William & Mary Bill of Rights Journal

Volume 19 (2010-2011)
Issue 1

Article 4

October 2010

The Inherent Structure of Free Speech Law

Joshua P. Davis

Joshua D. Rosenberg

THE INHERENT STRUCTURE OF FREE SPEECH LAW

Joshua P. Davis and Joshua D. Rosenberg*

To date no one has discovered a set of organizing principles for free speech doctrine, an area of the law that has been criticized as complex, *ad hoc*, and even incoherent. We provide a framework that distills free speech law down to three judgments: the first about the *role* of government; the second about the *target* of government regulation; and the third *a constrained cost-benefit analysis*. The framework can be summarized by three propositions: first, the Constitution constrains government if it regulates private speech, but not if government speaks, sponsors speech or restricts expression in managing an internal governmental function; second, government regulation is subject to the Free Speech Clause only if it targets communication; and, third, government regulation targeting communication is constitutional if it survives a constrained cost-benefit analysis. We first set forth our general theory and provide examples of its explanatory power. We then argue that our framework finds confirmation in the works of three renowned scholars: Dean Robert Post of Yale Law School on role of government, Professor Jed Rubenfeld of Yale Law School on the target of government regulation and the constraints on balancing, and Judge Richard Posner on cost-benefit analysis. The work of these scholars supports our position in two ways: first, each agrees with part of our framework; and, second, the writings of each are unpersuasive to the extent they are at odds with our rational reconstruction of free speech law.

INTRODUCTION

Free speech law seems to be an intricate tangle. Commentators routinely criticize it as unduly complicated, incoherent, and counterintuitive. As to the first of these points, scholars have characterized free speech doctrine as "maddeningly complex"[1]

---

* The authors are, respectively, Professor and Director, Center for Law and Ethics, USF School of Law and Professor, USF School of Law. This project has benefited from the suggestions of John Adler, Bill Bassett, Chris Eisgruber, Susan Freiwald, Tristin Green, David Greene, Bill Hing, Tim Iglesias, Richard Leo, Maya Manian, Julie Nice, Judge Richard Posner, Robert Post, Bruce Price, Jed Rubenfeld, Ronald Rotunda, Michelle Travis and Mark Tushnet. We are particularly grateful to Robert Post, who has provided extensive comments and constructive criticism about our framework. We thank Royce Barber, Brian Davies, Nick Larson, Erika Nusser, and Chris O'Connell for excellent research assistance.

[1] Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 PEPP. L. REV. 273, 274 (2009). John H. Garvey and Frederick Schauer similarly comment:

and *ad hoc*, consisting of a host of unrelated "three- and four-part tests."[2] For this reason, treatises, casebooks and law review articles dutifully divide government interference with speech into numerous and proliferating categories, addressing each one largely on its own terms.[3]

> In this section we begin by asking why the architecture of the First Amendment is so complicated. Law students are not the only ones who yearn for more simplicity. Courts who apply the law would make fewer mistakes if the law were less complex. And public and private actors would have an easier time conforming their behavior to the contours of the Constitution.

John H. Garvey & Frederick Schauer, THE FIRST AMENDMENT: A READER 172 (2d ed. 1996); s*ee also* Elana Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 515 (1996) (noting the "technical, complex classificatory schemes" of the First Amendment have "become only more intricate, as categories have multiplied, distinctions grown increasingly fine, and exceptions flourished and become categories of their own"); Susan H. Williams, *Content Discrimination and the First Amendment*, U. PA. L. REV. 615, 616 (1991) ("The doctrinal web surrounding the free speech clause of the first amendment is one of the most complicated and confusing areas in constitutional law.").

[2] Frederick Schauer describes free speech doctrine as involving "vague definitions, marginally (at best) useful three- and four-part tests, and slippery and hard to apply categories." Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1278 (2005) [hereinafter Schauer, *Institutional*]; *see also* Daniel A. Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND. L.J. 917, 938 (2009) ("First Amendment Doctrine is sometimes criticized for its complex array of rules, which some consider more suitable for a tax code than a statement of constitutional principle.").

[3] As Erwin Chemerinsky, perhaps our greatest organizer of constitutional doctrine, has stated, "Simply put, it is not possible to comprehensively flowchart the First Amendment as a defined series of questions in a required sequential order. There are many ways of approaching and evaluating government actions restricting expression." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 932 (3d ed. 2006). His treatise thus addresses free speech in a typical manner, subdividing the topic based on, *inter alia*, the methodology of analysis (including content-based vs. content-neutral; vagueness; overbreadth; prior restraints; defining infringements of speech); types of unprotected and less protected speech (incitement; fighting words, the hostile audience, and racist speech; sexually oriented speech; reputation, privacy, and publicity; symbolic speech; government employee speech; attorneys' speech; labor picketing and protests); and the location of speech (government properties; private property; speech in authoritarian environments, such as the military, prisons, and schools). *Id.* at xix. Other scholars take a similar approach. *See*, *e.g.*, WILLIAM W. VAN ALSTYNE, THE AMERICAN FIRST AMENDMENT IN THE TWENTY-FIRST CENTURY: CASES AND MATERIALS (3d ed. 2002) (discussing, *inter alia*, free speech rights in specific environments, coerced expression, lesser protected categories of speech); VINCENT BLASI, IDEAS OF THE FIRST AMENDMENT (2006) (dividing free speech by individual perspective, *e.g.*, John Milton, James Madison, John Stuart Mill, Learned Hand, Oliver Wendell Holmes, Jr., Louis Brandeis, and Alexander Meiklejohn); RONALD J. KROTOSZYNSKI, JR., ET AL., THE FIRST AMENDMENT: CASES AND THEORY (2008) (relying on various categories, including content-based discrimination, content-neutrality and

The second problem is that many free speech doctrines appear incoherent.[4] The Court has at times stated, for example, that it will strike down laws that impose an excessive incidental burden on expression.[5] Yet this doctrine is notoriously anemic.[6] And the Court has suggested that it would allow greater but not lesser incidental burdens on expression. It has thus relied on this doctrine in striking down a tax that applied only to newspapers, even though it would uphold a larger general tax that applied to all businesses,[7] and in striking down a ban on trespassing only if it is part of the distribution of pamphlets, even though it would uphold a stricter trespassing law that applies in general.[8] The Court has not explained why a greater incidental burden on expression is constitutional but a lesser one is not.[9]

Similarly, courts have upheld restrictions on expression explaining that the government's goal was not to suppress speech itself, but only its "secondary effects."[10] They have for this reason allowed cities to zone adult movie theatres that could otherwise increase crime rates and decrease property values.[11] But in other settings, courts scrutinize laws that target expression because of its potential consequences—its

---

government property, symbolic speech, compelled speech, commercial speech, mass media, sexually explicit speech, etc.); ARNOLD H. LOEWY, THE FIRST AMENDMENT: CASES AND MATERIALS (1999) (categories include speech v. conduct, obscenity, non-content limitations on speech, and government as educator); GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT (3d ed. 2008) (addressing, *inter alia*, dangerous ideas and information, overbreadth, vagueness, prior restraint, "low" value speech, and content-neutral restrictions).

[4] Robert Post provides a typical view—if an unusual metaphor—when he describes it as "danc[ing] macabrely on the edge of complete doctrinal disintegration." Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1270 (1995) [hereinafter Post, *Recuperating*]; *see also id.* at 1275 (characterizing free speech doctrine as "notoriously turgid and confused, thoroughly disconnected from the actual levers of its judgment"); John Greenman, *On Communication*, 106 MICH. L. REV. 1337, 1341 (2008) (claiming "current speech-conduct law is incoherent"); Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1497 (2007) (noting "increasing sense" that First Amendment doctrine "has become incoherent"); Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1430 (2006) (describing the Supreme Court's rules regarding content discrimination as "inconsistent, unprincipled or *ad hoc*"); Frederick Schauer, *Codifying the First Amendment*: New York v. Ferber, 1982 SUP. CT. REV. 285, 308–09 (1982).

[5] *See*, *e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 45 (1994); Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 577 (1983).

[6] *See*, *e.g.*, Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1208–09 (1996); Post, *Recuperating*, *supra* note 4, at 1264.

[7] *Minneapolis Star*, 460 U.S. at 575.

[8] Martin v. City of Struthers, 319 U.S. 141 (1943).

[9] *See*, *e.g.*, *Minneapolis Star*, 460 U.S. at 601–02 (Rehnquist, C.J., dissenting) (making this point).

[10] City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 52 (1986).

[11] *Id.*

secondary effects—including if it may lead to violence.[12] As a result, the principle behind the "secondary effects" doctrine is elusive.[13]

A third, related problem is that courts often fight against free speech rules to reach sensible outcomes rather than enlisting them to assist their decision-making.[14] An example is the heightened scrutiny courts are supposed to apply when government action depends on the content of speech and, especially, its viewpoint.[15] Thus, the Supreme Court concluded that a prison warden's screening of publications sent to prisoners to ensure their contents do not threaten "security, good order, or discipline"[16] was somehow content neutral,[17] and that a ban on burning crosses with the intent to intimidate was somehow viewpoint neutral,[18] even though the Court acknowledged the "indelible" association between this act and the Ku Klux Klan.[19] A satisfactory account of the relevance of subject and viewpoint discrimination would have to explain the Court's resistance to the ordinary meaning of those concepts in key cases.[20]

---

[12] *See* Hess v. Indiana, 414 U.S. 105, 109 (1973); Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969). This scrutiny has practical effects, potentially making it difficult for the government to prevent communication that may lead to non-imminent violent acts. *See also* David A. Anderson, *Incitement and Tort Law*, 37 WAKE FOREST L. REV. 957 (2002); Isaac Molnar, Comment, *Resurrecting the Bad Tendency Test to Combat Instructional Speech: Militias Beware*, 59 OHIO ST. L.J. 1333 (1998); Bryan Yeazel, Note, *Bomb-Making Manuals on the Internet: Maneuvering a Solution Through First Amendment Jurisprudence*, 16 NOTRE DAME J. L. ETHICS & PUB. POL'Y 279 (2002).

[13] *See* Post, *Recuperating*, *supra* note 4, at 1267 (criticizing secondary effects test by saying the Court has "failed to articulate any substantive First Amendment theory to guide its distinction between primary and secondary effects"). Scholars have reached similar conclusions about other doctrines as well. Robert Post has noted, for example, the public forum doctrine "has received nearly universal condemnation from commentators and is in such a state of disrepair as to require a fundamental reappraisal of its origins and purposes." ROBERT POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 199 n.5 (1995) [hereinafter POST, CONSTITUTIONAL DOMAINS] (citations omitted).

[14] *See* Dan V. Kozlowski, *Content and Viewpoint Discrimination: Malleable Terms Beget Malleable Doctrine*, 13 COMM. L. & POL'Y 131, 134 (2008) ("[T]he Court's malleable definitions and inconsistent applications leave the content and viewpoint concepts especially ripe for manipulation."); McDonald, *supra* note 4, at 1430 (noting limits on content discrimination have led the Supreme Court "to develop and employ often inconsistent, unprincipled, or *ad hoc* rules to allow it to reach common sense results in many cases where those results would otherwise be elusive under current doctrine").

[15] Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 55 (2000) [hereinafter Chemerinsky, *Content Neutrality*] ("[T]he general rule is that content-based restrictions on speech must meet strict scrutiny, while content-neutral regulations only need meet intermediate scrutiny.").

[16] Thornburgh v. Abbott, 490 U.S. 401, 404 (1989).

[17] *Id.* at 415–16.

[18] Virginia v. Black, 538 U.S. 343, 361–62 (2003).

[19] *Id.* at 354.

[20] The same point can be made about other free speech doctrines, including application of strict scrutiny. *See*, *e.g.*, Eugene Volokh, *Freedom of Speech, Permissible Tailoring and*

Given these difficulties, it is unsurprising that many scholars have despaired of developing a general framework for free speech law. As Jim Chen recently put the matter, in part quoting the great free speech scholar, William Van Alstyne:

> The impossibility of coherent First Amendment doctrine is emerging as one of those truths susceptible to mathematical proof. "Deriving a consistent theory of the First Amendment from the myriad opinions of the Supreme Court represents a task similar to defining the inside and outside of a Möbius strip; that which appears logical at one point evaporates from another perspective."[21]

This Article defies conventional wisdom. It identifies an inherent structure of free speech doctrine as entailing three judgments, one about *role* of government, a second about the *target* of government regulation, and a third a *constrained cost-benefit analysis*.[22]

In regard to the first issue, a court in a free speech case must determine whether the government is itself acting—speaking, subsidizing speech, or performing an internal governmental function—or whether it is regulating private conduct. Government acting on its own—a role we call "patron"[23]—generally is free from the constraints of the Free Speech Clause. Government in its role as regulator is not.

The second issue before a court is the object of government regulation. If government targets a non-communicative attribute of conduct, then the Free Speech Clause is generally inapposite. However, if government regulation aims at communication,[24] a more searching inquiry is necessary.

Transcending Strict Scrutiny, 144 U. PA. L. REV. 2417, 2441 (1996) ("[C]ourts might try to avoid the wrong results by ignoring or stretching the doctrine, striking down a law even though the law would pass strict scrutiny faithfully applied. This seems to happen fairly often.").

[21] Jim Chen, *Conduit-Based Regulation of Speech*, 54 DUKE L.J. 1359, 1452 n.634 (2005) (quoting WILLIAM W. VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT 68 (1984)).

[22] A natural issue is in what this structure inheres. Our framework, we believe, captures the rationales—perhaps intuitive and not fully conscious—that lead judges to decide particular free speech cases as they do. These rationales explain the coherence of the outcomes and some of the reasoning in those cases, even though they may be at odds with the doctrines courts articulate. The understanding of judicial reasoning implicit in this explanation is consistent with the proverbial genius of the common law in developing legal standards case by case. *See*, *e.g.*, KARL L. LLEWELLYN, THE BRAMBLE BUSH 40–41 (2d ed. 1951) (discussing case by case method of accreting rules in common law tradition). A discussion of the implications of this model of judicial reasoning is beyond the scope of this Article.

[23] We use the word "patron" in a way that derives in part from the opening paragraph of THOMAS PAINE, COMMON SENSE 65 (Penguin Classics 1987) ("Society is produced by our wants, and government by our wickedness; the former promotes our happiness *positively* by uniting our affections, the latter *negatively* by restraining our vices. The one encourages intercourse, the other creates distinctions. The first is a patron, the last a punisher.").

[24] We do not mean to take a position on whether the Free Speech Clause applies to communication, speech, expression, or some other similar concept. Nor do we seek to define any

The final issue is whether the costs of restricting expression outweigh its benefits. But this cost-benefit analysis is constrained. Some justifications for restricting expression are favored; others are impermissible or disfavored.[25] Courts, for example, generally do not allow government to restrict speech out of a concern that the ideas espoused may ultimately prove persuasive and thereby lead the polity down an undesirable path.[26]

In sum, according to our view, application of the Free Speech Clause entails three determinations: first, whether government regulates private conduct; second, if so, whether the target of regulation is communication; and, third, if so, whether the relevant benefits of regulating speech outweigh the costs of its suppression. This framework situates particular disputes within an overarching structure, rendering existing rules coherent and revealing their underlying purposes. That is not to say it makes deciding free speech cases easy. No framework can do that. But it defines the judgments courts must make.

Part I shows the capacity of our framework to organize and rationalize a great variety of doctrines. Part I.A explains that the first judgment—about role of government—can make sense of free speech law as applied in various contexts, including to public schools, public forums, prisons, the military, and government employees. It can also account for the unconstitutional conditions doctrine as applied to speech. Scholars generally treat these areas of the law as discrete.[27] But they all involve an assessment of whether government itself acts or whether it regulates the conduct of private individuals. This distinction matters because the Court has held—particularly in recent years—that when government speaks, sponsors speech, or manages an internal governmental function, it does not cause the kind of interference with private speech that implicates the Constitution.[28]

Part I.B addresses the second judgment—about the target of government regulation—which can explain the Court's approach to: symbolic conduct; time, place, and manner regulations; and incidental restrictions on expression. Only if government

---

of those terms with precision. *But see*, *e.g.*, Greenman, *supra* note 4, at 1340 (attempting to define communication as a key concept for First Amendment purposes).

[25] *See generally* Kagan, *supra* note 1, at 413–15 (arguing that free speech doctrine is primarily designed to identify impermissible government motives for restricting expression). A related notion is that courts sometimes take a categorical rather than a case by case approach to balancing the costs and benefits of restricting expression. *See generally* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 377 (2009) (discussing "categoricalism" and "balancing" in regard to free speech rights).

[26] *See*, *e.g.*, Gitlow v. New York, 268 U.S. 652, 672 (1975) (Holmes, J., dissenting); CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 155 (1995); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situational-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1304 (2005).

[27] *See generally supra* note 3. A notable exception is Robert Post. *See generally* POST, CONSTITUTIONAL DOMAINS, *supra* note 13, at 199–267.

[28] *See infra* Part I.A.

deliberately interferes with "speech" is the First Amendment at issue.[29] Again, courts and commentators often fail to detect the common thread running through these doctrines.[30] Its recognition can solve various conundrums, including the confusing nature of cases dealing with incidental burdens on expression. As Part I.B explains, the real concern of courts in this context is pretext. They tend to scrutinize only those government actions that have a suspiciously *disproportionate* impact on speech. That is why they rarely strike down laws because of their incidental effect on expression, and often indicate they would allow greater but not lesser burdens on speech.

Part I.C deals with the third judgment—a constrained cost-benefit analysis—which can account for a long list of contexts in which government may interfere with communication, ranging from intellectual property rights, contract, fraud, the right to privacy, defamation, and anti-harassment laws to incitement, obscenity, speech used in the commission of crimes, and government restrictions on speech based on its so-called "secondary effects."[31] Courts and commentators often fail to recognize that all of these areas of the law involve balancing, treating some of them, for example, as somehow simply beyond the scope of the First Amendment.[32] Recognition of the extensive use of balancing in free speech cases—as well as of the constraints on that balancing—can help to reconcile doctrines that otherwise appear to conflict.

Part I.C suggests, for example, that the "secondary effects" test is best understood as a way to give sexual speech less protection than more highly valued speech. Government generally is not free to restrict expression, even if it does so only because of its secondary effects. But the distinction between secondary and primary effects does some work. It gives government leeway to regulate sexual expression, while allowing courts to strike down government regulation if it is based on an impermissible or disfavored motivation, such as disagreement with the ideas espoused, that is, because of

---

[29] Note that if a law of general applicability—that can apply to conduct or communication—suppresses expression because of its message, that counts as targeting speech for these purposes. *See* Volokh, *supra* note 26, at 1278–82, 1286–87.

[30] Note, however, that Rubenfeld recognizes the unifying purpose of doctrines pertaining to symbolic conduct and incidental expressions on speech. *See* Jed Rubenfeld, *A Reply to Posner*, 54 STAN. L. REV. 753, 763 (2002) [hereinafter Rubenfeld, *Reply*]; Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 776 (2001) [hereinafter Rubenfeld, *Purpose*]. Also, the Supreme Court has described the tests for symbolic conduct and time, place, and manner regulations as essentially the same. Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989) ("[W]e have held that the *O'Brien* test [for symbolic conduct] 'in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions.'" (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 298 (1984))).

[31] *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41,52 (1986).

[32] *See*, *e.g.*, Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1767–68 (2004) [hereinafter Schauer, *Boundaries*] (arguing that many forms of communication find no protection in the First Amendment for reasons that are not so much legal as political, economic, social and cultural).

its "primary" effects.[33] This kind of constrained cost-benefit analysis, Part I.C concludes, is typical of the manner in which courts assess whether the First Amendment permits government regulation of speech.

Part I.D demonstrates the explanatory power of our framework by applying it to one of the most important[34] and confusing[35] topics in free speech law, government discrimination based on the content of expression. This area of the law makes sense if content discrimination is understood as relevant to free speech analysis insofar as it assists courts in identifying the role of government, the target of regulation, or the motivation behind government action. Thus, a prison warden may censor publications that threaten "security, good order, or discipline"[36] not because doing so is content neutral—it isn't—but because it is part of the legitimate governmental function of running a prison. And a state may ban cross burning with the intent to intimidate not because it is viewpoint neutral—it isn't—but because the law is designed to prevent a particularly threatening form of a true threat,[37] not to skew debate, silence offensive ideas, or serve some other impermissible or disfavored purpose.

Part II turns to academic analyses of free speech law. Responding to its apparent complexity and incoherence, renowned scholars have attempted to explain free speech doctrine by emphasizing a single issue: the role of government, according to Robert Post;[38] the target of government action, according to Jed Rubenfeld;[39] or a cost-benefit analysis, according to Richard Posner.[40] None of these scholars is right or, put differently, they all are. Each captures part, but only part, of free speech law,

---

[33] Post, *Recuperating*, *supra* note 4, at 1278 ("[T]he Court has used the doctrine to trigger strict scrutiny for regulations that attempt to restrict speech because of the harms that information conveyed by speech might cause.").

[34] Chemerinsky, *Content Neutrality*, *supra* note 15, at 50 (describing rules pertaining to content discrimination as the core of free speech); *see also* Kagan, *supra* note 1, at 443 ("The distinction between content-based and content-neutral regulations of speech serves as the keystone of First Amendment law."); Schauer, *Institutional*, *supra* note 2, at 1270 (noting that "conflation of the morally and politically divergent in the service of avoiding content-based or viewpoint-based distinctions explains much of the unalterable core of the First Amendment").

[35] *See*, *e.g.*, Post, *Recuperating*, *supra* note 4, at 1270 (describing case law on content discrimination as "haphazard and internally incoherent").

[36] Thornburgh v. Abbott, 490 U.S. 401, 404 (1989).

[37] Virginia v. Black, 538 U.S. 343, 363 (2003).

[38] *See generally* POST, CONSTITUTIONAL DOMAINS, *supra* note 13, at 1–20; Robert Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1809–24 (1987) [hereinafter Post, *Governance and Management*]; Robert Post, *Subsidized Speech*, 106 YALE L.J. 151, 172–75 (1996) [hereinafter Post, *Subsidized Speech*].

[39] *See generally* Rubenfeld, *Purpose*, *supra* note 30; Rubenfeld, *Reply*, *supra* note 30.

[40] *See* Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737 (2002) [hereinafter Posner, *Pragmatism*]; RICHARD A. POSNER, *The Speech Market*, *in* FRONTIERS OF LEGAL THEORY 62–94 (2004) [hereinafter POSNER, FRONTIERS].

leaving substantial areas unexplained. Part II modifies and then synthesizes their core insights.

Part II.A examines the work of Robert Post, which explores the first judgment in our framework, role of government. Relying on the concept of "constitutional domains," he distinguishes between government's managerial and regulatory capacities.[41] Although we have some points of disagreement with Post regarding role of government, we think his work extraordinarily valuable in that regard. But, as Part II further argues, he has taken this insight too far, applying it where its explanatory power is limited, that is, to the second and third judgments of our framework.

Part II.B contends that much the same can be said of Jed Rubenfeld's analysis of free speech law. He, too, has attempted to capture all of free speech law by emphasizing a single issue. Rubenfeld champions "purposivism,"[42] claiming that government action violates the Free Speech Clause if and only if it aims at expression (unless it does so in response to a false factual assertion).[43] Rubenfeld, like Post, does an elegant job of uncovering a crucial principle at work in judicial decision-making—in Rubenfeld's case the second judgment in the framework we propose.

But a careful review establishes that Rubenfeld falls short in two regards: first, he admits an exception to his thesis when government acts in what Post calls its managerial capacity,[44] an exception which he does not adequately explain; and, second, he fails to make sense of the many situations in which courts allow government to restrict expression because of the harms it will otherwise cause. In other words, Part II.B argues that Rubenfeld's purposivism is incomplete to the extent it resists the first and third judgments in our framework.

Part II.C explores Richard Posner's pragmatism and his debunking of a romanticized notion of free speech. He makes a potent argument that cost-benefit analysis is commonplace in a way that scholars and judges are reluctant to admit.[45] He recognizes that far from being absolute, the right to speak freely gives way to numerous governmental interests.[46] His skepticism is valuable, as courts have not acknowledged how often they subordinate free speech rights to other concerns.

But Posner is insufficiently attentive to the ways in which courts engage in formal reasoning—rather than case by case balancing—in resolving free speech cases. He questions whether formal rules are workable in the free speech arena.[47] Yet he makes

---

[41] POST, CONSTITUTIONAL DOMAINS, *supra* note 13, at 199–267.

[42] Rubenfeld, *Purpose*, *supra* note 30, at 770.

[43] *Id.* at 821.

[44] *Id.* at 819.

[45] Posner, *Pragmatism*, *supra* note 40, at 741–42.

[46] *Id.* at 745.

[47] *Id.* at 738. Posner's position on this issue is a bit unclear. While at times he expresses skepticism that free speech doctrine contains an element of formalism, at other times he qualifies this point. *See*, *e.g.*, *id.* at 740 (suggesting free speech law is not formal at least "outside

key concessions that tend to confirm our view of the formal nature of the first and second judgments in free speech cases. Of note, he admits that government may restrict expression when it acts in a managerial capacity[48] and when its regulations affect expression only indirectly, even if the incidental burden they place on speech is great.[49] To be sure, he treats these concessions as minor and claims that they are ultimately justified by pragmatism.[50] But they provide significant evidence that free speech doctrine is in fact formal in just the way we suggest. In sum, Part II.C claims that Posner's argument supports the framework we propose, even in regard to the formal characteristics that he is reluctant to acknowledge.

The last part concludes by suggesting a reason why Post, Rubenfeld and Posner go astray. Our view is that each introduces too much of his own position on what the law should be into an inquiry about what the law is. At first blush, this assertion may seem to rely on a strongly positivist view of law, a view that draws a strong distinction between law and morality.[51] But, as the conclusion explains, our project can be understood in terms of the concept of "fit" as set forth by Ronald Dworkin,[52] perhaps positivism's most forceful critic.[53] Our claim is that our framework fits the pattern of judicial decisions better than competing academic accounts and better than the rules courts articulate.

Indeed, the tendency of scholars to distort their description of free speech law to match their normative preferences has a counterpart in judicial reasoning. According to this view, the confusing nature of free speech doctrine may reflect judicial discomfort with the limited protection courts afford speech. To be clear, we do not assert bad faith. But the legal niceties courts have invented may allow them to avert their gaze from what they have wrought. If so, what is necessary is a ruthless attention to the pattern of free speech cases that places a much higher priority on description than prescription. With the misleading veneer of free speech law removed, and its underlying structure laid bare, judges, lawyers, and scholars will be in a better position to identify the key issues in free speech cases and, where appropriate, to make clear-eyed and cool-headed recommendations for reform.

---

the heartland of settled law"). *But see* E-mail from Judge Richard A. Posner, United States Court of Appeals for the Seventh Circuit, to Joshua P. Davis, Professor, University of San Francisco School of Law (Jan. 24, 2010, 09:38 EST) (on file with author) ("I don't think the Supreme Court's free speech doctrines do much work. The[y] just set a tone—the thumb is on the scale, favoring speech but not too much.").

[48] Posner, *Pragmatism*, *supra* note 40, at 748 n.33.

[49] *Id.* at 743–44.

[50] *Id.* at 743–44, 748.

[51] RONALD DWORKIN, JUSTICE IN ROBES 26–33 (2006).

[52] *See* Joshua P. Davis, Note, *Cardozo's Judicial Craft and What Cases Come to Mean*, 68 N.Y.U. L. REV. 777, 809–10 (1993) (discussing Dworkin's concept of fit).

[53] *See*, *e.g.*, DWORKIN, *supra* note 51, at 140–240; RONALD DWORKIN, LAW'S EMPIRE (1986); Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 17 (1967).

I. THE INHERENT STRUCTURE OF FREE SPEECH LAW

A. Role of Government

1. Government Itself Acting

The first judgment in free speech cases is about the role of government. At the most general level, that role can be defined in two ways: government itself can act, a capacity we label as patron; or government can interfere with the conduct of private citizens, which we call government as regulator.

Government as patron can be usefully subdivided. It can play the role of patron as a speaker,[54] a sponsor of speech,[55] or a manager of an internal governmental function.[56] Government speaks through public officials. An address by the President is an example.[57] And government promotes messages by enlisting the assistance of private individuals, at times offering incentives as part of that effort.[58] Consider government subsidies to medical professionals to provide information about medical services.[59]

Similarly, government as manager runs prisons, public schools, the United States Postal Service, the military, and other institutions. In this role, it may impose various restrictions on its employees so as to function effectively. So, for example, prison officials may allow certain groups access to prisoners to further the goals of the prison but not permit similar access to other groups that will not promote—or may undermine—those goals.[60] Or school administrators may require teachers of mathematics to address that subject during class hours, and not political issues.[61]

---

[54] *See* Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1131–32 (2009) (noting government may itself speak); Post, *Subsidized Speech*, *supra* note 38, at 183.

[55] *See*, *e.g.*, *Summum*, 129 S. Ct. at 1131 (noting government can control its message as sponsor of speech); Rust v. Sullivan, 500 U.S. 173, 192–200 (1991) (allowing government to control content of message it sponsors); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 n.3 (1988) (noting government can exercise control over speech it sponsors).

[56] *See generally* Ysursa v. Pocatello Educ. Ass'n, 129 S. Ct. 1093, 1098 (2009) (recognizing government may control speech as part of an internal governmental operation); POST, CONSTITUTIONAL DOMAINS, *supra* note 13, at 4–6, 199–267 (discussing how government may control speech in its managerial capacity).

[57] *See* Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 589 (2008) (recognizing that the Supreme Court has "shielded" government speech from scrutiny under the Free Speech Clause); Post, *Subsidized Speech*, *supra* note 38, at 183.

[58] *See* Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1384–85 (2001) (discussing propriety of government programs expressing a message).

[59] *Rust*, 500 U.S. at 192–93.

[60] Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 133–34 (1977) (allowing prisons to choose which groups had access to prisoners depending on whether they served a "rehabilitative" purpose).

[61] *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (noting schools have

When government acts within its permissible role as patron, it is not subject to the ordinary constraints of the Free Speech Clause. Government may promote one view of a topic—that people should not take illegal drugs or that abstinence before marriage is safe and wise—without providing support for an opposing perspective.[62] The general prohibition on viewpoint discrimination—one of the central tenets of modern free speech law[63]—does not apply.[64]

Much the same is true for government as manager. Schools may choose to teach astronomy, but not astrology, even though that is a form of content discrimination.[65] Or they may instruct students—and test them—on the year the Holocaust began, even though citizens at large would be free to deny that it occurred.[66]

But that does not mean that the Free Speech Clause leaves government completely unrestricted. To the contrary, courts police the outer boundary of government as patron. So, for example, when government interferes with expression in a way that is not justified by its role as manager, it acts as regulator. Along these lines, courts have held that government in running a prison may restrict expression only in the service of legitimate penological ends.[67] Courts thus are called upon to confront forthrightly what those legitimate ends are.

Other doctrines frame the same sort of judgment, although they are less transparent, causing courts at times to lose sight of their purpose. An example is the public forum doctrine.[68] This doctrine can be understood as designed to draw the line between government as manager and regulator. If an airport imposes restrictions on *solicitation*

---

constitutional authority to control curriculum); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (same).

[62] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995) ("When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.").

[63] *See* Chemerinsky, *Content Neutrality*, *supra* note 15, at 50 (noting "the principle of content neutrality has become the core of free speech analysis"); Amy Sabrin, *Thinking About Content: Can It Play An Appropriate Role in Government Funding of the Arts?*, 102 YALE L.J. 1209, 1220–21 (1993).

[64] *See*, *e.g.*, *Rust*, 500 U.S. at 193 (allowing government to subsidize provision of information about family planning, and to prohibit communication about abortion); *Rosenberger*, 515 U.S. at 833 (noting the Court in *Rust* allowed government to support one viewpoint on abortion).

[65] *Hazelwood*, 484 U.S. at 273 (noting schools have constitutional authority to control curriculum); *Fraser*, 478 U.S. at 685 (same).

[66] *Fraser*, 478 U.S. at 685; Posner, *Pragmatism*, *supra* note 40, at 748.

[67] Thornburgh v. Abbott, 490 U.S. 401, 404 (1989); Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 133–34 (1977); CHEMERINSKY, *supra* note 3, at 1149; POST, CONSTITUTIONAL DOMAINS, *supra* note 13, at 199–267 (discussing managerial role of government in various contexts).

[68] *See generally* Post, *Governance and Management*, *supra* note 38; Post, *Recuperating*, *supra* note 4, at 1270.

of funds to prevent disruptions in administering air travel[69]—for example, attempting to minimize "pedestrian congestion,"[70] "one of the greatest problems"[71] in some airports—that may well fall within government's permissible role as manager. On the other hand, a similar ban on the *distribution of literature* may go too far, constituting regulation because it lacks sufficient justification as part of government's managerial efforts.[72]

Courts, however, tend to obscure the crucial judgment in public forum cases,[73] often focusing, for example, on purely historical practices to determine whether a particular kind of government property qualifies as a public forum.[74] A more direct approach would be to assess the legitimate needs of the government in performing an internal governmental function, however challenging that may be.[75]

A similar explanation applies to the unconstitutional conditions doctrine. That doctrine holds in relevant part that the government cannot condition receipt of a government benefit on relinquishing the right to freedom of speech.[76] One such benefit is receiving a salary for teaching at a public college.[77] But this rule is too general to resolve concrete cases. Government may impose some restrictions on the speech of public college teachers—such as requiring them to address in class the subjects they are hired to teach—but not others—such as prohibiting them from making political speeches on their own time.[78] And so a teacher states a claim when he alleges he was fired for criticizing the Board of Regents, an action by government that may exceed its legitimate role in running a state college system.[79] If it does, government has strayed into the role of regulator.

This line of analysis also holds the promise of explaining the apparently disjointed decisions of the Supreme Court in the public school cases. These cases involve judicial efforts to define the metes and bounds of government's legitimate role as proprietor of a public school. The sources of constraint on government in this and other settings

---

[69] Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992).

[70] *Id.* at 685.

[71] *Id.*

[72] *Id.* at 677 (affirming the court of appeals in allowing ban on solicitation in airport, but not a similar ban on distribution of literature).

[73] For criticism of the way in which courts fail to recognize the nature of the inquiry relevant to public forum cases, see generally Post, *Governance and Management*, *supra* note 38; POST, CONSTITUTIONAL DOMAINS, *supra* note 13, at 199–267, 199 & n.5.

[74] *Lee*, 505 U.S. at 679–83. CHEMERINSKY, *supra* note 3, at 1143.

[75] *See generally* POST, CONSTITUTIONAL DOMAINS, *supra* note 13, at 199–267; Post, *Governance and Management*, *supra* note 38; *see also* Post, *Recuperating*, *supra* note 4, at 1275.

[76] *See*, *e.g.*, Perry v. Sindermann, 408 U.S. 593, 597 (1972).

[77] *Id.* at 595.

[78] *See*, *e.g.*, *id.* at 598 ("For this Court has held that a teacher's public criticism of his superiors on matters of public concern may be constitutionally protected."); Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).

[79] *Perry*, 408 U.S. at 598.

are at least twofold. First, government may define its mission in a way that limits the restrictions it may impose on student speech. So, for example, a school may well be permitted by the First Amendment to impose a dress code, but if it chooses not to do so, it cannot permit students to wear some symbols—say, buttons from national campaigns or the Iron Cross, a symbol of Nazism[80]—but not allow them to don others—including black armbands to protest the Vietnam War.[81] When government deviates from its own baseline for tolerating student expression in this way in effect it imposes "a regulation"[82] rather than merely managing a school.

But government in a public school or other setting is not entirely free in defining its mission.[83] Schools cannot, for example, remove books from a school library "in a narrowly partisan or political manner,"[84] based, for instance, on whether they are "written by or in favor of Republicans" or "by blacks or advocating racial equality and integration."[85] No matter how a school defines its mission, the Constitution places limits on its ability to impose certain kinds of orthodox views.[86] If government thus exceeds its legitimate role in managing a school, it regulates.

To be sure, the line between the role of government as patron and regulator will not always be obvious. Drawing it involves a contestable judgment. Our aim is to explain the nature and significance of that judgment, not to suggest how it should be resolved in any given case.

2. Recent Case Law

Judicial recognition of the role of government as patron has increased in recent years, as has the leeway the Supreme Court gives government in that capacity. Caroline Mala Corbin, for example, dates the Court's current understanding of government speech to its decision in *Rust v. Sullivan* in 1991.[87]

---

[80] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 510 (1969).

[81] *Id.* at 513.

[82] *Id.*

[83] *See*, *e.g.*, Morse v. Frederick, 551 U.S. 393, 423 (2007) (Alito, J., concurring) (noting schools should not have free reign because some public officials "have defined their educational missions as including the inculcation of whatever political and social views" they hold).

[84] Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 870 (1982) (Brennan, J., plurality).

[85] *Id.* at 871.

[86] *See Morse*, 551 U.S. at 409 (acknowledging a school cannot proscribe "political and religious speech" because it is offensive); *cf.* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 599 n.3 (1998) (Scalia, J., concurring) ("I suppose it would be unconstitutional for the government to give money to an organization devoted to the promotion of candidates nominated by the Republican Party but it would be just as unconstitutional for the government itself to promote candidates nominated by the Republican Party, and I do not think that that unconstitutionality has anything to do with the First Amendment.").

[87] *See* Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 612 (2008).

Indeed, permitting government great latitude to interfere with expression as patron has been a major theme of the Roberts Court's First Amendment jurisprudence. Consider its recent decision in *Pleasant Grove City v. Summum*.[88] It held that "the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause."[89] *Summum* provides perhaps the clearest articulation to date of the Court's view of government as speaker or sponsor of speech: "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. A government entity has a right to 'speak for itself.' [I]t is entitled to say what it wishes, and to select the views that it wants to express."[90]

The Roberts Court has been somewhat less clear—but similarly expansive—in permitting government to interfere with expression as manager.[91] So, for example, in *Morse v. Frederick* it held that an Alaskan public school could restrict student expression that officials "reasonably regard as promoting illegal drug use."[92] To be sure, the Court acknowledged that schools cannot punish speech for being political or religious.[93] But even though the student speech at issue arguably was both—the student had displayed a banner on a public sidewalk reading "BONG HiTS 4 JESUS," a message with elements of religion (it mentioned Jesus) and politics (the legalization of marijuana had been a hot topic in Alaska)[94]—the Justices deferred to school officials and held they did not violate the First Amendment in punishing the student.[95]

Similarly, in *Garcetti v. Ceballos*,[96] the Court held that a district attorney's office did not violate the First Amendment when it disciplined a deputy district attorney for writing a memorandum (and engaging in other expression) pursuant to his official duties.[97] Indeed, the Court went so far as to rule that any expression that is part of a government employee's job duties is subject to government control.[98]

---

[88] 129 S. Ct. 1125 (2009).

[89] *Id.* at 1129.

[90] *Id.* at 1131 (citations omitted).

[91] For the Court's most recent recognition of the point see Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 899 (2010) ("The Court has upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons, but these rulings were based on an interest in allowing government entities to perform their functions." (citations omitted)).

[92] Morse v. Frederick, 551 U.S. 393, 408 (2007).

[93] *Id.* at 409.

[94] *Id.* at 445 n.8 (Stevens, J., dissenting).

[95] *Id.* at 408. For this reason we believe Frederick Schauer overstates when he claims the Supreme Court generally has been indifferent to institutional context in free speech cases. *See* Schauer, *Institutional*, *supra* note 2, at 1263. In regard to the role of government, institutional context has often mattered a great deal. Schauer's point has greater force as applied to the second and third judgments in our framework.

[96] 547 U.S. 410 (2006).

[97] *Id.* at 419.

[98] *Id.* at 421.

This rule shows a great deal of deference to government as manager.[99] Not all speech in which government employees engage as part of their duties would hinder a legitimate governmental function. For this reason, Justice Breyer, in dissent, quarreled with the categorical conclusion that when an employee communicates as part of her official responsibilities—even on matters of public concern—she would necessarily cause the kind of disruption that warrants government suppression.[100]

In this way, Justice Breyer's position is arguably consistent with the traditional rule authorizing courts to weigh the value of speech against the harm it may cause to legitimate governmental activity.[101] *Garcetti* appears to leave no room for that sort of balancing. According to the majority in *Garcetti*, the only issue was the kind of task government was performing, not whether speech would cause sufficient disruption to justify its restriction.[102] Justice Breyer challenged this notion. But he agreed with the general proposition that government may prevent its employees from speaking in a way that would "unduly interfere with legitimate governmental interests, such as the interest in efficient administration."[103]

Most recently, in *Ysursa v. Pocatello Education Association*,[104] the Court held that Idaho did not violate the First Amendment by banning payroll deductions from local government employees for use in union political activities.[105] In so ruling, the Court reasoned that Idaho was not attempting to suppress ideas with which it disagreed, but rather sought to avoid the "reality or appearance of government favoritism or entanglement with partisan politics."[106] In other words, according to the Court, Idaho was exercising control over its internal functions and separating them from any private speech in which local public employees might engage. As the Court put the matter, "Banning payroll deductions for political speech . . . furthers the government's interest in distinguishing between internal governmental operations and private speech."[107]

In each of these cases, the Court held that government had not exceeded its role as patron by interfering with speech because it was managing an internal governmental function. Of course, this conclusion involves an exercise of judgment. In *Ysursa*,

---

[99] We believe the best way to characterize the government's role in *Garcetti* is as manager of an employee, even though the employee would speak on behalf of the government vis-à-vis the general public.

[100] *Garcetti*, 547 U.S. at 446.

[101] *See*, *e.g.*, Connick v. Myers, 461 U.S. 138, 143 (1983) (balancing free speech rights of individuals, including based on its importance to matters of public concern, against the need of government as employer to provide public services in an efficient manner); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (same).

[102] *Garcetti*, 547 U.S. at 424–25.

[103] *Id.* at 445.

[104] 129 S. Ct. 1093 (2009).

[105] *Id.* at 1096.

[106] *Id.* at 1098.

[107] *Id.* at 1099.

for example, Justice Stevens made a strong case in dissent that the relevant Idaho statute was designed to frustrate union efforts to finance political speech.[108]

But our point is not to defend all—or any—of the Supreme Court's many recent decisions that turn on the role of government. It is merely to frame the relevant judgment and to recognize its significance. The judgment is about whether government acts as patron or regulator. The line between the two is demarcated in part by how government defines its own role and in part by the Constitution. The significance of the judgment is that the Free Speech Clause constrains government in its role as regulator but not as patron.

3. The Kind of Deprivation that Implicates the Constitution

The role of government addresses a preliminary requirement for the Constitution to apply. The Constitution does not empower every citizen to object to every government action. A citizen must show that the government caused her to suffer the relevant kind of harm.[109] Characterizing the role of government is a way to address this issue.

Consider first when government speaks or sponsors speech. It is not clear that government causes any particular citizen to suffer harm as a result, even if government engages in viewpoint discrimination. Constitutional jurisprudence deals with this problem in various ways, including through the ban on lawsuits based on generalized grievances.[110] This framing can explain the Court's conclusion that government is free to say what it likes, including through private citizens who willingly agree to express the government's message. Recall the Court's statement in *Summum*: "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. A government entity has the right to 'speak for itself.' [I]t is entitled to say what it wishes, and to select the views that it wants to express."[111]

---

[108] *Id.* at 1104–08. *See also infra* notes 226–29 and accompanying text.

[109] CHEMERINSKY, *supra* note 3, at 91.

[110] *See* CHEMERINSKY, *supra* note 3, at 90–98. Individuals generally are not allowed to bring a claim against the government as either a citizen or taxpayer looking to encourage the government to follow the law. Plaintiffs are required to show that they personally have suffered a concrete injury. *Id.*

[111] Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1131(2009) (citations omitted). The Court continued:

> Indeed, it is not easy to imagine how government could function if it lacked this freedom. "If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it would be radically transformed." A government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message.

Id. (paragraph separations and citations omitted); *see also* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995) (noting that in *Rust v. Sullivan* "the government did

A variation on the same analysis applies to government as manager. To some extent private citizens cede their rights as a result of institutional context, including the right to say whatever they wish.[112] That understanding can explain the Court's pronouncement in *Garcetti*: "We hold that when public employees make statements pursuant to their official duties, the employees are *not speaking as citizens* for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[113]

None of this means that the Free Speech Clause can never restrain government when it purports to act as speaker, sponsor, or manager.[114] Regarding government as sponsor, for example, Justice Scalia concurring in *Finley* acknowledged that one might conclude denial of government subsidies in some circumstances amounts to coercion and therefore treat it as government regulating.[115] Similarly, government as manager of a school, a prison, or a district attorney's office can go too far, interfering with the speech of students,[116] prisoners,[117] or employees[118] as private citizens. However, when government remains within its legitimate role of patron, it does not harm citizens in a way that gives rise to a constitutional claim.

B. Target of Government Regulation

1. Regulation of Speech or Conduct

The second judgment in our framework is about the target of government regulation. Put simply, our claim is that the Free Speech Clause protects citizens only against government's intentional interference with speech, not conduct.

But this statement is imprecise. The protection applies not merely to speech, but also to other forms of communication. And all communication requires conduct, and all conduct is potentially communicative. We might put the same point in somewhat more exact terms, if more clumsily, by saying the Free Speech Clause applies if government targets an expressive attribute of conduct, but not if it targets a non-expressive attribute of conduct. For simplicity, we will at times refer to the distinction between government targeting conduct and speech (or expression or communication).

---

not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program").

[112] Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) ("When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom [of speech].").

[113] *Id.* at 421 (emphasis added).

[114] *See infra* note 121.

[115] Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 596 (1998) (Scalia, J., concurring) (citation omitted) ("One might contend, I suppose, that a threat of rejection by the only available source of free money would constitute coercion and hence 'abridgement' within the meaning of the First Amendment.").

[116] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

[117] Thornburgh v. Abbott, 490 U.S. 401, 415–16 (1989) (acknowledging this possibility).

[118] Perry v. Sindermann, 408 U.S. 593, 595–97 (1972).

A final preliminary note is in order. To make our argument, we need not resolve the thorny issue of how to distinguish conduct from speech.[119] Our claim is about the importance of that distinction, however courts draw it.

2. Doctrines and Examples

It is often easy to determine whether the purpose of government action is to regulate speech. In some cases, government regulation is obviously unrelated to expression. A ban on burglary is an example. Burglary can be part of an effort at communication—as can any act—but government prohibits burglary to preserve property rights, to prevent violence, and the like.[120] Its goal is not to suppress speech. Laws of this nature pose no difficulty under the First Amendment. They are constitutional.

At other times, it is similarly obvious that government intends to regulate speech. Consider a law imposing criminal penalties for criticizing the President. The manifest goal of this law is to silence communication. The strictures of the Free Speech Clause therefore apply.[121]

Matters become trickier in two situations where the target of government regulation is ambiguous. To put the matter crudely, these occur when government appears to regulate conduct but may really regulate expression and when it appears to regulate expression but may really regulate conduct. A somewhat more precise formulation of the same point is that courts struggle when government regulates conduct that is not ordinarily expressive, but it may be doing so because of the message the conduct expresses, and conversely, when it regulates conduct that is ordinarily expressive, but may be doing so for reasons unrelated to the message the conduct expresses.[122]

As to government appearing to regulate conduct but really regulating expression, consider a law proscribing flag burning. Setting an object on fire is conduct. And a general ban on conflagrations would not implicate the First Amendment. But the ban on flag burning is aimed at the message that the conduct expresses. The Free Speech

---

[119] *See*, *e.g.*, Greenman, *supra* note 4, at 1340 (attempting to define communication as a key concept for purposes of the First Amendment).

[120] *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) ("The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation."); *cf. id.* at 577 (Scalia, J., concurring) (noting that the Free Speech Clause nevertheless applies to conduct "[w]here the government prohibits conduct precisely because of its communicative attributes") (emphasis omitted); *see also* Post, *Recuperating*, *supra* note 4, at 1252; Rubenfeld, *Purpose*, *supra* note 30, at 776–78.

[121] The First Amendment is also implicated by a law of general applicability that regulates expression based on its content. An example is a ban on racial discrimination in the workplace, which could involve conduct—*e.g.*, deciding not to promote a worker because of her race—or speech—*e.g.*, making comments in the workplace that create a hostile work environment. *See* Volokh, *supra* note 26, at 1281–82.

[122] *See generally* Texas v. Johnson, 491 U.S. 397 (1989).

Clause therefore applies.[123] Case law has developed for dealing with laws restricting this kind of expressive or symbolic conduct. Justice Scalia, concurring in *Barnes v. Glen Theatre, Inc.*, a case involving nude dancing, recognized this half of the equation, noting the First Amendment applies "[w]here the government prohibits conduct *precisely because of its communicative attributes* . . . ."[124]

The second situation—one that is the other side of the same coin—involves government appearing to interfere with expression, but really addressing conduct. A law that prevents a person from stopping in a crosswalk and disrupting the flow of pedestrian traffic would fall into this category.[125] Assume the police invoke this law in issuing a ticket to someone who pauses while crossing the street to give a lengthy political speech. The law is designed for convenience and safety. Of course, in this particular instance in restraining conduct, government impedes speech. But communication is not in the government's sights.[126] The Free Speech Clause therefore permits this government regulation. More generally, we submit that the time, place, and manner doctrine addresses this situation.[127] The classic example is a ban on sound trucks because of the noise they produce.[128] In this sense, the Court is correct to point out the similarities between the doctrines that pertain to symbolic conduct and to time, place or manner restrictions, serving, as they do, the common goal of determining the target of government regulation.[129]

---

[123] United States v. Eichman, 496 U.S. 310, 315–17 (1990) (holding that ban on flag burning is related to the message the act expresses); Texas v. Johnson, 491 U.S. 397, 404–07 (1989) (noting that flag burning is expressive and that expression was the target of government regulation).

[124] *Barnes*, 501 U.S. at 577. We nevertheless disagree in part with Justice Scalia's reasoning in *Barnes*. Most notably, merely because government targets communication does not necessarily mean it violates the Constitution, as he asserts. *Id.* It means only that courts will subject government action to scrutiny.

[125] *See* Schneider v. State, 308 U.S. 147, 160 (1939) ("[A] person could not exercise this liberty [under the First Amendment] by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic . . . .").

[126] Of course, the analysis would be different if police used the law selectively, enforcing it in response to the content of the message expressed. *Cf.* Dorf, *supra* note 6, at 1208–09 (suggesting courts are concerned with incidental burdens on speech in the context of public forums).

[127] Note that while the thrust of the doctrine is to identify the target of government regulation, it can also be used to address the third judgment in our framework, a constrained cost-benefit analysis. But fully disentangling its elements and mapping them onto our framework is beyond the scope of this Article.

[128] *See*, *e.g.*, City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 428 (1993); Ward v. Rock Against Racism, 491 U.S. 781, 793 (1989); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 113 (1980) (discussing "sound trucks" and the distinction between speech and conduct).

[129] *Ward*, 491 U.S. at 798 ("[W]e have held that the *O'Brien* test [for symbolic conduct] 'in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions.'" (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 298 (1984))).

Another important point pertains to supposed judicial scrutiny of incidental burdens on expression. If we are correct, government action that has an unintended impact on speech does not violate the Free Speech Clause. Yet courts sometimes claim the contrary.[130] What, then, are we to make of this line of precedent?

Our answer is that courts in deciding the relevant cases—and formulating the relevant doctrines—are really concerned about the target of government regulation. This is true in two senses. First, the key cases tend to involve government restrictions on forms of expression, including *Schneider v. State*,[131] *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,[132] and *City of Ladue v. Gilleo*.[133] So, for example, *Schneider* addressed a ban on the distribution of leaflets,[134] *Minneapolis Star* a tax on materials used in publication,[135] and *City of Ladue* a prohibition on residential signs.[136] Leaflets, publications, and signs are by their nature expressive.[137] The government actions at issue, then, applied to the conduct because of an expressive attribute.[138]

Moreover, to the extent government offered a justification for its actions that was unrelated to expression, the courts had reason to suspect pretext.[139] Citing incidental effects may have just been a way for courts to avoid saying that they were second-guessing government's motive, which can be an uncomfortable task.[140]

This understanding can explain two anomalies regarding the supposed protection against incidental burdens on expression. First, the protection is anemic. Commentators have had difficulty explaining why courts so rarely strike down government action that has an incidental burden on expression.[141]

The second anomaly is that courts often say they would permit a greater but not a lesser incidental impact on expression—for example, in *Schneider* a strict ban on trespassing generally, but not one that addresses trespassing only to distribute leaflets[142] and in *Minneapolis Star*, a tax on all businesses, but not a tax only on ink and paper

---

[130] *See*, *e.g.*, Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983).

[131] 308 U.S. 147, 148 (1939).

[132] 460 U.S. 575, 577 (1983).

[133] 512 U.S. 43, 45 (1994).

[134] *Schneider*, 308 U.S. at 148.

[135] *Minneapolis Star*, 460 U.S. at 577.

[136] *Gilleo*, 512 U.S. at 45.

[137] *See* Rubenfeld, *Purpose*, *supra* note 30, at 831 (making a point along these lines).

[138] *See* Volokh, *supra* note 26, at 1284 (defining law as regulating expression if it applies based on its content).

[139] *See* Rubenfeld, *Purpose*, *supra* note 30, at 786.

[140] *See*, *e.g.*, City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 48 (1986) (denying courts should question government motive); United States v. O'Brien, 391 U.S. 367, 383 (1968) (same).

[141] *See*, *e.g.*, Post, *Recuperating*, *supra* note 4, at 1264; Dorf, *supra* note 6, at 1204 (characterizing the *O'Brien* test as addressing incidental burdens on expression and noting it "asks so little in principle, it should not be surprising that it means so little in practice").

[142] Schneider v. State, 308 U.S. 147, 163–64 (1939).

used in publications.[143] As Chief Justice Rehnquist noted in dissent in *Minneapolis Star*, government could place a far greater burden—and suppress more expression—by imposing a high general tax than a low special tax that applies only to newspapers.[144] But that point misses the crux of the majority's reasoning: "[D]ifferential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression."[145]

Indeed, both anomalies disappear if we recognize that cases and doctrines that purport to deal with incidental burdens on expression are actually concerned with pretext. Since many general laws that burden expression do so unintentionally, it is unsurprising that the protection against these laws appears weak. And since unintentional suppression may have a far greater impact than intentional suppression of speech, it is similarly unsurprising that courts allow greater but not lesser restrictions on expression.

3. Does the Free Speech Clause Apply?

Attention to the target of regulation can be understood as a way of defining the scope of the Free Speech Clause. That clause is not a general constraint on government action. It protects only speech.[146] Of course, defining speech is not easy. And speech may include more than verbal communication.[147] Other expressive conduct counts, too. Still, the Free Speech Clause is limited.

To be sure, courts could reasonably invoke the First Amendment to strike down incidental burdens on expression. But they have to define the scope of free speech in some way.[148] Our argument is that as a matter of rationalizing case law—that is, based on experience, not logic—the most plausible view is that courts have applied the Clause only when government targets expression.

C. A Constrained Cost-Benefit Analysis

The third judgment in our framework is about the costs and benefits of suppressing speech. But it does not necessarily involve balancing on a purely case by case basis. Courts have determined that some justifications for restricting speech are impermissible—or at least disfavored—while other justifications may generally suffice, at least

---

[143] Minneapolis Star & Trib. Co., v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983).

[144] *Id.* at 601–02 (Rehnquist, C.J., dissenting).

[145] *Id.* at 585.

[146] Texas v. Johnson, 491 U.S. 397, 404 ("The First Amendment literally forbids the abridgement only of 'speech.'").

[147] United States v. Eichman, 496 U.S. 310, 315–17 (1990) (flag burning as expression); *Texas*, 491 U.S. at 406–07 (same).

[148] *See* Post, *Recuperating*, *supra* note 4, at 1250–60 (discussing doctrine pertaining to "symbolic conduct" as relevant to whether the First Amendment applies to government regulation); Rubenfeld, *Purpose*, *supra* note 30, at 761 (same).

under certain conditions.[149] For these reasons, we characterize the third judgment as a constrained cost-benefit analysis.[150]

1. Cost-Benefit Analysis

To some extent, courts acknowledge that they are willing to sacrifice expression to various governmental interests. But they tend to treat these cases as minor exceptions.[151] In reality, the permissible justifications for silencing speech are many, and the absolute constraints on those justifications few.[152]

a. Acknowledged Sacrifices of Speech

Sometimes courts declare that the government may privilege other concerns over expression. Examples are: true threats;[153] fighting words;[154] and incitement.[155] In these instances, government may restrict speech to protect the relevant governmental interests. A particularly clear instance of balancing involves obscenity. According to the Supreme Court, expression is obscene only if it appeals to the prurient interest of the average person, is patently offensive, and lacks serious redeeming artistic, literary, political, or scientific value.[156] Here, we see doctrine attending to both costs and benefits: suppressing speech must entail low costs—the speech lacks any redeeming value—and high benefits—preventing significant offense.

b. Unacknowledged Sacrifices of Speech

i. Secondary Effects

At other times, courts are less straightforward about their balancing. Consider the secondary effects test. Courts often frame the test as identifying laws that do not threaten speech.[157] According to this view, if government seeks to address the

---

[149] ELLEN FRANKEL PAUL ET AL., FREEDOM OF SPEECH 84–85 (2004).

[150] The constraints involve a form of "categoricalism" familiar to First Amendment jurisprudence. *See generally* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009).

[151] *See*, *e.g.*, Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 596 (1998) (Scalia, J., concurring).

[152] *See*, *e.g.*, Schauer, *Boundaries*, *supra* note 32 (arguing that many forms of communication receive no protection from the First Amendment).

[153] Virginia v. Black, 538 U.S. 343, 359 (2003).

[154] Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).

[155] CHEMERINSKY, *supra* note 3, at 999 (discussing Brandenburg v. Ohio, 395 U.S. 444 (1969)).

[156] *Id.* at 1020.

[157] *See*, *e.g.*, City of Erie v. Pap's A. M., 529 U.S. 277, 289 (2000); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 52 (1986).

secondary effects of speech—as opposed to its primary effects—its actions are "unrelated to the suppression of free expression."[158] So, for example, the Supreme Court in *City of Renton* upheld a zoning ordinance applicable to adult movie theatres—and treated the ordinance as "content-neutral"—because it was designed "to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, [and] commercial districts'" not to suppress the expression of unpopular views.[159] In other words, the city was concerned with the indirect, not the direct, effects of expression. But this will not do.

Speech is routinely protected from laws concerned with its indirect effects. Indeed, this is the point of the narrow framing of incitement doctrine, which, under *Brandenburg v. Ohio*, allows government to punish speech only if it threatens imminent harm.[160] Ordinarily, the harm at issue in the incitement doctrine stems from its secondary effects.[161] Government is not concerned with direct harms from the speech itself, but rather with the consequences of others reacting to it.[162] This secondary effects doctrine suggests courts should allow government to interfere with expression that may lead to lawless behavior.

But, of course, incitement doctrine does not work that way. It does not because courts do not generally allow government to target expression because of its indirect consequences.[163] Courts would not permit a city to confine political activity to a narrow area, even if the city could show, for example, that a bookstore selling propaganda and leading discussion groups critical of the government had undesirable consequences—even if it increased the crime rate, undermined the city's retail trade, decreased property values, or compromised the quality of the city's neighborhoods and commercial districts, whatever that means.[164]

In reality, the content of speech matters for purposes of the secondary effects test. Sexually oriented speech is treated as low value and given less protection than, say, political speech.[165] In other words, the Supreme Court in *Renton* used the secondary effects test as a way to mask its balancing of the costs and benefits of restricting expression.[166] The harm from suppression of sexually oriented speech was not as

---

[158] *Renton*, 475 U.S. at 48.

[159] *Id.*

[160] *Brandenburg*, 395 U.S. at 447.

[161] CHEMERINSKY, *supra* note 3, at 999.

[162] *Id.* at 1000.

[163] *See* John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, 293 (2009) ("[W]hen political speech is concerned, the secondary effects doctrine has no rational place in First Amendment law. The good news, however, is that courts generally do not apply the secondary effects doctrine to most forms of protected speech.").

[164] *Id.*; Posner, *Pragmatism*, *supra* note 40, at 742; *see also* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 898 (2009) (noting special protection afforded political speech).

[165] CHEMERINSKY, *supra* note 3, at 1025–30; Posner, *Pragmatism*, *supra* note 40, at 741–42.

[166] *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 49 (1986).

great, in the eyes of the Court, as similarly restricting establishments that engage in political expression.[167]

ii. Speech as Conduct

Another example is judicial treatment of speech as conduct. Eugene Volokh has usefully divided this issue into four categories: speech that runs afoul of generally applicable laws based on the content of the message expressed;[168] speech used as part of an illegal course of action;[169] "situation-altering utterances;"[170] and a grab bag of doctrines including "aiding and abetting, criminal solicitation, conspiracy, perjury, agreements to restrain trade, and professional advice to clients."[171] He successfully casts doubt on whether any of these categories should be treated as non-speech, as opposed to speech that government may regulate under appropriate circumstances.[172]

Volokh's argument covers a great deal of ground, but his overarching point is that characterizing speech as conduct is generally conclusory, providing a label for when speech rights lose to other interests rather than a reason not to protect speech.[173] Take, for example, the notion that speech should be treated as conduct when the message expressed has effects that violate a generally applicable law.[174] Under this approach, a philosophical argument that our government should be overthrown—if sufficiently influential—might be subject to punishment in much the same way as building bombs.[175] Or praise of people who blockade or vandalize establishments that provide abortion services—again, depending on its consequences—might be subject to sanction just as would the blockading or vandalizing itself.[176] Yet we generally think this sort of communication is protected by the First Amendment.[177]

Of course, sometimes speech causes harms that are so certain and immediate that we allow government to suppress it, as permitted by the *Brandenburg* test.[178] But the more straightforward way to proceed is to acknowledge that we are suppressing speech, and to explain why we are doing so, rather than pretending that speech has somehow morphed into conduct because of the consequences of the message it expresses.

The secondary effects test and speech treated as conduct are but two among many examples. Courts allow government to restrict expression in a host of situations:

---

[167] *See generally id.*
[168] Volokh, *supra* note 26, at 1281.
[169] *Id.* at 1282–83.
[170] *Id.* at 1283–84.
[171] *Id.* at 1284.
[172] *See generally id.*
[173] *See generally id.*
[174] *Id.* at 1286–87.
[175] *Id.* at 1288–89.
[176] *Id.* at 1289.
[177] *Id.* at 1289–90.
[178] *See supra* note 160 and accompanying text.

contract, conspiracy, aiding and abetting, fraud, requirements for publicly traded securities (including forced disclosures), commercial speech, trademark, copyright, patent, the right to publicity, the right to privacy, sexual and racial harassment, nude dancing, defamation, malpractice, restrictions on who may provide professional advice to clients (including medical or legal), and so on.[179] Some of these contexts might be appropriately treated as involving speech that is tantamount to conduct, although, as we have seen, that categorization may just be a way to beg the difficult questions. But cumulatively it is clear that we permit government to restrict expression for a great many reasons in a great many situations. A cost-benefit analysis lurks behind many of them.

2. Constraints

Acknowledging that courts at times weigh the costs and benefits of silencing speech is not the same as claiming that judges may always engage in unstructured balancing. Various justifications for restricting expression may be impermissible—or at least disfavored—while others may be favored.

a. Incitement

Consider incitement. As noted above, *Brandenburg v. Ohio* holds that government may punish advocacy of illegal conduct provided several requirements are met: imminent harm; a likelihood of producing illegal action; and an intent to cause imminent illegality.[180] These requirements do not correlate to an ordinary cost-benefit analysis, which would, for example, focus on the magnitude of harm rather than its imminence.[181] Taken literally, *Brandenburg* does not allow punishment of speech if the harms it is likely to cause are delayed but very large, but it does allow punishment if the harms are immediate and relatively minor.[182]

The cost-benefit analysis under incitement, then, may be constrained. Justifications under incitement for great harms only in the future may be impermissible[183] (or at least disfavored—would courts really strike down government suppression of expression that would be certain to result in a nuclear explosion months or years in the future?). Other justifications may be favored, such as when relatively minor harms will occur with great certainty and no lapse of time. The reason is not obvious for focusing judges on the imminence rather than on the magnitude of harm. A possibility is that delayed harm is by its nature speculative.[184] We may not trust government actors, including

---

[179] *See generally* Schauer, *Institutional*, *supra* note 2; Volokh, *supra* note 26.

[180] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); CHEMERINSKY, *supra* note 3, at 999.

[181] ELY, *supra* note 128, at 108; POSNER, FRONTIERS, *supra* note 40, at 65; Rubenfeld, *Purpose*, *supra* note 30, at 829.

[182] ELY, *supra* note 128, at 108.

[183] POSNER, FRONTIERS, *supra* note 40, at 65; Rubenfeld, *Purpose*, *supra* note 30, at 829.

[184] Justice Brandeis implied as much in his famous concurrence in Whitney v. California, 274 U.S. 357, 377 (1927) ("[N]o danger flowing from speech can be deemed clear and present,

judges, to suppress speech on such a basis. In any case, the key points are that courts engage in cost-benefit analysis but that they sometimes do so within a formal structure.

b. Plausible, if Not Absolute, Constraints

The restrictions on cost-benefit analysis in free speech cases are not entirely clear, and they may give way at times. Justice Holmes dissenting in *Gitlow* recognized what would seem to be a bedrock principle of free speech law—that government cannot suppress expression because it may prove persuasive and cause the nation to choose an unwise course.[185] Cass Sunstein suggests four forbidden motivations for silencing speech: first, government's disagreement with the ideas expressed; second, its perception of the "government's (as opposed to the public's) self-interest;" third, "its fear that people will be persuaded or influenced by ideas;" and, fourth, to prevent offense from the ideas expressed.[186]

These constraints are plausible, but they do not seem to be absolute. Sunstein's third point—that government cannot ban speech for fear it will prove persuasive[187]—is similar to the one Holmes made in *Gitlow*[188]—and, again, Holmes was dissenting. It is difficult to reconcile with the result the Court reached in cases involving antiwar speech during World War I—including *Schenck v. United States*,[189] *Frohwerk v. United States*,[190] *Debs v. United States*,[191] and *Abrams v. United States*.[192] Of course, these decisions may no longer be good law.[193] But, as Judge Richard Posner has

---

unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

[185] *See* Gitlow v. People of New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.").

[186] CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 155 (1995); *see also* Kagan, *supra* note 1, at 435 (arguing government cannot restrict expression based on "ideological motives").

[187] *See also* Volokh, *supra* note 26, at 1304 ("[T]he premise of modern First Amendment law is that the government generally may not (with a few narrow exceptions) punish speech because of a fear, even a justified fear, that people will make the wrong decisions based on that speech.").

[188] *See Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting) ("If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.").

[189] 249 U.S. 47 (1919).

[190] 249 U.S. 204 (1919).

[191] 249 U.S. 211 (1919).

[192] 250 U.S. 616 (1919).

[193] *See* CHEMERINSKY, *supra* note 3, at 988 ("The reasonableness test is the one approach that has been expressly repudiated by later Court decisions."); Volokh, *supra* note 26, at 1287

noted—citing *United States v. Dennis*[194]—if Cold War hysteria caused the courts to cut back on free speech rights, perhaps such decisions reflect a realistic view of the scope of those rights when the nation is in the grip of fear.[195]

Similarly, Sunstein's fourth claim—regarding mere "offense"—meets resistance, for example, from government's ability to restrict nude dancing[196] and to zone establishments that host sexually oriented expression.[197] Perhaps these decisions can be limited to nudity and sexually explicit movies because they are not expressive of ideas in the same way as verbal communication, but drawing such a distinction is no mean feat.[198] A great deal of art—including music, painting, and poetry, not just pornography—might be at risk if we were to distinguish, say, between expression that appeals to us in a cerebral way and expression that appeals in a visceral way, and if we were to protect only the former.[199]

But, of course, cost-benefit analysis may be constrained, even if some justifications for restricting expression are merely disfavored, not impermissible.[200] And it is safe to say that courts are deeply skeptical of government restrictions on expression when they are justified in the ways Sunstein identifies.[201]

c. Secondary Effects Revisited

These constraints can make sense of the secondary effects doctrine, at least in a reconstituted form. As noted above, courts at times treat the secondary effects doctrine as if it identifies innocuous government action, innocuous because it to does not target expression in a way that implicates the First Amendment.[202] But it does. The Free Speech Clause generally applies to expression that is regulated because of the indirect harms it may cause.[203]

("These cases, which upheld the criminal punishment of antiwar speech, are now generally seen as wrongly decided.").

[194] 341 U.S. 494 (1951).

[195] *See* POSNER, FRONTIERS, *supra* note 40, at 72 ("[T]he economist is neither surprised by nor necessarily critical of the fact that freedom of speech has not always and everywhere been understood as capaciously as it is today in this country.").

[196] *See*, *e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

[197] *See*, *e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986).

[198] Miller v. Civil City of S. Bend, 904 F.2d 1081, 1099 (1990) ("If the line between the expressive and the nonexpressive is indistinct, the 'line' between speech and conduct, between live performances and performances on paper, videotape, or compact disc, is a blur."); *see also Barnes*, 501 U.S. at 592–93 ("The nudity element of nude dancing performances cannot be neatly pigeonholed as mere 'conduct' independent of any expressive component of the dance.").

[199] Rubenfeld, *Purpose*, *supra* note 30, at 779.

[200] FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 8 (1982).

[201] SUNSTEIN, *supra* note 186, at 155.

[202] *See supra* notes 10–11, 157–59 and accompanying text.

[203] Fee, *supra* note 163, at 293.

But the secondary effects test can be useful in a different way. Rather than identifying justifications for restricting expression that are perfectly *benign* it can be understood as identifying those that are categorically *unacceptable* (or at least *disfavored*). Robert Post suggests that the Court has categorized as primary, not secondary, those "effects caused by speech through persuasion or ideas, through the provision of information, or through the creation of offense."[204] This list looks a lot like some of Sunstein's prohibited justifications.[205] When government regulates speech because of its primary effects, then, we might conclude that its doing so is (virtually) automatically unconstitutional. When it comes to secondary effects, in contrast, courts may engage in balancing, allowing, for example, the restriction of sexual speech because of a perception of its low value.

3. Constrained Cost-Benefit Analysis: Application of the Free Speech Clause

The constrained cost-benefit analysis we have discussed is a way to determine whether expression or competing governmental interests will prevail in any given case. In making this determination, courts sometimes invoke a particular doctrine, such as the test for incitement under *Brandenburg*. At other times, courts apply a tier of scrutiny, often strict scrutiny.[206] In any case, our argument is about how courts apply the Free Speech Clause—they weigh the costs and benefits of suppressing expression, although they do so subject to constraints.

D. Content Discrimination

The framework we propose holds the potential to solve various free speech riddles. One of them is the relevance of content discrimination. Applying our framework to case law reveals how each of the three judgments is necessary to explain the full pattern of judicial decisions in this area of free speech law.

Judicial attention to content discrimination plays a crucial part in free speech cases. Professor Chemerinsky goes so far as to suggest that "the principle of content neutrality has become the core of free speech analysis."[207]

But the significance of content discrimination is difficult to explain. Courts often express skepticism when government discriminates based on the content of expression in general and based on its point of view in particular. So, for example, in *Police*

---

[204] Post, *Recuperating*, *supra* note 4, at 1267.

[205] *See* SUNSTEIN, *supra* note 186, at 155.

[206] Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2442 (1996) (discussing application of strict scrutiny).

[207] Chemerinsky, *Content Neutrality*, *supra* note 15, at 50; *see also* Schauer, *Institutional*, *supra* note 2, at 1270 (noting that "conflation of the morally and politically divergent in the service of avoiding content-based or viewpoint-based distinctions explains much of the unalterable core of the First Amendment").

Department of Chicago v. Mosley the Supreme Court famously declared that, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[208] *R.A.V. v. City of St. Paul* similarly held that even so-called unprotected speech—in that case, fighting words—cannot be punished based on the perspective it expresses.[209]

At other times, however, courts have upheld various government actions that engage in subject matter or even viewpoint discrimination. The Supreme Court, for example, permitted a school principal to punish a student for displaying a banner that could reasonably be construed as encouraging drug use,[210] though the principal would not have punished student expression discouraging drug use.[211] Similarly, the Court upheld a law proscribing the burning of crosses as a true threat,[212] though it admitted the "indelible" association between that act and the Ku Klux Klan.[213]

In these and similar cases, courts either appear to stray from the rules that they have articulated for dealing with content discrimination or they torture the ordinary use of language, denying that discrimination based on content is content discrimination[214] or that discrimination based on viewpoint is viewpoint discrimination.[215] Scholars have struggled in vain for a single principle that can render the Court's decisions coherent.[216] We believe they have failed because there is no such single principle.

Instead of embodying one principle, at various times courts enlist content discrimination for any of three purposes: (1) to define the role of government; (2) to identify the target of government regulation; or (3) to smoke out impermissible (or disfavored) motivations for restricting expression. In other words, judicial attention to content discrimination can assist in each of the judgments in our framework.

1. Role of Government

Government does not always violate the Constitution when it engages in content discrimination. Far from it. Government as speaker may take a controversial position,

---

[208] Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).

[209] R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992).

[210] Morse v. Frederick, 551 U.S. 393, 408 (2007).

[211] *Id.* at 401.

[212] Virginia v. Black, 538 U.S. 343, 363 (2003).

[213] *Id.* at 353–54.

[214] *See*, *e.g.*, Chemerinsky, *Content Neutrality*, *supra* note 15, at 55–56, 64 (arguing Supreme Court in some cases treats government action that discriminates based on content as if it were content neutral).

[215] *Id.* (arguing Supreme Court at times interprets viewpoint discrimination so narrowly that it allows government to discriminate by point of view).

[216] *See*, *e.g.*, *id.* at 55–56 (arguing that principle of content neutrality serves value of equality). *But see id.* at 64 (arguing numerous Supreme Court decisions have "compromised, even undermined" content-neutrality understood as serving equality); Post, *Recuperating*, *supra* note 4, at 1267–70 (arguing that equality principle underlies concern about content discrimination but that Supreme Court decisions are not coherent based on that principle).

as when the President makes a policy speech.[217] The same is true for government as sponsor, whether it subsidizes advice about family planning only if it does not address abortion[218] or provides a place in a public park for a monument that represents a particular perspective.[219] And government as manager may take sides on an issue, rewarding students only if they acknowledge the Holocaust (or World War II or the Enlightenment) but not if they do not.[220]

However, that does not mean content and viewpoint discrimination have no relevance to the inquiry into government role. Such discrimination can sometimes assist in identifying the capacity in which government acts. The school cases provide an example. Courts have held that schools may impose dress codes without violating the First Amendment.[221] But that does not mean school officials have unfettered discretion in this regard. Courts may balk at content or viewpoint discrimination regarding clothing if it does not serve a legitimate pedagogical function.[222]

This occurred in *Tinker*.[223] A school had banned black armbands protesting the Vietnam War but not campaign buttons or Iron Crosses.[224] Discrimination based on content in this setting suggested the school was imposing a political orthodoxy that did not fall within its permissible role as proprietor of a school. In other words, as the Court explained, the ban was akin to "a *regulation* . . . forbidding discussion of the Vietnam conflict, or the expression of any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise . . . ."[225] As a result, the Court scrutinized the school's actions under the Free Speech Clause.

Justice Stevens's dissent in *Ysursa* pursued a similar line of analysis. He claimed that for various reasons the ban on payroll deductions for the political activities of unions was designed to hinder their particular point of view: it was part of a package

---

[217] *See* Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 589 (2008) (recognizing that the Supreme Court has "shielded" government speech from scrutiny under the Free Speech Clause); Post, *Subsidized Speech*, *supra* note 38, at 183.

[218] Rust v. Sullivan, 500 U.S. 173, 192–93 (1991).

[219] Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1131 (2009).

[220] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1987) (noting schools have constitutional authority to control curriculum); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (same). The Court has come closest to recognizing this point in its recent decision in *Citizens United*. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 899 (2010) ("The Court has upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons, but these rulings were based on an interest in allowing governmental entities to perform their functions." (citations omitted)).

[221] *See*, *e.g.*, Jacobs v. Clark County Sch. Dist., 526 F.3d 419, 441–42 (9th Cir. 2008) (upholding public school imposition of mandatory dress policy).

[222] *See*, *e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

[223] *Id.*

[224] *Id.* at 504.

[225] *Id.* at 513 (emphasis added).

of legislation targeting unions;[226] as originally enacted it was overbroad, applying to both private and public employers;[227] it did not restrict deductions for charitable activities, which might give rise to a similar appearance of taking sides on political issues;[228] and it may have affected only unions, not other entities.[229] Stevens thus relied on content discrimination to suggest that Idaho was not pursuing the legitimate governmental function of avoiding entanglement in partisan politics but instead had strayed into a regulatory role by taking sides in partisan politics.

Similarly, in *Thornburgh v. Abbott*, the Supreme Court addressed various restrictions on the publications federal prisoners may receive.[230] The regulatory regime at issue allowed the warden to censor publications because they might have undermined the "security, good order, or discipline of the [prison]"[231] but not because their content was "religious, philosophical, political, social or sexual or . . . unpopular or repugnant."[232] The Court ultimately held that the government action was constitutional so long as it was "reasonably related to legitimate penological interests."[233]

In reaching that conclusion, the Court relied on an odd interpretation of content discrimination. The Court acknowledged that the regulations required the warden to assess the content of publications, but it nonetheless labeled the regulations as content "neutral" to the extent they required him to determine only whether the publications posed a threat to security at the prison.[234]

Commentators have understandably questioned the Court's reasoning in *Thornburgh*.[235] The Court strained to characterize content discrimination as somehow content neutral. But the reasoning of the Court—if not its use of language—makes sense once situated within the first judgment in our framework. The Court used content neutrality as a way to describe actions by the warden that remained within his legitimate role as manager of a prison. In contrast, had the warden banned all political publications, or all publications criticizing the government, he would have engaged in content or viewpoint discrimination in the relevant sense. In this and other cases, attention to content discrimination can be understood as a way of distinguishing government as patron from government as regulator.[236]

---

[226] Ysursa v. Pocatello Educ. Ass'n, 129 S. Ct. 1093, 1105 (2009) (Stevens, J., dissenting).

[227] *Id.*

[228] *Id.* at 1106.

[229] *Id.* at 1106 n.2.

[230] Thornburgh v. Abbott, 490 U.S. 401, 402 (1989).

[231] *Id.* at 404.

[232] *Id.* at 405.

[233] *Id.* at 404 (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)).

[234] *Id.* at 415–16.

[235] *See*, *e.g.*, Volokh, *supra* note 26, at 1303 n.126.

[236] The same point could be made with any number of additional examples. Professor Chemerinsky, for example, notes instances in which the Supreme Court has treated discrimination by viewpoint as not viewpoint discriminatory: in *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998), in allowing a public television station to deny a third party

2. Government's Purpose

The second judgment in our framework explains another use courts make of attention to content discrimination: identifying the target of government regulation. Consider *City of Cincinnati v. Discovery Network, Inc.*[237] Cincinnati prohibited news racks that dispense handbills, but not newspapers.[238] The city claimed it was concerned only about safety and aesthetics—that a surfeit of news racks posed a physical danger to its citizens and detracted from its appearance.[239] The city's argument in effect was that it was targeting conduct, not expression.[240] The Court rejected this contention, labeling the regulation "content based"[241] because it distinguished between news racks based on the content of the publications they displayed.[242]

This conclusion is understandable. It is plausible that the city gave preferential treatment to newspapers as compared to handbills in part as a result of the different messages the publications communicated. Content discrimination, then, can offer a crucial clue about whether expression is the target of government regulation. Indeed, it is difficult to imagine an example of government discriminating by content but not targeting expression.

3. Constrained Cost-Benefit Analysis

The constraints on cost-benefit analysis can explain a third use courts make of content and viewpoint discrimination. At times such discrimination reveals that government is acting on an impermissible (or disfavored) basis.

R.A.V. v. City of St. Paul provides an illustration. The Supreme Court held that even unprotected speech could not be regulated on the basis of viewpoint.[243] At issue was an ordinance in St. Paul, Minnesota that prohibited the use of fighting words—including burning crosses and Nazi swastikas—that arouse "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[244]

---

candidate participation in a debate for a congressional seat and in *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), in allowing the National Endowment for the Arts to consider "standards of decency" in awarding grants. Chemerinsky, *Content Neutrality*, *supra* note 15, at 56–59. Both opinions can be explained as the Court concluding government acted within its permissible role as patron, whether overseeing a political debate or subsidizing the arts. Indeed, Justice O'Connor's opinion for the Court in *Finley* distinguished "Government [ ] acting as patron rather than as sovereign . . . ." *Finley*, 524 U.S. at 589.

[237] 507 U.S. 410 (1993).

[238] *Id.* at 429.

[239] *Id.* at 418.

[240] *Id.*

[241] *Id.* at 429.

[242] *Id.*

[243] R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992).

[244] *Id.* at 380–81.

The Court rejected the notion that unprotected speech can be regulated for any reason.[245] Whether a particular regulation violated the First Amendment depends on its justification: "The proposition that a particular instance of speech can be proscribable on the basis of one feature (*e.g.*, obscenity) but not on the basis of another (*e.g.*, opposition to the city government) is commonplace and has found application in many contexts."[246] According to the Court, by limiting the ordinance to expression on the basis of race, color, creed, religion, and gender, the city engaged in subject matter and viewpoint discrimination: subject matter discrimination because the ordinance allowed the use of fighting words on some topics, such as "political affiliation, union membership, or homosexuality"[247] but not others, such as religion; and viewpoint discrimination because it permitted statements containing fighting words in favor of, for example, religious tolerance and equality—"all 'anti-Catholic bigots' are misbegotten"—but not in favor of religious *in*tolerance and *in*equality—"all 'papists'" are misbegotten.[248]

Of note, the Court acknowledged the legitimacy of the city's proffered justification for the ordinance. The city had argued the ordinance was designed "to ensure the basic human rights of members of groups that have historically been subjected to discrimination."[249] The Court accepted that this justification was compelling and that the ordinance promoted it.[250] But, it reasoned, content and viewpoint discrimination were unnecessary to achieve the desired end. According to the Court, a broader ban—one "not limited to the favored topics"—would have the "same beneficial effect."[251] The poor fit between means and ends thus "cast[ ] considerable doubt on the government's protestations that 'the asserted justification is in fact an accurate description of the purpose and effect of the law.'"[252] Instead, the Court concluded that the ordinance targeted particular speech out of hostility to the ideas it expressed.[253] "That," the Court concluded, "is precisely what the First Amendment forbids."[254] In other words, the Court interpreted St. Paul's content and viewpoint discrimination as revealing that the city acted based on an improper motivation.[255]

From this perspective, the Court was right to conclude that characterizing speech as unprotected involves oversimplification. Even fighting words may be protected from government regulation motivated by an impermissible (or disfavored) justification. *R.A.V.* thus shows how content and viewpoint discrimination can assist in applying the constraints on cost-benefit analysis in free speech cases.

---

[245] *Id.* at 383–84.
[246] *Id.* at 385.
[247] *Id.* at 391.
[248] *Id.* at 391–92.
[249] *Id.* at 395.
[250] *Id.*
[251] *Id.* at 396.
[252] *Id.* at 395 (quoting Burson v. Freeman, 504 U.S. 191, 213 (1992)).
[253] *Id.* at 396.
[254] *Id.*
[255] *Id.*

Viewpoint discrimination, however, does not always reveal an impermissible or disfavored government motive.[256] Even in regard to the third judgment in our framework,[257] government does not necessarily violate the Free Speech Clause if its aim in discriminating by viewpoint is consistent with the very reason the category of speech is unprotected in the first place.[258]

Virginia v. Black provides an example. The Court upheld a ban on cross burning with the intent to intimidate.[259] The ban discriminated by point of view, much the way the ordinance did in *R.A.V.* People burn crosses to express racial intolerance, not racial tolerance. Indeed, the Court acknowledged that the association between cross burning and the Ku Klux Klan is "indelible."[260] Yet it held that the ban was constitutional precisely because the history of cross burning made it "a particularly virulent form of intimidation."[261] In other words, if the rationale for viewpoint discrimination within a category of unprotected speech aligns with the very reason the category is unprotected in the first instance, it may be constitutional.[262] According to the Court, *Black* involved a particularly threatening true threat.[263] Thus, understanding the purpose of attention to viewpoint discrimination provides a basis for reconciling the Supreme Court's apparently inconsistent decisions in *R.A.V.* and *Virginia v. Black*.[264]

---

[256] Writing for the majority, Justice Scalia thus went too far by implying viewpoint discrimination is never permissible. *See id.* at 388 ("When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists.").

[257] *See supra* note 22 and accompanying text.

[258] *See supra* note 256 and accompanying text.

[259] Virginia v. Black, 538 U.S. 343, 363 (2003).

[260] *Id.* at 354.

[261] *Id.* at 363.

[262] *See id.* ("Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence. Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm.").

[263] *Id.* at 362, 368 (Stevens, J., concurring).

[264] Numerous other examples make the same point. Professor Chemerinsky points out situations in which the Supreme Court has held that laws that discriminate based on content do not involve content discrimination: in *City of Renton v. Playtime Theatres, Inc.*, the Court treated a zoning ordinance that applied to adult movie theatres as content neutral, and it did the same in *City of Erie v. Pap's A.M.*, in regard to an ordinance that prohibited public nudity as a way to shut down a nude dancing establishment. Chemerinsky, *Content Neutrality*, *supra* note 15, at 59–61. In both cases, the Court treated government action as content neutral even though it depended on the content of expression: it applied only to theatres that showed adult movies in *Renton* and only to dancing involving nudity in *Erie*. *Id.* The Court's odd use of content neutrality makes sense—as does the "secondary effects" test generally—if the Court is understood as giving a lower level of protection to sexual speech, protection that applies only if government acts on a disfavored basis, such as seeking to silence a political message that sexual speech conveys. *See supra* notes 202–05 and accompanying text. In this context, the Court labels only disfavored government motivations as content discriminatory.

4. Conclusion

All three judgments in our framework are necessary, then, to make sense of the apparent inconsistencies and incoherence regarding content discrimination. No one principle can explain the doctrine. The same is true for other areas of First Amendment jurisprudence, as becomes apparent in assessing the work of prominent scholars.

II. FREE SPEECH LAW THROUGH A SCHOLARLY PRISM

Our free speech framework finds confirmation in the work of three renowned scholars, Robert Post, Jed Rubenfeld, and Richard Posner. In part, this confirmation is straightforward. Post has developed a theory of free speech that is largely consonant with our view of the role of government.[265] Rubenfeld has made an argument that is consistent with our focus on the target of government regulation, as well as with the constraints that apply when courts balance the harms and benefits of restrictions on expression.[266] Posner has championed a pragmatic view that supports our position on the importance of cost-benefit analysis.[267]

But there is an additional, subtler way in which the writings of these great scholars corroborate our approach. We can learn not only from when they are most persuasive, but also from when their arguments flounder. Unable to capture all of free speech law by focusing on the role of government, Post labels as inconsistent judicial decisions that in fact cohere once situated within the second and third judgments in our framework.[268] Rubenfeld concedes (without explanation) that role of government is crucial in some settings[269] and he struggles unsuccessfully in contending that courts never engage in balancing.[270] Posner makes key concessions about the formal structure of free speech doctrine, including the significance of role of government and of the target of government regulation.[271] In each case, a common phenomenon is at work. Each scholar fails to achieve complete descriptive accuracy as a result of emphasizing only one of the three judgments in our framework.

A. Post's Domains and the Role of Government

Post provides wonderful insight about the importance of role of government in free speech analysis. Indeed, he has developed that insight not only into a theory of free speech but also of the Constitution as a whole.[272] However, Post at times loses

---

[265] *See infra* Part II.A.
[266] *See infra* Part II.B.
[267] *See infra* Part II.C.
[268] *See infra* Part II.A.5.
[269] *See infra* Part II.B.3.
[270] *See infra* Part II.B.2.
[271] *See infra* Part II.C.2.
[272] *See generally* POST, CONSTITUTIONAL DOMAINS, *supra* note 13, at 2.

sight of the texture of free speech doctrine as it is, as opposed to as it should be. This is true in a small but significant way even in his account of the part played by role of government. But his theory fails foremost—at least as a descriptive matter—in regard to the second and third judgments in our framework. As a result, he characterizes law as incoherent when in fact it operates on principles that do not conform to his normative theory.

To understand our analysis of Post some background is necessary. Distilling a few key points from a complex argument, he carves government action into three constitutional domains: democracy, management, and community.[273] Each domain correlates reasonably well to the roles of government as we define them.

Democracy is a realm dedicated to a polity's "self-determination."[274] Free speech is, of course, a crucial ingredient in self-determination.[275] Within the domain of democracy, courts should ensure government does not interfere with free debate and discussion, a process necessary to determine the ends citizens as individuals and society as a whole should pursue. Democracy holds sway on the public sidewalks, in newspapers and in various other settings. We would say that when government operates in the democratic domain, it plays the role of regulator.

Management is concerned with giving effect to a polity's decisions. It thus follows "the logic of instrumental rationality."[276] In the realm of management, government must be allowed to constrain speech in service of the goals the democratic process has assigned to it. School teachers may thus punish students who discuss politics or other irrelevant topics in mathematics class,[277] librarians may require silence in reading rooms, and prison officials may suppress various forms of speech to further penological ends.[278] We would characterize government in this realm as patron, and more specifically as manager.

Finally, community attends to "a framework of shared beliefs, interests, and commitments,"[279] a framework that maintains the norms that "define both individual and social identity."[280] Among other values, community fosters the "social cohesion necessary to facilitate the processes of collective self-determination."[281] Values that

---

[273] *Id.*

[274] *Id.* at 6.

[275] *Id.* at 186 ("[T]he notion that democratic self-determination turns on the maintenance of a structure of communication open to all commands an extraordinarily wide consensus.").

[276] *Id.* at 5.

[277] *Id.* at 236 ("[T]he Court has held that student speech, 'in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.'" (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969))).

[278] *Id.* at 249–55 (discussing managerial role of government in various contexts); *see also* Thornburgh v. Abbott, 490 U.S. 401, 404 (1988); CHEMERINSKY, *supra* note 3, at 1149.

[279] POST, CONSTITUTIONAL DOMAINS, *supra* note 13, at 3.

[280] *Id.*

[281] *Id.* at 14.

public schools may instill in students—including respect for others—reflect the nation's commitment to community.[282] Government action in this realm, too, we would characterize as in the role of manager.

In short, democracy is about making decisions, management about implementing decisions, and community a necessary predicate for both of those endeavors. We would say that government acts as regulator in the realm of democracy and as patron in the realms of management and community. To that extent, our view and Post's are complementary.

1. Post's Paradigm Shift: From Speech to Social Practices

Post's theory of constitutional domains places a premium on social context. What matters is not whether government action targets "speech as such,"[283] but whether, for example, it interferes with the practice of democracy—by, say, hampering newspapers or any other "recognized media for the communication of ideas."[284] He summarizes: "The unit of First Amendment analysis, in other words, ought not to be speech, but rather particular forms of social structure."[285]

Post's argument in this regard is ambitious: it "would remove us from the dominant First Amendment paradigm that informs the Court's contemporary doctrine."[286] It is unsurprising, then, that his normative vision might not account for the full pattern of actual free speech decisions. At a practical level, the two diverge in at least two ways. First and most significantly, he too readily dismisses doctrines as incoherent that can make sense when framed in terms of expression or speech, but not in terms of social practices and constitutional domains. Second, he tends to focus on the effects of government action rather than on government's intent. These moves follow naturally—if not as a matter of logical necessity—from Post's concern about the impact of government action on social structures.

2. Role of Government

Post's theory and our framework coincide best in regard to the role of government. His framework in particular provides a basis for explaining why government as manager may restrict expression, including by discriminating by point of view. Even in regard to role of government, however, Post's theory of constitutional domains leads him a bit astray, particularly when government itself speaks or sponsors speech. Post's theory suggests that government participation in the democratic domain should be suspect, as citizens should define the goals of the community unencumbered by

---

[282] *Id.* at 193.
[283] Post, *Recuperating*, *supra* note 4, at 1279.
[284] *Id.* at 1256.
[285] *Id.* at 1273 (citing POST, CONSTITUTIONAL DOMAINS, *supra* note 13, at 1–20).
[286] *Id.*

government. But the actual practice of the courts is to treat government speech like other speech, as not ordinarily interfering with First Amendment rights.

According to Post's reasoning, government participation in the democratic domain is fraught with danger. After all, democracy is supposed to be reserved for self-determination by citizens.[287] As Post's attention to social realities makes clear, democratic practices are fragile and government interference with them runs the risk of subverting meaningful self-determination. As he puts the matter, "the concept of public discourse requires the state to remain neutral in the 'marketplace of communities.'"[288] If Post's theory were to describe doctrine accurately, one would expect the Free Speech Clause to impose significant restrictions on government speaking or sponsoring speech.[289] Yet it does not.[290]

To the contrary, the Supreme Court has shown great—and increasing—deference to government as speaker or sponsor of speech. Government may choose to pay for the distribution of information about family planning that does not include abortion,[291] subsidize art taking into consideration standards of "decency,"[292] or display statues that reflect some but not all beliefs.[293] As noted above, the Court put the matter forthrightly in *Summum*: "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. A government entity has a right to 'speak for itself.' 'It is entitled to say what it wishes,' and to select the views that it wants to express."[294]

Post deals with this possibility, but largely by attempting to stretch the concept of government's managerial capacity to embrace when government speaks or sponsors speech in the democratic domain.[295] He thus struggles to characterize the government's role in *Rust v. Sullivan* as possibly managerial.[296] Recall that in *Rust* the government provided subsidies for medical advice on family planning, but did not allow dissemination of information about abortion.[297] Post proffers as the "most obvious justification" for the restriction "that the government wished to create family planning clinics that

---

[287] POST, CONSTITUTIONAL DOMAINS, *supra* note 13, at 6.

[288] *Id.* at 139.

[289] *See*, *e.g.*, Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104 (1979) (arguing for limits on government speech to protect the "principle of self-government").

[290] Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1131 (2009) (holding government may control message it subsidizes); Rust v. Sullivan, 500 U.S. 173, 192–200 (1991) (same). *But cf.* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 596 (1998) (Scalia, J., concurring) (suggesting possibility that denial of government subsidies could amount to coercion in some circumstances).

[291] *Rust*, 500 U.S. at 193.

[292] *Finley*, 524 U.S. at 583–84.

[293] *Summum*, 129 S. Ct. 1129.

[294] *Id.* at 1131 (citations omitted).

[295] Post, *Subsidized Speech*, *supra* note 38, at 171.

[296] *Id.* at 171–76.

[297] Rust v. Sullivan, 500 U.S. 173, 178 (1991).

did not include abortion, and that the HHS regulations served this end."[298] But the Court itself in *Rosenberger* explained *Rust* not as involving government as manager—running clinics—but rather as speaker communicating its message through others: "When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee."[299]

Post's theory of constitutional domains thus struggles to explain cases like *Rust*[300] and *Summum*.[301] Even in regard to role of government, then, we would claim that whatever the merits of Post's theory as a normative matter, it has shortcomings as a positive account of free speech law. But our disagreement with Post in this regard is relatively minor. The more significant deficiencies of his approach arise in regard to the second and third judgments in our framework.

3. Post and the Target of Government Regulation

Post's theory of constitutional domains—and his corresponding concern about effects rather than merely government intent[302]—has caused mischief for his dealings with the second judgment in our framework, the target of government regulation.

To be sure, Post has a wonderful sense of the contours of free speech case law. It is therefore unsurprising that in an article that Post entitles *Recuperating First Amendment Doctrine*, he partially recognizes the significance of the target of government regulation for two key areas of free speech law: symbolic (or expressive) conduct and time, place, or manner regulations.[303]

But Post criticizes the relevant doctrines as incoherent, in part because, he claims, they pay insufficient attention to the unintended effects that government regulation has on expression.[304] This, we contend, is an instance of Post's normative commitments interfering with his descriptive accuracy. While it is quite plausible to suggest that doctrine *should* focus not only on the purpose of government regulation, but also on its incidental effects on speech—and while courts at times *claim* to be concerned with incidental burdens on expression—the outcomes in the relevant cases are best explained by a simpler proposition: Government violates the Free Speech Clause only when it aims to interfere with expression.[305] Read in light of this proposition, free speech doctrine coheres.

---

[298] Post, *Subsidized Speech*, *supra* note 38, at 175.

[299] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1994).

[300] *Rust*, 500 U.S. 173.

[301] Pleasant Grove City v. Summum, 129 S. Ct. 1129 (2009).

[302] *See infra* note 352 and accompanying text.

[303] Post, *Recuperating*, *supra* note 4, at 1250.

[304] *Id.* at 1270.

[305] *See* Rubenfeld, *Purpose*, *supra* note 30, at 769 ("When a law is otherwise constitutional, and when an actor has not been singled out *because* of his expression, the actor has no free speech claim.").

a. Symbolic Conduct

Post's analysis of symbolic conduct is typical in this regard. As he notes, one way to assess the applicability of the First Amendment derives from *Spence v. Washington*.[306] The so-called *Spence* test holds that the Free Speech Clause is implicated whenever conduct (1) is intended "to convey a particularized message" and (2) under the circumstance "the likelihood [i]s great that the message would be understood" by its audience.[307]

Post argues (persuasively) that the *Spence* test on its own terms is untenable. He offers as an example a statute imposing criminal sanctions for defacement of public property.[308] As Post explains, application of this statute to a defendant accused of defacing a city bus would be constitutional, whether the defacement took the form of spray-painting random blotches of color on the side of the bus or carving a political message into its seats.[309] The fact that the latter would satisfy the *Spence* test—that the message would be particularized and would likely be understood by its audience—simply would not matter.[310]

This example from Post's analysis of *Spence* confirms our argument. The ban on defacement of property is constitutional because its target is conduct, not speech. The government's purpose is to prevent the act damaging public property, not the expression of any message the defendant might thereby convey.[311] The First Amendment therefore does not apply.[312]

Post also discusses another formulation of the test for whether the First Amendment applies to symbolic conduct, a test based on the Supreme Court's decision in *United States v. O'Brien*.[313] This test holds, in relevant part, that a restriction on expressive conduct is constitutional if (1) it furthers an important or substantial governmental interest; (2) the government interest is unrelated to the suppression of free expression; and (3) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[314] As Post recognizes, this test is extremely permissive and, as applied, "[t]he only portion of the test that has bite is the inquiry into whether the governmental interest at stake 'is unrelated to the suppression of free expression.'"[315] Incidental effects on expression rarely result in a

---

[306] 418 U.S. 405 (1974).

[307] Post, *Recuperating*, *supra* note 4, at 1251.

[308] *Id.* at 1252.

[309] *Id.*

[310] *Id.*

[311] *Id.*

[312] *See supra* note 305 and accompanying text.

[313] 391 U.S. 367 (1968).

[314] Post, *Recuperating*, *supra* note 4, at 1263. *O'Brien* also required that government acted within its constitutional power, but that is always necessary under the Constitution. *See* Dorf, *supra* note 6, at 1202.

[315] Post, *Recuperating*, *supra* note 4, at 1263.

court recognizing a violation under the First Amendment. For this reason he condemns the doctrine.[316]

But, again, Post's analysis of free speech doctrine is consistent with our thesis, which can explain both why courts take into consideration incidental effects on expression and why they rarely strike down a law on that basis.[317] If the real concern of the Court is to determine the target of government regulation, then the key part of the *O'Brien* test is an assessment of whether the governmental aim is unrelated to interfering with expression. Attention to incidental effects on speech serves only to detect pretext.[318] Government may provide a justification for a regulation that is unrelated to the suppression of expression. However, if its incidental effect on speech is great, that casts doubt on its asserted rationale.[319]

b. Time, Place, and Manner Regulations

A similar analysis applies to the time, place, and manner doctrine. Post relies on *Clark v. Community for Creative Non-Violence*[320] for its articulation: such a regulation is constitutional if (1) it is justified without reference to the content of the regulated speech; (2) it is narrowly tailored to serve a significant governmental interest; and (3) it leaves open ample alternative channels for communication of information.[321] Post describes the doctrine as "an unmitigated disaster."[322] But the doctrine makes sense if it is viewed as a way to identify the target of government regulation.

The problem with how courts have applied the *Clark* test, according to Post, is that they have focused their attention only on the first criterion, which allows courts to identify the purpose of government regulation,[323] and they have treated the second and third criteria as "neither rigorous nor critical."[324] As Post acknowledges, courts tend to uphold government regulations that are not narrowly tailored or that leave only limited opportunities for communication.[325] Courts therefore allow government to interfere with social practices that are crucial to the vitality of our democracy.[326]

---

[316] *Id.* at 1265–67.

[317] *See supra* note 152 and accompanying text.

[318] So does attention to governmental interest. All else equal, the less compelling the proffered government interest, the greater the likelihood that it is pretextual.

[319] *See* Rubenfeld, *Purpose*, *supra* note 30, at 786–87 (discussing *O'Brien* test as possible means of determining target of government regulation).

[320] 468 U.S. 288 (1984).

[321] Post, *Recuperating*, *supra* note 4, at 1261.

[322] *Id.*

[323] *Id.* at 1256, 1262.

[324] *Id.* at 1262; *see also* Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 644 (1991) ("The government interest and tailoring requirements [of the time, place, and manner test] are quite close to the rational basis standard applied to regulations that do not affect fundamental rights at all.").

[325] Post, *Recuperating*, *supra* note 4, at 1262–64.

[326] *Id.* at 1264.

But the way the time, place, and manner doctrine operates in practice makes sense under our view. A regulation is constitutional if it is not aimed at expression, even if it is not narrowly tailored to serve a significant government interest or if it leaves little alternative means for communication.[327] These latter two considerations only provide reason to question the rationale the government offers for a regulation that impinges on speech.

c. The Alleged Protection from Incidental Burdens

Post claims that his theory regarding social practices finds confirmation in the Court's own recognition that unintended effects on expression sometimes trigger the Free Speech Clause.[328] Post cites examples of judicial opinions that suggest the Court at times has worried about the effect of a regulation on communication, not merely about its purpose.[329] These cases form a potential obstacle to our theory.

In each case, however, government action targeted conduct that was by its nature expressive: in *Schneider v. State*, it banned the distribution of only leaflets on government property;[330] in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, it taxed the use of ink and paper only as part of publication;[331] and in *City of Ladue v. Gilleo*, it banned residential signs.[332] The scope of the laws at issue was defined by the expressive attributes of conduct. Leaflets, publications and signs are intrinsically expressive.[333]

Moreover, Post does not contend with the two anomalies about the supposed application of the Free Speech Clause to incidental burdens on free expression.[334] First, as Post admits, this doctrine has proven anemic.[335] Rare is the case in which the courts strike down government action because of an unintended effect on expression.[336] Second, when the courts do act on this asserted basis, they often indicate that a greater restriction—one that would suppress as much or more speech, as well as other conduct— would be constitutional.[337] These anomalies evaporate if the courts

---

[327] *See supra* Part IB.

[328] Post, *Recuperating*, *supra* note 4, at 1264.

[329] *See id.* (discussing City of Ladue v. Gilleo, 512 U.S. 43 (1994)); *id.* at 1256 (discussing Schneider v. State, 308 U.S. 147 (1939); Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983)).

[330] *Schneider*, 308 U.S. at 148.

[331] *Minneapolis Star*, 460 U.S. at 575.

[332] *Gilleo*, 512 U.S. at 45.

[333] *See* Rubenfeld, *Purpose*, *supra* note 30, at 831–32 (offering this explanation of *Schneider* and *Minneapolis Star*).

[334] *See supra* notes 5–9, 141–45 and accompanying text.

[335] Post, *Recuperating*, *supra* note 4, at 1264.

[336] Dorf, *supra* note 6, at 1203–04.

[337] *See*, *e.g.*, Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 588 (1982); Martin v. City of Struthers, 319 U.S. 141, 144 (1943); Rubenfeld, *Purpose*, *supra* note 30, at 831.

are understood as smoking out pretext, even if they do not always frame their analysis in that way.

Thus, in *Schneider*, when the Court struck down ordinances that banned the distribution of leaflets in various contexts,[338] it may have been worried about pretext, not burdens on expression. After all, it stated that a general ban on trespassing that included the conduct at issue would be permissible, but that singling out distribution of leaflets is not.[339] A strict approach to trespass in general would have at least as great an impact on communication—quite likely a greater one—than a narrow ban on leafleting. But the broader ban runs a much lesser risk of government targeting speech in the guise of accomplishing some other end.

Similarly, in *Minneapolis Star*, in rejecting a special tax on ink and paper used in publication, Justice O'Connor, writing for the Court, reasoned that "differential treatment, unless justified by some special characteristic of the press, *suggests that the goal of the regulation is not unrelated to suppression of expression* . . . ."[340] And, as Rehnquist noted in dissent, a high general tax could impose a greater burden on expression than a low tax aimed only at the press.[341] *Minneapolis Star*, then, makes more sense as a case about pretext than about burdens on speech.

Finally, in *City of Ladue*, in rebuffing a ban on most residential signs, the Court appeared to accept that the city acted for aesthetic reasons,[342] but nonetheless concluded that the ban silenced too much speech.[343] Perhaps, as the Court's reasoning suggests, its decision turned on an assessment of the burden on expression, not pretext. On the other hand, the Court might have been influenced by the city's decision to allow some expression—including advertisements for the sale or lease of property, and signs for churches, religious institutions and schools—but not political speech—including a sign that read, "For Peace in the Gulf."[344] The law at issue smacked of pretext, even if the Court was reluctant to say so openly.[345]

Of course, perhaps in a small number of cases courts have rejected government action based on its incidental effect on expression, and not based on pretext. Still, as

---

[338] Schneider v. State, 308 U.S. 147, 162 (1939).

[339] *Id.* at 163–64.

[340] *Minneapolis Star*, 460 U.S. at 585 (emphasis added); *see also* Rubenfeld, *Purpose*, *supra* note 30, at 831 (responding to Post's analysis of *Schneider* and *Minneapolis Star* as follows: "They are instances of *speech-targeting* laws being struck down on their face. The law 'preventing littering' in *Schneider* did not prohibit littering. It prohibited distributing any printed matter in any street, sidewalk, or park without a permit. The law 'raising revenue' in *Minneapolis Star* was not a generally applicable tax. It was a 'special tax,' an 'a paper and ink tax,' that 'applie[d] only to certain publications.' These were laws that singled out First Amendment activity for special legal liabilities." (citations and footnotes omitted)).

[341] *Minneapolis Star*, 460 U.S. at 601–02 (Rehnquist, J., dissenting).

[342] City of Ladue v. Gilleo, 512 U.S. 43, 44–45 (1994).

[343] *Id.* at 56.

[344] *Id.* at 46–47.

[345] *See*, *e.g.*, *id.* at 60 (O'Connor, J., concurring) (arguing that the Court should have addressed possible content-based discrimination).

Post's critique of the *Spence*, *O'Brien*, and *Clark* tests confirms, the best description of free speech law is that it shows little, if any, concern about mere effects on expression. Courts generally scrutinize regulation under the Free Speech Clause only if expression is its target.[346]

4. Constraints on Balancing and Secondary Effects

Post's concern about social practices, and his attention to effects rather than intent, may explain why he fails to recognize how to recuperate the secondary effects test. He justly condemns the doctrine on its own terms. But he does not explore the way in which courts can be understood to use it as a means to detect impermissible (or disfavored) motivations for restricting expression.

Post criticizes the secondary effects doctrine as it is ordinarily framed because he claims it lacks any organizing principle.[347] As Post notes, when courts invoke secondary effects, they appear to reason that the harm government seeks to avert is not based on the content of speech[348] and that they therefore should subject it to "relatively lax review."[349] He adopts a view of the doctrine as associating secondary effects with content neutrality and primary effects with content discrimination.[350]

Post is skeptical of a doctrine that attempts to categorize restrictions on expression in this way, noting that it is "haphazard, internally incoherent, and for these reasons inconsistent with any possible principled concern for content neutrality."[351] The points he makes in support of this position are powerful, but only insofar as we accept at face value the role that courts claim the doctrine plays.

The gravamen of Post's criticism is that courts have failed to articulate a principle for distinguishing between the primary and secondary effects of speech.[352] Post points out that some of the Court's statements about the secondary effects test appear to make little sense, including its claim in *Forsyth County v. Nationalist Movement* that a justification based on "[l]isteners' reaction to speech is not a content-neutral basis for regulation."[353]

Post offers as a contrast the principle that John Hart Ely articulated for determining whether "the evil the state is seeking to avert is one that is independent of the message

---

[346] Post, *Recuperating*, *supra* note 4, at 1265 (distinguishing between "content-neutral" and "content-based" laws, noting the former is subject to very deferential review).

[347] *Id.* at 1267.

[348] *Id.* at 1265.

[349] *Id.*

[350] *Id.*

[351] *Id.*

[352] *Id.* at 1266 ("The value of this line of analysis depends upon how clearly and usefully the communicative impact of speech is conceptualized in the distinction between primary and secondary effects.").

[353] *Id.* (quoting Forsyth County v. Nationalist Movement, 505 U.S. 123, 134 (1992)).

being regulated."[354] Ely suggested focusing on whether a justification for a regulation would stand even if its target were stripped of its communicative content—for example, a law banning sound trucks because of the sheer noise they cause.[355] As Post points out, because the ban on sound trucks is based on listeners' reactions—even if to noise rather than a message—a literal reading of the Court's language would result in labeling this law content-based.[356] On the other hand, Post explains, the Court has relied on the secondary effects test in upholding zoning regulations of adult movie theatres, even though the harms government seeks to avert depend on the reactions of listeners and would not occur if the movie theatres had simply displayed blank screens.[357]

Post's point is that the Court's approach fails to offer any clear principle—comparable to Ely's—for determining whether a regulation is content neutral. Because in Post's account content neutrality is the best way to define secondary effects, he believes this difficulty is fatal to the secondary effects doctrine.[358]

Post, however, makes an important concession consistent with our alternative understanding of the secondary effects test. He acknowledges that, despite confusion in the case law, the Court has identified certain justifications for restricting expression that are primary.[359] He asserts, "The Court has so far determined that effects caused by speech through persuasion or ideas, through the provision of information, or through the creation of offense, are not secondary."[360]

Herein lies the way to salvage the secondary effects test. Rather than identifying innocuous grounds for restricting expression—so-called secondary effects—the test can be understood as identifying particularly suspect grounds—so-called primary effects. In other words, the secondary effects test serves to determine those (primary) justifications that generally are impermissible (or disfavored) as a basis for government regulation of speech. Identifying impermissible (or disfavored) justifications for restricting expression one at a time provides a principled way to proceed.

5. Content Discrimination

Post's concern with effects on social practices—rather than with the intent of government regarding expression—has also prevented him from separating out the different strands of judicial doctrine dealing with content discrimination. Doing so allows us to appreciate how attention to content discrimination can help courts to make each of the judgments in our framework.

---

[354] *Id.* (quoting ELY, *supra* note 128, at 111).

[355] *Id.* (citing ELY, *supra* note 128, at 113). Note that Ely's approach is consistent with the second judgment in our free speech framework.

[356] *Id.*

[357] *Id.* at 1267 (discussing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)).

[358] *Id.* at 1265, 1267.

[359] *Id.* at 1267.

[360] *Id.*

Instead, Post characterizes the area of the law dealing with content discrimination as attempting to enforce a single antidiscrimination principle.[361] He complains that, so understood, case law vacillates in a "haphazard and internally incoherent"[362] manner between addressing discriminatory effects and discriminatory purpose.[363]

Post illustrates this point first by analyzing *Madsen v. Women's Health Center*,[364] a case involving an injunction restricting the location and manner of abortion protests.[365] The Court concluded that strict regulation of abortion protesters was not necessarily content or viewpoint based, even though it had the effect of interfering with the speech of only those who opposed abortion. As Post notes, Chief Justice Rehnquist, writing for the Court, explained that it looked to "the government's purpose as the threshold consideration"[366] and that discriminatory effect "does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated"[367] government action. *Madsen*, then, indicated that discriminatory purpose matters.[368]

As Post explains, this reasoning is difficult to reconcile with Chief Justice Rehnquist's opinion for the Court in *City of Renton v. Playtime Theatres, Inc.*[369] In *Renton* the Court upheld zoning regulations on adult motion pictures.[370] In so doing, it pronounced, quoting *O'Brien*: "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive . . . ."[371] So much for discriminatory purpose.

Similarly, Post points out that in *City of Cincinnati v. Discovery Network, Inc.*, the Court claimed to attend to discriminatory effects rather than purpose.[372] At issue was a city regulation banning news racks that dispensed handbills, but not newspapers.[373] The city claimed it was not targeting expression, but was merely worried about safety and aesthetics. Nevertheless, the Court labeled the regulation as "content based."[374] It reached this conclusion based on the effects of the regulation—which depended on the content of the publication—"[r]egardless of the *mens rea* of the city."[375]

---

[361] *Id.* at 1267–70. "The Court has been drawn to these methods because of its pronounced tendency to conceptualize the goal of content neutrality as a matter of eliminating discrimination 'on the basis of content.'" *Id.* at 1268.

[362] *Id.* at 1270.

[363] *Id.* at 1268.

[364] 512 U.S. 753 (1994).

[365] *Id.* at 759–61.

[366] Post, *Recuperating*, *supra* note 4, at 1268 (quoting *Madsen*, 512 U.S. at 763).

[367] *Id.* (quoting *Madsen*, 512 U.S. at 763).

[368] *Madsen*, 512 U.S. at 763.

[369] Post, *Recuperating*, *supra* note 4, at 1269–70.

[370] City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 52 (1986).

[371] *Id.* at 47–48 (quoting United States v. O'Brien, 391 U.S. 367, 382 (1968)).

[372] Post, *Recuperating*, *supra* note 4, at 1270.

[373] City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993).

[374] *Id.*

[375] *Id.*

Post makes a compelling argument that these cases reveal that the Supreme Court's concern about content discrimination does not embody a single antidiscrimination principle.[376] But, as our framework reveals, another account is available. The Court uses content discrimination to assist in each of the three judgments that form the inherent structure of free speech doctrine.[377] Seen in this way, *Madsen*, *Renton*, and *City of Cincinnati* are consistent.

Attention to content discrimination in *Madsen* and *Renton* assisted the Court in assessing whether government acted on an impermissible (or disfavored) motivation, an issue relevant to the constraints on cost-benefit captured by the third judgment in our framework. In *Madsen*, the Court explained that the abortion protesters were being singled out and subjected to an injunction, not because of hostility to their message, but merely because they had violated the legal rights of others.[378] The Court quoted, among other precedents, a key statement in *R.A.V.*: "The government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed."[379] *Madsen* can be understood, then, as looking to content neutrality to determine if government acted on a desire to suppress a particular perspective, an improper motivation. The Court concluded that government had not done so.[380]

The Court in *Renton* similarly focused on government motivation. It explained that "the ordinance d[id] 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.'"[381] The Court made clear the relevance of the concept of content neutrality to the case before it: courts are skeptical of regulations whose aim is to hamper the expression of disfavored or controversial views. According to the Court, no such concern was at play in *Renton*.[382] If it had been, the Court likely would have decided the case based on the government's motivation, notwithstanding its claim to the contrary.

The Court's use of content neutrality was quite different in *City of Cincinnati*. The city's argument was that its regulation merely addressed the time, place, or manner of presenting speech and was, in that sense, content-neutral.[383] It claimed its goal was merely to decrease the number of news racks on public property, a goal motivated by concern about safety and aesthetics.[384] In other words, the city was arguing

---

[376] *See generally* Post, *Recuperating*, *supra* note 4, at 1267–70.

[377] *See supra* notes 365–76 and accompanying text.

[378] Madsen v. Women's Health Ctr., 512 U.S. 753, 762 (1994).

[379] *Id.* at 763 (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992)).

[380] *Id.* at 763–64.

[381] City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48–49 (1986) (quoting Police Dep't v. Mosley, 408 U.S. 92, 95–96 (1972)).

[382] *Id.* at 48.

[383] City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 418 (1992).

[384] *Id.*

in essence that expression was not the target of its regulation, a point relevant to the second judgment in our framework.

The Court accepted this framing of the issue, offering as an example of a time, place, and manner regulation "a prohibition against the use of sound trucks emitting 'loud and raucous' noise in residential neighborhoods."[385] Such a prohibition is not really aimed at expression, but rather at the non-expressive attributes of expressive behavior. Understood in this way, the Court plausibly found the regulation content based, that is, that the city's target was the expressive content of the commercial handbills, as opposed to the content of newspapers. The Court's conclusion followed naturally that the Free Speech Clause applied.[386] And in making this judgment, the Court considered the purpose—not just the effects—of government action.[387]

In sum, Post is wrong to condemn the cases about content neutrality as incoherent. The key is not to take content discrimination as addressing a single concern. Instead, this body of case law can be understood as attending to content discrimination to assist in each of the three judgments in our framework.

6. Conclusion

Post, more than any other scholar, has recognized and explored the importance of role of government for free speech doctrine. But his emphasis on the role of government—and on the social context in which government action is situated—has led him astray on some key points, particularly when it comes to the second and third judgments in our framework. Unable to explain parts of the pattern of judicial decisions within his preferred theoretical structure, he gives up too readily on organizing them. He may be right about what free speech doctrine *should be*, but his account does not fully capture what it *is*.

B. Rubenfeld's Purposivism and the Target of Regulation

Rubenfeld's view of free speech law is based on an anti-orthodoxy principle—that government may not require its citizens to conform to an orthodox view on matters of opinion.[388] In furtherance of this position, he develops "purposivism," an approach to the Free Speech Clause that is self-consciously at odds with cost-benefit analysis.[389] Purposivism limits free speech doctrine to an inquiry into the purpose of government action. A cardinal virtue of this approach, according to Rubenfeld, is

---

[385] *Id.* at 428.

[386] *Id.* at 424 ("We nonetheless agree . . . that Cincinnati's actions in this case run afoul of the First Amendment.").

[387] *Id.* at 427–30 (discussing the justifications the city offered).

[388] *See generally* Rubenfeld, *Purpose*, *supra* note 30, at 818 (discussing the "anti-orthodoxy principle").

[389] *See generally id.* at 768.

that it permits courts to avoid an unworkable and undesirable balancing in protecting free speech rights.[390]

He attempts to reduce free speech law in effect to a single proposition: government violates the Free Speech Clause if and only if its purpose is to restrict expression (other than of false facts).[391] Rubenfeld offers powerful arguments in favor of the claim that the Free Speech Clause applies only if expression—not conduct—is the target of government regulation.[392] But he is much less persuasive in arguing that courts never engage in balancing in deciding whether to allow government to regulate opinion or true factual assertions.[393] And he concedes, without adequate explanation, that government in its managerial capacity may restrict expression, even of opinion.[394]

1. The Target of Government Regulation

Rubenfeld begins his argument by focusing on doctrines that address expressive (or symbolic) conduct. In particular, much like Post, he explores the inadequacies of the tests articulated in *O'Brien* and *Spence*.[395]

O'Brien involved prosecution of a man for burning his draft card in protest of the Vietnam War. The Court upheld the conviction.[396] In so doing, recall that the Court considered: (1) whether government thereby enforced an important or substantial governmental interest; (2) whether the governmental interest was unrelated to the suppression of free expression; and (3) whether the incidental restriction on expression was no greater than essential in furtherance of that interest.[397]

Rubenfeld offers a clever *reductio ad absurdum* that reveals the failings of this approach.[398] Imagine, he suggests, that person A is ticketed for speeding. A claims that the ticket violates his free speech rights. In support of this position, he makes only one argument: "that a higher speed limit would have been safer and more fuel efficient."[399]

As Rubenfeld points out, if we take the *O'Brien* test literally, an absurdity results regarding its third step. After all, speeding can be a form of expression (indeed, any illegal act may express opposition to its illegality). So there is an incidental restriction on expression.[400] And the speed limit may not in fact promote the relevant

---

[390] *Id.* ("Among other things, purposivism would eliminate most of the cost-benefit, balancing-test rhetoric so common in today's free speech jurisprudence. The language of balancing in First Amendment law, appealing as it may seem, is unacceptable in its implications and unnecessary in the cases where it is supposedly indispensable.").

[391] *See* Posner, *Pragmatism*, *supra* note 40, at 737.

[392] Rubenfeld, *Purpose*, *supra* note 30, at 771–72.

[393] *See generally id.* at 781–82.

[394] *See generally id.* at 784.

[395] *See generally id.* at 770–75.

[396] United States v. O'Brien, 391 U.S. 367 (1968).

[397] *Id.* at 377.

[398] Rubenfeld, *Purpose*, *supra* note 30, at 767.

[399] *Id.* at 767.

[400] *Id.* at 772.

interests.[401] A may be able to show that a higher speed limit would be both safer and more fuel efficient. If so, the actual speed limit—when compared to a higher speed limit—imposes a greater restriction on expression than is necessary to serve the governmental interests at play.[402] And in the guise of evaluating free speech rights, a court considering this argument would be forced to assess the wisdom of legislative policies for reasons entirely unrelated to expression.

But, of course, this result—and form of judicial reasoning—would be absurd. It is hard to imagine a court following *O'Brien* so mindlessly. As Rubenfeld rightly points out, a court would intuitively recognize the flaw in A's claim: in enacting a speeding law, government's target is conduct, not speech.[403] It simply does not matter whether A happens to use that conduct as a means of expression. So A not only has not stated a winning claim under the Free Speech Clause; properly understood, he has not stated a claim that implicates free speech at all.

Rubenfeld makes a similar point about the *Spence* test. *Spence*, as Rubenfeld explains, provides a gloss on when conduct is sufficiently expressive to implicate free speech rights.[404] Recall that under *Spence* a judge must inquire whether the speaker possessed "[a]n intent to convey a particularized message" and whether "the likelihood was great that the message would be understood by those who viewed it."[405] *Spence* would seem to provide a solution to the hypothetical involving A. Even if A intended to express a particularized message by speeding, others would be unlikely to understand what he hoped to convey.[406] But the *Spence* test creates difficulties of its own.

To make this point, Rubenfeld offers another illustration. Imagine, he suggests, that B is arrested for wearing a shirt bearing a particular symbol. He claims a First Amendment violation, arguing persuasively that the legislature criminalized the shirt because the symbol on it protests against state police practices.[407] But B acknowledges he was unaware of the meaning of the shirt when he wore it. He just thought "it looked cool."[408]

Taking *Spence* literally—much like *O'Brien*—would produce a silly (or scary) outcome. B's lack of intent to express a particularized message would mean that he cannot rely on the Free Speech Clause. The legislature's suppression of protest would succeed. And so, indeed, would its prohibition of any art that either is not intended to express a particularized message or that is apt to produce confusion in viewers rather than a great likelihood of understanding a particularized message. This will not do.

---

[401] *Id.* at 771.

[402] *See generally id.* at 771.

[403] *Id.* at 770–72. A person "can be punished for what he *did*, regardless of what he might have been *saying* through what he did." *Id.* at 776.

[404] *Id.* at 773.

[405] Spence v. Washington, 418 U.S. 405, 410–11 (1974).

[406] Rubenfeld, *Purpose*, *supra* note 30, at 772.

[407] *Id.* at 774.

[408] *Id.*

The problem with *Spence* is that it appears to focus on the perspective of the speaker (or audience). As Rubenfeld notes, the absurdity of B's plight disappears as soon as we recognize that what matters is the government's perspective.[409] If the target of government regulation is expression—as it is by assumption in B's situation—then the Free Speech Clause applies.[410]

As Rubenfeld explains, we can nevertheless make sense of *O'Brien*'s focus on governmental interests and incidental burdens on expression.[411] Inquiry into these matters assists a court to smoke out pretext—to determine whether government's target is really expression, even though government claims otherwise. And *O'Brien* itself is thereby revealed as dodging the crucial issue in the case before it: the Court should not have accepted uncritically the government's assertion that it banned the burning of draft cards for reasons unrelated to the act as an expression of protest against the war.

Rubenfeld could have added at least one more doctrine to his exposition: the test for time, place, and manner regulations. As noted above, not only do courts have to determine when government regulates expression in the guise of regulating conduct, but also when government regulates conduct but appears to regulate expression. This is the best reading of the time, place, and manner doctrine, a point consistent with Rubenfeld's purposivism.[412]

Rubenfeld does address how courts deal with incidental burdens on expression,[413] a potential challenge to his—and our—framework. Along these lines, he notes the disparate treatment of general taxes and taxes aimed only at forms of expression, such as newspapers.[414] He suggests that a high general tax may suppress a great deal of expression, whereas a low general tax and a slightly higher tax imposed on news publications might allow for a great deal of expression.[415] But, as he explains, the former tax raises no issues under the Free Speech Clause, while the latter tax does.[416] The explanation, as Rubenfeld recognizes, is that general taxes are not aimed at expression whereas taxes that single out newspapers are.[417]

---

[409] *Id.* at 776.

[410] *Id.*

[411] *Id.* ("If the ultimate question, then, as the Court's own language suggests, is whether the statute in question was 'aimed' at punishing dissent, then the real function of the *O'Brien* test is nothing other than ascertaining the law's purpose. As it should be.").

[412] Rubenfeld lumps the time, place, and manner doctrine in with other doctrines—like the tiers of scrutiny—that purport to assist courts in engaging in a cost-benefit analysis. *Id.* at 785. He argues that all of these doctrines can be understood as instead smoking out pretext, *id.* at 786, a position consonant, at least implicitly, with our view.

[413] *Id.* at 831 (discussing effects versus purpose).

[414] *Id.*

[415] *See generally id.*

[416] *See id.*

[417] Rubenfeld, *Reply*, *supra* note 30, at 763; *see also* Rubenfeld, *Purpose*, *supra* note 30, at 831–32 (distinguishing cases cited by Post as examples of courts striking down government regulation that has an excessive incidental burden on expression).

2. A Constrained Cost-Benefit Analysis: Unexplained Case Law

Rubenfeld's argument begins to break down when it comes to areas of the law in which courts allow government to restrict expression in service of various governmental interests. Even in this regard, he makes an important point: courts do not always engage in an unstructured, case by case balancing.[418] But he attempts to go further, arguing that courts should never restrict expression based on a cost-benefit analysis and that they (almost?) never do.[419] While this argument has some normative force, it is not descriptively accurate.

a. Constraints on Balancing

Rubenfeld is on firmest footing insofar as he claims courts do not always engage in case by case balancing in deciding free speech cases. He offers various contexts in which courts should—and generally would—reject government restrictions on expression even if they could be justified in that manner.[420]

Notable examples include the antiwar and civil rights demonstrations of past decades,[421] and the teaching of Islam or espousing of Islamic fundamentalism today.[422] Constitutional protection of each of these forms of expression might not survive a cost-benefit analysis. As Rubenfeld observes, under Posner's version of that approach, judges may choose not to protect speech that is "'felt' to 'pose a threat to American institutions and decencies.'"[423] The government might feel these forms of expression pose just that kind of threat, and many federal judges might agree. And yet that is not how most judges would address the issue.[424] They would say that government cannot restrict speech merely because it is offensive, particularly when it expresses a particular political or religious point of view.[425]

Rubenfeld makes a similar—if more subtle—point in regard to the incitement doctrine.[426] As Rubenfeld acknowledges, on its face the doctrine appears to allow judges to engage in a cost-benefit analysis.[427] But Rubenfeld argues that current

---

[418] *See generally* Rubenfeld, *Purpose*, *supra* note 30, at 789–90.

[419] *Id.* ("The balancer is not balancing of all in these cases. He thinks he is, but . . . [b]alancing cannot explain these judgements; purposivism can."). *But cf.* Posner, *Pragmatism*, *supra* note 40, at 739–40.

[420] Rubenfeld, *Reply*, *supra* note 30, at 756–57.

[421] *Id.* at 757.

[422] *Id.*

[423] *Id.* (quoting Posner, *Pragmatism*, *supra* note 40, at 741, 748).

[424] Rubenfeld, *Reply*, *supra* note 30, at 754.

[425] *See*, *e.g.*, W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.").

[426] Rubenfeld, *Purpose*, *supra* note 30, at 826–27 (discussing incitement).

[427] *Id.* at 827.

incitement law does not embody a pure cost-benefit analysis. Under *Brandenburg*, government may punish speech only when it is "intended and likely to induce imminent unlawful conduct."[428] As Rubenfeld explains, the focus on intention and imminence is oddly constraining. What should matter are the magnitude and probability of harm.[429] Yet we do not allow judges to prevent incitement of substantial harms that may occur in the distant future. This point supports Rubenfeld's argument that judges are not permitted to engage in an unstructured balancing in all free speech cases.[430]

However, Rubenfeld struggles in resisting the notion that balancing sometimes plays a role in incitement cases.[431] For example, one explanation of the requirement of imminence is that we do not trust judges with unfettered discretion.[432] According to this view, only if harms are sufficiently immediate and concrete are we willing to allow them to silence speech as incitement.[433] The greater the delay, the more speculative the harm and the higher the risk that judges will have exaggerated the consequences of speech.[434] While this plausible account does not refute Rubenfeld's claim that courts are not free to engage in any sort of balancing in free speech cases, it does tend to undermine his categorical rejection of balancing.[435]

And his alternative account of incitement doctrine is a stretch. He argues that *Brandenburg* "allows speech to be prohibited not because of its harmfulness, but because the speaker seeks there and then to bring about a particularized, prohibited, and prohibitable course of conduct."[436] In other words, although government appears to be targeting speech, it is actually targeting conduct. The problem is that government really is targeting expression. The impact on conduct is indirect. In other settings, Rubenfeld rightly rejects the notion that government may evade scrutiny under the Free Speech Clause by targeting expression as an indirect means to affect conduct.[437] His selective reliance on this sort of reasoning is unpersuasive.

---

[428] *Id.* (emphasis omitted).

[429] *Id.* at 829.

[430] Rubenfeld, *Reply*, *supra* note 30, at 757.

[431] *See generally* Rubenfeld, *Reply*, *supra* note 30, at 827.

[432] *See supra* note 184 and accompanying text.

[433] *See id.*

[434] *See*, *e.g.*, Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); POSNER, FRONTIERS, *supra* note 40, at 65.

[435] Rubenfeld also has trouble explaining cases in which the courts have allowed government to silence expression out of a fear of non-imminent risks. *Dennis v. United States*, 341 U.S. 494 (1951), provides an example. The Court upheld a restriction on political dissent. *Id.* Posner relies on this case in questioning Rubenfeld's view of free speech law, Posner, *Pragmatism*, *supra* note 40, at 741, and Rubenfeld fails to address it in his reply. *See generally* Rubenfeld, *Reply*, *supra* note 30.

[436] Rubenfeld, *Purpose*, *supra* note 30, at 827 (emphasis omitted).

[437] *Id.* at 826 ("A permissible *ultimate* legislative purpose (or motive) does not negate an impermissible *immediate* purpose. Incitement laws purposefully single out certain speech acts for punishment. They unquestionably punish persons for speaking. It is irrelevant, from a purposivist perspective, that they do so in order to prevent crime, just as it is irrelevant that a law censoring political criticism might be enacted in order to prevent crime.").

b. Balancing

Indeed, there are a number of contexts in which courts engage in balancing in free speech cases—and which Rubenfeld has to explain away, ignore, or criticize. In the end, he just cannot make a compelling argument that cost-benefit analysis has no place in free speech law.

i. False Factual Assertions

One of the most significant difficulties for Rubenfeld in this regard is the exception he makes for government regulation of false factual assertions.[438] This exception is flawed in part because it is both over- and under-inclusive.

It is over-inclusive because government may not restrict false factual assertions in all settings.[439] Holocaust deniers and political candidates almost certainly would be protected from government interference with their false factual statements. If a politician argued for—or against—trickle down economics in a television commercial, and in the process flatly misstated key historical facts—regarding, say, the gross national product or the unemployment rate in particular years—would Rubenfeld really allow the government to impose some kind of punishment?[440] Posner raises this issue in response to Rubenfeld's purposivism,[441] and Rubenfeld simply ignores it in his article responding to Posner.[442]

Rubenfeld's approach to false facts is also under-inclusive. Government may punish speech in some contexts even if it does not contain false facts.[443] Rubenfeld acknowledges that this is true of medical malpractice, an awkward reality that he attempts to explain away as a "false 'factual opinion.'"[444] But what of bans on non-doctors and non-lawyers providing, respectively, *accurate* medical and legal advice? And what of forced disclosures under the federal securities laws, restrictions on advertising of prescription drugs and alcoholic beverages, and requirements regarding the manner in which truthful information is presented under consumer protection laws? In these instances, government regulates far more than merely false factual assertions or even false factual opinions.

---

[438] Rubenfeld, *Purpose*, *supra* note 30, at 819.

[439] *See id.*

[440] *See* Rubenfeld, *Purpose*, *supra* note 30, at 792–93 (noting political dissent is protected, even if it may lead to violence); *see also* Robert Post, *Viewpoint Discrimination and Commercial Speech*, 41 LOY. L.A. L. REV. 169, 177 (2007) [hereinafter Post, *Viewpoint Discrimination*] (noting compelled disclosure of accurate information in political speech would be "anathema" under the First Amendment).

[441] Posner, *Pragmatism*, *supra* note 40, at 737.

[442] Rubenfeld, *Reply*, *supra* note 30.

[443] *See* Rubenfeld, *Purpose*, *supra* note 30, at 819–20.

[444] *Id.* at 819.

Rubenfeld's explanation for why false factual assertions are allegedly unprotected is that our constitutional law embodies an anti-orthodoxy principle, but one that extends only to expressions of opinion, not of fact.[445] In so doing, he relies on a supposed difference in the epistemology of matters of fact and opinion.[446] Facts, he claims, enjoy a privileged epistemic status in our modern, Western society, whereas opinions are relegated to an inferior epistemic status.[447] He notes the "irony" that the epistemic privilege we accord facts—that they can be right or wrong—means we afford lesser protection to expressions of fact than we do to the expression of "the very ideas and attitudes that are supposed to be epistemically underprivileged."[448]

Here Rubenfeld does not, as he so often does, reveal the core of the issue, but instead in large measure obscures it. After all, a politician is just as protected when she expresses a false fact—for example, that our gross domestic product has grown only under Republican (or Democratic) Presidents—as when she expresses an opinion—that Republican economics are superior (or inferior) to Democratic economics.[449] Or, to take another example, imagine if a scientific journal published an article arguing that no empirical evidence supports the theory of relativity or of quantum mechanics. Could the journal, or the author, really be subject to sanction by the government, even if the article were rife with demonstrably false assertions? Something is afoot other than epistemic hierarchy.

A more persuasive explanation is that courts separate out different justifications for restricting expression. When the aim of regulation is to ensure fair commercial interactions, government has a relatively free hand. Government may punish the deliberate assertion of false facts as part of a contract regarding the quality of goods or services. And it may attach legal consequences to the provision of certain kinds of commercial services, including through malpractice law. Government may even prohibit citizens from offering true factual opinions—again, non-doctors and non-lawyers—as part of a regime to ensure the competence of medical and legal professionals.

But when government aims to regulate political debate, it is much more constrained. It may not police the assertions of fact or opinion of politicians, activists, or others involved in political discussion or argument.

The ultimate reason for this distinction may be based on a kind of cost-benefit analysis. The benefits of restricting certain kinds of expression in a commercial setting are worth the cost. But for various reasons the same is not true in a political setting.[450] Indeed, Rubenfeld comes close to conceding this role of balancing. Here is the nub of his explanation for why government may regulate (some) false factual assertions:

---

[445] *Id.*

[446] *See id.* at 820.

[447] *See id.*

[448] *Id.*

[449] *See* Post, *Viewpoint Discrimination*, *supra* note 440, at 177 (noting compelled disclosure of accurate information in political speech would be "anathema" under the First Amendment).

[450] *See* Rubenfeld, *Purpose*, *supra* note 30, at 819.

> Why is it tolerable for state actors to declare the truth about how many miles a certain car has been driven, but not how many gods there are? The answer is in part that an injunction against false statements of fact is an orthodoxy that no legal system—indeed no communicative system—can do without. It would not be possible to have law or even to conceive of law without embracing the practice of fact-finding. The anti-orthodoxy principle is not self-immolating, as a rejection of the idea of true and false facts would necessarily be ("there is no such thing as a true or false fact—and that's a fact"). The anti-orthodoxy principle repudiates the concept of heresy; it does not repudiate the concept of fact.[451]

Understood most simply, in this passage Rubenfeld can be read as acknowledging that the costs of protecting false factual assertions exceed the benefits. That may be in part what he means when he says "no legal system"[452]—and "no communicative system"[453]—could do without "orthodoxy" of factual belief.[454] To be precise, however, he would have to add that no legal system could function without *enforcing* that orthodoxy by prohibiting some false factual assertions, at least in commercial settings. If this is Rubenfeld's point, it is persuasive, but only at the cost of abandoning his purposivism. For he would in effect be allowing government to target expression based on a cost-benefit analysis.

If, instead, Rubenfeld's claim is that as a philosophical matter government must be able to ban false factual assertions in order to recognize the possibility of factual truth, then that is a *non sequitur*. For there is a distinction between, on one hand, permitting the state to *declare* factual truth (or to *act* on factual truth) and, on the other hand, allowing the state to *prevent* its citizens from making false factual assertions. The denial of factual truth may be philosophically unsound and even self-contradictory. In contrast, a decision to bar government from punishing citizens for making false factual assertions would be perfectly sensible and coherent. If there is a reason to allow government to restrict (some) false factual assertions, it cannot rest on Rubenfeld's philosophical argument about the nature of truth.

ii. Offensive Expression

Similar problems beset Rubenfeld's treatment of nude dancing and adult movies. Indeed, Rubenfeld admits that pornography should receive the same formal treatment as other speech under his approach.[455] But he ignores that non-obscene pornography

---

[451] *Id.*
[452] *Id.*
[453] *Id.*
[454] *Id.*
[455] *See id.* at 824.

is restricted in ways that other speech is not. Courts, for example, allow the zoning of establishments that display adult movies and the like.[456] Similar zoning of political speech would—and should—be unconstitutional.[457] Consider a zoning ordinance that applies only to establishments that host "poetry slams." Surely Rubenfeld would not countenance a government decision to sequester the slams in a narrow area of a city.

Of course, the Supreme Court in *Renton* relied on the secondary effects test to explain the zoning of adult movie theatres.[458] But Rubenfeld should reject this explanation. After all, he points out that government regulations that target expression— even if only to get at the indirect consequences of that expression—violate his preferred view of the law.[459] So if Rubenfeld were to undertake the kind of withering interrogation of the secondary effects test that he performs on other doctrines, he would not accept it at face value.

Nor could Rubenfeld treat pornographic movies or nude dancing as something other than expression. True, one of the Supreme Court's opinions in *Barnes* contended that nudity is not an expressive element of nude dancing[460] and another that nude dancing is conduct, not expression.[461] But Rubenfeld has revealed his agreement with Posner that these views reflect an improper faith in the ability of judges to "make plausible measurements of 'expressive value' or 'aesthetic quality.'"[462]

Finally, it is also true that blue movies and nude dancing may not communicate a clear message. But as Rubenfeld points out, failing to protect expression for this reason would leave a great deal of art at risk, a consequence he understandably rejects.[463]

Rubenfeld, then, has a hard time explaining government restrictions on adult movies and nude dancing.[464] The most plausible view is that these forms of expression are provided only limited protection because they are considered by many to be offensive and because courts weigh the value of sparing people that offense against the value of the lost expression. That is an explanation that conflicts directly with Rubenfeld's

---

[456] *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 52 (1986).

[457] *See supra* notes 163–65 and accompanying text.

[458] *Renton*, 475 U.S. at 52 ("Moreover, the Renton ordinance is 'narrowly tailored' to affect only the category of theaters shown to produce the unwanted secondary effects, thus avoiding the flaw that proved fatal to the regulations.").

[459] *See* Rubenfeld, *Purpose*, *supra* note 30, at 826.

[460] Barnes v. Glen Theatre, Inc., 501 U.S. 558, 571 (1991) ("[T]he requirement that the dancers don pasties and G-strings does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic.").

[461] *Id*. at 580–81 (Scalia, J., concurring) ("The State is regulating conduct, not expression, and those who choose to employ conduct as a means of expression must make sure that the conduct they select is not generally forbidden.").

[462] Rubenfeld, *Purpose*, *supra* note 30, at 779 (quoting Miller v. City of South Bend , 904 F.2d 1081, 1098 (7th Cir. 1990) (Posner, J., concurring), *rev'd sub nom.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991)).

[463] *See* Rubenfeld, *Purpose*, *supra* note 30, at 823.

[464] *See id.* at 823–24.

purposivism. But Rubenfeld offers no alternative.[465] Indeed, Posner raises a point along these lines in critiquing Rubenfeld's theory,[466] and Rubenfeld provides no rejoinder to it in his reply.[467]

iii. Obscenity

Rubenfeld has similar difficulties explaining the obscenity doctrine. But on this point he is more straightforward. He simply admits that "banning obscenity would almost certainly be unconstitutional" under his approach.[468]

iv. Speech as Conduct

Finally, there is the cluster of doctrines that treat speech as conduct. Rubenfeld places in this category "agreements to commit unlawful acts (conspiracy), solicitations of unlawful acts, [and] threats,"[469] and in a novel twist, incitement.[470] This is the sort of traditional doctrinal distinction that Rubenfeld would likely dismantle if it were not necessary to make his purposivism work. As noted above, Eugene Volokh has argued that courts would likely achieve far greater analytic clarity—and more sensible results—if they were to acknowledge that speech is speech, not conduct,[471] and that when they treat speech as conduct they are evading a proper explanation of their decision under the First Amendment, not supplying one.[472] The same holds true for Rubenfeld.

3. Role of Government: A Concession

Rubenfeld makes a final important concession: that government may target expression in its managerial capacity.[473] (He does not address—but presumably would concede—that government may also speak or sponsor speech.) This point poses a problem for purposivism. Government may require its employees to express particular points of view as part of their work, as it did in *Garcetti*.[474] Posner has criticized Rubenfeld for failing to explain this exception to his general argument.[475] Rubenfeld's reply does not engage the issue.[476]

---

[465] *See id.* at 824.
[466] Posner, *Pragmatism*, *supra* note 40, at 741–42.
[467] *See generally* Rubenfeld, *Reply*, *supra* note 30.
[468] Rubenfeld, *Purpose*, *supra* note 30, at 830.
[469] *Id.* at 828.
[470] *Id.*
[471] *See supra* Part I.C.1.b.ii.
[472] *Id.*
[473] *See* Rubenfeld, *Purpose*, *supra* note 30, at 819.
[474] Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).
[475] Posner, *Pragmatism*, *supra* note 40, at 748, n.33.
[476] Rubenfeld, *Reply*, *supra* note 30.

4. Conclusion

In the end, Rubenfeld is persuasive that only if government targets expression does the Free Speech Clause apply, and when it does, that courts do not always engage in unstructured balancing. He cannot carry his burden, however, of showing courts never employ cost-benefit analysis, nor does he attempt to deny the first judgment in our framework regarding role of government.

C. Posner's Pragmatism and Cost-Benefit Analysis

Judge Richard Posner's analysis comes closest to identifying the third judgment in our framework, a constrained cost-benefit analysis. His approach to speech is in keeping with his view of the law generally. He is of course famous—or notorious—for attempting to make sense of the law in a pragmatic manner, often through recourse to the tools of law and economics and with a focus on wealth maximization. From this perspective, all judicial doctrines balance consequences.[477] It is no surprise, then, that Posner would extend this view to the First Amendment.

Posner's pragmatism provides a healthy corrective to various judicial pieties about the protection we afford speech. The reasons government may regulate expression are numerous and their consequences profound. Courts resist this reality.

To be sure, judges at times acknowledge their willingness to sacrifice free speech to other governmental interests.[478] However, in many other contexts they are less forthright. They invoke empty distinctions as a way to mask the trade-off that is taking place—suggesting, for example, that speech is tantamount to conduct, that government is regulating not speech but its secondary effects, and the like.[479] Indeed, in many settings judges act as if there is no First Amendment interest at stake when the reality is that government is regulating speech, but in a manner so routine that they are unconcerned.[480] Examples include the law of contracts, prohibitions on fraud, and intellectual property rights. Posner's pragmatic approach to free speech law allows a candid recognition of how frequently we privilege other policy concerns over free speech.

But Posner's account of free speech law is incomplete, at least as a descriptive matter. In making a philosophical point, he is too dismissive of its formal structure. As a result, he loses the trees for the forest. In responding to Jed Rubenfeld's argument for purposivism, Posner "urg[es] the unworkability of a formalist approach to free speech, even one defended on pragmatic grounds."[481] In general, then, Posner

---

[477] Posner, *Pragmatism*, *supra* note 40, at 738.

[478] Rubenfeld, *Purpose*, *supra* note 30, at 828.

[479] *See id.*

[480] *See* Schauer, *Boundaries*, *supra* note 32 (arguing that many forms of communication find no protection in the First Amendment for reasons that are not so much legal as "political, economic, social and cultural").

[481] Posner, *Pragmatism*, *supra* note 40, at 738.

seems to claim courts should engage in case by case cost-benefit analysis in free speech cases.[482]

This argument does not capture all of the case law. It fails to account, for example, for decisions that impose a constraint on the justifications for restricting expression. Moreover, Posner at times makes important concessions about the first and second judgments in our framework. At one point he acknowledges the significance of role of government in free speech law—citing it as an embarrassment for Rubenfeld's position.[483] And he appears to recognize that courts generally do not apply the Free Speech Clause to government action aimed at conduct that has only an incidental effect on expression.[484]

1. Constrained Cost-Benefit Analysis

The strength of Posner's argument lies in his recognition of the many ways in which courts allow government to restrict expression. In criticizing Rubenfeld's purposivism, for example, Posner identifies a host of situations in which courts allow government to restrict various forms of expression including: begging; offers to fix prices, sell illegal drugs, or commit murder for hire; and harassing phone calls, whether to collect debts or engage in sexual harassment.[485] Posner might have added to this list intellectual property rights, contractual commitments, and a host of other examples. Given that these laws target expression, they are difficult for Rubenfeld to explain.

Posner is not sympathetic to constraints on this cost-benefit analysis. Responding to Rubenfeld's categorical claim that government should not be permitted to squelch political dissent, even if it may lead to eventual violence, Posner notes that is just what the Supreme Court did in response to the threat of Communism in *Dennis v. United States*.[486] He similarly suggests that "offensiveness" can suffice to uphold restraints

---

[482] *But see id.* at 740 ("[A] pragmatist might reject the use of balancing tests in First Amendment cases because he thought the consequences of using them were on balance bad, maybe because they give judges too much discretion. I think on the contrary that the balancing approach has considerable merit in First Amendment cases *outside the heartland of settled law* . . . ." (emphasis added)).

[483] *See id.* at 748 n.33.

[484] A final point is appropriate. For purposes of this Article, it does not matter whether Posner is right that any formality of free speech doctrine finds its ultimate justification in pragmatism. (For an argument to the contrary see Rubenfeld, *Reply*, *supra* note 30.) To be sure, one must take care in critiquing pragmatism. Posner's argument is not that judges should always undertake a cost-benefit analysis on a case by case basis or in purely monetary terms. Posner is concerned with consequences that are systemic as well as immediate, non-monetary as well as monetary, and non-quantifiable as well as quantifiable. Posner, *Pragmatism*, *supra* note 40, at 740. For this reason, showing that courts at times engage in a formal analysis—rather than case-by-case balancing—is insufficient to contradict Posner's philosophical position.

[485] *See id.* at 746.

[486] *Id.* at 741 (citing Dennis v. United States, 341 U.S. 494 (1951)).

on expression, as occurs today when government bans particularly offensive pornography—"mainly child pornography"[487]—as well as when it regulates adult movie theatres, pornographic book stores or nude dancing, or when it prohibits public displays of pornography and prevents children from otherwise gaining access to it.[488]

However, Posner fails to contend with cases reflecting the constraints on this cost-benefit analysis. Consider *R.A.V. v. City of St. Paul*.[489] He does not explain why fighting words—which courts have determined to have very little value—should be protected when they may do significant harm—as hate speech arguably does.[490] Nor does Posner explain why the Court in *R.A.V.* expressed willingness to uphold a greater ban on speech—all fighting words—but not a lesser ban that would, presumably, come at a lower cost.[491] *R.A.V.* and similar cases pose a problem for the suggestion that free speech law embodies unstructured case by case balancing.

A similar point applies to Posner's treatment of the secondary effects test. Posner rightly criticizes the doctrine, recognizing that it does not provide an adequate explanation for the ways in which we allow government to restrict pornography.[492] True, he notes, pornography may "engender" noxious conduct, such as "prostitution" or "disorderly conduct."[493] But politically unpopular speech can have similar consequences. Yet we require government to regulate those consequences directly and not the speech that causes them.[494] He suggests we would do the same with pornography if we thought it as valuable as political dissent.[495] To this extent, he is on the mark. But that does not mean the secondary effects test serves no purpose.

Posner's doubts about formalism may explain his failure to recognize the work that a reconstituted secondary effects test can do. As explained above, the secondary effects test makes sense as a means for screening out impermissible (or disfavored) justifications for restricting expression rather than for identifying permissible (or favored) justifications.[496] Posner may be right, then, that courts rely on secondary effects to regulate pornographic but not political speech because they are less concerned about pornography than politics.[497] Yet he misses that courts generally do not allow regulation

---

[487] *Id.*

[488] *See id.* at 742.

[489] 505 U.S. 375 (1992).

[490] *See id.*

[491] *See R.A.V.*, 505 U.S. at 404 (White, J., concurring) (explaining that the majority opinion allows for the striking down of any content-based law, no matter how narrowly tailored, as long as the same outcome could be created by banning a wider category of speech).

[492] Posner, *Pragmatism*, *supra* note 40, at 742.

[493] *Id.*

[494] *See id.*

[495] Posner implies that perhaps we should afford greater protection to nude dancing than we do. *Id.* ("The proper response [to unpopular political speech that may result in disorder] is to punish the hecklers; and similarly one might suppose that the proper response to illegal conduct stimulated by erotic displays would be to punish the illegal conduct.").

[496] *See supra* notes 202–05 and accompanying text.

[497] *See* Posner, *Pragmatism*, *supra* note 40, at 741.

of either one on certain bases, including out of fear that it will ultimately prove persuasive.[498] For this reason, confining all nude dancing to a red light district might be permissible, but confining nude dancing only if it lampoons the government would not be.[499] Posner's view is thus incomplete to the extent he fails to contend with constraints on the cost-benefit analysis in the third judgment in our framework.

2. Role of Government and Target of Government Regulation

In an article criticizing Rubenfeld's purposivism, Posner also makes crucial concessions about the formal nature of free speech doctrine regarding what we have labeled the first and second judgments in its inherent structure.[500]

a. Role of Government

Along these lines, in taking Rubenfeld to task Posner leaves room for the importance of role of government in free speech law. He notes that Rubenfeld concedes government may restrict expression on its own property, including military bases, and more generally when it performs a managerial, as opposed to regulatory, function.[501] In making this point, Posner in effect concedes that a formal analysis of role of government may play a key part in free speech doctrine (although he would rest his view "on pragmatic grounds").[502]

b. Target of Regulation

Similarly, in responding to Rubenfeld, Posner appears at one point to acknowledge that courts generally will not strike down laws that have a large, but only incidental effect, on expression.[503] To be sure, he frames the point somewhat differently than we do. He notes that "measures that have a really big impact on speech are regularly ignored by the courts, which, however, pounce on tiny ones."[504] And he characterizes the kinds of restrictions on speech that courts scrutinize as "direct,"[505] suggesting that

---

[498] *See id.* at 750–51.

[499] The Supreme Court in *City of Renton* suggested that such viewpoint discrimination in zoning sexually oriented expression would be impermissible: "[T]he ordinance d[id] 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.'" City of Renton v. Playtime Theaters, Inc., 475 U.S.41, 48–49 (1972) (quoting Police Dep't v. Mosley, 408 U.S. 92, 95–96 (1972)).

[500] *See* Posner, *Pragmatism*, *supra* note 40, at 745.

[501] *Id.* at 748 n.33.

[502] *Id.*; *see also* POSNER, FRONTIERS, *supra* note 40, at 71–72 (making a pragmatic argument in favor of the different kinds of public "fora," but nevertheless accepting the use of formal categories to distinguish the limits government may place on expression).

[503] *See* Posner, *Pragmatism*, *supra* note 40, at 743.

[504] *Id.*

[505] *Id.* at 744.

courts generally tolerate restrictions on speech that are indirect or, as we would put the point, incidental.[506]

The illustrations Posner offers confirm that he is in effect accommodating the second judgment in our framework. He acknowledges the substantial impact on speech of various laws of general applicability—ones that are not aimed at expression—including increases to the price of third-class mail and various taxes that extend to communication (on entertainment, telephones, author royalties, and the like).[507] And he notes that courts "ignore[ ]" these "measures."[508] Indeed, Posner even concedes that this aspect of free speech law provides an "argument against balancing."[509]

To be clear, Posner contests Rubenfeld's purposivism.[510] The thrust of his argument, however, is that courts sometimes uphold the regulation of expression on a cost-benefit basis,[511] a proposition with which we agree. He makes no similarly systematic argument that courts will strike down restrictions on conduct because of their incidental effect on expression.

True, at least one of Posner's contentions runs contrary to the point he appears to concede: that regulation is constitutional if its purpose is to regulate conduct, not expression. The contention is that identifying legislative purpose is too difficult to be practical.[512] But it is hard to take this argument seriously. Could such an endeavor really be more challenging than assessing and balancing the undetectable, unquantifiable and incommensurable costs and benefits of restricting expression?[513] Could it be less practical than balancing the offense caused by nude dancing and weighing it against the loss of valuable expression?

In reality, the problem of determining government purpose is no more vexing than that of balancing; it simply requires courts to look at the evidence available and exercise their best judgment, as they do in so many contexts.[514] In this regard, Posner is guilty of using the kind of argument for which he criticizes Rubenfeld: "The academic tactic of studied obtuseness, of making the easy seem difficult in order to score a point."[515] Of course, it is not necessarily easy to assess government's purpose, but it is feasible, just as it is feasible to engage in balancing.

---

[506] Posner's language also echoes the language of secondary effects, which courts have sometimes distinguished from "direct impact." *See*, *e.g.*, Boos v. Barry, 485 U.S. 312, 321 (1988) (O'Connor, J., plurality opinion). But given Posner's criticism of the secondary effects test, *see* Posner, *Pragmatism*, *supra* note 40, at 742, it is hard to imagine this is the distinction he has in mind.

[507] *See* Posner, *Pragmatism*, *supra* note 40, at 743–44.

[508] *Id.* at 743.

[509] *Id.*

[510] *See id.* at 742.

[511] *See id.* at 744–45.

[512] *See id.* at 751–52.

[513] *See* Rubenfeld, *Purpose*, *supra* note 30, at 788–91.

[514] *See id.* at 785 (discussing Equal Protection doctrine).

[515] Posner, *Pragmatism*, *supra* note 40, at 743.

While Posner's argument, then, does significant damage to the claim that courts never allow restrictions of expression of opinion on a cost-benefit basis, he strikes at most a glancing blow to our view: that regulation aimed at conduct falls outside of the purview of the Free Speech Clause. Indeed, at times he seems to accept this formal proposition, explaining it in terms of costs and benefits.[516] "The direct regulations of speech," he contends, "often have a smaller effect on the speech market, but the bad consequences of prohibiting such regulations are immensely smaller."[517] That claim at most justifies the formal rule in pragmatic terms; it does not refute its formalism.

In sum, Posner focuses his criticism on only part of Rubenfeld's purposivism. Posner correctly denies that government restriction of the expression of opinion is always unconstitutional (a host of examples make that claim untenable), but he does not similarly undermine the claim that government regulation aimed at conduct does not violate the Free Speech Clause, even if it has a large incidental impact on expression.[518]

3. Conclusion

In significant measure, Posner's arguments are compatible with our framework, notwithstanding his suggestion to the contrary. He does not foreclose the formal structure we contend is immanent in judicial decisions.

CONCLUSION

Our framework explains free speech doctrine as it is, not necessarily as it should be. A simplistic view would be that the framework comports only with positivism—a school of thought that distinguishes between these two understandings of the law.[519] But it is consistent as well with the belief that description always entails normative judgment.[520]

Consider the interpretive theory of Ronald Dworkin, who has made perhaps the strongest case against positivism. He recognizes two dimensions of any interpretive

---

[516] *See id.* at 744.

[517] *Id.*

[518] Posner at one point does address an example suggesting some incidental restrictions on expression may be unconstitutional. He discusses a hypothetical of Rubenfeld's—government imposing a ceiling on all forms of campaign spending, not just on communication. *Id.* at 747. As Posner explains, Rubenfeld acknowledges that this action should be unconstitutional "because such a high percentage of campaign spending is on communication." *Id.* Posner in turn asserts that "[i]n fact, virtually all campaign expenditures are directly or indirectly for communication." *Id.* So this hypothetical does not turn out to be much of a test. The ceiling on campaign spending targets expression—even if government claims otherwise—and falls within the Free Speech Clause.

[519] *See* DWORKIN, *supra* note 51, at 26–33.

[520] *See*, *e.g.*, *id.* at 140–240.

endeavor: fit and justification.[521] Fit is descriptive.[522] In regard to case law, an interpretation fits if it makes sense of the outcomes—and perhaps the reasoning—of the relevant precedents.[523] Justification is normative.[524] In a legal context, it attends to how attractive an interpretation is from the perspective of justice.[525] The two interact. The more compelling the justification for a particular interpretation, the greater leeway it should be allowed in regard to fit, and vice-versa.[526] In Dworkin's terms, our argument is that our framework fits the outcomes in free speech cases far better than the alternatives we discuss.

To be sure, other scholars have provided strong justifications for parts of our framework: Post regarding role of government; Rubenfeld regarding the target of regulation and constraints on balancing; and Posner regarding cost-benefit analysis. And the judgments in our framework fit the general structure of constitutional rights, addressing, respectively, whether the Constitution applies, whether the Free Speech Clause applies, and how to apply the Free Speech Clause. But we leave the issue of justification largely for another day.

Indeed, we believe excessive normativity has created problems for characterizing free speech law. It has led scholars to perceive only part of its structure. Post's theory of constitutional domains and social practices has led him to place undue emphasis on the role of government; Rubenfeld's hostility to balancing has caused him to exaggerate the significance of the target of government regulation; and Posner's penchant for pragmatism and resistance to formal reasoning have left him focusing only on cost-benefit analysis. Perhaps cabining in normativity is essential to perceiving free speech law as it really is.

What applies to scholars in this regard also pertains to judges. Soaring rhetoric about free speech law is difficult to reconcile with actual practice. Judges at times make heroic claims: free speech is an absolute right;[527] government may never engage in content discrimination.[528] But the categorical claims turn out to be qualified, and even as qualified they are readily circumvented. Expression is somehow conduct, not speech. Government is not regulating speech itself, but only its secondary effects. And so on. Candid recognition of the contours of the right to free speech may make it appear somewhat more modest than we thought it to be. But it may also steel us not let it become more modest yet. Or it may spur us to make it nobler.

---

[521] *See* Davis, *supra* note 52, at 809–10 (discussing Dworkin's concepts of fit and justification).

[522] *Id.* at 809.

[523] *Id.*

[524] *Id.*

[525] *Id.*

[526] *Id.*

[527] *See* ELY, *supra* note 128, at 109 (characterizing Justices Black and Douglas as asserting this position).

[528] *See* Police Dep't v. Mosley, 408 U.S. 92, 95–96 (1972).