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Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications

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CUBAN CIGARS, CUBAN BOOKS, AND THE PROBLEM OF INCIDENTAL RESTRICTIONS ON COMMUNICATIONS

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I.

With unappreciated frequency, government action has the effect of restricting communications protected by the first amendment. Residential zoning restrictions exclude bookstores as well as lumber mills. The press could give us more news, and give it to us faster, if newspaper delivery trucks and automobiles driven by reporters were not restricted by the 55 miles per hour speed limit. Television networks presumably could devote more of their resources to investigative reporting if they were not required to devote so much money to paying the minimum wage to new employees and to ensuring the health and safety of their camera operators. Book publishers might produce more books if their printing plants were not constrained by the expense of compliance with environmental and zoning restrictions. And think of the money that all of us could spend on books, or publishers could spend on producing them, if money otherwise available for book publishing and book buying were exempt from income taxation.

Traditionally, the law has not treated these examples, and others like them, as hard cases. The routine response to first amendment claims of this variety has been that communicators or recipients of communication can be subjected to generally applicable government regulations without even implicating the protections of freedom of speech and freedom of the press.[1] Thus, newspapers can properly be made to comply with the antitrust laws,[2] to obey gen-

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1. "Clearly, the First Amendment does not prohibit all regulation of the press. It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems." Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 581 (1983).

2. Citizens Publishing Co. v. United States, 394 U.S. 131 (1969); Lorain Journal Co. v. Unites States, 342 U.S. 143 (1951); Associated Press v. United States, 326 U.S. 1 (1945).

erally applicable labor laws,[3] and to pay taxes imposed under a generally applicable tax scheme.[4] Distributors of magazines door-to-door can be subjected to the same regulations that restrict door-to-door sellers of vacuum cleaners and brushes.[5] And a general prohibition on sleeping in the park can be applied to ideological sleepers as well as to those who are merely tired.[6]

These cases stand for the proposition that incidental restrictions on speech, those that are incidental to a more general regulatory scheme, do not create significant first amendment problems. And it is this proposition that is of concern with respect to some of the issues raised by Professor Neuborne.[7] Not all of the problems identified by Neuborne fit this mold. Issues such as the exclusion of foreign speakers precisely because of their political views,[8] or the identification of foreign films as propaganda,[9] present for consideration governmental actions that would, if taken in the domestic context, present core first amendment violations. The question is whether the existence of an international component renders constitutionally permissible actions that would, if taken domestically, violate well-settled first amendment principles.[10] With respect to these and other related actions, I have substantial sympathy with Neuborne's arguments, in large part because for me the focus of the first amendment is on the motivations of the government. If we are to be concerned mainly with government's motives, motives that are otherwise impure do not become instantly sterilized merely because the incidence of those impure motives lies beyond our territorial borders.

But some of Neuborne's other concerns are dramatically differ-

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3. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946); Associated Press v. NLRB, 301 U.S. 103 (1937).

4. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983).

5. Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 586 n. 9 (1983) (explaining Breard v. Alexandria, 341 U.S. 622 (1951)).

6. Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065 (1984).

7. Neuborne & Shapiro, *The Nylon Curtain: America's National Border and the Free Flow of Ideas*, 26 WM. & MARY L. REV. 719 (1985).

8. *Id.* at 722-28.

9. *Id.* at 735-38.

10. The requirement of identifying certain foreign-source materials as propaganda, for example, might usefully be compared to Talley v. California, 362 U.S. 60 (1960), in which the Supreme Court struck down an identification requirement with respect to handbills.

ent. They present the issues with which I commenced these comment—issues of purely incidental restrictions on communication. Let me focus, as my working example, on the application of the Trading With the Enemy Act.[11] Neuborne properly notes that this act, and its accompanying regulations,[12] prohibit the importation of Cuban books, magazines, and newspapers. What is legally important here, however, is that this same act, and the same accompanying regulations, prohibit the importation of *all* Cuban products, *including* books, magazines, and periodicals, but also including, most notoriously, Cuban cigars.[13] Thus, from the perspective of the statutory and regulatory scheme, books and cigars are on an equal footing, both being but instances of the larger generic categories of "property" and "merchandise."[14]

Restrictions on the importation of Cuban books, magazines, and newspapers therefore are "incidental" restrictions as that term is used here. No evidence exists that the regulatory scheme, neutral on its face, focuses on books as its primary goal.[15] Nor is this a case in which a statute neutral on its face as between communicative material and noncommunicative material, and possibly even neutral in motivation as between communicative and noncommunicative material, is in fact applied by government officials to single

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11. 50 U.S.C. app. § 1-44 (1982) (discussed in Neuborne & Shapiro, *supra* note 7, at 728-32).

12. *See, e.g.*, Cuban Assets Control Regulations, 31 C.F.R. § 515 (1985).

13. 50 U.S.C. app. § 3(c)(1982) does deal specifically with mail and communication, but 50 U.S.C. app. § 3(a) covers trade, and § 3(b) covers people. Taken together, the three subsections seem to encompass just about everything. In the relevant regulations, 31 C.F.R. § 515.201 (1985) includes "any property" and § 515.204 speaks in terms of "any merchandise."

14. *See supra* note 13.

15. I take it as a given that such a motive would render constitutionally suspect even a facially acceptable scheme. *See* Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 579-80 (1983) (explaining Grosjean v. American Press Co., Inc., 297 U.S. 233 (1936)). This is consistent with the approach in other areas of constitutional law. *See* Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977) (dormant commerce clause); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (racial discrimination); McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982), *aff'd*, 723 F.2d 45 (8th Cir. 1983) (establishment clause). *See generally* Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation In Constitutional Law*, 79 YALE L.J. 1205 (1970); Symposium, *Legislative Motivation*, 15 SAN DIEGO L. REV. 925 (1978).

out the communicative.[16] Rather, here we are presented in relatively pristine form with a regulatory scheme that is innocuous facially, in conception, and in application, but which has the incidental effect of prohibiting the import into the United States, along with Cuban cigars, of books, magazines, and newspapers.

The presence of this incidental restriction on material itself protected by the first amendment is for Professor Neuborne a source of concern, and it is that concern that I want to focus on here. Is the incidental effect sufficient to raise a first amendment issue? Or shall we take the incidental nature of the effect as sufficient to exclude the matter from the purview of first amendment attention, treating Cuban books like Cuban cigars, and therefore treating the issue in the same way that we treat application of traffic, labor, and antitrust laws to publishers of newspapers.

II.

Initially we are confronted with the problem of whether the distinction between purposeful restrictions and incidental restrictions should be a distinction worth drawing at all. Although it is true that even a dog knows the difference between being kicked and being stumbled over,[17] this aphorism from Holmes is substantially question-begging. The ability to draw a distinction is hardly a self-sufficient reason for doing so. That we be able to draw a distinction may be a necessary condition for legal utility, but it is not a sufficient condition. Were it otherwise, the ability to distinguish between black children and white children would be sufficient to justify school segregation.

Thus, we must look a bit deeper to see if the distinction between purposeful restrictions of speech and incidental restrictions of speech is sufficiently grounded. And here we face the distinction between a positive conception of the first amendment and a negative one. Under a positive conception of the first amendment, the guiding principle is the positive value of speech, the particular ad-

16. Again, I take it that evidence of such would be sufficient to raise substantial first amendment problems. Cox v. Louisiana (Cox I), 379 U.S. 536 (1965). This principle applies to more than the first amendment. Yick Wo v. Hopkins, 118 U.S. 356 (1886) (racial discrimination).

17. O. HOLMES, JR., THE COMMON LAW 7 (M. Howe ed. 1963).

vantages, beauties, and purposes served by certain communicative acts. Under this conception, a reduction in the quantity of speech is a substantial and primary constitutional harm, regardless of the source of the reduction or the motivations of the reducer. From this perspective, then, the loss of 1000 Cuban books incidental to the loss of Cuban cigars and Cuban machinery is still the loss of 1000 Cuban books, and no less serious than the loss of 1000 Cuban books as a result of a conscious government decision to keep Cuban books out of the hands of American readers. From this perspective there is an equivalent loss, and thus, presumptively, no reason to treat one of these events as substantially different, doctrinally, from the other. And although I have just presented the positive view in oversimplified and possibly even caricatured form, thoughtful and reasoned arguments have been made for a deemphasis on purpose, motive, or intent.[18]

A negative perspective on the first amendment, however, produces a different analysis. Under a negative view, the focus is not so much on the particular values that are served by speech as on the particular dangers of its regulation.[19] And if this is the primary concern, then a government action intended to deal with communication is different in kind from one that has a restriction on communication as merely an incidental effect. Only the intentional restriction calls into question the state's motives, and if our aim is specifically to prevent the government from having certain motives, then the intentional restriction involves dangers of a different order.

What I have just offered is, of course, embarrassingly abbreviated, but I do not want to stray too far from the doctrinal mission I have set for myself here. Yet it is important at least to note here that a vision of the first amendment that focuses on the positive virtues of speaking is fundamentally different from one that focuses on the nature of government regulation. And thus there are two competing notions of the first amendment that will be troub-

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18. *See* Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422 (1980); Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981).

19. I consider myself an adherent to the negative view, but will not here detail its underlying premises and arguments. *See* F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982), Schauer, *Must Speech Be Special?*, 78 NW. U.L. REV. 1284 (1983).

led differently by the existence of an incidental but unplanned restriction on the flow of information and ideas. To be as troubled by the incidental restriction of Cuban books or the incidental burdens on newspapers of antitrust laws as by the intentional attempts by the government to "get" newspapers or Cuban books is to take a particular position on one of the most important and fundamental questions about free speech. This is not the place to answer that question, but its existence, and its effect on this doctrinal issue, must be noted.

The resolution of this difference in perspective may also involve taking a position with respect to the frequency and intrusiveness of judicial review. To be concerned significantly, in a constitutional sense, with incidental effects is to be committed to judicial scrutiny of an enormous range of government decisions. Even if the outcome of that scrutiny is upholding the government's action, the very imposition of close scrutiny ought to be of some concern as long as we consider judicial review the exception rather than the rule. Virtually every government decision is likely to have some incidental effect on some constitutionally protected value.[20] More than in many other areas, the stopping point problem here is very real. This is not the only consideration. Requiring communication-directed purpose has support independent of the desire to cabin judicial review within relatively narrow limits. But if judicial intrusiveness is less of a concern, then opening to judicial scrutiny the whole host of government actions that have some effect on the quantity of protected speech will be seen as less problematic. Again, this is not the kind of issue that can be seriously confronted here. But it is again important to point out that to urge serious judicial scrutiny of incidental effects on communication is to take a strong position on one side of a highly contested issue about the frequency and intrusiveness of judicial scrutiny of legislative actions.

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20. *See* Washington v. Davis, 426 U.S. 229 (1976), in which this concern seemed a primary reason for the Court's insistence on proof of intentional discrimination in equal protection cases. *See also* Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275 (1972); Silverman, *Equal Protection, Economic Legislation, and Racial Discrimination*, 25 VAND. L. REV. 1183 (1972).

III.

Within the relatively narrow doctrinal scope of this comment, I can avoid exploring deeply the issues raised in the previous section because the Supreme Court already has committed itself squarely on one side of these issues. The cases dealing with labor laws, antitrust laws, and taxation, among others, make clear that the absence of a governmental focus on communication, at the very least, makes a big difference. Even apart from the issue of what level of scrutiny will be applied to intended and unintended restrictions on speech, the cases make clear that the distinction between the intentional and the incidental constitutes an important threshold issue.

This issue is commonly discussed in the context of what has come to be known as the "*O'Brien* analysis." Drawing heavily on the analytical approach of Chief Justice Warren's opinion in *United States v. O'Brien*,[21] the commentators have urged that this approach is applicable to a far wider range of free speech issues than just the "symbolic speech" question at issue in that case.[22] The key to the approach is a two-track analysis that first looks, in the language of *O'Brien*, to see if there is a "governmental interest . . . unrelated to the suppression of free expression."[23] As properly elaborated in the commentary, the question is not so much whether the government interest is related to "free expression," but rather whether the government interest is predicated on the "communicative impact" of the speech. If so, then the communicative nature of the act is central to the regulatory goal, and the case demands scrutiny under the normally applicable first amendment standards.[24]

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21. 391 U.S. 367 (1968).

22. *See* especially Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 580-601 (1978); Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29 (1973). That the approach is applicable outside the issue of symbolic speech is clear after Members of City Council (Los Angeles) v. Taxpayers for Vincent, 104 S. Ct. 2118 (1984).

23. 391 U.S. at 377.

24. I say "normally applicable" because a variety of different standards may be relevant, depending on the particular nature of the communicative impact and the nature of the government interests. In some circumstances, such as the regulation of perjury or offers to fix prices, the government interest is indeed predicated on communicative impact, but the par-

If the government interest is not related to communicative impact, however, there is only an incidental restriction on speech. The *O'Brien* analysis tells us that these incidental restrictions are to be measured against a lower standard. But what exactly is that standard? Language in *O'Brien* prescribes, for this lower track of incidental restrictions, a test requiring "an important or substantial governmental interest," and a least restrictive alternative test that allows only an "incidental restriction on alleged First Amendment freedoms [that] is no greater than is essential to the furtherance of that interest."[25] Yet this standard seems sometimes not to be applied at all, and sometimes to be applied in different ways.[26] In the following section, therefore, I want to deal directly with the question of what standard is to be applied to incidental restrictions on speech.

Clearly, this is the question we must ask if we are to look at Cuban books, Cuban cigars, and the related problems raised by Professor Neuborne. The fact that books are kept out of the country as products, rather than as messages, shows that the more stringent track of this bifurcated approach is inapplicable. Undoubtedly, of course, governments are likely to be less than enamored by the messages contained in the books that are incidentally excluded. Apparently, however, the regulations in our example would apply equally to exclude Cuban books on nonpolitical subjects, Cuban books with blank pages, Cuban products that are the size and weight of books but are not books, and, of course, Cuban

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ticular communicative impact is taken to be wholly outside the coverage of the first amendment, thus generating mere rational basis scrutiny. *See generally* Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 267-82 (1981). In other circumstances, such as the regulation of commercial advertising, governmental interests related to communicative impact are measured against a standard that might loosely be described as "intermediate scrutiny." *See, e.g.*, Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980). And sometimes government interests related to communicative impact are tested by the stringent standards exemplified in Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam). I do not intend for this catalogue to be taken as exhaustive, but only to show that the "upper" track of the *O'Brien* approach requires analytic subdivision itself. This is not to say that the approach fails, but only to say that by itself it is incomplete. It takes us a long way towards dealing with a wide range of important problems, and it is a crucial starting point for many issues, but it is rarely the finishing point.

25. 391 U.S. at 377.

26. *See infra* notes 27-31 and accompanying text.

cigars. We are, therefore, measuring the incidental exclusion of Cuban books against a lower standard, but just how low is that standard?

IV.

Under some circumstances incidental restrictions on speech seem to receive no first amendment scrutiny whatsoever. The cases dealing with labor, antitrust, and taxation seem to fit this mold. So too do the cases refusing to grant special press privileges in the face of otherwise generally applicable legal requirements or prohibitions.[27] One can imagine a host of situations in which a similar nonconsideration of first amendment values seems appropriate. We would not want to open for first amendment analysis every criminal prosecution in which the defendant claimed that the littering or the murder was for political and communicative purposes. I am troubled by the thought that every owner of a movie theater, concert hall, bookstore, magazine stand, or newspaper dispensing machine would have a first amendment-inspired claim for a special exemption from otherwise generally applicable zoning laws. And, more controversially, it does not seem feasible to test every trespass prosecution under a substantial interest and least restrictive alternative standard solely because the trespasser trespassed for the purpose of communicating.

These kinds of problems explain the second approach to incidental restrictions on speech. Under this approach, unlike the one just described, the Court acknowledges the applicability of the "important or substantial governmental interest" and least restrictive alternative requirements of *O'Brien*, but applies them in a toothless manner, producing a standard of review that in practice resembles mere rational basis scrutiny. *O'Brien* itself seems to fit this characterization, and so does its most recent application, *Clark v. Community for Creative Non-Violence*.[28] Indeed, although in cases like *Members of City Council v. Taxpayers for Vincent*[29] the Court

27. Zurcher v. Stanford Daily, 436 U.S. 547 (1978); Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974); Branzburg v. Hayes, 408 U.S. 665 (1972).

28. 104 S. Ct. 3065 (1984).

29. 104 S. Ct. 2118 (1984).

seems to take more seriously the relatively heightened scrutiny that is nominally applicable to some incidental restrictions on speech, there are no cases in which the application of this heightened scrutiny has resulted in upholding the claim of the speaker. In practice, the application of the lower track of this analysis, although open linguistically to the possibility of some bite, has resembled rational basis review. In this respect, therefore, application of the standard parallels the results in those cases, labor and antitrust, in which the relevance of the first amendment is expressly dismissed. Taken together, the two groups of cases also seem to track the equal protection cases, in which the failure to prove intentional discrimination immediately relegates the claimant to minimal scrutiny.[30]

In other cases, however, the results as well as the approach differ from that just described. Think, for example, of a general regulatory ordinance prohibiting blocking sidewalks. The ordinance is applied evenly to all sidewalk-blockers, including those who chain their bicycles to railings, those who pile their trash in the way of pedestrians, those who set up temporary stands to sell umbrellas, and those who would obstruct the sidewalks by attracting crowds with their speeches. Such an ordinance also could apply to streets, and perhaps even to parks. In all of these cases we can imagine a substantial restriction on speaking, but that restriction would be merely incidental to a generally applicable restriction on certain physical activities. Under these circumstances, will first amendment pleas be treated as casually as they were in the cases discussed above? Surely not, because these are "public forum" cases. The cases support the view that even incidental restrictions on speech must meet more exacting standards when the "public forum" label properly attaches.[31] It is not my purpose here to deal with the intricacies of public forum doctrine. But that doctrine is

30. *E.g.*, Personnel Adm'r v. Feeney, 442 U.S. 256 (1979); Washington v. Davis, 426 U.S. 229 (1976).

31. International Bd. of Teamsters v. Vogt, Inc., 354 U.S. 284 (1957); Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268, 276-77 (1951) (Frankfurter, J., concurring); Schneider v. State, 308 U.S. 147 (1939); Hague v. CIO, 307 U.S. 496, 515-16 (1939). *See generally* Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984); Kalven, *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1.

significant because it can be characterized in terms particularly relevant here. Public forum doctrine is in fact a first amendment-inspired *exception* to a generally applicable regulation. Despite a regulation's neutrality and generality, the characteristics of certain actors or conduct encompassed by that regulation will justify an exemption for that actor or conduct from the otherwise applicable regulation.

Putting all of this together, then, we might describe the current state of the law on incidental effects on speech as follows: Under most circumstances a burden on speech incidental to a generally applicable regulation not focused on communication will be tested against standards not significantly more stringent than minimal rationality; but under certain narrowly bounded circumstances—the public forum—conduct otherwise reached by a general regulation will be exempt from the force of that regulation because of the first amendment purposes it serves. And as so described, there is a structural parallel with current doctrine under the free exercise clause of the first amendment. Burdens on religious practices that are incidental to generally applicable police power regulations need not be evaluated with reference to free exercise standards.[32] But under some narrowly bounded circumstances—interference with practices central to a well-established organized religion—the free exercise clause mandates a constitutionally-compelled exception unless the state can meet a compelling interest level of scrutiny.[33]

V.

It thus appears that the putative importer of Cuban books faces an uphill constitutional battle. On the stipulated and apparently accurate presupposition that Cuban books are excluded merely as products, that there is no distinction in government aim between Cuban books and Cuban cigars, then the exclusion of the books is

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32. Braunfeld v. Brown, 366 U.S. 599 (1961); Prince v. Massachusetts, 321 U.S. 158 (1944); Reynolds v. United States, 98 U.S. 145 (1878); *see* United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment).

33. Wisconsin v. Yoder, 406 U.S. 205 (1972); *see also* Thomas v. Review Board of Ind. Employ. Sec. Div. #1, 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963). Even when the triggering conditions have been met, the Court has been quite receptive to claims of a compelling state interest. *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983); United States v. Lee, 455 U.S. 252 (1982).

an incidental burden and nothing more. Under current law, then, the public forum exception being inapplicable, the evaluation of excluding Cuban books would be only an evaluation for minimal rationality. The first amendment would either not even be relevant, or it would be nominally relevant but would not constitute a significant factor in the analysis.

Those who would import Cuban books, therefore, or who would try to escape from any of the other incidental burdens discussed by Professor Neuborne, must try to change current doctrine in a particular way. They must provide reasons why the kind of constitutionally mandated exception, found in the public forum cases and in the *Yoder* principle, should be created here. This task has two facets, one of which seems substantially more difficult than the other. The easy task is to demonstrate the constitutional derivation of the exception. The relationship between books and the principles of freedom of speech and freedom of press need not be insulted by a citation, and thus one who argued that an exception for communicative material generally, or books in particular, was justified by the first amendment would seem to be on at least as sound a constitutional footing as those who argued for exceptions for the public forum and for certain religious practices.

The harder task, however, is to provide the boundaries for the exception. As discussed above,[34] "floodgates" arguments inspire a reluctance to grant first amendment scrutiny to incidental burdens. The related arguments about the very nature of judicial review also provide a source for a reluctance to allow a constitutionally mandated exception unless the boundaries for that exception are both tolerably narrow as well as tolerably clear. Thus, the task before the claimant of the exception is to distinguish this case from the application of the antitrust laws to newspapers, and from the application of speed limits to book delivery trucks. And the task is to do so in a way that will avoid requiring courts to look closely at *every* incidental burden case. Such an exception might draw on the special character of books, even within the universe of actions covered by the first amendment.[35] Perhaps the exception could draw a distinction between a restriction and an absolute prohibition. And

34. *See supra* note 20 and accompanying text.

35. *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

perhaps it would focus on alternative channels of communication.[36] Maybe it would incorporate all of these elements, as well as others. But I will not address either the definition of such an exception, or its advisability, here. The task is too large to be taken on in the context of mere comments. And it is a task more appropriate to those who would argue for such an exception. I have tried here only to provide frame and canvas. I will leave it to others to paint the picture.

36. *See* Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640 (1981).