in this section, however, the secondary effects doctrine undermines this traditional inquiry in three important ways.

First, the express use of the secondary effects doctrine directly undermines the most straightforward requirement of content neutrality: that a law must be neutral in its application. As *Renton*'s critics have noted, the secondary effects doctrine itself permits governments to regulate speech based on its content—that is, to enact laws that are content based in their application—so long as it is asserting a neutral reason for the regulation.

Second, because of reliance on *Renton*, courts (including the Supreme Court) have begun using a much weaker version of the "justified without reference" analysis, even in non-secondary-effects cases concerning core political speech. In particular, the post-*Renton* approach to this justification analysis does not seem to require the same type of means-ends analysis undertaken in *O'Brien*, *Clark*, and *Eichman.*

Third, again in reliance on *Renton*, courts have begun claiming that the "principal inquiry" for content analysis is whether the government operated with an impermissible motive (i.e., "because of disagreement with the message it conveys").[74] This formulation of the neutrality analysis improperly elevates motive—which is easy for governments to fake and hard for courts to assess—over the more objective application and justification inquiries.

Our hypothesis here is that these three developments—and particularly the last two—have subtly distorted the content-neutrality analysis even applied to regulations of political speech by turning it into a direct inquiry focused almost exclusively on legislative motive. As we see it, this weakens the neutrality inquiry and is a departure from the traditional content analysis in precisely the same way many commentators feared the secondary effects doctrine would eviscerate the First Amendment. But because these changes have occurred gradually over time—and because the secondary effects doctrine is almost never mentioned in these cases—these developments have not prompted anything like the outcry from First Amendment scholars that originally greeted *Renton*.

74. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

A. *Express Use of the Secondary Effects Doctrine Undermines the Content-Neutrality Test*

The development of the secondary effects doctrine undermines the neutrality test because it permits laws that are clearly content based to be treated as content neutral in certain circumstances.

1. Origins of the Doctrine: *Young*, *Renton*, and *City of Erie*

Historically, the secondary effects doctrine can be traced to *Young v. American Mini Theatres, Inc.*,[75] where the Court considered a city ordinance that regulated the placement of adult theaters in relation to other adult businesses and residential areas.[76] Although acknowledging that the law was content based, the Court ultimately held that the law was justified by "the city's interest in preserving the character of its neighborhoods."[77] In a footnote, the Court used, for the first time, the "secondary effects" language:

> 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.[78]

The Court explained that its footnoted reference to "secondary effects" was not its sole reason for upholding the law. The ruling was also supported by what the Court saw as the lower value of "adult" speech as compared with "untrammeled political debate" or "political oratory or philosophical discussion."[79]

A decade later, the Court followed *Young* with its decision in *Renton*.[80] *Renton* involved a zoning ordinance that prohibited adult theaters from being located within a thousand feet of any residential zone, park, church, or school.[81] The Court first observed that the ordinance did not "fit neatly into either the 'content-based' or the 'content-neutral' category,"[82] as the ordinance was addressed specifically at adult theaters yet restricted only their location. The Court deemed the ordinance content neutral, however, noting that the law "is aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters

75. 427 U.S. 50 (1976).
76. *Id.* at 52–53.
77. *Id.* at 71.
78. *Id.* at 71 n.34.
79. *Id.* at 70 ("[I]t 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 that inspired Voltaire's immortal comment. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice.").
80. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).
81. *Id.* at 43.
82. *Id.* at 47.

on the surrounding community."[83] The Court therefore believed that the City's "predominant" intent was "unrelated to the suppression of free expression."[84] The city had acted validly in attempting to "prevent crime, protect the city's retail trade, [and] maintain property values, . . . not to suppress the expression of unpopular views."[85]

The *Renton* Court made certain, however, to also cite *Young*'s statement distinguishing the level of First Amendment protection for such speech as compared to political speech: "[I]t is manifest that society's interest in protecting [sexually explicit] expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . ."[86] And in dissent, Justices William Brennan and Thurgood Marshall attempted to reinforce this point by arguing that "the Court's analysis is limited to cases involving 'businesses that purvey sexually explicit materials,' and thus does not affect our holdings in cases involving state regulation of other kinds of speech."[87]

The Court applied the secondary effects doctrine again in *City of Erie v. Pap's A.M.*[88] In *Erie*, the Court relied on the secondary effects doctrine to hold that a ban on public nudity was content neutral. Although there was some evidence that the law was aimed at banning nude dancing—including "statements by the city attorney that the public nudity ban was not intended to apply to 'legitimate' theater productions"—the Court found the law neutral because "one purpose" of the ordinance was "to combat harmful secondary effects."[89]

Together, *Young*, *Renton*, and *Erie* establish that—at least in the context of pornography and adult businesses—a law that would otherwise fail the traditional content-neutrality analysis may still be analyzed as content neutral. This is apparently true even: (1) when the law's *application* turns entirely on the content of speech (for example, the zoning restrictions in *Renton* were triggered solely by the content of movies shown); (2) when the law's *justification* depends on content (for example, the zoning restrictions in *Renton* were justified only because of a perceived connection between the content of films shown and likely crime and other effects in the community); and (3) even where there is evidence of a content-based motivation (for example, in *Erie*, where the Court was willing to ignore openly stated government content preferences so long as "one purpose" of the law was to target secondary effects). In this regard, the secondary effects test therefore undermines each of the three parts of the traditional neutrality inquiry described in Part I.B, *supra*.

83. *Id.*
84. *Id.* at 48.
85. *Id.*
86. *Id.* at 49 n.2 (first alteration in original) (quoting Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 70 (1976)).
87. *Id.* at 55–56 (Brennan, J., dissenting) (citation omitted).
88. 529 U.S. 277 (2000).
89. *Id.* at 292.

2. Secondary Effects and Government Motive

At heart, secondary effects doctrine is really a claim about the importance of governmental motive. The doctrine essentially provides that a government regulation of speech can be permissible if the government's motive—that is, its *reason* for enacting a particular law—is something other than a concern about the communicative impact of the speech. If the laws in either *Renton* or *Young* were enacted simply because the legislatures disliked the content of the films at issue, both would have been unconstitutionally content based. But because the legislature asserted a different motive—namely to address the "secondary" effects of adult movie theaters, such as the crime that often accompanies such theaters—the laws were not subjected to strict scrutiny and were upheld.

The ease with which the secondary effects doctrine permits a governmental claim of permissible motive to insulate a law from strict scrutiny prompted many commentators to sound the First Amendment alarm. As discussed above, Justice Brennan explained the dangers of permitting a government's claimed motive to govern the level of scrutiny a speech restriction receives:

> The dangers and difficulties posed by the *Renton* analysis are extensive. Although in this case it is easy enough to determine that the display clause does not aim at a "secondary effect" of speech, future litigants are unlikely to be so bold or so forthright as to defend a restriction on speech with the argument that the restriction aims to protect listeners from the indignity of hearing speech that criticizes them. Rather, they are likely to defend content-based restrictions by pointing, as Justice O'Connor suggests, to secondary effects like "congestion, . . . visual clutter, or . . . security . . ." But such secondary effects offer countless excuses for content-based suppression of political speech.[90]

Many commentators have raised similar concerns, calling the secondary effects doctrine "an impressively bold act of illogic"[91] that has "been much discredited,"[92] and "if taken seriously and applied broadly, would effectively negate all First Amendment protection for all disfavored advocacy."[93] As David Hudson observes, "The problem with this

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90. Boos v. Barry, 485 U.S. 312, 335 (1988) (Brennan, J., concurring) (alteration in original) (citation omitted).

91. Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108, 1120 (2005) ("It would seem hard to imagine a law that was more obviously a regulation of speech based on its content. Yet the Court, in an impressively bold act of illogic, deemed the ordinance content-neutral. . . . Thus the justification for the law, not the face of the law, became dispositive of its First Amendment validity.").

92. Stephen Townley, Note, *The Hydraulics of Fighting Terrorism*, 29 HAMLINE L. REV. 65, 79 n.93 (2006) ("The secondary effects doctrine has, however, been much discredited.").

93. Thomas R. McCoy, *Understanding* McConnell v. FEC *and Its Implications for the Constitutional Protection of Corporate Speech*, 54 DEPAUL L. REV. 1043, 1048 n.31 (2005) ("It is difficult to perceive any limit on the applicability of this secondary effects doctrine since the government's ultimate regulatory objective in every case of suppressing core political speech is the prevention of some undesirable *effect* of the message. Direct suppression of the speech in and of itself is never the ultimate regulatory objective. The ultimate regulatory objective is always the prevention of some effect that is expected to

expansive doctrine is that all speech causes effects. The secondary effects doctrine, a fertile ground for abuse, insidiously eviscerates free expression by allowing government officials to characterize content-based regulations as content-neutral. In practice, government officials use the doctrine to silence expression they dislike."[94]

3. Secondary Effects Beyond Adult Businesses

Despite these strong criticisms of the secondary effects doctrine, many commentators appear to take solace in the belief that the doctrine is generally confined to the context of adult businesses and pornography. For example, John Fee explains in his recent article about the doctrine:

> The good news . . . is that courts generally do not apply the secondary effects doctrine to most forms of protected speech. The doctrine was created for the regulation of pornography and sexually oriented

result from the message if left unrestricted. Thus, it appears that the secondary effects doctrine, if taken seriously and applied broadly, would effectively negate all First Amendment protection for all disfavored advocacy."); *see also* Heidi Kitrosser, *From Marshall McLuhan to Anthropomorphic Cows: Communicative Manner and the First Amendment*, 96 NW. U. L. REV. 1339, 1397–98 (2002) ("The secondary effects doctrine, or any deviation from treatment of facially content-based restrictions as content-based, is problematic insofar as it fails to comport with free speech theory and insofar as it accords unrealistic significance to government statements that a regulation has a neutral purpose. As suggested above, those regulations that target content directly, either on their faces or in terms of their underlying governmental purposes, should raise presumptions of illegitimacy, justifying the application of strict scrutiny. From this perspective, there is little basis to distinguish those regulations that target content directly and that the government justifies on a noncontent basis, from those regulations that target content directly, but that are unaccompanied by non-content-based justifications."); Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1267 (1995) ("[T]he Court has so far failed to articulate any substantive First Amendment theory to guide its distinction between primary and secondary effects.").

94. David L. Hudson, Jr., *The Secondary Effects Doctrine: "The Evisceration of First Amendment Freedoms,"* 37 WASHBURN L.J. 55, 61 (1997); *see also* Neuman, *supra* note 4, at 293 n.145 ("[I]f taken seriously as a statement of first amendment law, [*Renton*] would effectively eviscerate the concepts of 'time, place and manner,' 'content neutrality,' and 'narrow tailoring.' It is reasonable to hope that the distortions introduced in that opinion will apply only to the category of 'sexually explicit materials . . . .'"); Oser, *supra* note 4, at 350–51 ("The shift to motivation and the reduced access requirement have alarmed commentators who fear that *Renton* marks a gutting of the first amendment. They read *Renton* to say that any ordinance aimed at secondary effects, and not at the suppression of ideas, is constitutional if it meets a deferential balancing test."); Philip J. Prygoski, *The Supreme Court's "Secondary Effects" Analysis in Free Speech Cases*, 6 T.M. COOLEY L. REV. 1, 29 (1989) ("The secondary effects analysis creates a grave danger of courts upholding laws that purport to regulate non-speech evils, but are actually designed to restrict the underlying speech activity."); William M. Sunkel, City of Renton v. Playtime Theatres, Inc.*: Court-Approved Censorship Through Zoning*, 7 PACE L. REV. 251, 253 (1986) ("The danger of the *Renton* decision is that it heralds a movement away from imposing any meaningful standard of judicial scrutiny on legislation which intrudes on fundamental first amendment freedoms. Instead, the Court seems to be headed towards a deferential, 'rubber stamp' approach to this kind of legislation. In *Renton*, the Court effectively abandoned previously-delineated tests for determining the validity of a constitutionally-challenged ordinance. Such an approach constitutes little more than tacit Court approval of governmental censorship through manipulation of a municipality's zoning power.").

> entertainment, a type of expression that differs from other speech in significant ways.
>
> . . . .
>
> Indeed, recognizing the distinctive constitutional status of pornographic speech has the advantage of preventing the secondary effects doctrine from spilling into other areas of law, which could erode First Amendment protections for all forms of speech.[95]

Other commentators are in agreement.[96]

These commentators are generally correct, though the exceptions are important and worthy of discussion. To be sure, in the years since *Renton*, no majority of the Court has ever *explicitly* applied the secondary effects approach to political speech. In two cases, however, the Court appeared to at least consider using the doctrine outside the pornography context. In *Boos v. Barry*,[97] the Court considered a District of Columbia law that prohibited displaying signs within 500 feet of foreign embassies with a particular content—namely those that tended to bring the foreign government into "public odium" or "public disrepute."[98] Although the speech at issue was obviously core political speech, three justices (Sandra Day O'Connor, John Paul Stevens, and Antonin Scalia) at least considered applying *Renton*'s secondary effects doctrine. They found *Renton* inapplicable not because the speech was higher value nonpornography speech, but because the law targeted the *primary* effect of speech—that is, the impact of the speech on its audience—and therefore fell outside of *Renton*.

Similarly, a majority of the Court at least entertained the notion of using secondary effects analysis in the 1993 case of *City of Cincinnati v. Discovery Network, Inc.*[99] The case concerned a Cincinnati law regulating the placement of freestanding news racks on public property.[100] The Court rejected the City's attempt to rely on *Renton,* explaining that there was no evidence that news racks dispensing commercial handbills (which were banned) created different secondary effects than news racks dispensing newspapers (which were permitted).[101] Thus, as in *Boos*, the Court again distinguished secondary effects analysis.

Despite the absence of a Supreme Court decision expressly applying the secondary effects doctrine to nonpornographic speech, some lower courts have begun using the doctrine more broadly, as a handful of commentators

95. Fee, *supra* note 7, at 293–94.
96. For example, Kathleen Sullivan likewise explained that the secondary effects doctrine is used by the Court to "uphold otherwise content-based statutes [concerning sexually explicit speech] whose political counterparts would readily be struck down." Sullivan, *supra* note 6, at 730.
97. 485 U.S. 312 (1988).
98. *Id.* at 315.
99. 507 U.S. 410 (1993).
100. *Id.* at 412.
101. *Id.* at 430.

have pointed out.[102] These areas include door-to-door solicitation,[103] billboards,[104] discrimination,[105] and commercial entertainment.[106] As these cases indicate, although the Supreme Court has only applied the secondary effects doctrine to adult business and pornography cases, lower courts have, at least on occasion, used the doctrine more broadly.

We suspect that it is the general infrequency of these express uses of the secondary effects doctrine that has prompted many commentators to believe *Renton* has been cabined to sexually explicit speech and did not cause the severe damage its early critics feared. Nevertheless, we believe that *Renton* is actually causing this damage quietly through the subtle changes to the neutrality inquiry described below.

B. A Changed "Justified Without Reference" Analysis

As described above in Part I.B, the traditional content-neutrality analysis includes an inquiry into whether a law is "justified without reference to the content of speech." Historically, that inquiry required the government to do something more than merely identify a government interest that was not related to content, such as "public safety," or "keeping the parks clean," or "improving traffic flow." Instead, the government was required to demonstrate that the *relationship* between its allegedly neutral interest and the regulation of speech it adopted did not depend on the content of speech. The Court used this justification analysis in *O'Brien*, *Clark*, and *Eichman*, forcing the government to convince the Court that its justification was sound, *regardless* of the expressive content of the regulated speech. Thus, in *Eichman*, the Court rejected the state's attempted reliance on an interest in protecting the flag as a national symbol not because it found the interest invalid (the Court said the opposite), but because the justification for the law only made sense as to flag burnings with a particular message. The law was not justified without reference to the content of speech.[107]

The secondary effects doctrine has worked a subtle and perhaps unintended change to the traditional "justified without reference" test.[108]

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102. *See generally* David L. Hudson, Jr., *Justice Stevens, Justice Souter and the Secondary Effects Doctrine*, 35 UWLA L. REV. 48, 59 (2003); Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1372–82 (2006); Christopher J. Andrew, Note, *The Secondary Effects Doctrine: The Historical Development, Current Application, and Potential Mischaracterization of an Elusive Judicial Precedent*, 54 RUTGERS L. REV. 1175, 1213–14 (2002).

103. *See, e.g.*, City of Watseka v. Ill. Pub. Action Council, 796 F.2d 1547, 1554–58 (7th Cir. 1986).

104. *See, e.g.*, Wheeler v. Comm'r of Highways, 822 F.2d 586, 594–95 (6th Cir. 1987).

105. *See, e.g.*, Presbytery of N.J. of the Orthodox Presbyterian Church v. Florio, 902 F. Supp. 492, 521–22 (D.N.J. 1995).

106. *See, e.g.*, Nat'l Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 741–42, 749 (1st Cir. 1995).

107. *See supra* notes 58–59 and accompanying text.

108. For interesting discussions of "stealth overruling" (i.e., deliberate overruling of a prior precedent by the Court without expressly saying so) and "accidental overruling" (i.e., overruling past precedents truly by accident), see Barry Friedman, *The Wages of Stealth*

Rather than forcing the government to demonstrate that its regulation of speech served neutral interests regardless of the content of speech, the test has begun to resemble very closely the secondary effects analysis of *Renton*. Instead of looking to see whether an allegedly neutral justification for a law is implicated regardless of content (as it would be, for example, by a requirement for a parade permit before marching down Main Street), courts have begun to simply ask whether the government was pursuing any neutral interest *at all*, without inquiring as to whether that neutral interest is served only by restricting speech of a particular content.

1. Justification Analysis in *Renton* Itself

We believe this has occurred through a little-noticed aspect of *Renton*. Although the Court in *Renton* was quite clear that it was going to treat that expressly content-based law as content neutral because of the legislative motive of targeting secondary effects—the move that attracted all of the attention and criticism—the Court also asserted that the law in *Renton* was "justified without reference" to the content of regulated speech:

> In short, the Renton ordinance is completely consistent with our definition of "content-neutral" speech regulations as those that "are *justified* without reference to the content of the regulated speech." The ordinance does not contravene the fundamental principle that underlies our concern about "content-based" speech regulations: that "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."[109]

The cases cited by the *Renton* Court are consistent with the traditional form of the "justified without reference" test, which requires the government to put forward a justification that does not depend on the content of regulated speech (as described above in Part I.B). Viewed in conjunction with these cases, there can be no serious contention that the *Renton* ordinance passed the test in the same way.

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., for example, was a commercial speech case that simply recited the test, but noted that there was no serious contention that a regulation prohibiting price advertising was content neutral.[110] As described above, *Clark* expressly considered whether the connection between the banned activity (sleeping in parks) and the harm to be avoided

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Overruling (With Particular Attention to Miranda v. Arizona*)*, 99 GEO. L.J. 1 (2010), and Suzanna Sherry, *The Four Pillars of Constitutional Doctrine*, 32 CARDOZO L. REV. 969 (2011).

109. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48–49 (1986) (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976), and Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95–96 (1972)) (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984), and Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 648 (1981)).

110. *Va. State Bd.*, 425 U.S. at 771 ("There is no claim, for example, that the prohibition on prescription drug price advertising is a mere time, place, and manner restriction.").

(litter, etc.) was dependent on the communicative nature of the sleeping. Finding that the government's interest was implicated as much by communicative as noncommunicative sleeping, the Court deemed the interest neutral.[111]

In *Heffron v. International Society for Krishna Consciousness*, the Court implicitly found that the restriction on leafleting at the Minnesota State Fair was justified without reference to the content of speech.[112] The plaintiffs in the *Heffron* case sought the right to practice Sankirtan, the practice of walking around, soliciting donations, and offering literature to passersby.[113] Although the Court indicated that such behavior in the public forum would likely receive different treatment, it noted that the asserted state interest in maintaining crowd flow in the limited public forum of a state fair was sufficient to justify the law.[114] Notably, the Court explained that the state's interest would be implicated as much by speakers with other content, including "other religious, nonreligious, and noncommercial organizations" as by the plaintiffs.[115] Accordingly, the restriction in *Heffron* was clearly justified without reference to the content of speech.[116]

Finally, the *Renton* Court's reliance on *Mosley* further confirms that the "justified without reference test" was not historically satisfied by mere assertion of a neutral interest. In *Mosley*, the government had prohibited picketing on a "public way" within 150 feet of a school, but had exempted peaceful labor picketing.[117] In an effort to defend the law, the government

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111. *Clark*, 468 U.S. at 299 ("[T]here is a substantial Government interest in conserving park property, an interest that is plainly served by, and requires for its implementation, measures such as the proscription of sleeping that are designed to limit the wear and tear on park properties. That interest is unrelated to suppression of expression.").

112. *Heffron*, 452 U.S. at 649 ("[The Minnesota law] applies evenhandedly to all who wish to distribute and sell written materials or to solicit funds. No person or organization, whether commercial or charitable, is permitted to engage in such activities except from a booth rented for those purposes.").

113. *Id.* at 644–46.

114. *Id.* at 654 ("By focusing on the incidental effect of providing an exemption from Rule 6.05 to [*Heffron*], the Minnesota Supreme Court did not take into account the fact that any such exemption cannot be meaningfully limited to [*Heffron*], and as applied to similarly situated groups would prevent the State from furthering its important concern with managing the flow of the crowd. In our view, the Society may apply its Rule and confine the type of transactions at issue to designated locations without violating the First Amendment.").

115. *Id.* at 653 ("Indeed, the court below agreed that without Rule 6.05 there would be widespread disorder at the fairgrounds. The court also recognized . . . a much larger threat to the State's interest in crowd control if all other religious, nonreligious, and noncommercial organizations could likewise move freely about the fairgrounds distributing and selling literature and soliciting funds at will.").

116. *Id.* at 654.

117. Police Dep't of Chi. v. Mosley, 408 U.S. 92, 92–93 (1972). Section 193-1 of the Chicago Municipal Code read:

> A person commits disorderly conduct when he knowingly: (i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded, provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute . . . .

CHI., ILL., MUNICIPAL CODE § 193-1(i) (1972).

had argued that its exception was permissible "because, as a class, non-labor picketing is more prone to produce violence than labor picketing."[118] The Court rejected this asserted justification, noting that the First Amendment bars the city from making generalizations based on the content or subject matter of speech: "Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter."[119] Thus the city's proffered justification was expressly, and impermissibly, based on the content of regulated speech. Accordingly, the Court noted, "Selective exclusions from a public forum may not be based on content alone, and *may not be justified by reference to content alone*."[120]

Juxtaposed with these cases, it is clear that the ordinance in *Renton* could not actually pass the "justified without reference" test, at least as that test had been applied in the earlier cases described above. Indeed, the exact opposite is true: the *only* reason it made sense for the government in *Renton* to focus its regulation on adult establishments was the government's belief that movie theaters with a particular content created negative secondary effects.[121] Thus the city's justification—that adult businesses cause certain harmful secondary effects—was actually directly based on content.[122] If those businesses changed their content—if they started offering knitting clubs and church services instead of nude dancing—then the City's secondary effects rationale disappears entirely.

In this regard, *Renton* should have been the very exemplar of a law that was *not* justified without reference to content of speech. The *Renton* Court should have simply acknowledged that the secondary effects doctrine was an exception to this part of the neutrality test as well, to avoid watering down the test when applied to the rest of free speech doctrine.

Looking back, it is clear that the exact opposite has happened. Rather than recognizing *Renton* as an exception to an ordinarily strong "justified without reference" analysis, the Court instead began treating *Renton* as a paradigmatic example of how the justification test should be employed.

118. *Mosley*, 408 U.S. at 100.

119. *Id.* at 100–01.

120. *Id.* at 96 (emphasis added).

121. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986) ("[T]he adult theater zoning ordinance was aimed at preventing the secondary effects caused by the presence of even one such theater in a given neighborhood."); *see also* Northend Cinema, Inc. v. City of Seattle, 585 P.2d 1153, 1155 (Wash. 1978) (explaining that the city amended the zoning code "to preserve the character and quality of residential life in its neighborhoods" and "to protect neighborhood children from increased safety hazards, and offensive and dehumanizing influence created by location of adult movie theaters in residential areas").

122. *See, e.g.*, *Renton*, 475 U.S. at 50; *Northend Cinema*, 585 P.2d at 1158 (acknowledging "the different treatment accorded adult movie theaters as distinguished from other types of movie theaters").

2. *Renton* Becomes the New Exemplar of the Justification Inquiry

Rather than treat the justification analysis in *Renton* as an outlier, the Court instead embraced it as the exemplar for this aspect of the neutrality test. The first time this occurred, in *Boos v. Barry*,[123] the Court cited *Renton* as providing "the definition of a content-neutral statute" as one that is "*justified* without reference to the content of the regulated speech."[124]

Four years later in *R.A.V. v. City of St. Paul*,[125] the Court again relied on *Renton*'s definition of neutrality for the "justified without reference" analysis:

> 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."[126]

With this language, the Court in *R.A.V.* expressly tied *Renton*'s "justified without reference" analysis to its secondary effects language. The *R.A.V.* Court apparently viewed *Renton*'s secondary effects arguments as connected to, and sufficient to satisfy, the "justified without reference" portion of the content-neutrality test. In this manner, the secondary effects doctrine—so loudly objected to by so many defenders of the First Amendment—was essentially read into the standard justification inquiry, which is part of the standard neutrality analysis.

Following the Supreme Court's lead, many other courts have cited *Renton* for its "justified without reference" test.[127] This broader use of *Renton* not only as an exemplar of the secondary effects doctrine, but also as a model for how to perform the "justified without reference" analysis, is particularly troubling. The justification for the law in *Renton* expressly

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123. 485 U.S. 312 (1988).

124. *Id.* at 320 (quoting *Renton*, 475 U.S. at 48) (internal quotation mark omitted).

125. 505 U.S. 377 (1992).

126. *Id.* at 389 (quoting *Renton*, 475 U.S. at 48).

127. A Westlaw search returns more than 100 hits. Search Results, WESTLAW.COM, http://www.westlaw.com (search "Renton /25 'justified without reference'" in the ALLCASES database) (last accessed Nov. 22, 2013). Many of these cases appear to follow *R.A.V.*'s lead in treating *Renton*'s secondary effects analysis as part and parcel of its "justified without reference" analysis. *See, e.g.*, McDoogal's E., Inc. v. Cnty. Comm'rs, 341 F. App'x 918, 924 (4th Cir. 2009) ("By focusing on the harmful secondary effects, the Enactments are 'justified without reference to the content of the regulated speech.'" (quoting *Renton*, 475 U.S. at 48)); Cook v. Gates, 528 F.3d 42, 67 (1st Cir. 2008) ("[T]he Supreme Court has held that the speech restriction is content-neutral so long as it is '*justified* without reference to the content of the regulated speech.'" (quoting *Renton*, 475 U.S. at 47–48)); Buzdum v. Vill. of Germantown, No. 06-C-159, 2007 WL 3012971, at *20 (E.D. Wis. Oct. 12, 2007) ("Content-based time, place or manner regulations are subject only to intermediate scrutiny if they 'are *justified* without reference to the content of the regulated speech.'" (quoting *Renton*, 475 U.S. at 48)); Stadium Book & Video, Inc. v. Miami-Dade County, Nos. 04-20537-CIV-JORDAN, 04-21156-CIV-JORDAN, 04-20553-CIV-JORDAN, 2006 WL 2374740, at *12 (S.D. Fla. July 31, 2006) ("A regulation is subject to intermediate scrutiny if it is 'justified without reference to the content of the regulated speech,' that is, if it is 'designed to combat the undesirable secondary effects of such businesses.'" (quoting *Renton*, 475 U.S. at 48)).

depended on content—it *was* the adult-oriented content of the businesses in *Renton* that convinced the city that they would cause negative secondary effects. Thus, any "justified without reference" analysis that the *Renton* law would pass must be very watered down. This analysis must essentially ask nothing more than what the secondary effects test asks: is the government targeting speech because of disagreement with its message? If not, this extremely weakened justification test is satisfied.

In a sense, this is precisely the effect Justice Brennan feared with the secondary effects doctrine itself, when he observed in *Boos*:

> No doubt a plausible argument could be made that the political gatherings of some parties are more likely than others to attract large crowds causing congestion, that picketing for certain causes is more likely than other picketing to cause visual clutter, or that speakers delivering a particular message are more likely than others to attract an unruly audience. Our traditional analysis rejects such *a priori* categorical judgments based on the content of speech, [*Mosley*], requiring governments to regulate based on actual congestion, visual clutter, or violence rather than based on predictions that speech with a certain content will induce those effects. The *Renton* analysis, however, creates a possible avenue for governmental censorship whenever censors can concoct "secondary" rationalizations for regulating the content of political speech.[128]

The same can be said for the post-*Renton* justification test: if all the government needs is to name some reason other than disagreement with speech as its justification, surely such reasons will abound.

Thus while it is certainly true that the Supreme Court has never *expressly* applied the secondary effects doctrine to sanction restriction of political speech, it is equally true that the Supreme Court has, through use of *Renton*, essentially enshrined the secondary effects analysis into a weakened version of the "justified without reference" test. This weakened justification inquiry essentially requires courts only to look at whether the government has asserted a neutral motive for its actions, without inquiring whether the proffered justification depends on content.

C. Ward*'s "Principal Inquiry" Analysis*

A third change in the content-neutrality test stems from the Supreme Court's 1989 decision in *Ward v. Rock Against Racism.*[129] As with both the secondary effects analysis and the *Renton*-inspired weaker "justified without reference" analysis, *Ward*'s change to the neutrality test focuses on governmental motive, and does so in heavy reliance on *Renton*.

In *Ward*, the Court considered the constitutionality of a New York City law that regulated sound amplification at a Central Park bandshell.[130] In

128. *Boos*, 485 U.S. at 335 (Brennan, J., concurring).
129. Ward v. Rock Against Racism, 491 U.S. 781 (1989).
130. *Id.* at 784.

setting forth the test for content neutrality, the Court explained that the "principal inquiry" of the neutrality test relates to the government's motive:

> *The principal inquiry in determining content-neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.* The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content-neutral so long as it is "justified without reference to the content of the regulated speech."[131]

Ward's "principal inquiry" paragraph makes three subtle but very important changes to the content-neutrality inquiry. First, *Ward*'s emphasis on governmental purpose as "the controlling consideration" and the "principal inquiry" in the content-neutrality test was actually a new development in the doctrine. In a sense, this language seems to confuse ends with means. There has long been agreement that government discrimination among ideas is the main *target* of the content-neutrality test. But until *Ward*, the Court had never described an inquiry into government motive as the principal *inquiry* when doing the analysis.[132]

The only authority the Court cites for its "principal inquiry" sentence is *Clark*. Yet *Clark* actually did not elevate government purpose above other aspects of the neutrality test at all. Instead, the cited portion of *Clark* simply stated, "The requirement that the regulation be content-neutral is clearly satisfied. The courts below accepted that view, and it is not disputed here that the prohibition on camping, and on sleeping specifically, is content-neutral and is not being applied because of disagreement with the message presented."[133] Notably, although the passage from *Clark* clearly refers to the fact that the law is not being applied "because of disagreement with the message," nothing in *Clark* suggests that this issue is the "principal" inquiry, or is *more* important than determining whether the law is neutral in its application or in its justification.

Second, the elevation of governmental purpose in *Ward*'s formulation of the neutrality test may be due, at least in part, to *Renton*. After citing *Clark*, the *Ward* Court explained that "a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."[134] Notably, the court cites *Renton* for this proposition.[135]

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131. *Id.* at 791–92 (emphasis added) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)) (citing *Clark*, 468 U.S. at 295, *Renton*, 475 U.S. at 47–48, Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 648 (1981) (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)), and *Boos*, 485 U.S. at 320–21).

132. *See generally* Kagan, *supra* note 15.

133. *Clark*, 468 U.S. at 295.

134. *Ward*, 491 U.S. at 791.

135. *Id.* (citing *Renton*, 475 U.S. at 47–48).

As with the justification inquiry, this reliance on *Renton* in a general statement of the content-neutrality test is another avenue through which the secondary effects approach may be having a broader impact than is generally understood.[136] In fact, the reference to a law that "serves purposes unrelated to the content of expression" is essentially the secondary effects doctrine by another name. A law banning all antiwar protests on the National Mall, for example, may be motivated by a dislike of antiwar protests, but it would certainly "serve purposes unrelated to the content of expression," such as reducing litter and congestion.[137] So too would a ban on flag burning (which produces smoke and risk of fire);[138] a ban on leafleting about elections (which can lead to litter);[139] and a ban on nonlabor protesting within 150 feet of a school (which could distract the students).[140]

In short, it is virtually impossible to think of speech regulations—even flagrantly content-based speech regulations—that do not "serve purposes unrelated to the content of expression." If all of these qualify as "content-neutral" simply because they *also* serve a purpose unrelated to content, then the neutrality test has no meaning at all.

Third, *Ward*'s reference to "incidental" effects is particularly strange. *Ward* notes that a law may be content neutral despite the fact that it has "an incidental effect on some speakers or messages but not others."[141] This is surely true as to some perfectly neutral laws. For example, a law requiring a permit to march down Main Street has an incidental effect on speakers who want to march down Main Street,[142] but not on speakers who get their

136. One notable exception here is Barry McDonald, who correctly recognized that *Ward*'s emphasis on purpose was a way of "importing" *Renton* that "threw the door wide open to content-neutral defenses for selective content restrictions." *See* McDonald, *supra* note 102, at 1376.

137. *See generally Clark*, 468 U.S. at 288.

138. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 420 (1989) (holding that flag burning was "expressive conduct" protected under the First Amendment and that "[t]he State's interest in preventing breaches of the peace does not support his conviction because Johnson's conduct did not threaten to disturb the peace"); *id.* at 410 ("We are equally persuaded that this interest is related to expression in the case of Johnson's burning of the flag. The State, apparently, is concerned that such conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, that we do not enjoy unity as a Nation. These concerns blossom only when a person's treatment of the flag communicates some message, and thus are related 'to the suppression of free expression' within the meaning of *O'Brien*.").

139. *See, e.g.*, Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 649–50 (1981).

140. *See, e.g.*, Police Dep't of Chi. v. Mosley, 408 U.S. 92, 92–93, 102 (1972).

141. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47–48 (1986)).

142. Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 130 (1992) ("[T]he Court has recognized that government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a march, parade, or rally . . . ." (citing Cox v. New Hampshire, 312 U.S. 569, 574–76 (1941))); *see, e.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147, 149 (1969) ("It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in, any parade or procession or other

message out by publishing books or buying television ads. In such circumstances, the unequal impact of a permitting requirement probably would be "incidental," that is, not the intended result of the law.

Curiously, the *Ward* Court does not cite any such neutral law for this proposition—instead, it cites *Renton*. In *Renton*, however, the relocation of adult businesses surely was not *incidental* to the regulatory scheme at issue.[143] Rather, the relocation of businesses of that content was the *deliberate* mechanism through which the scheme attempted to achieve its stated purpose. If businesses with adult content did not relocate, the law would have been a complete failure. Thus, to the extent *Renton* qualifies as an "incidental" burden on the deliberately targeted speakers, the Court is actually redefining "incidental" to include situations where the government *deliberately* targets and directly regulates speakers according to the content of their speech, but purports to do it for a reason other than suppression of their ideas. In other words, this use of *Renton* appears to read the secondary effects doctrine into the analysis of whether a burden is "incidentally" falling on a particular speaker or speakers based on content.

Together, *Ward*'s elevation of governmental purpose as "the controlling consideration," its characterization of the neutrality inquiry as satisfied so long as the law serves any "purposes unrelated to the content of speech," and its characterization as "incidental" of even deliberate regulations of certain speech because of its content, suggest a further move toward making the neutrality test focus on motive.

In this regard, *Ward*'s principal inquiry paragraph is the culmination of the *Renton*-driven doctrinal shifts we have described in this section. The "principal inquiry" paragraph relies directly on *Renton*[144]—the principal secondary effects case—in a time, place, and manner case. It cites *Renton* more broadly for the proposition that so long as a law serves *any* neutral purpose it should be deemed neutral.[145] The *Ward* paragraph claims that the "principal inquiry" in the neutrality test is whether the government acted with an impermissible motive, and suggests that even deliberate burdens on particular speakers can be treated as "incidental."[146]

As we shall see below, since these changes to the content-neutrality test, many courts are committing precisely the sort of First Amendment errors Justice Brennan, Professor Stone, and others greatly feared with the original

public demonstration on the streets or other public ways of the city, unless a permit therefore has been secured from the commission.").

143. *Renton*, 475 U.S. at 57, 59 (Brennan J., dissenting) ("[B]oth the language of the ordinance and its dubious legislative history belie the Court's conclusion that 'the city's pursuit of its zoning interests here was unrelated to the suppression of free expression.' . . . Prior to the amendment, there was no indication that the ordinance was designed to address any 'secondary effects' a single adult theater might create. 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.'" (second alteration in original)).

144. *Ward*, 491 U.S. at 791 (citing *Renton*, 475 U.S. at 47–48).

145. *See id.*

146. *See id.*

adoption of the secondary effects doctrine. But because courts are deciding these cases without express reference to the secondary effects doctrine and, instead, are purporting to use the traditional content-neutrality analysis, the dangers to the First Amendment have gone largely unnoticed.

III. THE WEAKENED CONTENT-NEUTRALITY TEST IN ACTION

For the reasons set forth above, we believe that the secondary effects doctrine has distorted the standard content-neutrality analysis in many cases. Our concern is that the subtle changes to the neutrality test have turned the test into a much more direct inquiry into governmental motive, which makes it much easier for governments to favor speech they like and disfavor speech they dislike.

We have identified seven cases to demonstrate the weakened neutrality test in action, and to explain how that test differs from the traditional neutrality analysis.

Our search for examples of this doctrinal problem proceeded as follows. First, because we believe *Ward*'s "principal inquiry" paragraph epitomizes the weakened, post-*Renton* neutrality approach, we searched for all federal cases using that formulation of the neutrality test. This searched revealed more than 200 federal cases. From within this 200, we narrowed the search further to examine (a) every Supreme Court case to use the formulation (there are three) and (b) every federal court of appeals case decided between 2008 and 2012 to use the formulation (there are twenty-three).

From within these smaller groups, below we present our analysis of seven cases in which either the Supreme Court or the courts of appeal get the content-neutrality analysis wrong in the ways we have described above. In particular, in reliance on the weakened neutrality analysis, these courts have treated laws as content neutral, even though they obviously fail the traditional neutrality inquiry described in Part I, by being content based in application, justification, or motivation.

Notably, *none* of these cases concerns sexually explicit speech or adult businesses—the original target of the secondary effects doctrine. Most actually concern core political speech. Yet these cases exhibit all the hallmarks of the secondary effects doctrine: an overemphasis on government motive, a willingness to allow laws that are content based and even viewpoint based in application to be treated as content neutral, and a largely ineffectual "justified without reference" analysis.

A. Weakened Content Neutrality at the Supreme Court: Turner*,* Madsen*, and* Hill

There are three Supreme Court cases since *Ward* to rely on *Ward*'s "principal inquiry" paragraph as an authoritative statement of the content-neutrality test: *Turner Broadcasting System, Inc. v. FCC*,[147] *Madsen v.*

147. 512 U.S. 622 (1994).

Women's Health Center, Inc.,[148] and *Hill v. Colorado*.[149] Each involves what was a very controversial content-neutrality analysis in an area other than sexually explicit speech. None mentions or purports to employ the secondary effects test. Yet each errs in deeming a content-based law to be content neutral in the exact ways we have described above, and in the exact ways predicted by *Renton*'s early critics.

1. *Turner Broadcasting System, Inc. v. FCC*

Five years after *Ward*, the Court had occasion to consider its content-neutrality tests in the context of requirements that cable providers carry a certain amount of local broadcast programming. As part of the Cable Television Consumer Protection and Competition Act of 1992,[150] Congress imposed a wide range of requirements on the nation's cable television industry.[151] *Turner* concerned two such requirements, which were known as "must carry" provisions. First, section 4 of the Act required cable companies to carry a specified number of local commercial broadcasting stations.[152] Second, section 5 of the Act required cable companies to carry a specified number of local "noncommercial educational" channels.[153]

These portions of the Act grew out of Congress's concern that the success of cable companies would eventually crowd local broadcast stations out of the market entirely.[154] In its findings, Congress explained the importance of the continued vitality of local broadcast stations, without which many viewers would not be able to receive programming.[155] Congress made clear that its interest in these stations was connected to its desire to "promot[e] a diversity of views," and that "public television provides educational and informational programming to the Nation's citizens, thereby advancing the Government's compelling interest in educating its citizens."[156] Congress further explained, "A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation."[157] Further, Congress stated, "Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate."[158]

The Court began its neutrality analysis by noting, "Deciding whether a particular regulation is content based or content neutral is not always a

148. 512 U.S. 753 (1994).
149. 530 U.S. 703 (2000).
150. Pub. L. No. 102-385, § 2(a)(6), (8), 106 Stat. 1460, 1461.
151. *See Turner*, 512 U.S. at 630.
152. *See id.* (citing 47 U.S.C. § 534(b)(1)(B), (h)(1)(A) (1988)).
153. *See id.* at 631–32 (citing 47 U.S.C. § 535(a)).
154. *See id.* at 633–34.
155. *See id.*
156. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(6), (8), 106 Stat. 1460, 1461.
157. *Id.* § 2(a)(10).
158. *Id.* § 2(a)(11).

simple task."[159] The Court then noted *Ward*'s "principal inquiry" paragraph explaining that the "'principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.'"[160] The Court found that Congress had acted with a content-neutral purpose—"to avoid the elimination of broadcast television" because "'[s]uch programming is . . . free to those who own television sets and do not require cable transmission to receive broadcast television signals,'" and because "'[t]here is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming.'"[161]

Upon a closer analysis, it is clear that the must-carry provisions at issue in *Turner* actually failed all three of the traditional, pre-*Renton* content-neutrality inquiries. First, the law was content based in its application. In order to determine whether a cable operator is complying, the FCC must look at and evaluate the content of the cable operator's offerings to determine whether it includes a sufficient number of local commercial and noncommercial stations. If a cable company is not complying, the remedy is to require a change in the content of the programming—to delete a certain number of channels the cable company wishes to provide, and to replace them with the government's preferred channels.

The law in *Turner* is also clearly content based in its justification and motivation. As Congress's findings make clear, the very point of the law is to preserve and protect a particular content that Congress finds valuable, namely local broadcast channels, because Congress viewed them as "'an important source of local news [and] public affairs programming and other local broadcast services critical to an informed electorate.'"[162] Further, Congress felt educational and informational programming advances "the Government's compelling interest in educating its citizens," and "promot[es] a diversity of views."[163] Thus, the justification for the law—Congress's view that preserving local broadcast stations will be beneficial—depended in large part on the content of their speech, which Congress valued. Put another way, if the local broadcast channels decided to air mindless chatter or a plain blank screen, the must-carry rules would not serve the government's purpose at all. Accordingly, it cannot fairly be said that the law is "justified without reference" to the content of speech; to the contrary, the law was actually and expressly justified by Congress based

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159. *Turner*, 512 U.S. at 642.

160. *Id.* (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

161. *Id.* at 646 (quoting Cable Television Consumer Protection and Competition Act of 1992 § 2(a)(12)).

162. *Id.* at 648 (quoting Cable Television Consumer Protection and Competition Act of 1992 § 2(a)(11)); *see also* Cable Television Consumer Protection and Competition Act of 1992 § 2.

163. *See Turner*, 512 U.S. at 676 (O'Connor, J., dissenting) (quoting Cable Television Consumer Protection and Competition Act of 1992 § 2(a)(8)(A), 2(a)(6)).

on the content of speech of the local channels, and that interest is only served if the local channels have a particular content.[164]

Under the traditional neutrality inquiry, therefore, the must-carry provisions of the Act should have been easily recognizable as content based and subjected to strict scrutiny.[165] Nevertheless, by focusing largely on one particular neutral purpose, the Court in *Turner* declared them to be content neutral, and upheld them, exactly as one would expect under the secondary effects doctrine. The Court did so without mentioning either the secondary effects doctrine or *Renton*.

2. *Madsen v. Women's Health Center, Inc.*

In *Madsen*, the Court considered the constitutionality of a state court injunction against protesters outside of a Florida abortion clinic.[166] Among other things, the injunction established a thirty-six-foot buffer zone on the public sidewalks around the clinic into which the enjoined parties and anyone "acting in concert or participation with them" could not enter.[167]

In evaluating whether the injunction was content-neutral or content-based, the Court began with *Ward*: "Our principal inquiry in determining content-neutrality is whether the government has adopted a regulation of speech 'without reference to the content of the regulated speech.'"[168] The Court therefore stated that "the government's purpose" is "the threshold consideration."[169] The Court found this purpose analysis to be simple:

> Here, the state court imposed restrictions on petitioners incidental to their antiabortion message *because they repeatedly violated the court's original order.* That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order. It suggests only that those in the group *whose conduct* violated the court's order

164. The four dissenting justices—Sandra Day O'Connor, Ruth Bader Ginsburg, Antonin Scalia, and Clarence Thomas—recognized this point, saying that they "cannot avoid the conclusion that [Congress's] preference for broadcasters over cable programmers is justified with reference to content. The findings, enacted by Congress as § 2 of the Act . . . make this clear." *Id.* Neither the majority nor the dissent, however, drew the connection to *Renton* as the reason for the majority's weak justification analysis.

165. The Court rejected the government's suggestion that a relaxed First Amendment standard should be applied because the law involved television stations. The Court explained that, while the First Amendment allows the government a freer hand in regulating broadcast airwaves—which are limited and require some level of regulation in order to be useable—no such relaxed standard is needed in the cable field, because cable technology essentially allows a limitless number of speakers. *See id.* at 636–37. However, the Court did emphasize that it would only permit differential regulation of cable stations because of the "bottleneck" control that cable providers have since they control an "essential pathway" for cable speech and can "silence the voice of competing speakers with a mere flick of the switch." *Id.* at 656.

166. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994).

167. *See id.* at 759–61.

168. *Id.* at 763 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

169. *Id.*

> happen to share the same opinion regarding abortions being performed at the clinic.[170]

For these reasons, the Court concluded that the injunction was content neutral.[171]

The Court's analysis of the judge's motivation in entering the injunction—while characterized as a "threshold" consideration—was actually the beginning, middle, and end of its content-neutrality analysis. Having found that the judge was motivated to stop recurrent law breaking, rather than to penalize abortion opponents because of their message, the Court considered its content analysis complete.

Had the Court continued—had it analyzed whether the law was content based in its application and its justification under the standard neutrality inquiry described in Part I, *supra*—the Court would have easily concluded that the injunction was, in fact, content based.

First and foremost, the Court's motivation inquiry allowed it to ignore the express evidence in the record showing that the injunction was content and viewpoint based in its application. In other words, how and whether the injunction applied to particular individuals turned entirely on the content and viewpoint of their speech. In particular, the trial court repeatedly indicated that it would simply treat those who speak against abortion as necessarily "acting in concert" with the enjoined parties, as illustrated by the following exchanges:

> Mr. Lacy: "I was wondering how we can—why we were arrested and confined as being in concert with these people that we don't know, when other people weren't, that were in that same buffer zone, and it was kind of selective as to who was picked and who was arrested and who was obtained for the same buffer zone in the same public injunction."
>
> The Court: "Mr. Lacy, I understand that those on the other side of the issue [abortion-rights supporters] were also in the area. If you are referring to them, the Injunction did not pertain to those on the other side of the issue, because *the word in concert with means in concert with those who had taken a certain position in respect to the clinic, adverse to the clinic. If you are saying that is the selective basis that the pro-choice were not arrested when pro-life was arrested, that's the basis of that selection. . . .*"
>
> . . . .
>
> John Doe No. 16: "I also understand that the reason why I was arrested was because I acted in concert with those who were demonstrating pro-life. I guess the question that I'm asking is, were the beliefs in ideologies of the people that were present, were those taken into consideration when we were arrested? . . . *When you issued the Injunction did you determine that it would only apply to—that it would apply only to people that were demonstrating that were pro-life*?"
>
> The Court: "*In effect, yes*."

170. *Id.* (first emphasis added).
171. *Id.*

> . . . .
>
> John Doe No. 31: "How did the police determine that I was acting in concert with some organization that was named on this injunction? I again am a person who haven't [sic] seen this injunction. So how did the police determine that I was acting in concert?"
>
> The Court: "They observed your activities and determined in their minds *whether or not what you were doing was in concert with the—I gather the pro-life position* of the other, of the named Defendants."[172]

These statements confirm that the injunction was, in fact, both content and viewpoint based in application. Both the court and the police decided who was subject to the injunction based on the content and viewpoint of their speech. *All* speakers who were (a) speaking about a particular content (abortion) and (b) a particular viewpoint (opposed to abortion) were *automatically* deemed to be "acting in concert" with the people who had previously been found to have violated the law.

In this regard, the injunction should have been immediately recognizable as content based in its application—indeed, this is the easiest sort of content problem to spot, and the judge admitted to using content and viewpoint to determine whether the injunction would apply to new speakers who had never met the original lawbreakers. Yet the Supreme Court allowed its emphasis on the "threshold" question of motive to trump this clear content problem.

Relatedly, the excerpts from the trial court also reveal that the injunction was not "justified without reference to the content of speech." If it were, the court would have applied the injunction against *all* speakers in the thirty-six-foot zone, not simply pro-life speakers. But the exact opposite happened: speakers who supported abortion were given free rein on the public sidewalk, while those who opposed abortion were subject to the injunction, even if they had never met or collaborated with the original lawbreakers. Clearly the court did not think the injunction was justified for *all* speech or *all* speakers; rather, the court determined which speakers the injunction applied to based, and apparently only based, on the court's "reference to the content of speech."

The Court in *Madsen*, however, conducted no inquiry into the law's application or whether its justification depended on content. Instead, the Court simply used its "threshold" analysis of the judge's motive to end the neutrality inquiry. This is perhaps not surprising given the Court's post-*Renton* elevation of motive analysis as the "principal inquiry" in content neutrality. As discussed in Part II.A, *supra*, this is also precisely how the secondary effects doctrine itself proceeds. Yet neither the doctrine nor *Renton* is mentioned in the opinion.

172. *Id.* at 795–97 (Scalia, J., concurring in part and dissenting in part) (emphasis added).

3. *Hill v. Colorado*

In *Hill v. Colorado*,[173] the Court again addressed abortion protests, this time in the context of a Colorado ordinance regulating speech outside of medical facilities. The law provided,

> No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility.[174]

The Supreme Court upheld the statute as content neutral.[175] Writing for the Court, Justice Stevens began with *Ward*'s language about the inquiry into motive being the "principal inquiry" for content neutrality.[176] Then Justice Stevens explained that Colorado's buffer zone statute was content neutral for "three independent reasons."[177] First, the law was "not a 'regulation of speech,'" but rather "of the places where some speech may occur."[178] Second, Justice Stevens stated that the facial applicability to all speech, as opposed to just antiabortion speech, proved its content neutrality.[179] Finally, he noted that the state's interest in protecting access and privacy is unrelated to the content of the demonstrators' speech, rendering the law content neutral because it was "justified without reference to the content of regulated speech."[180] The Court rejected the petitioners' suggestions that the requirement for law enforcement officers to determine

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173. 530 U.S. 703 (2000).

174. Hill v. Thomas, 973 P.2d 1246, 1249 n.4 (Colo. 1999) (en banc) (citing 6 COLO. REV. STAT. § 18-9-122 (1993)).

175. *See Hill*, 530 U.S. at 714.

176. *Id.* at 719.

177. *Id.*

178. *Id.* This is a particularly odd statement by the Court. On this analysis, all time, place, and manner regulations are no longer regulations of speech but simply regulations "of the places where speech may occur." *Id.* Both before and since *Hill*, however, the Court has treated time, place, and manner regulations as regulations of speech, and has subjected them to strict scrutiny (when they are content based) or intermediate scrutiny (when they are not). *See, e.g.*, Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343, 2347 (2011) (approving a limitation on speech at a particular legislative session as "a reasonable time, place and manner limitation"); Police Dep't of Chi. v. Mosley, 408 U.S. 92 (1972) (applying strict scrutiny to a regulation limiting places for nonlabor protests).

Indeed, the Court's argument here contradicts all of its time, place, and manner jurisprudence, because the time, place, and manner test itself applies *only* when there has been some regulation of *speech*. *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 197 (1992) (plurality opinion) (explaining that the "time, place, and manner" test applies to regulations of expressive activity).

179. *See Hill*, 530 U.S. at 719.

180. *Id.* at 720 (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). As will be discussed *infra*, the Court simply stated the government interests and, without analysis, proclaimed that those interests are not related to content. *Id.* at 719. This pronouncement stands in stark contrast to the detailed analysis that occurred, for example, in *Eichman.*

whether speech was "protest, education, or counseling" rendered the law content based.[181]

As in *Turner* and *Madsen*, the content-neutrality analysis in *Hill* bears the imprint of *Renton* and the secondary effects doctrine. First, the Court began by emphasizing the government's purpose as the controlling consideration. From this point, the Court then ignored the quite express emphasis on content in the text of the law itself: approaches to engage in certain types of speech ("protest, education, or counseling") were banned, while approaches to speak in other ways (i.e., idle chatter, asking a question, selling a product, etc.) were left unregulated. Thus it seems very clear that the application of the law depended on the content of speech.[182]

Worse, the Court applied a weak version of the justification inquiry, seemingly only asking whether the state had *named* a neutral justification for the law. In particular, the Court stated that government interests in "access" and "privacy" are "unrelated to the content of the demonstrators' speech."[183] At one level, of course, this is obviously correct: the government might seek to protect an interest in access to medical care or an interest in privacy in ways that have nothing to do with anyone else's speech. In such circumstances a law serving those interests may well be "justified without reference to the content of speech."

But in *Hill*, the only law before the Court was a law that purported to protect access and privacy by outlawing certain approaches near medical facilities—and only when the approach is made *with the intent to speak*. That is, if a person approached an incoming patient silently and without carrying a leaflet or holding a sign, the approach is perfectly permissible under the law at issue in *Hill*. It is only if that approach is *combined with an intent to engage in certain types of speech* that the approach becomes punishable.

Had the Court applied the type of justification test we saw in *O'Brien*, *Clark*, and *Eichman*, it would have found that the law was not justified without reference to the content of speech. As discussed in Part I, in *O'Brien,* the state interest was in preserving Selective Service records; in *Clark*, the interest was in maintaining clean and accessible parks; in

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181. *See id.* Justice Stevens explained that the law often looks at the content of a communication to determine the speaker's purpose, and to determine, for example, whether a communication is a threat, blackmail, an offer to sell securities, or an agreement to fix prices. *See id.* at 720–21.

182. The Court's reasoning here—that sometimes it is permissible to look at the content of speech to determine if it falls into a category like bribery or copyright violations, which have always been understood to be "outside" the First Amendment—seems particularly out of place when discussing what the Court acknowledges as core protected First Amendment speech. *See id.* at 715 (noting that the plaintiffs' "leafleting, sign displays, and oral communications are protected by the First Amendment"). The Court is, of course, correct that courts must take the content of speech into account to determine whether the speech at issue falls outside of the First Amendment's protection, but it had never before asserted that this practice allows legislatures to impose content-based regulations of core protected speech.

183. *Id.* at 720.

Eichman, the interest was in protecting the flag as a national symbol.[184] None of these interests facially involves the content of speech. It was only by questioning *how* the regulation at issue actually served the asserted interest that the Court was able to distinguish the content-*based* justification in *Eichman* from the content-*neutral* justifications in *O'Brien* and *Clark*.

The Court in *Hill* never probed this connection. The justification inquiry had withered to asking only whether the state purported to have some neutral motive. This exactly replicates the secondary effects doctrine, except that in *Hill* the speech was core political speech in the public forum, rather than an adult business.

Had the Court seriously probed whether the law was, in fact, justified without reference to the content of speech, it would have been forced to conclude that the law fails that test. The Colorado law did not even apply to all approaches. Rather, it *only* punished approaching *speakers*, and only those speakers who wanted to engage in a particular type of speech (protest, education, or counseling). Thus the legislature apparently did not believe that *all* approaches, or even all *speaking* approaches, triggered its interests in preserving access and privacy. The only logical reason to believe that some speaking approaches will threaten access or impinge on privacy is if the legislature (and later the Court) is implicitly assuming the content of the speech to be something unwelcome. Approaching to say, "Good luck on your surgery today," or, "Would you like to buy some Girl Scout cookies?" or, "The hospital down the street has better doctors," would neither threaten access nor privacy.

In this manner, there can be no serious doubt that the law in *Hill* was not "justified without reference to the content of speech." Instead, the law only made sense as applied to speakers who oppose a medical procedure (chiefly, abortion). Following the traditional content analysis, the Court should therefore have deemed the law content-based and applied strict scrutiny.[185]

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184. *See supra* Part I.B.

185. The Court's content analysis in *Hill* has garnered widespread criticism. Justice Kennedy wrote that the opinion contradicted "more than a half century of well-established First Amendment principles." *Hill*, 530 U.S. at 765 (Kennedy, J., dissenting); *see also* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1298 (2007) (citing *Hill* for the proposition that "Court majorities have unconvincingly denied that the predicate conditions for strict scrutiny actually exist—for example, by maintaining that a content-based restriction on speech is not really content-based"); John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1127 (2005) (pointing out that, in applying the *Hill* analysis, "one must necessarily examine the content of a person's speech to determine if it constitutes 'education, protest or counseling'" (quoting *Hill*, 530 U.S. at 707)); Michael W. McConnell, Professor, Univ. of Utah Coll. of Law, Remarks at the Symposium Conducted in Honor of the Inauguration of Andrew K. Benton As the Seventh President of Pepperdine University (Sept. 23, 2000), *in* 28 PEPP. L. REV. 747, 748 (2001) ("You cannot tell, other than by the content of what I say, whether the law [in *Hill*] is being violated or not. Now if that is not content-based, I just do not know what 'content-based' could possibly mean."); Sullivan, *supra* note 6, at 737 ("*Hill* showed a striking readiness to accept the Colorado legislature's effort to draw a facially neutral statute to achieve goals clearly targeting particular content."); *cf.* Erwin Chemerinsky, Professor, Univ. of S. Cal., Remarks at the Symposium Conducted in Honor of the Inauguration of Andrew K. Benton As the Seventh President of

4. Counterexample: *Sorrell v. IMS Health Inc.*

To be clear, the Supreme Court does not always employ the type of weakened content-neutrality analysis we have described above. In fact, in *Sorrell v. IMS Health Inc.*,[186] the Court recently demonstrated that it remains quite capable of applying the standard neutrality analysis discussed in Part I, *supra*.

Sorrell concerned a Vermont law that limited the dissemination of pharmacy records about the prescribing practices of different doctors.[187] The state asserted what appeared to be neutral interests—protecting patient privacy, protecting doctors from harassment by sales representatives, lowering the cost of medical services, and promoting the public health.[188]

Rather than simply accept these facially neutral interests and deem the law content neutral—as courts applying the weakened neutrality test we have described above might do—the Court instead applied the traditional content-neutrality inquiry to deem the law content based. In particular, the Court found that because the Vermont law allows use of the information for "educational communications" but not for marketing purposes, the statute "thus disfavors marketing, that is, speech with a particular content."[189] Notably, this is the exact opposite of the approach the Court took in *Hill*, which saw no content-based restrictions imposing special burdens on "protest, education, or counseling" that were not imposed on other speech. Even though the Court acknowledged that many of Vermont's goals were permissible, it unequivocally held that those goals could not be advanced by selectively regulating speech based on its content or the identity of the speaker. Thus, the Court in *Sorrell* completely avoided the doctrinal errors set forth in Part II above.

As we will discuss in Part IV below, the fact that there are still Supreme Court decisions applying this more traditional content-neutrality inquiry is heartening, and provides lower courts with an avenue for avoiding the doctrinal problems set forth above.

However, as we demonstrate in the next section, the existence of the doctrinal problems described in Part II, and demonstrated in *Turner*, *Madsen*, and *Hill* is currently leading many courts of appeals to endorse content- and viewpoint-based laws as neutral.

Pepperdine University (Sept. 23, 2000), *in* 28 PEPP. L. REV. 752, 752–53 (2001) (agreeing with the result in *Hill* but disagreeing with the Court's rationale: "Where I become concerned is where the Court tried to find a content-neutral regulation, and the problem is the whole doctrine of content neutrality right now is quite confused. . . . [And] this case further adds to the confusion").

186. 131 S. Ct. 2653 (2011).

187. *Id.* at 2659.

188. *See id.* at 2668, 2670.

189. *Id.* at 2663.

B. Weakened Content Neutrality in the Courts of Appeals

A review of recent cases from the federal courts of appeals suggests that the *Renton*-inspired neutrality inquiry is being used to allow governments to pick and choose which private messages will get favored or disfavored treatment from the government in the public forum. This is precisely the danger *Renton*'s early critics predicted, and it is occurring frequently in the courts of appeals, without mention of the secondary effects doctrine.

In order to demonstrate further the extent of the current problems caused by this weakened content-neutrality analysis, we have selected four recent cases decided by the federal courts of appeals for analysis below. These cases show the use of this weaker neutrality analysis to uphold laws that should have been easily classified as content based and sometimes viewpoint based in the contexts of school dress codes, abortion clinic buffer zones, satellite television regulation, and parade permitting schemes.

As with the Supreme Court cases discussed above, none of these cases concerns sexually explicit speech, and none expressly applies *Renton* or the secondary effects doctrine. Yet each, in effect, applies the weakened neutrality analysis we have described to content-based restrictions on core protected First Amendment activity.

1. School Dress Codes

In *Palmer ex rel. Palmer v. Waxahachie Independent School District*,[190] the Fifth Circuit considered the constitutionality of a public school dress code. The dress code at issue in *Palmer* generally prohibited students from wearing shirts with messages. However, the school district created exceptions for shirts with "small logos" and, most importantly, for "principal-approved" shirts that promoted school clubs, organizations, athletic teams, or school spirit.[191]

Although it is clear that the First Amendment does not always apply with its usual rigor in the public school context,[192] the court purported to apply the same content-neutrality inquiry applicable elsewhere under the First Amendment.[193] In applying the neutrality test, the court did acknowledge the "general rule" that laws that "'distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.'"[194] However, the court relied on the *Renton*-inspired "principal

190. 579 F.3d 502 (5th Cir. 2009).

191. *See id.* at 505 n.1.

192. *See generally* Morse v. Frederick, 551 U.S. 393 (2007); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

193. *See Palmer*, 579 F.3d at 506 ("The 'loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction.' Because '[w]ords printed on clothing qualify as pure speech and are protected under the First Amendment,' the dress code's ban on his shirts would cause Palmer irreparable injury.") (alteration in original) (quoting Deerfield Med. Ctr. v. City of Deerfield Beach, 661 F.2d 328, 338 (5th Cir. Unit B Nov. 1981), and Canady v. Bossier Parish Sch. Bd., 240 F.3d 437 (5th Cir. 2001)).

194. *Id.* at 509 (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642–43 (1994)).

inquiry" test—in fact, citing *Ward*, *Turner*, and *Hill* together[195]—to find that the dress code was nevertheless content neutral because it was not designed to suppress unpopular speech. The court explained:

> The District was in no way attempting to suppress any student's expression through its dress code—a critical fact based on earlier student speech cases—so the dress code is content-neutral. Its allowance for school logos and school-sponsored shirts does not suppress unpopular viewpoints but provides students with more clothing options than they would have had under a complete ban on messages.[196]

Under the traditional neutrality test, it should have been clear that a law that allows the government to choose certain pre-approved messages that will be permitted—and to ban all other messages—is content based.[197] Yet the court—without citing *Renton* and without mentioning the secondary effects doctrine—simply declared the law to be content neutral because of a nondiscriminatory purpose.[198]

The Ninth Circuit reached a similar result, with similar reasoning, in *Jacobs v. Clark County School District.*[199] Relying on the "principal inquiry" language from *Ward*, the court found a dress code that discriminated between permissible and impermissible messages to be content neutral.[200] The court emphasized that the school district's policy had a neutral motive because it

> [wa]s aimed at "increasing student achievement, promoting safety, and enhancing a positive school environment." Nothing in the Regulation's language suggests it was directed at the type of messages or specific viewpoints previously conveyed by students' wardrobe choices; indeed, the record evidence unambiguously indicates that the District's purpose in enacting the Regulation was to further the Regulation's stated goals, not to suppress the expression of particular ideas.[201]

As in the Fifth Circuit, therefore, the Ninth Circuit allowed the presence of such neutral motives to permit a law that was expressly based on content (pro-school logos were permitted, but all other messages were prohibited) to be treated as content neutral.[202]

This move by the Fifth and Ninth Circuits—allowing the asserted existence of a content-neutral motive to overcome the express content-based application of a law—is precisely how the secondary effects doctrine

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195. *See id.* at 510 n.12 (citing Hill v. Colorado, 530 U.S. 703, 719 (2000)).
196. *Id.* at 510.
197. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 66 (1983) (noting that "viewpoint discrimination implicates core First Amendment values" and is thus content based); *see also supra* Part I.
198. *See Palmer*, 579 F.3d at 510 ("The District was in no way attempting to suppress any student's expression through its dress code—a critical fact based on earlier student speech cases—so the dress code is content-neutral.").
199. 526 F.3d 419, 432–33 (9th Cir. 2008).
200. *Id.* at 432 & n.30.
201. *Id.* at 432.
202. *Id.* at 433.

works.[203] Thus, these courts are basically applying the secondary effects doctrine as part of their *standard* neutrality analysis.[204]

2. Abortion Clinic Buffer Zones

In *McCullen v. Coakley*,[205] the First Circuit upheld a Massachusetts abortion clinic buffer zone law. The statute at issue created zones on public streets and sidewalks extending thirty-five feet in all directions from all entrances, exits, and driveways of stand-alone abortion clinics. Although passersby were permitted to cross through the zones, most speakers were not permitted to enter the zone to engage in speech or advocacy. The law made an exception for employees and agents of the abortion clinics, who were exempt from the law, and therefore permitted to operate within the zones.[206]

The district court had upheld the law as content neutral "relying mainly on *Hill*."[207] The Act, however, had several key differences from *Hill*, including that (a) *Hill* applied to all medical facilities, while the Massachusetts law applied only at abortion clinics; (b) *Hill* applied equally to all speakers, while the Massachusetts law exempted speakers from the clinics; and (c) *Hill* was limited to *unwanted* speech, while the Massachusetts law criminalized *all* speech (other than by clinic speakers) within the zones, even if the speech was invited by the listener.[208] The district court found that the Act even prohibited merely wearing T-shirts with "abortion-related" messages on them while legally passing through the zone to go elsewhere.[209]

The First Circuit did not believe that any of these differences mattered at all. After beginning with the familiar "principal inquiry" language from *Ward*, the First Circuit dismissed these differences from *Hill* as immaterial.

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203. *Cf.* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47–48 (1986) (holding an ordinance content neutral because it "is aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community" because the Government's proffered interest was not "predominant[ly]" content based).

204. Indeed, these decisions presumably would allow the schools to ban the message on the sign in *Mosley* itself ("Jones High School Practices Black Discrimination") yet allow pro-school messages ("Jones High School Is Great!"). *See* Police Dep't of Chi. v. Mosley, 408 U.S. 92, 93 (1972). This approach therefore turns content neutrality on its head, allowing government preference of certain messages in precisely the way *Mosley* said was impermissible.

205. 571 F.3d 167, 178 (1st Cir. 2009), *cert. granted*, 133 S. Ct. 2857 (June 24, 2013) (No. 12-1168). The Supreme Court recently granted certiorari in *McCullen* and will hear the case in early 2014. *McCullen*, 133 S. Ct. at 2857. One of us (Rienzi) is counsel of record for the speakers in that case.

206. *McCullen*, 571 F.3d at 177–78.

207. *Id.* at 176.

208. *Compare* MASS. ANN. LAWS ch. 266 § 120E1/2(a), (b)(1)–(2), (d), (f) (LexisNexis 2007), *with* Hill v. Colorado, 530 U.S. 703, 726–27 (2000).

209. *See* McCullen v. Coakley, 573 F. Supp. 2d 382, 423 n.294 (D. Mass. 2008) (finding that "displaying signs or shirts with abortion-related or partisan messages clearly qualifies" as a violation of the law, even for passersby who may otherwise legally walk through the zones).

The court explained: "it suffices to say that the mere fact that a content-neutral law has a disparate impact on particular kinds of speech is insufficient, without more, to ground an inference that the disparity results from a content-based preference."[210] For this reason, and relying on prior buffer zone cases in the circuit, the court found the Massachusetts law content neutral.[211]

The First Circuit's neutrality decision defies the standard content-neutrality inquiry, and even defies the weakened version of that inquiry as it was conducted in *Hill*. In particular, the legislature's decision to allow speech on the public sidewalks by abortion clinic employees, but not by their pro-life opponents, is obviously impermissible.[212] As the Supreme Court found in *Mosley,* the government does not have the authority to "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."[213] In fact, the Court in *Hill*—which itself applied a weakened version of the neutrality inquiry (as discussed *supra*)—expressly stated that neutrality requires equal treatment of *all speakers*:

> The statute . . . applies to all "protest," to all "counseling," and to all demonstrators whether or not the demonstration concerns abortion, and whether they oppose *or support* the woman who has made an abortion decision. *That is the level of neutrality that the Constitution demands.*[214]

Thus, contrary even to *Hill*, the First Circuit upheld a law as neutral that did not apply equally to all speakers in the public forum, and particularly favored a group of speakers who support the abortion decision.[215] As the district court found, this favoritism was not accidental—rather, the law was enacted "to make crystal clear . . . that those who work to secure peaceful access to [the clinic] need not fear prosecution."[216] The law thus does not provide "the level of neutrality that the Constitution demands," even under *Hill*.

The First Circuit also failed to examine adequately whether the law in *McCullen* was "justified without reference to the content of speech."[217] Given the fact that the law permits passersby to walk through the same

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210. *McCullen*, 571 F.3d at 177.

211. *Id.* at 178.

212. *Cf.* Burson v. Freeman, 504 U.S. 191, 197 (1992) (plurality opinion) (finding that a statute that determines "[w]hether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign" and is a content-based regulation because the law favored some speech and disfavored other speech).

213. *See* Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972).

214. Hill v. Colorado, 530 U.S. 703, 725 (2000) (emphasis added).

215. *See McCullen*, 571 F.3d at 176–77.

216. McCullen v. Coakley, 573 F. Supp. 2d 382, 406 (D. Mass. 2008). The trial court also concluded that the exemption was permissible based on the theory that speakers from the abortion clinic would be "less likely to engage in directing of unwanted speech" toward incoming patients. *Id.* at 407.

217. *See McCullen*, 571 F.3d at 177 (concluding that to the extent there was a "disparate impact" on pro-life speech, there was "no more" to suggest that the statute was only justified by referencing the content of speech).

zones, and simply prohibits people walking through the zone from also expressing their views about abortion in the zone, it is impossible to believe that the government's justification is unrelated to the content of speech. If the government's interest is triggered by a passerby saying "abortion is bad," but not a passerby remaining silent or saying "the Red Sox are bad," then the interest is clearly related to the content of speech.[218]

In sum, the law upheld as neutral in *McCullen* should have been analyzed as content based because it is content based in its application (some speech and speakers are permitted, while others can be imprisoned), in its justification (the legislature clearly believed its interests were not threatened by silent passersby, or by speakers from one side of the debate), and in its motivation (a government desire to protect speech offering access to abortion, but not speech offering access to abortion alternatives). Yet the First Circuit deemed this government favoritism in its regulation of peaceful speech on a public sidewalk to be completely neutral, because it relied on the *Renton*-driven "principal inquiry" analysis instead of applying the traditional neutrality tests.[219]

3. Satellite Television Regulation

In *DISH Network Corp. v. FCC*,[220] the Ninth Circuit considered the constitutionality and content neutrality of FCC regulations requiring satellite television providers to carry "qualified noncommercial educational television stations" on their system.[221]

In order to be a "qualified noncommercial educational television station," a station needs to be eligible for a Corporation for Public Broadcasting (CPB) grant.[222] CPB grants, in turn, impose certain content criteria, namely that

> applicants must devote the substantial majority of their daily total programming hours to general audience programming that serves demonstrated community needs of an educational, informational and cultural nature. Programs that further the principles of particular political or religious philosophies do not qualify.[223]

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218. As noted in Part I.B, *supra*, the flag-burning context is comparable. There, the government's asserted interests were only threatened by burnings with a certain message, and the Court thus determined the regulations were content based and subjected to strict scrutiny. *See* United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989). Indeed, the district court found that the plaintiffs were barred from "expressing their views about abortion"—even "displaying signs or shirts with abortion-related or partisan messages" would violate the law. *McCullen*, 573 F. Supp. 2d at 423.

219. The First Circuit's decision is now in direct conflict with the Ninth Circuit's recent conclusion in *Hoye v. City of Oakland*. *See* 653 F.3d 835, 851 (9th Cir. 2011) ("The City's policy of distinguishing between speech that facilitates access to clinics and speech that discourages access is not content-neutral. It is the epitome of a content-based speech restriction."). The Supreme Court granted certiorari to review the *McCullen* decision in June 2013. McCullen v. Coakley, 133 S. Ct. 2857 (June 24, 2013) (No. 12-1168).

220. 653 F.3d 771, 778–80 (9th Cir. 2011).

221. *Id.*

222. *Id.*

223. *Id.* at 778 n.3 (internal quotation marks omitted).

The imposition of content criteria for the stations required to be carried in *DISH Network* thus distinguished the case from *Turner*. In *Turner*, the majority concluded that the must-carry regulations "do not burden or benefit speech of a particular content" and therefore could be deemed content neutral.[224] Rather than forcing cable companies to carry channels broadcasting particular content, the regulations at issue in *Turner* simply required the cable companies to carry certain *types* of channels (i.e., local broadcast channels), regardless of their programming content.[225]

Nevertheless, applying the weakened content-neutrality analysis we have described, the Ninth Circuit concluded that the regulations in *DISH Network* were content neutral, even though they required carrying channels with a government-dictated content (and with government imposed proscriptions on programming that furthered "particular political or religious philosophies").

The Ninth Circuit arrived at this counterintuitive conclusion in familiar fashion. It began its analysis with the *Ward* "principal inquiry" formulation of the neutrality doctrine.[226] The court then stated a seemingly neutral interest: that Congress merely sought to "guard against the influence of special interests" and "even the playing field" to "prohibit satellite carriers from 'discriminating' against noncommercial stations."[227] The court therefore found that the law "serves interests unrelated to the suppression of free expression," citing *Renton*.[228] Accordingly, the court found that the regulation "seeks to support expression, not suppress it" and is content neutral.[229]

Had the court actually applied the traditional neutrality test, the law would have been easily classified as content based. First, the law is content based in its application: the government is ordering the satellite broadcaster to carry stations *with a particular government-required content*, and with a government-imposed limitation on programs with less favored content (i.e., those that further "particular political or religious philosophies"). Nor could the regulations be defended as "justified without reference to the content of speech." Indeed, if noncommercial stations carried the exact same programming as the commercial stations, there would be no justification for the regulations at all.

In short, even if the regulations in *Turner* really could be considered neutral (because they applied to all local broadcasters regardless of content), there is no plausible argument that the requirements in *DISH Network* are content neutral in their application, justification, or motivation. Nevertheless, applying the weakened neutrality test, the Ninth Circuit upheld the regulations as neutral.

224. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 645 (1994).
225. We disagree with the Court's neutrality arguments in *Turner*, for the reasons set forth above.
226. *DISH Network*, 653 F.3d at 778.
227. *Id.* at 779.
228. *Id.* at 778.
229. *Id.* at 779.

4. Parade Permitting

Reasonable people might disagree as to whether, as a policy matter, there are good reasons for wanting to allow school districts somewhat greater authority over the messages on student clothing than we would accept in other contexts. But the broader danger of cases like *Palmer* and *Jacobs* (discussed in Part III.B.1, *supra*) is that the courts are purporting to apply the *standard* neutrality analysis—i.e., the same analysis they would and should provide to core political speech in any sidewalk demonstration or parade—yet they are creating precedents using the *Renton*-driven, weaker content analysis in ways that will inevitably apply more broadly.

This is precisely what has occurred in the Fifth Circuit on the question of whether the government can single out government favored political messages for special treatment in parade regulations.

In *International Women's Day March Planning Committee v. City of San Antonio*, the Fifth Circuit recently considered whether a San Antonio parade permit scheme was content neutral or content based.[230] Under the scheme, organizers of most parades were required to pay government-imposed fees for police and cleanup activities.[231] The city decided, however, that there were certain parades which it wanted to exempt from these requirements. Therefore, the fees were not applicable to certain parades, including parades to celebrate Martin Luther King Jr. Day and Veterans Day.[232]

The plaintiffs in the case—who were seeking a permit for a parade to celebrate International Women's Day—argued that the scheme was content based, in that the city was preferring parades with certain government-approved messages, but charging fees to other marchers.[233]

Using the *Renton*-inspired "principal inquiry" analysis, the court nevertheless deemed the scheme entirely neutral, *even though it expressly found that the law was designed to favor certain messages in the public forum*. The court reasoned that the city was not trying to *suppress* anyone's message, but instead had "singl[ed] out a limited number of favored messages for special treatment."[234] The court found this was permissible under *Palmer*, its school dress code case discussed above.[235]

This approach is flagrantly content based under all three aspects of the traditional content analysis. First, the preference is content based in application: parades with certain government-approved messages and themes receive free use of the streets while others must pay. Second, the preference is obviously not justified without reference to the content of speech—indeed, the content of speech was the very reason the city wanted to waive fees for certain parades. And third, as even the Fifth Circuit's

230. Int'l Women's Day March Planning Comm. v. City of San Antonio, 619 F.3d 346 (5th Cir. 2010).
231. *Id.* at 350.
232. *Id.* at 353.
233. *Id.* at 354–55.
234. *Id.* at 361.
235. *Id.*

analysis demonstrates, the law is intended to identify "favored messages" which will be "singl[ed] out" for "special treatment" in the regulation of the public forum.[236] Thus, the law also has an obviously content-based motivation.

The Fifth Circuit's analysis should be shocking. The core, blackletter teaching of the quintessential content-neutrality case—*Police Department of Chicago v. Mosley*—is that the government *cannot* "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."[237] Yet here the Fifth Circuit is deeming content neutral a law that the court openly acknowledges to be designed to "single out . . . favored messages" and give them preferential treatment in the public forum. Moreover, the court arrived at this result not with express application of the secondary effects doctrine, but by purporting to use the standard content-neutrality analysis, which has been warped over time.

5. Counterexample: *Hoye v. City of Oakland*

Despite the cases discussed above, there remain courts of appeals decisions that avoid the doctrinal pitfalls discussed in Part II. The Ninth Circuit's recent decision in *Hoye v. City of Oakland*[238] provides a useful example.

In *Hoye*, the Ninth Circuit confronted an abortion clinic statute modeled on the Colorado law upheld by the Supreme Court in *Hill.* Like the law in *Hill*, the Oakland statute on its face applied to all speakers, including speakers from abortion clinics.[239] However, the City of Oakland enforced the law in a discriminatory way: it treated all speakers offering access to abortion as automatically exempt, while it treated speakers offering access to abortion alternatives (such as adoption) as covered by the law.[240] This is the same type of speaker discrimination that was written into the Massachusetts statute upheld as neutral by the First Circuit in *McCullen*.

Unlike the First Circuit, however, the Ninth Circuit did not apply the weakened, *Renton*-driven content-neutrality analysis described in the cases above. Instead, the Ninth Circuit correctly found that Oakland's preferential treatment of some speakers on the public sidewalk "is the epitome of a content-based speech restriction."[241] The court reached this conclusion by applying the traditional application inquiry described in Part I above ("a regulation is content-based if . . . the regulation, by its very

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236. *Id.* at 361.
237. Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972).
238. 653 F.3d 835 (9th Cir. 2011).
239. *Id.* at 851.
240. *Id.* at 850–51 ("At oral argument, the City confirmed that it would not enforce the Ordinance against an escort who approached a patient, without consent, and said, 'May I help you into the clinic?' but that it would enforce it against a sidewalk counselor who said, 'May I talk to you about alternatives to the clinic?'").
241. *Id.* at 851.

terms, singles out particular content for differential treatment")[242] and by reciting the familiar, pre-*Renton* standard from *Mosley* 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."[243]

IV. SEVERAL PATHS TO RESTORING THE CONTENT-NEUTRALITY TEST

The very idea that the government would "single out favored messages" to receive special treatment on public streets and sidewalks should strike any judge as obviously impermissible under First Amendment content analysis. Indeed, this is the precise opposite of the neutrality test as applied in *Mosley*, the paradigmatic content-neutrality case.[244] Yet three judges on the Fifth Circuit, in 2010, apparently saw no problem with the government regulating speech content in this way. And judges in the other circuit courts and justices on the Supreme Court have recently made similar errors in the other contexts described above.

We believe the only explanation for courts viewing these speech restrictions as "neutral" is that they are no longer applying the standard content-neutrality inquiry. Instead, they are applying a severely weakened neutrality analysis, which has been subtly distorted over time by the secondary effects doctrine. The result is that courts tend to be satisfied by the mere assertion of a neutral-sounding motive, and allow that neutral-sounding motive to crowd out other aspects of the neutrality inquiry, including a focus on the law's application and justification.

In this regard, the secondary effects doctrine is having the precise impact feared by its early critics. It is creating the opportunity for governments to "single out favored messages" legally. And whether this government favoritism occurs in parades, on public sidewalks near abortion clinics, on television, or in public schools, the Supreme Court and the courts of appeals are frequently allowing the favoritism to occur without triggering strict scrutiny. So long as the government is savvy enough to couch the state interest as neutral, there is a good chance a court can be convinced to find the law neutral. In this manner, the content-neutrality inquiry is functioning less like "the keystone"[245] holding First Amendment doctrine together, and more like a roadmap for governments to regulate speech selectively based on its content and even viewpoint while avoiding the compelling interest test.

This is a serious problem in First Amendment doctrine and application. As the Court has repeatedly acknowledged, viewpoint discrimination is "an egregious form of content discrimination," and the government should

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242. *Id.* (alternation in original) (quoting Berger v. City of Seattle, 569 F.3d 1029, 1051 (9th Cir. 2009) (en banc)) (internal quotation marks omitted).

243. *Hoye*, 653 F.3d at 851 (citing Menotti v. City of Seattle, 409 F.3d 1113, 1128 (9th Cir. 2005)).

244. *See, e.g.*, Stone, *supra* note 4, at 115 (deeming *Mosley* "perhaps the seminal decision distinguishing content-based and content-neutral restrictions").

245. Kagan, *supra* note 15, at 449.

never be permitted to engage in it.[246] Yet as the recent cases discussed above demonstrate, the courts of appeals are often using the weakened content-neutrality analysis even to permit viewpoint discrimination in the public forum.

The good news, however, is that the problem is not yet universal, and the harm from the doctrinal shift described above can be addressed.

The optimal way to address the problem is for the Supreme Court to take a case—or series of cases—to address directly the doctrinal damage created by the secondary effects doctrine. Doing so would require several steps. First, the Court should grant certiorari in a case to clarify that the express use of the secondary effects doctrine is limited to so-called "low value" speech and cannot be applied beyond that context. The Court should look for a case that expressly invokes the doctrine in the context of core political speech. As discussed in Part II.A.3 *supra*, these cases do arise from time to time.

Second, the Court should also clarify—in the next content-neutrality case it decides—that the "principal inquiry" statement from *Ward* is a misstatement. What the Court presumably meant was that the "principal *target*" of the content inquiry is laws that discriminate based on disagreement with the message. But calling an analysis of motive the "principal *inquiry*" confuses means with ends. As Justice Kagan rightly noted, a content-neutrality inquiry that focuses on such direct inquiries into motive is avoided too easily to do any real work. The Court's recent grant of certiorari in the *McCullen* case offers an opportunity to make this correction.

Third, the Court should also correct its obvious overstatement from *Ward* that a law is neutral so long as it serves "purposes unrelated to the content of expression." A law that bans all civil rights marches would of course protect *some* purposes unrelated to the content of expression, as it would reduce litter and traffic congestion. But the law would still be obviously content based and should be treated as such.

Fourth, the Court should correct its past statements suggesting that *Renton* offers a valid example of a law that is "justified without reference to the content of speech." The entire point of the secondary effects doctrine is that there are certain effects that come with speech *of a certain content*. Thus *Renton*'s secondary effects approach should rightly be viewed as an *exception* to the justified without reference inquiry. Allowing *Renton* to continue to be used in this regard essentially allows the secondary effects doctrine to be read into the rest of the neutrality inquiry in a way that no majority of the Court has ever embraced.

There are good reasons to believe that the Supreme Court would be prepared to make these corrections and directly address the problems that

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246. "The government *must abstain* from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) (emphasis addded).

are becoming apparent in the courts of appeals. Over the past several years, the Court has taken a variety of cases to clarify questions of First Amendment doctrine.[247] Furthermore, with Justice Kagan's arrival, the Court now also has within its midst a prominent academic critic of allowing the neutrality inquiry to be a direct inquiry into motive.[248]

If the Supreme Court does not address the doctrinal problems directly, lower courts still have some room within existing case law to apply a proper content-neutrality inquiry. Because the doctrinal problems we have discussed have occurred subtly, they have left in place a host of strong content-neutrality cases that have never been overruled and are still widely accepted as valid law. Thus, courts confronted with content-neutrality questions are perfectly able to rely upon *Mosley*, *O'Brien*, *Eichman*, *Johnson*, *Clark*, and other cases that do not use the weakened content analysis described above. This is how the Ninth Circuit in *Hoye* reached the correct result on the abortion clinic speaker question (the Ninth Circuit relied on the principles from *Mosley*) while the First Circuit erred (because it applied the weakened *Renton*-driven content approach and ignored *Mosley*). The Supreme Court's decision last term in *Sorrell* provides yet another example of a strong content analysis, which lower courts can and should use as a model going forward.

Nearly three decades ago, when the Court announced the secondary effects doctrine, it was widely believed that doctrine would severely undermine the First Amendment. As detailed above, it has done so, just more slowly and quietly than most commentators have realized. The damage has occurred through Supreme Court decisions that, whether deliberately or not, incorporated the secondary effects approach into the standard content-neutrality inquiry. The Court needs to take deliberate action now to reverse that damage and restore the neutrality test to its proper strength.

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247. *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011); Snyder v. Phelps, 131 S. Ct. 1207 (2011); United States v. Stevens, 130 S. Ct. 1577 (2010); Citizens United v. FEC, 130 S. Ct. 876 (2010).

248. *See* Kagan, *supra* note 15, at 443.