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THE TEST THAT ATE EVERYTHING:† INTERMEDIATE SCRUTINY IN FIRST AMENDMENT JURISPRUDENCE

*Ashutosh Bhagwat**

There is little doubt that over the past thirty years, the most important doctrinal development in the jurisprudence of constitutional rights has been the formulation, and proliferation, of "tiers of scrutiny," which courts employ to reconcile individual liberties with societal needs. The First Amendment "intermediate scrutiny" tier was born as a product of the merger of several distinct and narrow branches of the Supreme Court's jurisprudence and, over the years, has attained central importance in the overall structure of free speech law. Indeed, so important and ubiquitous has intermediate scrutiny become that Justice Scalia has described it as a "default standard," and it has been the standard of review in countless significant Supreme Court and courts of appeals cases over the past quarter century. Despite this importance, however, scholarly analysis of First Amendment intermediate scrutiny has been curiously muted.

This article seeks to fill this major gap in modern First Amendment scholarship by offering a comprehensive assessment of the intermediate scrutiny test. After providing a historical description of the development of intermediate scrutiny since the mid-1980s, this article argues that despite uncertainties that still exist in the Supreme Court, it is clear that a distinct body of intermediate scrutiny free speech jurisprudence has emerged at the appellate level. Then, this article turns to an examination of how the intermediate scrutiny test has in fact been applied in the courts of appeals since its emergence. Because an examination of the case law reveals that the intermediate scrutiny test does not function very well in practice, this article concludes that the proper doctrinal solution is disaggregation. Disaggregation, the dismantling of the intermediate scrutiny test into its constituent parts, will

† *Cf.* JEFFREY STEINGARTEN, THE MAN WHO ATE EVERYTHING (Knopf 1997).

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create a more detailed jurisprudence regarding how appellate courts should balance speech rights and societal interests in different areas of free speech law.

INTRODUCTION

There is little doubt that over the past thirty years, the most important doctrinal development in the jurisprudence of constitutional rights has been the formulation, and proliferation, of "tiers of scrutiny," which courts employ to reconcile individual liberties with societal needs. These tiers were created by the Supreme Court to formalize the jurisprudence of rights, and reconcile the general presumption of constitutionality and deference to legislative bodies with the inherently countermajoritarian nature of judicial review. Originally, the Court created two tiers—the highly deferential rational basis review and the almost always "fatal in fact"[1] strict scrutiny—to structure constitutional analysis. These tests had their roots in the Court's due process and equal protection jurisprudence, but by the 1980s, they provided the dominant mode of analysis throughout the Court's constitutional rights jurisprudence.

Whatever the merits of the two-tiered paradigm in due process and equal protection analysis, in the area of free speech it was never adequate to explain the subtleties of the Court's jurisprudence. In particular, beginning in the late 1960s, in addition to the strict scrutiny test (which was limited in the free speech arena to content-based regulations of speech) and the rarely invoked rational basis test, the Court developed distinct free speech tests to assess the constitutionality of regulations of symbolic conduct;[2] restrictions on the time, place, and manner of speech in the public forum;[3] regulations of commercial speech;[4] and a number of other areas of free speech law.[5] For a short time, chaos seemed to reign. However, in the early to mid-1980s, the Supreme Court, and even more so the lower courts, began to bring order to this tangle, ultimately combining these various "tests" into a single, unitary standard of review that has come to be called intermediate scrutiny (a development that paralleled, and drew upon, the emergence of an intermediate scrutiny tier of review as the test for sex discrimination in the equal protection arena).

First Amendment intermediate scrutiny thus first emerged as a product of the merger of several distinct and relatively narrow branches

1. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

2. *See* United States v. O'Brien, 391 U.S. 367, 376–77 (1968).

3. *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 719–20 (2000); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); United States v. Grace, 461 U.S. 171, 176–78 (1983).

4. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563–64 (1980).

5. These developments are discussed in more detail *infra* notes 174–81, 185–211 and accompanying text.

of the Court's jurisprudence. Over the years, however, it has attained central importance in the overall structure of free speech law. Indeed, intermediate scrutiny has become so important and ubiquitous that Justice Scalia has described it (pejoratively, of course) as "some sort of default standard,"[6] and it has been the standard of review in literally dozens of significant Supreme Court and courts of appeals cases over the past quarter century. Despite this importance, however, scholarly analysis of First Amendment intermediate scrutiny has been curiously muted. Geoffrey Stone's 1987 article on content-neutral restrictions remains the leading, and indeed the only significant, comprehensive scholarly examination of this area of law,[7] and although Stone's article is both thorough and insightful, the law inevitably has evolved in the two decades since its publication.

In this article, I begin the task of plugging this hole in modern First Amendment scholarship. Specifically, the objective of this article is to explore the birth of First Amendment intermediate scrutiny, and more importantly, how this form of analysis has been applied *in practice* in federal appellate courts. An examination of the cases turns out to be extremely rewarding. The story the cases tell, in short, is that whatever the theoretical merits and institutional convenience (for the Supreme Court, at least) of creating all-encompassing tests, the actual effect of this doctrinal movement has been to sacrifice much-needed subtleties for doctrinal simplicity. In particular, the movement towards a unitary, intermediate scrutiny test has tended to mask the more nuanced messages that the Supreme Court has been sending regarding the relative weight to be given to speech and regulatory interests in the various areas where intermediate scrutiny has come to reign, and regarding specific legal principles that might be at play in certain areas of free speech law. Furthermore, in applying intermediate scrutiny to reconcile governmental interests with free speech claims, the appellate courts have tended to systematically favor the government. Although the balance that the courts have drawn in individual cases is often perfectly defensible, and indeed may be an inevitable consequence of the form of analysis mandated by the intermediate scrutiny test, this article shows that the aggregate consequence of this governmental preference is the suppression of substantial amounts of important, socially valuable speech. The article concludes with some suggestions regarding where we might go from here to alleviate these problems.

6. *See* Susan Dente Ross, *Reconstructing First Amendment Doctrine: The 1990s [R]Evolution of the* Central Hudson *and* O'Brien *Tests*, 23 HASTINGS COMM. & ENT. L.J. 723, 727 (2001) (quoting Madsen v. Women's Health Ctr., 512 U.S. 753, 792 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part)).

7. Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987).

I. TIERS IN FIRST AMENDMENT LAW

The modern jurisprudence of tiers has its roots in the post-*Lochner* era, when the New Deal revolution forced the Supreme Court to reassess its existing methodologies. During this time, the Court came to recognize that for reasons of institutional capacity and democratic legitimacy, legislation should come to the courts, under normal circumstances, with a strong presumption of constitutionality. As such, even in the face of a claim of an individual rights violation, action by the democratic branches of government should be struck down only if completely irrational.[8] This presumption of constitutionality was strongest in the area of economic regulation (a natural reaction to the excesses of *Lochner*), but was never so limited. Thus was born the modern rational basis test, under which legislation will be upheld so long as it is "rationally related to a legitimate state interest."[9]

Although rational basis review provided an acceptable starting point for analysis in most cases, the Court recognized from the beginning that it could not apply this review in all cases, unless the judiciary was to abdicate its responsibilities to check legislative overreaching. This point was most famously made in a footnote of the seminal rational basis review opinion in *Carolene Products*, where Justice Stone pointed out that judicial deference may not be appropriate "when legislation appears on its face to be within a specific prohibition of the Constitution," when it "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," or when it is "directed at . . . discrete and insular minorities."[10] Restrictions on freedom of speech would appear to fall squarely within Stone's first category, and indeed he cited two First Amendment cases in support of it.[11] Thus, even at the height of the era of post-*Lochner* deference, the Court did not defer to legislative or executive actions in free speech cases, as evidenced by contemporary cases such as *Cantwell v. Connecticut*[12] and *Bridges v. California*.[13] The more stringent review in these cases was not designated strict scrutiny (a label that had yet to emerge in the Court's jurispru-

8. The key cases here are *Nebbia v. New York*, 291 U.S. 502, 525 (1934); *West Coast Hotel v. Parrish*, 300 U.S. 379, 397–98 (1937); and *United States v. Carolene Products Co.*, 304 U.S. 144, 153–54 (1938).

9. City of New Orleans v. Duke, 427 U.S. 297, 303 (1976); *see also* Washington v. Glucksberg, 521 U.S. 702, 728 (1997); FCC v. Beach Commc'ns, 508 U.S. 307, 314 n.6 (1993); Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 457–58 (1988).

10. *Carolene Prods.*, 304 U.S. at 152 n.4.

11. *Id.* (citing Lovell v. City of Griffin, 303 U.S. 444, 452 (1938); Stromberg v. California, 283 U.S. 359, 369–70 (1931)).

12. 310 U.S. 296, 303–04 (1940).

13. 314 U.S. 252, 267–68 (1941). Searching scrutiny in free speech cases went into temporary eclipse in the early 1950s during the McCarthy era, notably in *Dennis v. United States*, 341 U.S. 494, 507–11 (1951), and *Feiner v. New York*, 340 U.S. 315, 320–21 (1951), but soon reemerged and of course remains the rule today.

dence[14]); instead, the Court employed a number of different doctrinal formulations, though the dominant one—invoked in *Cantwell, Bridges*, and a number of other contemporary cases—was the version of the Clear and Present Danger test developed by Justices Holmes and Brandeis in their famous separate opinions.[15] Regardless of names, however, the Court's methodology here provided clear antecedents for modern heightened scrutiny in free speech cases.

The final step in the codification of tiered review in free speech cases was the adoption of the formal standards of review developed in the equal protection arena—that is, rational basis review and strict scrutiny—into the edifice of First Amendment law. In particular, because rational basis review plays an extremely limited role in free speech cases,[16] the key event was the formulation of the rule that all content-based restrictions on speech should be subject to strict scrutiny. Oddly enough, this incorporation appears to have happened almost inadvertently. As Justice Kennedy discussed in his concurring opinion in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*,[17] the strict scrutiny test for content-based regulations entered free speech law via citations to *Carey v. Brown*,[18] an equal protection case, albeit one involving speech. Furthermore, *Carey* itself relied on the Court's earlier decision in *Police Department of Chicago v. Mosley*,[19] another equal protection case involving discrimination based upon the content of speech. Regardless of how it happened, however, by the late 1980s the adoption of the two basic equal protection tiers of review into free speech law was complete, and seemingly universally accepted.[20]

II. THE ROOTS OF INTERMEDIATE SCRUTINY

The above description of the gradual adoption of equal protection tiers, though a critical part of the story of modern First Amendment jurisprudence, is clearly incomplete. For one thing, the Court has long recognized, and defined, categories of speech that are completely (or al-

14. The concept of strict scrutiny, as well as the term itself, originated in the Court's equal protection jurisprudence. The term is first used in the modern case law in *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942), the leading case in the fundamental rights strain of equal protection law. The principle that heightened scrutiny should be applied to all racial classifications can be traced to *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

15. *See* Whitney v. California, 274 U.S. 357, 373–79 (1927) (Brandeis, J., concurring); Gitlow v. New York, 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting); Abrams v. United States, 250 U.S. 616, 627–31 (1919) (Holmes, J., dissenting).

16. *Cf.* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 580 (1991) (Scalia, J., concurring in the judgment) (applying rational basis review to a regulation of nude dancing).

17. 502 U.S. 105, 124–28 (1991) (Kennedy, J., concurring in the judgment).

18. 447 U.S. 455, 461–62 (1980).

19. 408 U.S. 92, 98–99 (1972).

20. The tiers have also been incorporated into the law of substantive due process, *see, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 721–29 (1997), and that of free exercise of religion, *see, e.g.*, Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 546 (1993).

most completely[21]) unprotected by the First Amendment.[22] But even with respect to protected speech, there have always been a number of strands of free speech cases in which neither the extreme deference of rational basis review nor the almost automatic invalidation of heightened scrutiny has been applied. It is these areas of case law that form the roots of modern intermediate scrutiny in free speech cases.

A. Time, Place, and Manner Regulations

The first strand of free speech cases that eventually emerged as intermediate scrutiny has its roots in the very beginning of the modern, post-*Lochner* era, when the Court declined to apply either the newly minted form of deferential, rational basis review, or the heightened scrutiny of the Holmes/Brandeis Clear and Present Danger test, presumably because neither seemed appropriate. Instead, some sort of middle course seemed required, a form of analysis permitting the accommodation of social and private interests. Accordingly, in *Schneider v. State*,[23] the Court struck down ordinances banning the distribution of literature in streets and other public places, on the grounds that the State's legitimate interest in preventing litter was insufficient to justify such a severe limitation on free speech. Similarly, in *Martin v. City of Struthers*,[24] the Court held unconstitutional a flat ban on the door-to-door distribution of handbills. In contrast, in *Kovacs v. Cooper*,[25] the Court (albeit by a 5 to 4 vote) upheld a ban on the use of sound trucks and loud speakers on public streets, on the grounds that the government's legitimate concerns regarding safety and tranquility justified a limited restriction on speech. Finally, in a related line of cases, the Court considered, and generally struck down, ordinances requiring speakers to obtain licenses or permits before engaging in particular kinds of communicative activities.[26] The commonality here is that in all of these cases, the Court was faced with laws that imposed substantial burdens on free speech, but that did not involve flat censorship (in today's jargon, content-based regulations), and that implicated significant, legitimate societal interests. The methodological solution the Court adopted in these cases was the "weighing"[27] or

21. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 386–96 (1992) (striking down content-based discrimination within category of unprotected "fighting words").

22. *See, e.g.*, New York v. Ferber, 458 U.S. 747 (1982) (child pornography); Brandenburg v. Ohio, 395 U.S. 444 (1969) (incitement); Roth v. United Sates, 354 U.S. 476 (1957) (obscenity); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) ("fighting words").

23. 308 U.S. 147, 162–65 (1939).

24. 319 U.S. 141, 143–49 (1943).

25. 336 U.S. 77, 85–89 (1949).

26. *See, e.g.*, Saia v. New York, 334 U.S. 558 (1948) (striking down permit requirement for using sound amplification devices); Cox v. New Hampshire, 312 U.S. 569 (1941) (upholding requirement of a license before holding a parade or procession on a public street); Lovell v. City of Griffin, 303 U.S. 444 (1938) (striking down permit requirement for all distribution of literature).

27. *Martin*, 319 U.S. at 143.

"balancing"[28] of First Amendment rights against community interests to reach an appropriate compromise.

In recent years, particularly since the early 1980s, the Court has somewhat modified its approach to the problem posed in the above cases, which it now characterizes as the imposition of "content-neutral," "time, place, and manner" restrictions of speech, and usually of speech on public property (more on this later). In particular, the Court has replaced the general balancing approach of the early period with a seemingly more formalized, four-part test.[29] Under this test, as formulated in the 1989 *Ward* decision, time, place, and manner regulations will survive constitutional scrutiny, provided that they are "justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[30] The Court has further clarified that the "narrowly tailored" aspect of this test requires only that the chosen regulatory means are not "substantially broader than necessary to achieve the government's interest,"[31] not that they constitute the least restrictive means to achieve its goals. Finally, in addition to the above requirements, when a licensing scheme is at issue, the Court has held that the "regulation [must] contain adequate standards to guide the official's decision and render it subject to effective judicial review."[32]

Applying the above-described approach, the Court has tended in recent years to reject free speech claims. It has thus upheld such varied regulations as a ban on camping in a park, as applied to a proposed "tent city" to protest homelessness;[33] a ban on targeted picketing of a residence;[34] a requirement of using city-provided sound equipment for concerts at a band shell in Central Park;[35] a statute limiting protests near "health care facilities";[36] and a requirement that a permit be obtained before holding an event involving more than fifty people in a public park.[37] On the other hand, the government's position is not unassailable: using the same test, the Court has struck down a flat ban on demonstrations on the sidewalk outside the Supreme Court building,[38] and at least a plural-

28. *Saia*, 334 U.S. at 562.

29. As I discuss below, though, in practice this test has amounted to little more than general balancing. *See infra* Part V.A.

30. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)); *see also* Hill v. Colorado, 530 U.S. 703, 725–26 (2000); United States v. Grace, 461 U.S. 171, 177 (1983).

31. *Ward*, 491 U.S. at 800.

32. Thomas v. Chi. Park Dist., 534 U.S. 316, 323 (2002).

33. *Clark*, 468 U.S. at 299.

34. Frisby v. Shultz, 487 U.S. 474 (1988).

35. *Ward*, 491 U.S. at 803.

36. Hill v. Colorado, 530 U.S. 703, 730 (2000).

37. *Thomas*, 534 U.S. at 323.

38. United States v. Grace, 461 U.S. 171, 183 (1983).

ity applied the time, place, and manner standard to strike down a flat ban on leafleting at an airport.[39] The commonality appears to be that the Court will uphold regulations of speech so long as, in its view, the regulation keeps open *for that speaker* ample alternative, and effective, channels of communication. If, however, the Court concludes that the regulation effectively forecloses a speaker from communicating her message, it is struck down.[40]

Finally, an ambiguity must be noted about the scope of the *Ward* test. Almost all of the cases in which this test, or its predecessor general balancing test, has been applied have involved regulation of speech *on government property*, and as such, have been decided under the so-called public forum doctrine.[41] Indeed, the Court has at times described the four-part test as applicable to "content-neutral time, place, and manner regulation[s] of the use of a public forum."[42] However, it is also true that at times the Court has, without comment, applied the same test to content-neutral regulations of speech on *private property*. This occurred most notably in cases involving structural regulations of the mass media (discussed below), but the phenomenon was not so limited. One of the Court's earliest cases in this area, *Martin v. City of Struthers*,[43] involved door-to-door distribution of literature, and thus arguably was a private property case. More recently, in *City of Ladue v. Gilleo*,[44] the Court applied the *Ward* test in striking down a municipal ban on signs posted on private homes, where no governmental property was at stake.[45] *City of Ladue* is, however, a complex case to understand. Despite citing content-neutrality cases generally, the Court appeared to apply the test with some extra stringency because of the long constitutional tradition of respecting "individual liberty in the home," including the liberty to speak there, and because of the absence of regulatory needs that exist when the government is managing its own property.[46] *City of Ladue* can thus be read to suggest that the level of scrutiny of content-neutral regulations of speech is *not* the same on public and private property because of an individual's greater liberty interests on private property, as well as the government's greater regulatory needs on public property. Moreover, the

39. Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 692 (1992) (O'Connor, J., concurring).

40. Thanks to Eugene Volokh for this insight; he also points out that a similar argument is made in Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 920–24 (1994).

41. For a concise description of the modern public forum doctrine, see *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 676–79 (1998).

42. *Thomas*, 534 U.S. at 322; *see also* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); *Grace*, 461 U.S. at 177; Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

43. 319 U.S. 141 (1943).

44. 512 U.S. 43 (1994).

45. *Id.* at 56.

46. *Id.* at 58. Indeed, it is difficult to believe that the Court would have treated a ban on the posting of signs on government property nearly as skeptically as it did the law in *City of Ladue*.

Court's reasoning in *Bartnicki v. Vopper*,[47] a decision even more recent than *City of Ladue*, raises serious doubts about whether the Court intends the relatively deferential *Ward* test to be a general test for content-neutral regulations. In *Bartnicki*, the Court struck down a federal statute prohibiting the disclosure of illegally intercepted electronic communications, as applied to the disclosure of information of public concern by the media, where the disclosing party had no role in the original interception.[48] The Court acknowledged that the statute was content-neutral, indeed citing *Ward* in its analysis of content-neutrality.[49] Nonetheless, the Court did *not* apply the usual four-part *Ward* test, engaging instead in a form of weighted balancing that seemed to strongly elevate free speech interests—and this despite the fact that, as the Court recognized, the lower court *had* applied the *Ward* test, designating it as "intermediate scrutiny."[50]

B. Regulations of Symbolic Conduct

The other key source of the modern First Amendment intermediate scrutiny test is the Court's jurisprudence regarding symbolic speech. The leading case here is *United States v. O'Brien*,[51] in which the Court faced a First Amendment challenge to a conviction under a statute forbidding the "forg[ing], alter[ing], knowingly destroy[ing], [or] knowingly mutilat[ing]" of one's draft card, as applied to an individual who publicly burned his draft card in protest against the Vietnam War.[52] The question posed by the case was whether the First Amendment forbade the application of a general statute regulating behavior to symbolic conduct that conveyed a distinct, political message. In assessing this claim, the Court created a new, four-part constitutional test for regulations of expressive conduct: such a regulation will be upheld

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

Applying this new test (albeit with some dubious reasoning), the Court upheld the conviction.[54]

47. 532 U.S. 514 (2001).
48. *Id.* at 517–19.
49. *Id.* at 526.
50. *Id.* at 521 (citing Bartnicki v. Vopper, 200 F.3d 109, 121 (3d Cir. 1999)).
51. 391 U.S. 367 (1968).
52. *Id.* at 369–72.
53. *Id.* at 377.
54. *Id.* at 382.

Since it was adopted in 1968, the *O'Brien* test has become the definitive doctrinal statement in this area. The *O'Brien* test has been applied by the Court to such diverse activities as the closing of an adult bookstore pursuant to a statute targeted at buildings used for prostitution,[55] the application of public nudity statutes to prohibit nude dancing,[56] and the application of antitrust laws to a boycott by lawyers seeking higher governmental compensation for representing indigent criminal defendants.[57] In each of these instances, the Court rejected the First Amendment challenge to the regulation at issue and clarified that notwithstanding its seemingly strict language, the *O'Brien* test is not an especially strict one.[58] In particular, despite the obvious similarities between the *O'Brien* and *Ward* tests,[59] in applying *O'Brien* the Court does not seem inclined to enforce an "ample alternative channels of communication" requirement with any force and therefore essentially never upholds free speech claims.

C. Regulations of the Mass Media

As the above discussion demonstrates, by the late 1980s, the Supreme Court had a fairly well-established jurisprudence regarding time, place, and manner restrictions and regulations of symbolic speech. Soon thereafter, a subtle but extremely significant expansion of the ambit of these tests occurred, effectively creating a new body of jurisprudence. In particular, the Court began applying its time, place, and manner and symbolic speech tests to assess content-neutral regulations of the mass media that restricted speech, but which could *not* in any way be characterized as merely symbolic conduct and which did *not* occur on public property. By so doing, the Court appears to have begun a process of converting its two four-part tests, which as I will discuss had begun to merge into a single test,[60] into a general test for content-neutral regulations of speech, or at least of the mass media.

The beginnings of this expansion can be seen as early as the Court's 1984 decision in *Regan v. Time, Inc.*,[61] where a plurality applied the time, place, and manner test to uphold a federal statute regulating the color and size of permissible reproductions of U.S. currency, as applied to a cover on *Sports Illustrated* magazine. The critical case in this development, however, was the Court's 1994 decision in *Turner Broadcasting System, Inc. v. FCC*.[62] In *Turner*, the Court considered a First Amend-

55. Arcara v. Cloud Books, Inc., 478 U.S. 697, 698–99 (1986).
56. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 562–64 (1991).
57. FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 414–18 (1990).
58. *Barnes*, 501 U.S. at 567–72; *FTC*, 493 U.S. at 429–32; *Arcara*, 478 U.S. at 706–07.
59. *See infra* notes 125–31 and accompanying text.
60. *See infra* note 132 and accompanying text.
61. 468 U.S. 641, 655–59 (1984).
62. 512 U.S. 622 (1994).

ment challenge to Congress's so-called must-carry rules, which required cable television operators to dedicate a portion of their channel capacity to, and carry free of charge, the signals of local broadcast television stations.[63] In assessing this claim, the Court first concluded, over a vigorous dissent, that the must-carry rules were content-neutral because they did not facially, and were not intended to, benefit or burden speech of a particular content.[64] Having so concluded, the Court then announced, citing *Ward* and *O'Brien* but without much further analysis, that "the appropriate standard by which to evaluate the constitutionality of must-carry is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech."[65] The Court then remanded the case to the lower court for application of this standard.[66]

Notably, the Court felt that the relatively deferential *Ward* and *O'Brien* tests should apply, even though the must-carry rules clearly (despite the Court's description of the rules as imposing an "incidental burden")[67] imposed a *direct* restriction on speech by the mass media and even though the government had no special, proprietary justifications for its regulation.[68] As such, the *Turner* Court appears to have (albeit perhaps inadvertently) converted the *Ward* time, place, and manner and *O'Brien* symbolic speech tests into one general test for media regulations, or perhaps (in combination with the *City of Ladue* case) for all speech regulations, so long as they do not target the content of speech. The *Turner* decision thus represents a crucial step in the creation of an overarching intermediate scrutiny standard in First Amendment law.

D. Regulations of Commercial Speech

The discussion to this point elucidates the process by which an intermediate scrutiny standard was gradually evolving in the areas of core First Amendment concern, where the State was regulating fully protected speech, notably including political speech and speech of the mass media (i.e., the press). At the same time, however, a similar legal evolution was occurring in other, perhaps less central but still highly significant, areas of First Amendment law. The most important of these developments occurred in the area of commercial speech regulations.

The term commercial speech, as used in First Amendment jurisprudence, refers purely to commercial advertising; in fact, the Court has defined it as speech that "does no more than propose a commercial transac-

63. *Id.* at 630.
64. *Id.* at 643–52.
65. *Id.* at 661–62.
66. *Id.* at 668. The lower court upheld the rules on remand, and three years later the Supreme Court affirmed that decision. Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997).
67. *Turner*, 512 U.S. at 662.
68. *Id.*

tion."[69] The category thus does *not* encompass speech merely because it is the *subject* of a commercial transaction, such as the sale of a newspaper or even the placement of a political advertisement—such speech is fully protected by the Constitution. Until 1976, the Court understood commercial speech to be completely outside the ambit of the First Amendment and therefore subject to unrestricted regulation.[70] In 1976, however, the Court held that commercial speech, though admittedly of lower First Amendment value than other forms of speech, was nonetheless entitled to some level of protection.[71] The exact level of protection was left unclear, though the Court did clarify that some regulations of commercial speech are surely permissible. Four years later, in *Central Hudson Gas v. Public Service Commission of New York*,[72] the Court finally adopted a four-part test for commercial speech regulations: as a threshold matter, the Court asks (1) "whether the expression is protected by the First Amendment," i.e., the speech "must concern lawful activity and not be misleading."[73] If this requirement is met, the challenged regulations will be upheld so long as (2) "the asserted governmental interest is substantial"; (3) "the regulation directly advances the governmental interest";[74] and (4) the governmental interest cannot "be served as well by a more limited restriction on commercial speech."[75] This test, despite the occasional criticism by various justices,[76] remains the governing standard in this area.

The *Central Hudson* test has obvious parallels with the four-part tests for time, place, and manner regulations, and for regulations of symbolic speech. There are, however, some important differences. Most notably, the *Ward* test for time, place, and manner regulations, as well as the *O'Brien* test for symbolic speech, are limited to content-neutral regulations. Commercial speech regulations, however, may be, and generally are, content-based, but because of the lower constitutional value of such speech, only intermediate scrutiny applies. In addition, the *Central Hudson* test has performed quite differently from the content-neutral tests in application. When originally announced, *Central Hudson* was seen as stepping back from *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*[77] by creating a relatively lenient test for commercial

69. Thompson v. W. States Med. Ctr., 535 U.S. 357, 367 (2002).
70. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942).
71. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 770 (1976).
72. 447 U.S. 557 (1980).
73. *Id.* at 566.
74. *Id.*
75. *Id.* at 564.
76. *See* Thompson v. W. States Med. Ctr., 535 U.S. 357, 367–68 (2002) (listing justices' criticisms of *Central Hudson* test).
77. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).

speech regulations.[78] For the first decade of its existence the test was applied relatively leniently—in fact, in 1989 the Court, in an opinion by Justice Scalia, seemed to further weaken the test by clarifying that the fourth prong of *Central Hudson* required only a "reasonable" fit, not the use of the least restrictive means available.[79] Since around 1990, however, the Court has notably *not* been deferential to legislatures in this area and has relied upon the *Central Hudson* test to strike down such diverse regulations as a federal ban on the advertising of compounded drugs,[80] state restrictions on tobacco advertising,[81] and a federal ban on labels stating the alcoholic content of beer.[82] In particular, in a number of modern cases, the Court appears to be applying, as a complement to the general *Central Hudson* test, a strong antipaternalism principle, which flatly forbids suppressing commercial speech "in order to prevent members of the public from making bad decisions with the information."[83] This aggressiveness is in stark contrast to the Court's application of the *Ward* and *O'Brien* tests, which have been notably lacking in force, and it has made commercial speech law one of the most active areas of modern First Amendment jurisprudence.

E. Speech of Government Employees

Another area where in recent years the law has evolved towards the intermediate scrutiny standard is government restrictions on the speech of public employees. First, it should be noted that the issues raised in this area of law have obvious parallels to government regulations of speech on public property because both instances deal with the government in the role of proprietor (or employer), rather than in the role of regulator. There is, however, an important distinction here that must be borne in mind—in cases involving public property, the intermediate scrutiny standard is limited to *content-neutral* regulations of speech, where the government's regulatory interests are unrelated to the message being conveyed. In the public employee cases, however, the government is imposing sanctions precisely because of the content of speech, particularly because of the potentially disruptive impact of the *message* conveyed by an employee. Nonetheless, as we shall see, the governing legal standards for these two situations have turned out to be very similar.

78. Indeed, Justice Blackmun, the author of *Virginia Pharmacy*, made precisely this point in his separate opinion in *Central Hudson*. *See Central Hudson*, 447 U.S. at 573–76 (Blackmun, J., concurring in the judgment).

79. Bd. of Trs., State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989).

80. *Thompson*, 535 U.S. at 360.

81. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).

82. Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).

83. *Thompson*, 535 U.S. at 374. For a general description of the role of antipaternalism principles in commercial speech doctrine, see Kathleen Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, 1996 SUP. CT. REV. 123.

The Supreme Court's modern jurisprudence on the speech of government employees has its roots in the 1968 decision of *Pickering v. Board of Education*,[84] in which the Court recognized that speech of government employees on matters of public concern is entitled to constitutional protection. The Court also recognized, however, that the government clearly has a stronger interest in restricting the speech of its employees than it has in restricting the speech of the general public.[85] As a consequence, the Court stated that it was necessary "to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[86] In short, the Court adopted a balancing test in this area, which has come to be known as *Pickering* balancing.

This *Pickering* balancing approach to public employee speech remains the law today, essentially unchanged. Later cases have clarified some of the details of the test, such as setting forth a framework to determine if an employee was indeed punished *because* of her speech,[87] clarifying the nature of the "matter of public concern" limitation in *Pickering*,[88] and limiting the application of *Pickering* to situations where employees are "speaking as citizens" rather than "pursuant to their official duties";[89] but the essential balancing approach remains unaltered, and *Pickering* continues to be cited for this proposition.[90] This balancing approach manifestly resembles the Court's approach to content-neutral speech regulations, and as we shall see, the lower courts appear in recent years to be moving towards subsuming it into the general mass of First Amendment intermediate scrutiny.[91]

F. Regulation of Sexually Oriented Businesses

Regulations imposed by state and local governments on "adult" (i.e., sexually oriented) businesses such as adult book stores, adult movie theaters, and adult "clubs" present some peculiar and distinct jurisprudential problems, which the Supreme Court has dealt with in varying ways over the years. In recent years, however, it seems safe to say that the jurisprudence in this area has largely merged with the general intermediate scrutiny analysis. As such, the regulation of sexually oriented

84. 391 U.S. 563 (1968).
85. *Id.* at 568.
86. *Id.*
87. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285–87 (1977).
88. Connick v. Myers, 461 U.S. 138, 146 (1983).
89. Garcetti v. Ceballos, 126 S. Ct. 1951, 1960 (2006).
90. *See* City of San Diego v. Roe, 543 U.S. 77, 82 (2004); Rankin v. McPherson, 483 U.S. 378, 388 (1987).
91. *See infra* notes 185–86 and accompanying text.

businesses represents yet another strand of modern First Amendment intermediate scrutiny.

For obvious reasons, both moral and pragmatic, state and especially local governments often seek to impose special restrictions on the operation of sexually oriented businesses. Such restrictions can take the form of zoning ordinances,[92] restrictions on multiple adult businesses in a single location,[93] restrictions on completely nude dancing,[94] and any number of other types of limitations or bans. Such restrictions pose difficult First Amendment issues because sexual *speech*, so long as it falls short of obscenity (as it typically does in these cases), is in principle fully protected under the First Amendment, and yet the challenged ordinances appear to single out such speech for disfavored treatment on the basis of its content. As such, under the Court's traditional doctrine, such restrictions seemingly should be subject to strict scrutiny and be presumptively unconstitutional. Nonetheless, in a series of cases beginning in 1976 with *Young v. American Mini-Theatres*,[95] the Court has upheld restrictions on sexually oriented businesses without applying strict scrutiny. The key doctrinal innovation adopted by the Court was its conclusion in the 1986 decision of *City of Renton v. Playtime Theatres, Inc.*[96] that so long as a challenged ordinance is directed at the "secondary effects" of adult businesses (i.e., the crime and blight with which they are often associated) rather than aimed at suppressing the speech itself, it should be treated as content neutral and thus subject only to the test for time, place, and manner regulations. The secondary effects doctrine is an extremely odd one, as it seems clearly inconsistent with the Court's approach to content neutrality elsewhere in its First Amendment jurisprudence, and though it has been cited elsewhere,[97] the Court has actually relied upon it only in the context of sexually oriented speech.[98] The secondary effects doctrine has recently been criticized by what seems to be a majority of the Court, and thus its continuing vitality might be in doubt.[99] Nonetheless, the basic holding of *Renton*, that regulations of sexually oriented businesses short of outright bans should be subjected to intermediate and not strict scrutiny, continues to be followed.[100]

92. *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Young v. Am. Mini-Theatres, 427 U.S. 50 (1976).

93. City of L.A. v. Alameda Books, Inc., 535 U.S. 425 (2002).

94. *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277 (2000); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

95. 427 U.S. 50 (1976).

96. 475 U.S. 41, 47–48 (1986).

97. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 394 (1992); Forsyth County v. Nationalist Movement, 505 U.S. 123, 134–35 (1992).

98. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 573–74 (2001) (Thomas, J., concurring in part and concurring in the judgment); Boos v. Barry, 485 U.S. 312, 314 (1988).

99. City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 444–47 (2002) (Kennedy, J., concurring in the judgment); *id.* at 454–60 (Souter, J., dissenting).

100. *Id.* at 440–42 (O'Connor, J., plurality opinion); *id.* at 447 (Kennedy, J., concurring in the judgment).

G. Charitable Solicitation

In three cases in the 1980s, the Supreme Court considered, and struck down, various attempts by states to regulate professional, charitable solicitation.[101] In those cases, the Court made clear that charitable solicitation was *not* equivalent to commercial speech and thus deserved strong First Amendment protection. At the same time, however, the Court seemed to suggest that because of its nature (and intertwining with elements of conduct), charitable solicitation should be subject to "reasonable regulation."[102] The Court then proceeded in these cases to apply an indeterminate form of balancing/tailoring analysis to strike down the regulations.[103]

The precise doctrinal test applicable to regulations of charitable solicitation still remains unclear. In its 1988 decision in *Riley v. National Federation of the Blind of North Carolina*, the Court suggested that at least with respect to content-based regulations of such solicitation, strict scrutiny should apply;[104] though this suggestion is somewhat deceptive because regulations of charitable solicitation by definition target speech based on its content (because they apply only to requests for money on behalf of a charity) and as such necessarily seem to be content-based under the general test. Nonetheless, so long as the regulations do not restrict the speech a charitable solicitor utters, the applicable test appears to be something short of strict scrutiny.[105] In a recent Fourth Circuit decision authored by Judge Wilkinson, the court recognized that there has been some confusion on this subject in the lower courts, but also recognized that many appellate courts are treating the *Village of Schaumburg* test (named after the first of the Court's 1980s decisions) as converging with the general intermediate scrutiny analysis.[106] Moreover, although the Fourth Circuit did not resolve the ambiguity about whether the test is properly described as "strict" or "intermediate," it proceeded to uphold two quite broad regulations (issued by the Federal Trade Commission) of professional telemarketing on behalf of charitable foundations[107]—a result that would be most unlikely under a true, strict scrutiny standard.

101. Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781 (1988); Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947 (1984); Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980).

102. *Vill. of Schaumburg*, 444 U.S. at 632.

103. *See Riley*, 487 U.S. at 787–89 (describing test applied in cases).

104. *Id.* at 795–801.

105. In *Riley*, a disclosure requirement was treated as a direct regulation of content and thus subject to more stringent scrutiny than other regulations. *See id.*

106. Nat'l Fed'n of the Blind v. FTC, 420 F.3d 331, 338 n.2 (4th Cir. 2005) (citing Nat'l Fed. of the Blind of Ark. v. Pryor, 258 F.3d 851, 855 (8th Cir. 2001)) (equating the *Village of Schaumburg* standard to the time, place, and manner test); *see also* Fraternal Order of Police, N.D. State Lodge v. Stenehjem, 431 F.3d 591, 597 (8th Cir. 2005) (same and describing test as "intermediate scrutiny"); Am. Target Adver., Inc. v. Giani, 199 F.3d 1241, 1247 (10th Cir. 2000) (describing standard as "an intermediate level of scrutiny").

107. *Nat'l Fed'n of the Blind*, 420 F.3d at 338 n.2.

Therefore, it would appear that the test for regulations of charitable solicitation has indeed largely merged into the general, intermediate scrutiny test.[108]

H. Regulation of Political Contributions

Finally, another area of First Amendment jurisprudence where the applicable standard of review might—and here it is important to emphasize the word *might*—be evolving towards intermediate scrutiny is the analysis of the constitutionality of statutory restrictions on political *contributions*. The Supreme Court's leading decision in this area is its 1976 *Buckley v. Valeo* opinion.[109] In *Buckley*, the Court heard constitutional challenges to restrictions placed by the Federal Election Campaign Act on both political expenditures by candidates and political contributions to candidates by members of the public.[110] Critically, the *Buckley* Court distinguished between expenditures and contributions, imposing a substantially higher standard of review on expenditure limitations than on contribution limitations, the result of which was the invalidation of expenditure limits, but the upholding of contribution limits.[111] In subsequent cases the Court reaffirmed this distinction, relying upon it to sustain numerous regulations and restrictions of political contributions.[112] In its most recent decision in the area, a majority of the Court once again appeared to have reaffirmed this distinction, albeit in the process of striking down *both* an expenditure and a contribution limit.[113]

If the applicable test for expenditure limits is strict scrutiny, as it appears to be, then the test for political contributions, which is clearly more lenient and deferential than the former, would appear to resemble intermediate scrutiny. Indeed, at least one lower court has explicitly applied intermediate scrutiny to uphold a restriction on political contributions.[114]

Having said this, it must be acknowledged that there are grave doubts about whether the Supreme Court itself understands the test for political contributions to be intermediate scrutiny. In *Buckley*, the Court explicitly rejected application of either the *O'Brien* or *Ward* test to the

108. *Cf.* Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton, 536 U.S. 150, 164 (2002) (declining to resolve question of what standard of review applied to ordinance requiring charitable solicitors to obtain permit).

109. 424 U.S. 1 (1976).

110. *Id.* at 7.

111. *Id.* at 143.

112. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 134–38 & n.40 (2003); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 386–90 (2000).

113. Randall v. Sorrell, 126 S. Ct. 2479, 2491–92 (2006).

114. Mich. State AFL-CIO v. Miller, 103 F.3d 1240, 1251–52 (6th Cir. 1997) (addressing a Michigan law that required annual consent if corporations or labor unions sought to use automatic payroll contributions to obtain political contributions from members or employees).

statute before it (including the contribution limits),[115] a rejection it reaffirmed in 2000 in *Nixon v. Shrink Missouri Government PAC*.[116] Indeed, those cases suggest that the applicable standard of review for political contributions is strict scrutiny. Most recently, in *Randall v. Sorrell*,[117] a controlling plurality again confirmed the Court's adherence to *Buckley*, declaring that political contribution limits must be "'closely drawn' to match a 'sufficiently important interest.'"[118] However, the level of scrutiny the Court has accorded to contribution limits from *Buckley* to the recent *McConnell v. FEC*[119] case is simply not as stringent as traditional strict scrutiny. The Court has permitted the government, in defending restrictions on political contributions, to invoke such vague governmental interests as preventing the *appearance* of corruption,[120] and it has explicitly deferred to congressional judgments regarding the proper balance to be drawn in this area.[121] This relaxed approach certainly seems more reminiscent of a form of intermediate rather than strict scrutiny, no matter how the Court might title it, suggesting that in practice, if not in name, the standard of review of restrictions on political contributions is evolving towards intermediate scrutiny.[122] In closing, however, it must be noted that the recent *Randall* decision, by striking down a contribution limit and declining to defer to legislative findings in the course of doing so,[123] raises some questions about whether this evolution will continue or be reversed.

III. MERGER AND SYNTHESIS

A. Merger in the Supreme Court

The various areas of First Amendment doctrine described above have very different origins and very different pedigrees. Some, such as the public forum doctrine, have their roots in cases from the 1930s or even earlier, whereas others, such as the commercial speech doctrine and regulations of sexually oriented businesses, are entirely products of the last thirty years. Furthermore, the evolutions of these different strands of law reflect quite distinct policies and concerns. The public forum doctrine, for example, reflects the Court's reconciliation of important free speech rights with the government's legitimate, managerial concerns. Similarly, the symbolic speech cases reflect a reconciliation of constitu-

115. *Buckley*, 424 U.S. at 16–18.
116. *Nixon*, 528 U.S. at 386.
117. *Randall*, 126 S. Ct. 2479.
118. *Id.* at 2491 (quoting *Buckley*, 424 U.S. at 25).
119. McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).
120. *Id.* at 136.
121. *See id.* at 137.
122. *Cf.* Grutter v. Bollinger, 539 U.S. 306, 326–28 (2003) (applying a seemingly more deferential form of "strict scrutiny" to a race-based admissions policy at the University of Michigan Law School).
123. *See Randall*, 126 S. Ct. at 2492–2500.

tional values with the government's obviously legitimate power to protect society from harmful conduct. Other areas of law, however, reflect entirely different policies. The Court's reasons for protecting commercial speech seem to sound more in substantive due process/economic liberty principles than in free speech policy,[124] and its reasons for tolerating regulation of such speech are also distinct. Likewise, the cases regarding regulation of the mass media and political contributions reflect judgments regarding the power of Congress to advance diversity of speech even if the consequence is to burden the speech of some, which has little or nothing to do with the explicit balancing entailed in the time, place, and manner and symbolic speech cases. At first, the variation in these policies and interests led the Court to treat each of these bodies of law as discrete, leading to distinct formulations of the relevant doctrinal tests, insofar as any such tests were formulated.

In recent years, however, the Supreme Court has tended to ignore, if not altogether abandon, these distinctions. Instead, the Supreme Court has come to emphasize the fact that despite somewhat differing formulations, many of the Court's new "tests" share some basic, common characteristics: under these tests, laws will be upheld so long as they serve some sort of a significant/substantial/important governmental interest and are *reasonably* well tailored to that purpose (i.e., not unreasonably overbroad). First, beginning in the mid-1980s, the Court began to acknowledge that there was little, if any, difference between the *Ward* time, place, and manner test and the *O'Brien* symbolic speech test, applying them interchangeably.[125] About the same time, the Court, through the "secondary effects" fiction, extended this test to regulations of adult businesses.[126] Then, in the late 1980s, the Court went further to acknowledge that its commercial speech test was "substantially similar" to its time, place, and manner and symbolic speech tests[127] and indeed went so far as to rely explicitly on time, place, and manner cases in weakening the "narrow tailoring" prong of the commercial speech doctrine to require only that the fit between the challenged regulation and the government's aims be "reasonable."[128] Next, in the 1994 *Turner* decision, the Court extended the time, place, and manner test to content-neutral regulations of the mass media, even when the relevant speech was *not* on government property and did not intrude upon any proprietary or managerial inter-

124. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 762–65 (1976).

125. *See* Barnes v. Glen Theatre, Inc, 501 U.S. 560, 566 (1991); Ward v. Rock Against Racism, 491 U.S. 781, 797–98 (1989); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 298 & n.8 (1984). For a description of the evolution, and merging, of the *Ward* and *O'Brien* tests, see Ashutosh Bhagwat, *Of Markets and Media: The First Amendment, the New Mass Media, and the Political Components of Culture*, 74 N.C. L. REV. 141, 166–72 (1995).

126. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46–55 (1986).

127. Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989) (citing San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 537 n.16 (1986)).

128. *Id.* at 480.

ests of the government.[129] Finally, that same year in *City of Ladue v. Gilleo*,[130] the Court at least arguably applied the test to a content-neutral regulation of private speech on private property. As such, by the mid-1990s, the Court had acknowledged the similarities, and in effect merger, of what I have identified as the most important strands of First Amendment intermediate scrutiny. Admittedly, the Supreme Court does not consistently describe these various strands of doctrine as constituting a unified form of intermediate scrutiny analysis, nor do the justices appear fully to have accepted the complete merger of the Court's various tests,[131] but the process of merger appears to be well on its way.

B. Synthesis in the Courts of Appeals

If the merger of the various strands of doctrine described above into a unitary, overarching standard of review has not yet been fully accomplished, or acknowledged, by the Supreme Court, that process has in fact proceeded much further along in the courts of appeals. As the cases described herein indicate, there can be no doubt that the courts of appeals increasingly seem to accept the existence of a single, overarching standard of First Amendment scrutiny called "intermediate scrutiny," which has emerged as a synthesis of the various distinct bodies of Supreme Court doctrine discussed in Part II. Moreover, the courts of appeals appear to have taken a step beyond the Court's current jurisprudence by treating intermediate scrutiny as, to use Justice Scalia's words, a "default standard,"[132] applicable to *any* governmental regulation of speech, which for whatever reason does not trigger strict scrutiny. As such, intermediate scrutiny has become a doctrine of increasing importance in First Amendment law as it operates *in action*, in day-to-day constitutional litigation.

The use of the phrase "intermediate scrutiny" in First Amendment cases in the courts of appeals dates back to two cases from the mid-1980s referencing the commercial speech standard.[133] The true explosion of intermediate First Amendment scrutiny in the courts of appeals began, however, in the mid-1990s, as those courts began to take account of the

129. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994).

130. 512 U.S. 43 (1994). For a more detailed discussion of *City of Ladue* and its ambiguous scope, see *supra* notes 44–46 and accompanying text.

131. *But cf.* Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton, 536 U.S. 150, 175–76 (2002) (Rehnquist, C.J., dissenting) (advocating "intermediate scrutiny" for ordinance regulating charitable solicitation); Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189, 213 (1997) (discussing application of "intermediate scrutiny" and citing both *Ward* and *O'Brien*); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 579–80 (1991) (Scalia, J., concurring in the judgment) (describing *O'Brien* as "an intermediate level of First Amendment scrutiny"). *See generally* City of L.A. v. Alameda Books, Inc., 535 U.S. 425 (2002) (debating applicability of intermediate scrutiny to regulation of adult businesses).

132. *See supra* note 6 and accompanying text.

133. Glover v. Cole, 762 F.2d 1197, 1200 (4th Cir. 1985); Lamar Outdoor Adver., Inc. v. Miss. State Tax Comm'n, 701 F.2d 314, 326 (5th Cir. 1983).

Supreme Court's statements, in cases such as *Clark*, *Ward*, *SUNY v. Fox*, and *Turner*, that there were no significant differences between the standards of review applicable in symbolic conduct; time, place, and manner; commercial speech; and media regulation cases. In 1994 alone, the courts of appeals issued at least six important free speech decisions explicitly invoking the intermediate scrutiny standard, on topics ranging from economically significant regulations of the mass media,[134] to regulations of adult businesses,[135] to regulations of highway signs.[136] As the next Part indicates, that rate has continued apace since that time, indeed accelerating substantially in the current decade. Furthermore, intermediate scrutiny cases in recent years continue to demonstrate a tremendous range and variety, covering everything from extremely broad, national regulations of the structure of the mass media, to run of the mill local zoning disputes, to cases touching upon the "War on Terror." As such, the cases clearly establish that in the collective vision of the courts of appeals, there now exists not only a unitary "intermediate scrutiny" test in First Amendment jurisprudence, but additionally, that test has a very broad range.

The appellate courts have also repeatedly recognized that the various strands of intermediate scrutiny doctrine are in fact interchangeable, and thus need not be distinguished. For example, in *Hodkins v. Peterson*, in evaluating a youth curfew ordinance, the Seventh Circuit stated that the symbolic speech and time, place, and manner standards are equivalent and described them jointly as "tests that apply an intermediate level of scrutiny to content neutral government regulations affecting speech."[137] The Seventh Circuit has elsewhere acknowledged the equivalence of the *Renton* standard for adult businesses and the *O'Brien* symbolic speech test.[138] The Tenth Circuit, acknowledging the same equivalence, has then applied the test to a regulation of charitable solicitation.[139] Finally, at least one court has held that a generally applicable intermediate scrutiny standard, derivable from such diverse sources as the *Pickering* test for speech of government employees, as well as cases dealing with political patronage and political contributions, should govern challenges to the associational and speech rights of government employees.[140] Indeed, as the cases discussed in the next Part demonstrate, there is now a widespread willingness among the courts of appeals to discuss

134. *See* US West, Inc. v. United States, 48 F.3d 1092 (9th Cir. 1994); Chesapeake & Potomac Tele. Co. v. United States, 42 F.3d 181 (4th Cir. 1994).

135. *See* Am. Library Ass'n v. Reno, 33 F.3d 78 (D.C. Cir. 1994); MD II Entm't, Inc. v. City of Dallas, 28 F.3d 492 (5th Cir. 1994).

136. Rappa v. New Castle County, 18 F.3d 1043, 1061–66 (3d Cir. 1994).

137. Hodgkins v. Peterson, 355 F.3d 1048, 1057 (7th Cir. 2004).

138. G.M. Enters. v. Town of St. Joseph, 350 F.3d 631, 638 (7th Cir. 2003).

139. Am. Target Adver., Inc. v. Giani, 199 F.3d 1241, 1247 n.1 (10th Cir. 2000).

140. Int'l Ass'n of Firefighters, Local No. 3808 v. City of Kansas City, 220 F.3d 969, 973–74 (8th Cir. 2000); *see also* Akers v. McGinnis, 352 F.3d 1030, 1037 (6th Cir. 2003) (describing *Pickering* balancing "as a form of intermediate scrutiny").

and apply a generic intermediate scrutiny standard, often without any effort to disentangle its forebears.[141]

C. Consequences: Some Preliminary Thoughts

The above discussion demonstrates that over the last two decades, at least at the appellate level, a number of previously independent strands of First Amendment doctrine have merged into a single, comprehensive intermediate scrutiny test. One might wonder, however, why this phenomenon matters. After all, if all that has happened is that the lower courts are labeling existing tests as forms of "intermediate scrutiny," but applying these tests as they otherwise would, then this is merely a change in terminology with no substance to it. This article will argue, however, that the trend towards integration of these standards in the courts of appeals actually has had important, substantive consequences. A full discussion of those consequences, to have meaning and support, must await an examination of how intermediate scrutiny cases are decided in practice, the subject of the next Part. Two specific developments are worth noting immediately, however, both because they nicely illustrate the shape of the overall problem and because they help establish the framework for the empirical project.

First, there are numerous instances in which, as a consequence of the merging of the various strands of intermediate scrutiny, the secondary effects analysis of *City of Renton v. Playtime Theatres, Inc.* has been extended beyond the arena of regulations of sexually oriented businesses to which the Supreme Court has confined it,[142] into other areas of First Amendment analysis—with predictably troubling results. In *Brentwood Academy v. Tennessee Secondary School Athletics Ass'n*,[143] the Sixth Circuit relied upon secondary effects analysis to hold that a regulation forbidding schools from using "undue influence" in recruiting student athletes, including a flat ban on any contact between coaching staff and prospective students, was content neutral and thus subject only to intermediate scrutiny. Similarly, in two separate cases, the Sixth and D.C. Circuits upheld a federal statute imposing extensive recordkeeping requirements regarding the identity and age of persons depicted on *all* visual representations of sexually explicit conduct (regardless of the age of the participating individuals) on the theory that this statute targeted only the secondary effects of such materials—in particular, the production of

141. *Cf.* Gun Owners' Action League, Inc. v. Swift, 284 F.3d 198, 210–12 (1st Cir. 2002) (upholding a law banning the use of human-shaped targets in target practice, describing the statute as a "content-neutral regulation of expressive conduct," and thereby conflating the *O'Brien* and the time, place, and manner tests).

142. *See supra* notes 96–100 and accompanying text; *infra* notes 143–44 and accompanying text.

143. 262 F.3d 543, 551–54 (6th Cir. 2001).

child pornography—and not the content of the speech itself.[144] Consequently, the analysis was applied to a statute that was *obviously* facially content based in that it imposed a burden on speech triggered precisely by its content, where the evil to be avoided was in no way a product of the plaintiff's own speech (as the secondary effects doctrine would appear to require), but was rather that of *other* speakers (i.e., actual child pornographers, which the plaintiffs were not). The above cases thus illustrate one systematic way in which the coalescence of intermediate scrutiny doctrine has tilted free speech doctrine in favor of the government.[145]

Even more important than the expansion of the secondary effects doctrine, however, has been the appellate courts' expansion of intermediate scrutiny generally to govern *any* challenge to *any* statute regarded by the court as content neutral, regardless of whether any of the triggers to lowered scrutiny identified by the Supreme Court are present. In other words, the courts of appeals have extended the intermediate scrutiny test to all content-neutral regulations of speech, even if the speech does *not* occur on public property (and so implicate the government's proprietary interests), does not involve symbolic *conduct* (and so raise the usual concerns about socially harmful conduct), does not involve structural regulation of the media (with its own special problems), or does not involve lower-value speech such as commercial speech or sexually explicit speech. These cases thus apply intermediate scrutiny to government regulations of private speech, on private property, solely on the grounds that the regulations are content neutral.

Examples of this expansion of intermediate scrutiny abound. Consider, for example, *Casey v. City of Newport*, which involved a challenge to a licensing restriction banning the use of amplification, as well as all singing, in a nightclub.[146] The First Circuit concluded that intermediate scrutiny (which it characterized as a form of balancing)[147] applied because the challenged rule was content neutral, though it did ultimately strike down the rule on tailoring grounds. Or consider *Universal Cities Studios, Inc. v. Corley*,[148] where the Court upheld a provision of the Digital Millennium Copyright Act that prohibited posting or linking to software that permitted decryption of copyrighted materials, applying intermediate scrutiny, because the law was content neutral in that it targeted only the functional aspects of prohibited code.[149] Other examples include the *Brentwood Academy* case discussed above, where the Sixth Circuit up-

144. Connection Distrib. Co. v. Reno, 154 F.3d 281, 290–91 (6th Cir. 1998); Am. Library Ass'n v. Reno, 33 F.3d 78, 87 (D.C. Cir. 1994).

145. *Cf.* McGuire v. Kelly, 260 F.3d 36, 43–44 (1st Cir. 2001) (citing *City of Renton* in the course of upholding, and finding content-neutral, statute restricting speech near abortion clinics).

146. 308 F.3d 106, 110–11 (1st Cir. 2002).

147. *Id.* at 116.

148. 273 F.3d 429, 442 (2d Cir. 2001).

149. *Id.* at 454.

held under intermediate scrutiny a rule regulating recruitment of high school athletes,[150] and *National Amusements v. Town of Dedham*,[151] where the court applied intermediate scrutiny to uphold a law barring movie theaters from showing movies between 1:00 and 6:00 a.m. Finally, a particularly interesting instance of this development is *Rappa v. New Castle County*,[152] in which the Third Circuit applied intermediate scrutiny and suggested that it might largely uphold (after remand) a set of state and local laws banning advertising along highways (but with many built-in exceptions, including exceptions for direction and traffic signs, for sale signs, and numerous other commonly used highway signs), as applied to signs along a highway supporting a political candidacy. Crucially, the ban applied to all signs close to highways, including those located on private property,[153] and yet the court's analysis in no way considered this fact relevant.

In each of the above cases, the court was faced with a regulation of fully protected speech (i.e., speech which did not fall into a "lower value" category such as commercial speech or libel), where there were no special considerations (such as government ownership) in play suggesting a greater regulatory role for the government. Nonetheless, the standard of review applied in these cases was no different from, and thus no more protective than, the standard developed by the Supreme Court in the context of the assorted special circumstances previously discussed. Admittedly, this application of intermediate scrutiny is not without basis in the Supreme Court's own jurisprudence. As discussed above,[154] cases such as *City of Ladue* and *Turner Broadcasting* certainly provide some support for this approach. However, as also noted above,[155] the Court's own position on the proper standard of review in cases involving purely private speech is far from clear, and to some extent, recent cases (including *City of Ladue*) can be read to point *away* from an unthinking expansion of the *Ward* and *O'Brien* lines of cases outside the public forum context. Consequently, and for reasons discussed in more detail below,[156] I would argue that these cases involve a significant and potentially troubling expansion of the Supreme Court's jurisprudence, with important implications for core First Amendment concerns.[157]

150. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 262 F.3d 543, 553 (6th Cir. 2001).
151. 43 F.3d 731, 740–41 (1st Cir. 1995).
152. 18 F.3d 1043, 1066 (3d Cir. 1994).
153. *Id.* at 1070.
154. *See supra* notes 44–46, 62–66 and accompanying text.
155. *Id.*
156. *See infra* Part V.C.
157. *Cf.* Trans Union Corp. v. FCC, 267 F.3d 1138, 1141 (D.C. Cir. 2001) (applying intermediate scrutiny to a congressional ban on the sale of "target marketing lists" by credit reporting agencies on the grounds that the covered speech, because it involved "matters of purely private concern," was "low-value" speech and thus not entitled to strict scrutiny). *Trans Union* is distinguishable from the cases discussed in the text because it does not involve "fully protected" speech, but it is another instance of the steady expansion of intermediate scrutiny.

The lesson to learn from all of these developments is that the emergence of intermediate scrutiny matters, and it is having a profound, systemwide impact on the law of free speech. To fully understand the nature of that impact, however, it is necessary to conduct a more systematic examination of the courts of appeals cases, to see what "intermediate First Amendment scrutiny" means *in practice*. We now turn to that examination.

IV. INTERMEDIATE SCRUTINY IN THE COURTS OF APPEALS

In order to assemble a comprehensive list of courts of appeals cases applying intermediate scrutiny to free speech claims, I conducted three different searches on the LEXIS/NEXIS "US Court of Appeals Cases, Combined" database. The searches were: (1) "First Amendment" and "intermediate scrutiny"; (2) "intermediate First Amendment scrutiny"; and (3) "intermediate level of scrutiny" and "First Amendment." The searches were conducted for all cases through calendar year 2005 and were last updated on January 20, 2006. Obviously, the resulting lists of cases will not include all opinions falling within the various categories listed in the previous Part because an opinion resolving, for example, a challenge to a commercial speech regulation may not use the phrase "intermediate scrutiny" (or some variant thereof). But these searches are likely to identify almost all cases where the court was self-consciously applying the intermediate standard of review to a free speech claim, and because the purpose of this paper is to explore the operation of this new standard in the appellate courts, this seemed to be the most relevant criterion.[158]

After I culled the resulting lists of cases for false positives and duplicates (including multiple appeals in the same case), 111 cases remained.[159] The earliest of these cases dates from 1983, and the latest from December of 2005, demonstrating that the intermediate scrutiny test now has a well-established pedigree. The cases, however, also demonstrate that the test has gained substantially greater acceptance in recent years. Of the 111 cases found, only four dated from the 1980s, and forty-seven from the 1990s. Sixty of the cases, over half of the total, date from the six years from 2000 through 2005, and of the forty-seven cases decided in the 1990s, only eight were decided before 1995. In summary, of the 111 relevant cases, a full ninety-nine, or 89.2%, date from the eleven years from 1995 through 2005. What exactly triggered this explosion is hard to say (perhaps the Supreme Court's *Turner Broadcasting*

158. In future projects, I hope to explore whether, in specific areas of free speech law, the designation of a test as "intermediate scrutiny" affects outcomes.

159. The list of remaining cases, along with citations and classifications, is reprinted as appendix A.

decision in 1994[160]), but given these figures, the fact that an explosion has occurred over the past decade, creating a new category of jurisprudence, cannot seriously be doubted. It is now time to examine in greater detail how these cases break down, and what they do.

A. The Pattern of the Cases

The cases compiled were divided into the eight categories representing the various areas of Supreme Court case law from which intermediate scrutiny evolved, along with a ninth category of cases involving challenges to content-neutral regulations of fully valued private speech on private property.[161] The cases were further classified based on whether the government action was upheld or the free speech claim sustained. Of course, each of these classification decisions required judgment calls, sometimes difficult ones. For example, many of the cases might have been placed into either of two (or even more) categories, and the deciding courts sometimes wavered on their proper classification—indeed, one of the theses of this paper is that in recent years, the distinct categories of intermediate scrutiny analysis have been blended in the lower courts. I nevertheless placed each case within the single category that seemed the best fit. An additional complication was that some of the cases resulted in remands, rather than clear conclusions regarding constitutionality. In those circumstances, I classified the case based on my assessment of whether the language of the opinion seemed to indicate that the law was likely valid or likely invalid (for example, if the appellate opinion was reversing a clear result below regarding constitutionality, I tended to classify the case as opposite to the result reached below). Obviously, another analyst might have made different judgments regarding individual cases, but these minor differences are very unlikely to alter the overall picture.

160. *See supra* note 62 and accompanying text.

161. I chose to classify these cases separately, rather than folding them into the time, place, and manner category (which in this analysis is limited to regulations of the public forum) because, as discussed above, it is my view that the public forum test should *not* be extended without thought or modification to this context. For a discussion of how the courts of appeals (with some uncertain support from the Supreme Court) have extended intermediate scrutiny to this kind of case, see *infra* Part IV.B.9.

The results of my classifications are set forth in table 1.

TABLE 1

Category (Regulations of . . .)	**Government Action Upheld**	**Free Speech Claim Sustained**	**Total**
Time, Place and Manner of Speech on Public Property	11	2	13
Symbolic Conduct	11	2	13
The Mass Media	8	4	12
Commercial Speech	8	5	13
Speech of Government Employees	2	2	4
Sexually Oriented Businesses	22	12	34
Charitable Solicitation	3	0	3
Political Contributions	2	0	2
Protected Private Speech on Private Property (Content Neutral only)	14	3	17
Totals	81	30	111

What do these numbers reveal? Some clear patterns emerge from this table. First, the cases were spread relatively evenly across the nine selected categories, but one category—regulations of sexually oriented businesses—included substantially more cases (indeed, twice as many) than any other category, reflecting a depressing recent trend across free speech law. Second, the government tended to win—the constitutionality of the government action was sustained in 81 of the 111 cases, with only 30 free speech victories (put differently, the government won 73%, or almost three-quarters, of the time). Third, the outcomes were fairly even across the categories—in other words, the government's advantage was not limited to those areas, such as regulations of sexually oriented businesses, where the Supreme Court has in recent years signaled a preference for constitutionality. Finally, there were a substantial number of cases within the ninth category of private speech on private property, into which the lower courts have extended the intermediate scrutiny test, despite the lack of either weak speech rights or an especially strong regulatory interest, and in this category, the government's advantage was even stronger (with an 82.4% win ratio) than in the general run of intermediate scrutiny cases.

The patterns described above, simple though they are, have important implications for the shape and efficacy of the law in this area. Before turning to those implications, however, there is value in examining the reasoning and results in a sampling of the most interesting cases from

the compiled lists. Such an examination reveals distinct, though complementary, patterns and lessons from a numerical approach.

B. A Sampling of the Cases

1. Time, Place, and Manner Case(s):

Bl(a)ck Tea Society v. City of Boston.[162] The First Circuit upheld restrictions placed by the City of Boston on demonstrators during the 2004 Democratic Party Convention in Boston, the effect of which was to limit demonstrators to a "demonstration zone" that was separated from the convention space itself and surrounded by fencing and some coiled razor wire.[163] As the court described them, "the aggregate effect of the security measures was to create an enclosed space that the [demonstrator plaintiff] likens to a pen."[164] Noting that "the government's judgment as to the best means for achieving its legitimate objectives deserves considerable respect,"[165] the court concluded that because of the potentially serious security threats facing the Convention, the restrictions constituted a reasonable balance between free speech and regulatory interests.[166] The court acknowledged that this was a difficult case, given the fact that the restrictions were significant and the regulated speech was of extremely high (arguably the highest) First Amendment value, but nonetheless found intermediate scrutiny satisfied.[167]

2. Symbolic Conduct Case(s):

Hodkins v. Peterson.[168] The Seventh Circuit, invoking the *O'Brien* and *Ward* tests, struck down an Indiana curfew law excluding (with certain exceptions) minors between fifteen and seventeen years old from public places during late night hours.[169] The court concluded that the law was not "narrowly tailored" because it lacked adequate exceptions for minors who were engaged in First Amendment activities, even though the court had earlier acknowledged that the law was not directed at, and did not have a disproportionate impact on, free speech.[170]

Humanitarian Law Project v. Reno.[171] The Ninth Circuit, in an opinion by Judge Kozinski, upheld a criminal statute prohibiting the provi-

162. 378 F.3d 8 (1st Cir. 2004).
163. *Id.* at 11, 15.
164. *Id.* at 11.
165. *Id.* at 13 (citing Ward v. Rock Against Racism, 491 U.S. 781, 798–99 (1989)).
166. *Id.* at 13–14.
167. *Id.* For a more detailed discussion of this case, see Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581, 592–95 (2006).
168. 355 F.3d 1048 (7th Cir. 2004).
169. *Id.* at 1052–53, 1057, 1065.
170. *Id.* at 1057, 1064–65.
171. 205 F.3d 1130 (9th Cir. 2000).

sion of "material aid" to terrorist organizations against a claim that the statute burdened speech and association rights because of the expressive nature of providing financial support to organizations that engaged in political advocacy (which, according to the plaintiffs, some terrorist organizations do).[172] The court applied intermediate scrutiny, citing *O'Brien*, but then found the standard easily satisfied.[173]

3. Mass Media Case(s):

Time Warner Entertainment Co. v. FCC.[174] The D.C. Circuit struck down regulations enacted by the Federal Communications Commission that imposed horizontal and vertical limits on ownership in the cable television industry.[175] The FCC rules prohibited any single cable company from reaching more than 30% of the total number of U.S. subscribers to multichannel video programming services (i.e., cable television and direct broadcast satellite services)[176] and prohibited cable firms from dedicating over 40% of their channels to programming in which they had a financial interest.[177] The court applied intermediate scrutiny because the rules were content neutral, but then struck down the regulations on the grounds that there was insufficient evidence to establish that the rules were necessary (i.e., narrowly tailored) to achieve the Commission's objectives.[178] This case was of some importance because it represented an important setback to congressional efforts to regulate the cable industry.

Time Warner Entertainment v. FCC.[179] The D.C. Circuit upheld legislation and implementing regulations restricting the rates charged by cable television companies.[180] Citing *Turner*, the court applied intermediate scrutiny, and then found the test easily satisfied.[181]

4. Commercial Speech Case(s):

Anheuser-Busch, Inc. v. Schmoke.[182] The Fourth Circuit applied intermediate scrutiny to uphold a Baltimore ordinance imposing broad restrictions on outdoor billboard advertising of alcoholic beverages, on the grounds that the ban constituted a reasonable means of combating un-

172. *Id.* at 1132–35, 1138.
173. *Id.* at 1135–36.
174. 240 F.3d 1126 (D.C. Cir. 2001).
175. *Id.* at 1136, 1139.
176. 47 C.F.R. § 76.503 (2005).
177. *Id.* § 76.504.
178. *Time Warner Entm't Co.*, 240 F.3d at 1130–39.
179. 56 F.3d 151 (D.C. Cir. 1995).
180. *Id.* at 162.
181. *Id.* at 182–86.
182. 63 F.3d 1305 (4th Cir. 1995).

derage drinking.[183] Although acknowledging that the "narrow tailoring" prong of the *Central Hudson* test constituted "the closest question in this case," the court nonetheless concluded that the tailoring requirement was satisfied given the other avenues that remained available for such advertising to reach adult audiences.[184]

5. Speech of Government Employees Case(s):

Thomasson v. Perry.[185] The Fourth Circuit upheld the military's "Don't Ask, Don't Tell" policy towards homosexuals against a First Amendment challenge (among others). The court concluded that intermediate scrutiny applied both because the policy was content neutral and because it involved the speech of government employees, and then ruled for the government on the grounds that the policy was "an allowable means of furthering the nation's military mission."[186]

6. Sexually Oriented Businesses Case(s):

R.V.S., L.L.C. v. City of Rockford.[187] The Seventh Circuit applied intermediate scrutiny to strike down a zoning ordinance restricting the location of establishments featuring (clothed) "exotic dancing," and in particular forcing such establishments to be located more than one thousand feet away from schools, churches, residential districts, or other such clubs. The court concluded that the City of Rockford had failed to demonstrate that its ordinance would in fact reduce the secondary effects associated with such clubs, and that in any event, the ordinance was not narrowly tailored because it might sweep in some "mainstream performances."[188] In so holding, the court appeared to impose a fairly substantial evidentiary burden on municipalities seeking to adopt such ordinances.

7. Charitable Solicitation Case(s):

National Federation of the Blind v. FTC.[189] The Fourth Circuit, in an opinion by Judge Wilkinson, upheld a series of regulations issued by the Federal Trade Commission restricting professional telephone fundraising on behalf of charitable organizations. The regulations did not ban such fundraising but limited it in various ways, including limiting the fundraising to daytime hours, imposing disclosure requirements, and requiring fundraisers to respect a request that no further calls be made.[190] The

183. *Id.* at 1311.
184. *Id.* at 1315–16.
185. 80 F.3d 915 (4th Cir. 1996).
186. *Id.* at 934.
187. 361 F.3d 402 (7th Cir. 2004).
188. *Id.* at 404, 406, 413.
189. 420 F.3d 331 (4th Cir. 2005).
190. *Id.* at 341–42.

regulations also did not restrict fundraising by nonprofit charities on their own behalf.[191] While acknowledging that the speech regulated here was fully protected, and of high First Amendment value, the court concluded that the regulations were properly tailored to advance the government's interests in preventing fraud and securing privacy in the home.[192]

8. Political Contribution Case(s):

Michigan State AFL-CIO v. Miller.[193] The Sixth Circuit upheld a statute requiring annual consent to political contributions collected from union members through automatic payroll deductions. The court concluded (counterintuitively) that the law was content neutral, despite being limited to *political* contributions, on the grounds that the *purpose* of the law was not related to content, and then upheld the law under intermediate scrutiny as a reasonable means to ensure that political contributions indeed respect the wishes of union members.[194] As with the *Bl(a)ck Tea Society* case discussed above (and the *Rappa* case discussed below), the *Miller* court upheld restrictions directed at core First Amendment values (assuming, as should be uncontroversial, that political speech is the most highly valued speech under the First Amendment) by avoiding strict scrutiny and instead applying a relatively deferential form of intermediate scrutiny. *Miller* might be distinguished from those other cases on the grounds that the net effect of the Michigan statute is to advance, rather than burden, speech rights (to wit, the right of individual employees to control their political contributions), and so the result is perhaps defensible. But significantly, the doctrinal path the court chose to reach its conclusion was to apply reduced scrutiny, rather than to find no free speech burden at all.

Republican National Committee v. Federal Election Commission.[195] The D.C. Circuit upheld against a First Amendment challenge an FEC regulation (implementing a congressional statute) that requires political committees to make "best efforts" to obtain and submit to the FEC information regarding the identity and other details of donors who contribute more than $200, by sending follow-up requests to donors who do not originally provide the information. The court held that the additional financial burden of sending such requests was not sufficient to infringe the speech of political committees.[196]

191. *Id.* at 349.
192. *Id.* at 338–39.
193. 103 F.3d 1240 (6th Cir. 1997).
194. *Id.* at 1243.
195. 76 F.3d 400 (D.C. Cir. 1996).
196. *Id.* at 409.

9. Private Speech Case(s):

Casey v. City of Newport.[197] The First Circuit applied intermediate scrutiny to strike down licensing restrictions on a nightclub that prohibited all amplification and (oddly) all singing. The court concluded that although both restrictions, even the ban on singing, were content neutral because their purpose was to limit disturbance to residential neighbors, neither restriction was narrowly tailored to achieve that goal.[198] As noted previously,[199] this case is a prime example of the extension of intermediate scrutiny to a situation where the regulated speech is fully protected and there are no special circumstances (such as government ownership) elevating the state's regulatory interests.

Universal Cities Studios, Inc. v. Corley.[200] The Second Circuit upheld provisions of the Digital Millennium Copyright Act prohibiting "trafficking" in technology used in circumventing encryption, or other "digital walls" used to protect copyrighted works, as applied to the posting on a Web site of computer code usable to decrypt DVDs' digital protections. The court held that the provisions were content neutral because they targeted the functional, rather than the communicative, aspects of the code, and then applying intermediate scrutiny, found the legislation properly tailored.[201] Again, this case involved application of intermediate scrutiny to purely private speech, albeit in this case the speech had a conduct element to it, given the intertwined communicative and functional aspects of computer code.

Transunion Corp. v. FTC.[202] The D.C. Circuit upheld a regulation banning the sale of "target marketing lists" by credit reporting agencies. The court concluded that intermediate scrutiny was appropriate, even though the regulation was arguably content based, because the regulated speech was of "purely private concern" and thus merited reduced First Amendment protection, and then found the regulation easily passed intermediate scrutiny.[203] This too was a case involving purely private speech, and the court pushed precedent quite far (relying, for example, on libel cases involving false speech) to invoke intermediate scrutiny.

National Amusements v. Town of Dedham.[204] The First Circuit upheld a municipal law barring movie theaters from showing movies between 1:00 and 6:00 a.m. The regulation was (obviously) content neutral, and was found to be a reasonable effort to control the noise and disrup-

197. 308 F.3d 106 (1st Cir. 2002).
198. *Id.* at 117–18, 120.
199. *See supra* text accompanying notes 146–47.
200. 273 F.3d 429 (2d Cir. 2001).
201. *Id.* at 451–55.
202. 267 F.3d 1138 (D.C. Cir. 2001).
203. *Id.* at 1140.
204. 43 F.3d 731 (1st Cir. 1995).

tion caused by late-night crowds.[205] (Note that this too is an example of intermediate scrutiny being applied to wholly private, fully protected speech, on purely private property.)

Rappa v. New Castle County.[206] The Third Circuit evaluated the constitutionality of a complex Delaware statutory scheme barring most signs on or adjacent to state highways and roads, including signs on private property adjacent to highway right-of-ways. The statutes were challenged by a candidate for the U.S. House of Representatives who wished to post campaign signs that violated the statutes.[207] The court applied intermediate scrutiny to substantial portions of the law, despite the fact that the laws clearly distinguished between permissible and impermissible signs based on their content (e.g., permitting "for sale" and directional signs), because the purpose of those exemptions was not to suppress speech, but rather was related to the function of the relevant property[208] (though the court did strike down aspects of the challenged statutes on the grounds that some of the exemptions were not justifiable under the court's analysis).[209] With respect to the portions of the law deemed content neutral, the court remanded to the trial court for application of intermediate scrutiny. In its instructions on remand, the court clarified that in its view the aesthetic interests that Delaware asserted in defense of the statute satisfied the significant interest requirement of intermediate scrutiny and that the law was likely narrowly tailored.[210] Thus the dispositive issue on remand was likely to be whether the law left open ample alternative channels of communication. On this point, the court felt that some doubt remained, though it did suggest that if on remand the defendants could prove the efficacy of alternative media (such as radio advertisements), combined with the placement of signs in places not prohibited by the statute, as forms of campaign speech, the regulatory scheme should probably be upheld (though perhaps not as applied to homeowners—a result foreshadowing the Supreme Court's *City of Ladue* decision later that year).[211]

In short, although the *Rappa* court did not wholeheartedly endorse the Delaware statutory scheme, its reasoning left little doubt that states *could* effectively ban many if not most road signs, so long as the legislation was properly drafted. As discussed previously, the obvious impact of this decision was to place substantial barriers in the way of political candidates, such as the plaintiff in this case, who seek to use signage to obtain the name recognition necessary to challenge political incumbents.

205. *Id.* at 741–42.
206. 18 F.3d 1043 (3d Cir. 1994).
207. *Id.* at 1048.
208. *Id.* at 1066.
209. *Id.* at 1072.
210. *Id.* at 1075.
211. *Id.* at 1076–77.

As such, the ruling has a significant, and arguably perverse, impact on political speech and the political process.

V. IMPLICATIONS

As the numerical analyses and summaries provided above indicate, close examination of intermediate scrutiny free speech cases in the courts of appeals reveals some surprising patterns and results. Moving now from the descriptive to the prescriptive, it is time to consider what overarching conclusions may be drawn here and what implications they have for the future. As I will argue, there are important lessons to be gleaned from the above, relating both to the role of doctrine in a hierarchical judicial system and to its capacity to produce desirable results. I conclude with some thoughts about where the Supreme Court might go from here to avoid or alleviate the problems that this article has exposed.

A. The Supreme Court and the Problem of Coherence

The first and most significant lesson that emerges from the above analysis is that a very large disjunction has arisen in recent years between the Supreme Court's apparent preferences and policies and what the courts of appeals are actually *doing*. The doctrine that the Supreme Court has created in this area of First Amendment law has simply failed as a mechanism of control over lower court decision making. In other words, the lower courts are not following the Supreme Court's marching orders.

What is the basis for this conclusion? Consider the various strands of the Supreme Court's decisions. As my description in Part II demonstrates, even a cursory examination of the cases within those strands leaves no doubt that in the Court's eyes, free speech claims within the general rubric of "intermediate scrutiny" are *not* all equal. In certain areas, the Court has been *extremely* speech protective, consistently upholding claims against even quite powerful governmental regulatory interests. For example, in the commercial speech area, the Court has in recent years been highly receptive to attacks on regulations, striking down limitations on tobacco advertising, drug advertising, and liquor labeling, and generally adopting a strong presumption against paternalistic regulations.[212] Similarly, the Court has also consistently struck down restrictions on charitable solicitation, emphasizing along the way the highly protected status of such speech. Finally, although the Court has not taken a consistent stance in the area of regulations of political contributions, there can be no doubt that since *Buckley v. Valeo*,[213] the Court has strongly signaled that such speech is entitled to substantial constitutional

212. *See supra* notes 69–83 and accompanying text.
213. 424 U.S. 1 (1976).

protection. Certainly the Court's most recent case in this area indicates such a view,[214] and in recent years a number of justices (albeit often in dissent) have argued that such speech should be entitled to full First Amendment protection.[215]

In contrast, the Court has been much more, indeed resoundingly, unreceptive to constitutional claims in other areas. Most notably, in the area of regulating sexually oriented businesses, the Court, since *City of Renton v. Playtime Theatres, Inc.* (1986)[216] and through *City of Los Angeles v. Alameda Books, Inc.* (2002),[217] has been extraordinarily consistent in rejecting constitutional claims, going so far as to describe the speech in the nude dancing context as "within the outer perimeters of the First Amendment . . . [but] only marginally so."[218] Similarly, in the symbolic conduct area, the Court has rejected challenges to content-neutral statutes with absolute consistency since the 1968 *O'Brien* decision,[219] so much so that Justice Scalia, noting this pattern, has urged the Court to abandon any heightened scrutiny of such regulations.[220] The pattern of cases is so clear in these two areas of law that one could make a convincing case that the Court has in fact adopted a categorical balancing approach in both areas and resolved the balance against speech claims. The problem is, of course, that if this is the Court's conclusion, it has not made it explicit, but rather has subsumed these areas of law into general intermediate scrutiny analysis, thereby sending very mixed signals to the lower courts.

The pattern of the Supreme Court's intermediate scrutiny decisions in these two areas is thus relatively clear. Moreover, the pattern makes good sense as a matter of constitutional policy. Close judicial scrutiny of the application of content-neutral regulations to symbolic conduct raises profound problems of manageability and interferes with legitimate legislative policy because essentially *any* conduct can be employed to "communicate a message" (consider the September 11 attacks). Also, no serious theory of the First Amendment would place regulations of sexually oriented businesses at anything but the outer periphery of free speech policy. Charitable solicitation, however, is an essential component of the activities of nonprofit organizations, which are in turn heavily involved in political and policy advocacy in this country. Similarly, regulations of the political process raise profound concerns about legislative interference

214. Randall v. Sorrell, 126 S. Ct. 2479, 2492–94 (2006).

215. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 266 (2003) (Thomas, J., dissenting); *id*. at 311–12 (Kennedy, J., dissenting); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 410–18 (2000) (Thomas, J., dissenting).

216. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

217. 535 U.S. 425 (2002).

218. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) (plurality opinion).

219. United States v. O'Brien, 391 U.S. 367 (1968).

220. City of Erie v. Pap's A.M., 529 U.S. 277, 307–10 (2000) (Scalia, J., concurring in the judgment); *Barnes*, 501 U.S. at 578–79 (Scalia, J., concurring).

with democracy, and thus with the self-governance rationale of the First Amendment.[221] Finally, although strong protection for commercial speech might be more controversial, it seems clear that in recent years a number of justices have begun to question the proposition that commercial speech has systematically "lower value" than other seemingly nonpolitical speech protected by the First Amendment (such as artistic speech), at least when the only justification for regulation of commercial speech is paternalism.[222]

An examination of the appellate cases, however, suggests that the courts of appeals have largely failed to pick up on these cues. As noted above, the lower courts' analysis of cases in different areas of intermediate scrutiny is very consistent—regardless of context, the government usually wins. Indeed, insofar as there *are* differences in outcomes, they seem to fly in the face of the Supreme Court's guidance. As noted earlier,[223] overall free speech claims were upheld by the courts of appeals in 30 out of a total of 111 cases, or 27% of the time. However, a surprising 35.3% (12 out of 34) of the challenges to regulations of sexually oriented businesses succeeded, despite the lack of any success for such claims in the Supreme Court. In the symbolic conduct area the lower courts were more hostile, accepting only 15.4% (2 out of 13) claims, though even that might be generous given the Supreme Court's posture, and in any event, the numerical breakdown in the symbolic speech cases was *identical* to that in the time, place, and manner cases, where the Supreme Court itself has been less hostile to speech claims. It was only in the commercial speech area that there was some significant evidence that the Court's cues are being read—the lower courts accepted 5 out of 13, or 38.5% of claims, which is substantially higher than the average overall. Even here, however, some doubts arise. A 38.5% win ratio (barely higher than 1 out of 3) seems rather low given the trend of cases in the Supreme Court, the seemingly gradual merger of commercial speech doctrine with the doctrine governing fully protected speech, and the fact that commercial speech regulations are essentially *always* content based.

What explains the gap between the Supreme Court's decisions and lower court applications of those decisions? One possible answer is deliberate defiance—lower court judges simply do not share the assessments of the justices regarding the relative weights of speech and regulatory interests, and thus are reaching different conclusions. But this explanation does not seem terribly plausible. It seems exceedingly unlikely, for example, that a large number of federal appellate judges think that pornographic theaters and nude dancing constitute more valuable speech than charitable solicitation or political contributions. In any

221. *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

222. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 575 (2001) (Thomas, J., concurring).

223. *See supra* Part IV.A.

event, even if the divergence is a product of differing values and deliberate defiance, surely one of the purposes of the judicial doctrines announced by the Supreme Court is to control lower courts, and to prevent their divergence from the legal principles and values favored by the Court.

Another possible explanation for the discrepancies between Supreme Court and appellate outcomes is case selection—i.e., that in the categories where government win rates are high, plaintiffs tend to bring weaker claims. This explanation (though harder to refute without a more detailed, and inevitably subjective, examination of all of the cases in my sample) also seems inadequate. In particular, with respect to regulations of sexually oriented businesses, given the obvious, strong economic incentives of plaintiffs in those cases to challenge regulations even when the claim on the merits is relatively weak, one would expect a *lower* win ratio than in other areas of intermediate scrutiny; yet the result is the opposite. Also, although economic incentives to bring weak claims (combined, presumably, with a bias in the certiorari process for the Supreme Court to hear relatively strong claims) might explain the relative lack of plaintiff success in areas such as commercial speech and charitable solicitation where the Supreme Court has accorded strong protection, an examination of individual appellate cases involving commercial speech[224] and charitable solicitation[225] strongly suggests that in a number of them, appellate courts rejected constitutional challenges that the Court would have sustained. Therefore, case selection also seems a poor, or at least insufficient, explanation for why results in appellate intermediate scrutiny cases diverge so sharply from those in the Supreme Court.

Rather, the problem here seems to stem from the very *shape*, or structure, of the Court's doctrine in this area. As noted above, the common characteristic of all of the various intermediate scrutiny tests announced by the Supreme Court is a requirement that a reviewing court examine both the strength of the (important/substantial/significant) governmental interest asserted in support of the regulation and the level of tailoring of the regulation (including notably, the availability of alternate channels of communication). In fact, however, as Geoffrey Stone noted

224. *See, e.g.*, Capobianco v. Summers, 377 F.3d 559, 564 (6th Cir. 2004) (upholding thirty-day bar on soliciting of accident victims by chiropractors); Consol. Cigar Corp. v. Reilly, 218 F.3d 30, 53 (1st Cir. 2000), *aff'd in part, rev'd in part sub nom.*, Lorillard Tobacco v. Reilly, 533 U.S. at 571 (rejecting First Amendment challenges to extensive regulation of tobacco advertising; First Amendment analysis largely rejected by Supreme Court on certiorari); Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 1305, 1317 (4th Cir. 1995) (upholding ban on billboard advertising of alcohol).

225. *See, e.g.*, Fraternal Order of Police, N.D. State Lodge v. Stenehjem, 431 F.3d 591, 600 (8th Cir. 2005) (upholding ban on professional solicitors acting on behalf of charities calling telephone numbers on state "do not call" registry); Nat'l Fed'n of the Blind v. FTC, 420 F.3d 331, 351 (4th Cir. 2005) (upholding broad regulation of telemarketing on behalf of charitable foundations); Am. Target Adver., Inc. v. Giani, 199 F.3d 1241, 1248–49 (10th Cir. 2000) (upholding statute imposing licensing and other obligations on "professional fundraising consultants," though striking down a few provisions of statute).

almost twenty years ago, all of these tests clearly constitute an implicit form of balancing (albeit some of them might constitute categorical, rather than case-by-case balancing).[226] A number of courts of appeals decisions recognize that intermediate scrutiny constitutes a form of balancing,[227] and of course the *Pickering* test for restrictions on the speech of government employees has always been described as *Pickering* balancing.[228] Moreover, balancing follows naturally from the very vacuity of the intermediate scrutiny formulations. The tests require courts to assess whether a government interest is "important," "substantial," or "significant," but that inquiry obviously cannot be made in a vacuum, especially given the malleability of the intermediate scrutiny formulations (what exactly is an "important" or "significant" policy?) and given the institutional limitations on the ability of courts to make judgments regarding the abstract strength of a social policy.[229] Instead, the tests inevitably invite courts to *compare*—i.e., to balance—the strength of the asserted policy against the constitutional interests on the other side. Tailoring analysis also factors into this balancing because it informs one's judgments regarding the extent and necessity of the burden on speech interests. The difficulty is that such a balancing approach, with no further elucidation (and the Supreme Court, at least in enunciating doctrine, has given none), provides little or no guidance about *how* to balance. In particular, it does not clarify what kinds of speech rights should be highly valued (or concomitantly, what kinds should not), and what kinds of regulatory interests, in what contexts, should be given more or less weight. Indeed, the falling back onto vaguely articulated balancing tests perhaps constitutes an implicit admission of the Supreme Court's inability to articulate such standards.

Another way to describe the jurisprudential difficulty in this area is to say that the courts of appeals have demonstrated a systematic inability to calibrate their constitutional analysis to the relative strengths of the speech and regulatory interests in individual cases. The sharp disjunctions described above between the Supreme Court's decisions and the results in the lower courts, especially in the areas of charitable solicitation, political contributions, public forum regulations, and (perhaps) commercial speech restrictions, are indicative of this phenomenon because they seem to evince an inability to grapple with the fact that the

226. Stone, *supra* note 7, at 58.

227. *See, e.g.*, Wirzburger v. Galvin, 412 F.3d 271, 275 (1st Cir. 2005); Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8, 19 (1st Cir. 2004) (Lipez, J., concurring); Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, 337 F.3d 1251, 1273 (11th Cir. 2003); Casey v. City of Newport, 308 F.3d 106, 110–11 (1st Cir. 2002); Bartnicki v. Vopper, 200 F.3d 109, 123 (3d Cir. 1999), *aff'd*, 532 U.S. 514 (2001).

228. *See supra* text accompanying notes 84–91.

229. I have discussed these institutional problems in detail elsewhere. *See* Ashutosh Bhagwat, *Affirmative Action and Compelling Interests: Equal Protection Jurisprudence at the Crossroads*, 4 U. PA. J. CONST. L. 260, 272–74 (2002); Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Law*, 85 CAL. L. REV. 297, 321–25 (1997).

speech in such cases *matters* and should be given at least a presumption of protection, albeit not an absolute one. Even more salient are the outcomes in cases involving content-neutral regulations of the mass media, as well as of private, fully protected speech on private property (the area into which the lower courts have arguably extended the intermediate scrutiny jurisprudence). These are all cases in which the regulated speech is fully protected, and therefore presumptively of high value (especially, of course, in the context of mass media regulation). At the same time, these are *not* cases where the State has special interests, either as a proprietor (as is true in the time, place, and manner/public forum and government employee cases) or as a regulator (as is true in the symbolic conduct cases). Yet, in the courts of appeals, there is simply *no* significant difference between these and other intermediate scrutiny cases. In the mass media category, the success rate of First Amendment claims is 33.3% (4 out of 12), only marginally higher than the overall 27% rate, and in the private speech cases, the success rate is only 17.6% (3 out of 17), *lower* than the overall rate and lower than the success rate in commercial speech (38.5%) and sexually oriented businesses (35.3%) categories. These results simply make no social sense.

More generally, the fact that intermediate scrutiny has collapsed over time into undifferentiated balancing also probably explains the substantial advantage enjoyed by the government in these cases. The difficulty is this: in any intermediate scrutiny case, a reviewing court is being asked to compare a burden on speech against a claimed regulatory objective. By definition, however, in many individual intermediate scrutiny cases, the constitutional interest is going to be relatively marginal, because the regulation does not target communicative impact,[230] because it is targeted at "low-value" speech, or perhaps both (both factors would seem to be in play in some of the symbolic conduct cases, for example). On the other hand, the regulatory interests in intermediate scrutiny cases are no less weighty than in strict scrutiny cases. Indeed, they are often weightier because intermediate scrutiny is frequently applied in contexts such as commercial speech, regulation of conduct, or regulation of publicly owned property, where the government's interests are particularly powerful. In fact, this is true by definition, because if the speech interests were *not* reduced or the regulatory interest not weightier, the court would be applying strict, not intermediate scrutiny. The result is a systematic bias in judicial perceptions and decisions in favor of the government, resulting in a rejection of First Amendment claims in almost three-quarters of cases.[231]

230. Underlying the proposition that content-neutral regulations raise more peripheral constitutional concerns than content-based ones is of course an assumption, which is that the First Amendment is particularly geared towards the prevention of official censorship, rather than merely maximizing the amount of speech.

231. For a similar argument, see Stone, *supra* note 7, at 79.

But, one might argue, are these results not entirely appropriate given the relative weights of the constitutional and regulatory interests here? Perhaps so in any individual case because in no individual case does the loss of free speech seem all that significant. Furthermore, absent a theoretically grounded base rate, there is no way to know whether the actual win rate for the government (73%)[232] is "too high" or "too low." I do not claim to possess any theory capable of deriving such a base rate and indeed doubt that such a base rate *can* be meaningfully defined given a rule as amorphous as case-by-case balancing. The problem is that the *cumulative* effects of a large number of decisions, all prone to the same progovernment bias, leads to the suppression of a great deal of speech indeed, so much so as to potentially skew the shape of political and cultural debate. Consider, for example, the cumulative impact of cases such as *Bl(a)ck Tea Society* and *Rappa*,[233] upholding very intrusive restrictions on the time and place of core, political speech. Such restrictions are far more likely to burden political insurgents or "the poorly financed causes of little people"[234] than political incumbents or socially powerful interests, resulting in an entrenchment of governing interests and ideas—an outcome at odds with the very purposes of the First Amendment. Similarly, the consistent validation of restrictions on charitable solicitations threatens to hamstring nongovernmental organizations, which provide an important source of social dissent. And the (fairly) consistent sustaining of structural regulations of the mass media also gives the government a tool with which to exert pressures on, and extract favors from, the institutional media, thereby restricting yet another source of dissent and oversight.

Not only is the cumulative effect of intermediate scrutiny likely to be the suppression of a substantial amount of valuable speech, the social implications of the problem are not likely to be symmetrical. In other words, the social gains from regulations sustained are not likely to offset the costs of the lost free speech. The reason for this asymmetry is that when courts resolve intermediate scrutiny cases, they do so assuming a background of free speech and robust political debate. As such, they tend to value the lost speech relatively slightly on the assumption that other speech will take its place and provide society with the lost benefits. In fact, however, as the number of content-neutral restrictions on speech which are upheld mounts, that background assumption begins to weaken, and new speech will *not* necessarily replace the lost speech. Individual judges, of course, cannot observe these cumulative effects in individual cases, and so from their perspective they are balancing properly, but overall it may well be that judges are systematically undervaluing the

232. *See supra* Part IV.A tbl.1.

233. *See supra* Part IV.B.8.

234. Martin v. City of Struthers, 319 U.S. 141, 146 (1943) (Black, J.); *see also* Kovacs v. Cooper, 336 U.S. 77, 102–04 (1949) (Black, J., dissenting).

speech interests in intermediate scrutiny cases, resulting in too many regulations being upheld.[235] None of this is to say that Armageddon is upon us, or that our democracy is on the verge of collapse, but it is to say that the intermediate scrutiny cases do contribute to the general weakening of "debate on public issues [that is] uninhibited, robust, and wide-open."[236]

Not only does intermediate scrutiny have the potential to reduce public debate, it also has the potential to skew its content. This is true for two reasons. First, as noted above, regulations of speech are most likely to suppress the speech of the disempowered because they are the speakers who are least likely to have easy access to favored modes of communication. It also seems likely that the disempowered have particular viewpoints and political perspectives. As a consequence, even content-neutral speech regulations can cumulatively skew the content of debate by silencing particular perspectives. Second, the intermediate scrutiny test invites judges to make judgments about the value of speech in the course of balancing, but to date the Court has provided little guidance about how to make those valuations. In this situation, it is quite plausible that judges' estimates of value will be influenced, whether consciously or not, by the content of the speech, especially when the speech presents a fringe or highly unpopular perspective—consider as examples religious hate speech or speech supporting Al Qaeda. If this is true, then judges will be systematically more likely to uphold applications of content-neutral laws to such speech, than to "mainstream" speech; and the result of this tendency, in turn, will be to shift the balance of political debate, especially because suppressed "fringe" speech is far less likely to be replaced than other forms of speech.[237]

It must be understood that the above arguments should not necessarily be considered a wholesale condemnation of balancing methodology (though such condemnations might be appropriate and certainly have been offered elsewhere).[238] There is nothing about balancing as a methodology that necessarily precludes judges from carefully considering the relative strengths, in each individual case, of speech and regulatory interests. The difficulty is that the intermediate scrutiny doctrine, as articulated by the Supreme Court, does not provide any guidance on how such assessments should be made, thereby eliminating any hope that the Court can assert control over (and consistency among) appellate courts applying its precedents. Furthermore, the pattern of appellate results and their variation from the Supreme Court's articulated preferences

235. Thanks to Jonathan Masur for this insight.

236. N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964).

237. Again, thanks to Jonathan Masur.

238. *See, e.g.*, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987). For a summary of the commentary, see Ashutosh Bhagwat, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30 CONN. L. REV. 961, 989–1001 (1998).

suggest that, *in practice*, the lower courts, in applying intermediate scrutiny, have failed to take into account in any systematic way such clearly relevant factors as the various social values of different kinds of speech and the existence, or lack thereof, of any special *need* for regulation in different spheres of life and human activity. As a consequence, these courts appear to be systematically overprotecting speech in some contexts and underprotecting it in others. The question that obviously remains, therefore, is whether there exist strategies by which doctrine might be reformed to advance the complementary goals of control, consistency, and principle in this area of First Amendment jurisprudence.

B. A Call for Disaggregation

Many of the problems noted above with the application of free speech intermediate scrutiny in the courts of appeals appear to be a direct, and rather predictable, product of the imprecision and malleability of the doctrine announced by the Supreme Court in this area. This imprecision and malleability in turn appear to be direct results of the fact that the test (or tests) that constitute intermediate scrutiny seem to predictably collapse into unguided balancing. One might therefore be tempted to conclude that the only solution to the problem is to abandon balancing altogether. Such a radical solution, however, is not necessary and, furthermore, is probably not even desirable. Instead, a better and more achievable goal might be to move towards more focused and targeted doctrinal tests, albeit tests which still incorporate an element of balancing.

Taking the desirability point first, it is not at all clear that balancing can or should be eliminated altogether from the various areas of law that constitute intermediate scrutiny. As Geoffrey Stone has argued, reduced scrutiny of content-neutral regulations and some element of balancing (whether categorical or case-by-case) may be unavoidable in resolving these cases.[239] The reason is simple. As noted above,[240] intermediate scrutiny cases are by definition cases where the Court has concluded that strict scrutiny should *not* apply because of some combination of the lower value of protected speech (as in the commercial and sexually oriented speech cases), the strong societal interests at stake (as in the public property, symbolic conduct, government employee, and political contribution cases), or simply lessened concerns about governmental misconduct (as in the mass media and pure content-neutral cases).[241] Nonetheless, because of the highly preferred status of free speech in our constitutional thought, the Court also does not believe that the supine rational basis standard is appropriate in these cases. Thus in every in-

239. Stone, *supra* note 7, at 72–77.
240. *See supra* Part II.
241. Stone, *supra* note 7, at 74–76; *see also* Bhagwat, *supra* note 238, at 1000.

termediate scrutiny case, some difficult reconciliation of speech and societal interests will be necessary. That need would seem to lead to balancing—even if with respect to some kinds of speech or regulations, the result of balancing is to conclude (as in the child pornography context)[242] that constitutional claims should be rejected on a categorical basis.

Balancing thus may be inevitable here. But it need not be unguided, unfettered balancing. The lack of consistency and nuance one observes in this area is not a result of balancing as such, it is a result of the vague and open-ended nature of the tests the Court has fashioned here—the ultimate in doctrinal mush. That mush is an inevitable consequence of trying to deal with the extraordinarily varied issues and problems that arise in the various areas of doctrine that have been subsumed into intermediate scrutiny through one overarching test. But *that* step, the creation of a single, indivisible middle tier in free speech law, was neither necessary nor desirable, and it should be reversed.

In short, the solution here is disaggregation, the dismantling of the intermediate scrutiny test into its constituent parts. The primary benefit of such disaggregation is that it will permit the development of a more detailed jurisprudence (or more accurately, multiple bodies of jurisprudence) regarding how courts should balance speech and societal interests in different areas of free speech law. In particular, such a jurisprudence could begin to articulate standards regarding what kinds of speech, and what kinds of regulatory interests, should be accorded more or less weight (or indeed, any weight at all) in each of the different areas of law which have been combined into intermediate scrutiny—including in some instances, perhaps, a categorical conclusion that certain kinds of free speech claims should always be rejected.[243] In addition, in some areas of law, disaggregation will permit the Supreme Court to articulate more clearly, and (more to the point) lower courts to heed, the existence and relevance of distinct legal principles (such as the antipaternalism principle in commercial speech law), which are independent of balancing. Such bodies of jurisprudence could substantially reduce the disjunction between appellate decisions and the Supreme Court's apparent preferences, as well as the incidence of socially undesirable results in the lower courts.[244]

242. New York v. Ferber, 458 U.S. 747 (1982).

243. Unsurprisingly, Justice Scalia has advocated abandoning balancing in favor of just such a proposition in two areas of law within the "intermediate scrutiny" rubric: content-neutral regulations of symbolic conduct and regulations of "the business of pandering sex." *See* City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 443–44 (2002) (Scalia, J., concurring); City of Erie v. Pap's A.M., 529 U.S. 277, 307–10 (2002) (Scalia, J., concurring); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 578–79 (1991) (Scalia, J., concurring).

244. For a sophisticated examination of the broader jurisprudential question of how the Supreme Court can exert greater control over results in the lower courts, tying that issue to the general rules versus standards debate, see Caroline Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271 (2006).

To understand fully why disaggregation holds promise for such outcomes, some further explanation is necessary. One key insight here is that speech interests are *not* equally strong across these different areas of law. Whatever one's preferred theory of the First Amendment, it seems obvious that media speech, charitable solicitation, and political speech generally, whether they be on public property, by government employees, or completely private, have far greater constitutional value than sexual speech.[245] The Court should make that distinction an overt element of its precedent. Similarly, the Court should and must explicitly resolve the question of whether commercial speech systematically is, or is not, of lower value than the kinds of scientific, artistic, and literary speech that receive full First Amendment protection. Such guidance should have a substantial impact on disciplining balancing.

Even more significant than recognizing the varying strength of speech interests (a recognition that is implicit in current law), is realizing that different state regulatory interests should *not* be accorded equivalent weights when invoked to regulate different kinds of speech. Consider, for example, the governmental proprietary interests in order, management, and bureaucratic discipline that so often underlie restrictions on speech on public property or speech by government employees. Such interests can and should certainly be accorded great weight in those contexts, but *not* in other areas of free speech law. Similarly, the kinds of interests in preventing harm, combined with manageability concerns, which so often justify the application of generally applicable laws to symbolic conduct, should be given less or even no weight when the regulation specifically targets speech such as commercial speech, mass media operations, and charitable solicitation. Or again, the acknowledged interests in preventing false or even misleading speech in the commercial speech and charitable solicitation contexts should have little or no relevance for regulations of other speech (most especially political speech) or of the mass media. Concomitantly, if commercial speech is truly of high First Amendment value, perhaps no *other* regulatory interests should be sufficient to restrict it.

Indeed, a careful examination of relevant and irrelevant regulatory interests has promise for entirely revolutionizing some areas of intermediate scrutiny jurisprudence. In mass media cases, for example, there is a powerful argument to be made that the *only* permissible state interest should be one in preserving competition and a diversity of voices, with-

245. The greater value of political over sexual speech is clear under either the "search for truth" or democratic self-governance rationales championed by Justices Holmes and Brandeis respectively. *See* Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). It might be less clear under a theory built on autonomy or self-fulfillment; but even under such an approach, presumably free speech has value primarily because it advances *intellectual* autonomy or self-fulfillment, and as such political (and other ideas-based) speech again becomes more valuable than sexual speech.

out preferring any specific speech or speakers.[246] A general intermediate scrutiny test, however, leaves little scope to communicate such specific principles. Similarly, when speech of government employees is at issue, one might ask why *any* suppression should be permitted when the relevant speech is not uttered either on government property or in the course of the employee's official duties, and does not disclose confidential information. Surely in those circumstances the state's proprietary interests are only most marginally involved, and if that is the case, what reason is there for reduced protection of the speech? With respect to regulation of sexual speech and sexually oriented businesses, the Court might articulate with greater precision what exactly *are* the relevant regulatory interests here. Is it secondary effects—and if so, what kinds of secondary effects? Is it protection of children? If so, protection from what, and what role do parental preferences play here?[247] Or is it simply because nudity and depictions of sexuality are "*contra bonos mores*," to quote Justice Scalia?[248] Lower courts might like to know.

One area of law where greater detail, and more careful consideration of policy, has special promise is in the last category of intermediate scrutiny cases discussed above—content-neutral regulations of purely private speech on private property. This is an area where the lower courts have operated especially free of specific guidance from the Supreme Court because of the dearth of decisions from the Court in this area. Indeed, as noted earlier, the Court has been quite ambiguous about whether such cases belong in the intermediate scrutiny box at all. Nonetheless, taking their cue from cases such as *City of Ladue*[249] and *Turner Broadcasting*,[250] the lower courts are now very likely to apply intermediate scrutiny in this context, and in particular, the relatively deferential form of intermediate scrutiny that is applied to First Amendment claims (as opposed to equal protection claims).[251] But to extend to such cases the deference that has evolved in cases dealing with regulations of public property, symbolic conduct, commercial speech, and sexual speech is highly problematic because none of the *reasons* why deference is accorded in those cases applies here. In fact, a careful examination of the relevant context suggests that far from being deferential, these are cases in which courts should tilt the balance heavily against the government.

First, these are cases where, unlike in sexual speech and (perhaps) commercial speech cases, the speech interest is generally very strong—or at the least, there is no reason to believe that the speech interest is especially weak. Many of the cases, including the Supreme Court's *City of*

246. For a more detailed elucidation of this argument, see Bhagwat, *supra* note 125, at 187–93.

247. *See generally* Ashutosh Bhagwat, *What If I Want My Kids to Watch Pornography? Protecting Children from "Indecent" Speech*, 11 WM. & MARY BILL RTS. J. 671 (2003).

248. *Barnes*, 501 U.S. at 575 (Scalia, J., concurring).

249. City of Ladue v. Gilleo, 512 U.S. 43 (1994).

250. Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 180 (1997).

251. *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996).

Ladue and *Bartnicki* decisions,[252] and the Third Circuit's *Rappa* decision,[253] involve explicitly political speech. Even if the speech is not expressly political, it is generally artistic or cultural in character and therefore not in the "periphery" of the First Amendment like sexual speech, as well as perhaps commercial speech, campaign contributions, and symbolic conduct. Indeed, as the Supreme Court pointed out in *City of Ladue*, there is an argument to be made that the constitutional interests are *especially* high in such cases because restrictions on speech on one's own property implicate autonomy and property rights, as well as speech rights,[254] and because speaking on one's own property is a uniquely effective way to express personal support for a message.

Second, as the *City of Ladue* Court also recognized, when the government regulates speech on private property (especially in private homes), its regulatory interests are especially weak. Unlike in public forum cases, these are not situations where the government needs to "mediate among various competing uses" of the property; that is the right and responsibility of the property owner.[255] These are also not generally cases involving regulation of conduct (if they were, *O'Brien* would mandate deferential review). Indeed, an argument can be made that the *only* legitimate reason for government to restrict private speech on private property is to prevent harm to others—in law and economics parlance, to prevent externalities.[256] Moreover, to provide meaningful protection against suppression, the concept of harm or externalities here must be defined narrowly. Not only is ideological offense clearly not a cognizable form of harm,[257] but as the Court's holding in *City of Ladue* implies, minor aesthetic harms are also insufficient. Furthermore, even if the harm to be prevented is cognizable and significant, such as protection of neighbors from excessive noise or protecting the privacy of others, because of the narrow scope of the State's regulatory authority in this area, courts must insist that suppression of speech is *necessary* to prevent significant harm, i.e., they must insist on truly narrow tailoring, as opposed to the supine standard of *O'Brien*, *Ward*, and *SUNY v. Fox*. That is certainly the message of *Martin v. City of Struthers*[258] and *Bartnicki v. Vop-*

252. Bartnicki v. Vopper, 532 U.S. 514 (2001); *City of Ladue*, 512 U.S. at 43.

253. Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1999).

254. *City of Ladue*, 512 U.S. at 58 (referring to our tradition of "special respect for individual liberty in the home").

255. *Id.*

256. I leave aside here the special cases of structural mass media regulations, and regulations of political contributions, where arguably another legitimate regulatory goal is to enhance the voice of others and thereby to increase the diversity of speech in the marketplace of ideas. Whether this diversity rationale suffices to suppress speech in those contexts, it is difficult to believe it can be sufficient to suppress private speech generally—on that path lies autocracy.

257. *Cf.* Terminiello v. City of Chi., 337 U.S. 1, 5 (1949) (holding conviction for "breach of the peace" unconstitutional, although speaker's ideological speech angered crowd).

258. 319 U.S. 141, 148–49 (1943).

per,[259] and it should become an explicit part of the doctrine governing regulations of speech on private property. These are all important considerations, with important implications for how courts should approach these cases. If the Court were to explicitly treat private speech cases as raising issues quite distinct from other intermediate scrutiny cases—as the Court came close to doing in *Bartnicki*[260]—it could provide the guidance needed to nudge the lower courts in this direction.

Finally, there is also another reason, quite independent of providing better guidance in the application of interest balancing, why disaggregation has the potential to improve the law in this area: the subsuming of distinct bodies of precedent into an overarching test has the tendency to bury *other* operative principles, beyond general balancing, which can be relevant to particular areas of law. This is most evident in the area of commercial speech law. As noted earlier,[261] one of the most significant developments in the Court's commercial speech doctrine in recent years is the increasingly forthright adoption of a very strong antipaternalism principle, which forbids government from suppressing commercial speech "in order to prevent members of the public from making bad decisions with the information."[262] Similarly, as also noted above,[263] in cases involving content-neutral regulations of the public forum, the Court appears to have adopted a fairly strong presumption that when a regulation is so broad as to eliminate *all* effective, alternative channels of communication for a speaker, it should be invalidated. These principles appear to apply regardless of the results of balancing and thus constitute independent limitations on governmental power. As specific bodies of commercial speech law or public forum law disappear into a general intermediate scrutiny test, however, such principles can be lost from sight, a result with important and regrettable consequences for free speech.

C. A Second Look at Some Cases

The above are some general and somewhat abstract arguments in favor of disaggregation. But would such greater specificity in doctrinal formulations make any difference in individual cases? There are of course no guarantees, but it might. Consider for example the *Bl(a)ck Tea Society* case, involving demonstrators at the 2004 Democratic National Convention,[264] and the *National Federation of the Blind* case, involving regulation of charitable solicitation.[265] In both of those cases,

259. 532 U.S. 514, 527–58 (2001).

260. For a discussion of why *Bartnicki* appears to push in this direction, see *supra* notes 47–50 and accompanying text.

261. *See supra* note 83 and accompanying text.

262. Thompson v. W. States Med. Ctr., 535 U.S. 357, 374 (2002).

263. *See supra* note 40 and accompanying text.

264. *See supra* notes 162–67 and accompanying text.

265. *See supra* notes 189–92 and accompanying text.

perhaps the appellate court would have reached different results if it had given more weight to the fact that the suppressed speech was of very high value. Concomitantly, in the 2001 *Time Warner Entertainment* case,[266] the D.C. Circuit might have been more tolerant of the cable industry regulations it struck down if it had acknowledged the power of the governmental interest in maintaining competition and a diversity of voices. In its *Turner* decision, the Supreme Court explicitly made this point,[267] but it appears to have been lost in the cacophony of intermediate scrutiny.

Another case, this time in the commercial speech arena, where more specificity might have made a difference is *Anheuser-Busch, Inc. v. Schmoke*,[268] where the Fourth Circuit upheld a flat ban on billboard advertising of alcoholic products in most of the city of Baltimore. Given the later result in *Lorillard Tobacco*, in which the Supreme Court struck down a similar regulation of tobacco advertising,[269] the result here seems inconsistent with the Court's views, and clearer guidance from the Court might have avoided the divergence. On the other hand, in the cases involving regulation of sexually oriented businesses, such as *R.V.S., L.L.C. v. City of Rockford*,[270] a forthright statement by the Court that such regulations raise only the most attenuated First Amendment concerns, which are easily trumped by concerns about public morality, might have altered the result in all such cases where the claimants prevailed.

Finally, in the cases where courts are evaluating content-neutral regulations of speech on private property, a recognition that *neither* of the critical factors counseling for deference in other intermediate scrutiny contexts are present might well lead appellate courts to take a far more skeptical stance towards regulation. A good example is the *Rappa* case concerning roadside signs.[271] The practical consequence of the Third Circuit's decision in *Rappa* appears to be that states, if they so desire, may bar most roadside signs, even political signs (as the signs in *Rappa* were) and signs on private property. Such a ban, however, would have a substantial impact on political speech, especially the political campaigns of insurgents—and this even if the silenced speakers theoretically had access to "alternative channels of communication" in the form of radio ads or *some* road signs.[272] The First Amendment, after all, aims for *robust* public debate, not just some debate. Consider also *National Amusements v. Town of Dedham*,[273] where the First Circuit upheld a ban on the showing of movies in movie theaters between 1:00 and 6:00 a.m. Obviously,

266. *See supra* notes 174–78 and accompanying text.
267. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 663–64 (1994).
268. 63 F.3d 1305 (4th Cir. 1995).
269. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 525–26 (2001).
270. 361 F.3d 402, 404 (7th Cir. 2004).
271. *See* Rappa v. New Castle County, 18 F.3d 1043, 1047 (3d Cir. 1994).
272. *Id.* at 1077.
273. 43 F.3d 731, 749 (1st Cir. 1995).

the speech interests in this case were not as powerful as in *Rappa*, but neither were they trivial. Crucially, however, the court upheld the ban under intermediate scrutiny by applying the deferential form of tailoring analysis derived from *Ward*, under which regulations are typically upheld so long as *some* alternative channels of communication exist (something that will almost always be true with time restrictions).[274] If, on the other hand, the court had insisted that the government demonstrate that a flat ban on speech (as opposed to a more tailored regulation) was necessary to prevent *substantial* harm, the case might have come out differently.

CONCLUSION

Over the past two to three decades, a new, overarching doctrine has emerged in the area of free speech jurisprudence: the test of intermediate scrutiny. The test was born as a result of the consolidation and merger of a number of distinct strands of First Amendment doctrine, including notably public forum analysis, symbolic conduct analysis, the commercial speech doctrine, and the *Pickering* balancing test for restrictions on government employee speech. Since the mid-1990s, however, especially in the decisions of the courts of appeals, the intermediate scrutiny test is fast becoming, in Justice Scalia's words, a "default standard" applicable to essentially all free speech cases where strict scrutiny is not, for some reason, appropriate. Its importance is thus very substantial.

In this article, I have examined how First Amendment intermediate scrutiny functions in practice in the U.S. courts of appeals. After examining in some detail the substantial body of intermediate scrutiny case law that has emerged over the past two decades, I conclude that the test does not function very well. In particular, when applying intermediate scrutiny, the courts of appeals decide cases in ways that do not seem to accord with the policies expressed in Supreme Court decisions, the decisions appear to systematically favor the government, and most problematically, the overall pattern of the decisions does not demonstrate any coherent constitutional or social policy.

The doctrinal solution I propose to this problem, which should alleviate at least some of the dysfunctions revealed by an analysis of the cases, is disaggregation. The doctrinal merger that has occurred should be reversed, and instead the Supreme Court, and the judiciary generally, should restart the process of building distinct, detailed bodies of jurisprudence within the different areas of free speech law currently subsumed in the intermediate scrutiny rubric. Such a jurisprudence, or such a body of jurisprudences, promises to enable the Supreme Court to provide clearer answers to the difficult questions raised in intermediate scrutiny cases regarding the relative weights to be accorded speech and broad

274. *Id.* at 744–46.

societal interests, and generally to provide better guidance to the lower courts.

The task proposed here is concededly not an easy one. Each of the distinct bodies of law that have in recent years become subsumed into intermediate scrutiny deserves a careful, independent analysis of the relevant constitutional and regulatory policies that are raised therein. This will take time and effort, both in the courts and in the scholarly literature. But the effort is worthwhile because the issues here are sufficiently important, and the promise of improvement sufficiently real. It is worthwhile because despite the seeming triviality of many of the individual cases treated here, collectively their resolution has a substantial impact on the shape and content of public debate in our country. And after all, preserving the vitality of that debate is what the First Amendment is all about.

APPENDIX A

FIRST AMENDMENT INTERMEDIATE SCRUTINY CASES IN THE U.S. COURTS OF APPEALS, 1983–2005

	Citation	Category	Prevailing Party
1.	FOP v. Stenehjem, 431 F.3d 591 (8th Cir. 2005).	Charitable Solicitations	Gov't
2.	United States v. Wenger, 427 F.3d 840 (10th Cir. 2005).	Commercial Speech	Gov't
3.	Nat'l Fed'n of the Blind v. FTC, 420 F.3d 331 (4th Cir. 2005).	Charitable Solicitations	Gov't
4.	Odle v. Decatur County, 421 F.3d 386 (6th Cir. 2005).	Sexually Oriented Businesses	Claimant
5.	Wirzburger v. Galvin, 412 F.3d 271 (1st Cir. 2005).	Symbolic Conduct	Gov't
6.	Zibtluda, LLC v. Gwinnett County, 411 F.3d 1278 (11th Cir. 2005).	Sexually Oriented Businesses	Gov't
7.	Prime Media, Inc. v. City of Brentwood, 398 F.3d 814 (6th Cir. 2005).	Private Speech	Gov't
8.	Gammoh v. City of La Habra, 395 F.3d 1114 (9th Cir. 2005).	Sexually Oriented Businesses	Gov't
9.	McGuire v. Reilly, 386 F.3d 45 (1st Cir. 2004).	Time, Place and Manner Regulations of the Public Forum	Gov't
10.	Dream Palace v. County of Maricopa, 384 F.3d 990 (9th Cir. 2004).	Sexually Oriented Businesses	Gov't
11.	United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004).	Symbolic Conduct	Gov't
12.	Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8 (1st Cir. 2004).	Time, Place and Manner Regulations of the Public Forum	Gov't
13.	Capobianco v. Summers, 377 F.3d 559 (6th Cir. 2004).	Commercial Speech	Gov't
14.	World Wide Video of Wash., Inc. v. City of Spokane, 368 F.3d 1186 (9th Cir. 2004).	Sexually Oriented Businesses	Gov't
15.	R.V.S., L.L.C. v. City of Rockford, 361 F.3d 402 (7th Cir. 2004).	Sexually Oriented Businesses	Claimant
16.	Hodgkins v. Peterson, 355 F.3d 1048 (7th Cir. 2004).	Symbolic Conduct	Claimant
17.	Am. Acad. of Pain Mgmt. v. Joseph, 353 F.3d 1099 (9th Cir. 2004).	Commercial Speech	Gov't
18.	G.M. Enters. v. Town of St. Joseph, 350 F.3d 631 (7th Cir. 2003).	Sexually Oriented Businesses	Gov't
19.	N.W. Enters. v. City of Houston, 352 F.3d 162 (5th Cir. 2003).	Sexually Oriented Businesses	Gov't
20.	Heideman v. S. Salt Lake City, 348 F.3d 1182 (10th Cir. 2003).	Sexually Oriented Businesses	Gov't
21.	Neinast v. Bd. of Trs. of the Columbus Metro. Library, 346 F.3d 585 (6th Cir. 2003).	Time, Place and Manner Regulations of the Public Forum	Gov't
22.	BGHA, LLC v. City of Universal City, 340 F.3d 295 (5th Cir. 2003).	Sexually Oriented Businesses	Gov't
23.	Ctr. for Fair Pub. Policy v. Maricopa County, 336 F.3d 1153 (9th Cir. 2003).	Sexually Oriented Businesses	Gov't
24.	Fly Fish, Inc. v. City of Cocoa Beach, 337 F.3d 1301 (11th Cir. 2003).	Sexually Oriented Businesses	Claimant

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	Citation	Category	Prevailing Party
25.	Peek-a-Boo Lounge of Bradenton, Inc. v. Manatee County, 337 F.3d 1251 (11th Cir. 2003).	Sexually Oriented Businesses	Claimant
26.	Ruggiero v. FCC, 317 F.3d 239 (D.C. Cir. 2003).	Mass Media	Gov't
27.	SOB, Inc. v. County of Benton, 317 F.3d 856 (8th Cir. 2003).	Sexually Oriented Businesses	Gov't
28.	Ben's Bar, Inc. v. Vill. of Somerset, 316 F.3d 702 (7th Cir. 2003).	Sexually Oriented Businesses	Gov't
29.	Z.J. Gifts D-4, L.L.C. v. City of Littleton, 311 F.3d 1220 (10th Cir. 2002).	Sexually Oriented Businesses	Gov't
30.	Encore Videos v. City of San Antonio, 310 F.3d 812 (5th Cir. 2002).	Sexually Oriented Businesses	Claimant
31.	Casey v. City of Newport, 308 F.3d 106 (1st Cir. 2002).	Private Speech	Claimant
32.	Giovani Carandola, Ltd. v. Bason, 303 F.3d 507 (4th Cir. 2002).	Sexually Oriented Businesses	Claimant
33.	Norton v. Ashcroft, 298 F.3d 547 (6th Cir. 2002).	Time, Place and Manner Regulations of the Public Forum	Gov't
34.	Spingola v. Vill. of Granville, 39 Fed. Appx. 978 (6th Cir. 2002).	Time, Place and Manner Regulations of the Public Forum	Gov't
35.	Essence, Inc. v. City of Fed. Heights, 285 F.3d 1272 (10th Cir. 2002).	Sexually Oriented Businesses	Claimant
36.	Gun Owners' Action League v. Swift, 284 F.3d 198 (1st Cir. 2002).	Symbolic Conduct	Gov't
37.	Taxi Cabvertising, Inc. v. City of Myrtle Beach, 26 Fed. Appx. 206 (4th Cir. 2002).	Time, Place and Manner Regulations of the Public Forum	Gov't
38.	Satellite Broad. & Commc'ns Ass'n v. FCC, 275 F.3d 337 (4th Cir. 2001).	Mass Media	Gov't
39.	Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County, 274 F.3d 377 (6th Cir. 2001).	Sexually Oriented Businesses	Gov't
40.	Knights of Columbus v. Town of Lexington, 272 F.3d 25 (1st Cir. 2001).	Time, Place and Manner Regulations of the Public Forum	Gov't
41.	Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001).	Private Speech	Gov't
42.	Trans Union Corp. v. FTC, 267 F.3d 1138 (D.C. Cir. 2001).	Private Speech	Gov't
43.	CBS Broad., Inc. v. EchoStar Commc'ns Corp., 265 F.3d 1193 (11th Cir. 2001).	Mass Media	Gov't
44.	Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n, 262 F.3d 543 (6th Cir. 2001).	Private Speech	Gov't
45.	McGuire v. Reilly, 260 F.3d 36 (1st Cir. 2001).	Time, Place and Manner Regulations of the Public Forum	Gov't
46.	Utah Licensed Bev. Ass'n v. Leavitt, 256 F.3d 1061 (10th Cir. 2001).	Commercial Speech	Claimant
47.	Chambers v. Stengel, 256 F.3d 397 (6th Cir. 2001).	Commercial Speech	Gov't

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	Citation	Category	Prevailing Party
48.	Time Warner Entm't Co. v. FCC, 240 F.3d 1126 (D.C. 2001).	Mass Media	Claimant
49.	Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 240 F.3d 553 (6th Cir. 2001).	Private Speech	Gov't
50.	Flanigan's Enters. v. Fulton County, 242 F.3d 976 (11th Cir. 2001).	Sexually Oriented Businesses	Claimant
51.	Schultz v. City of Cumberland, 228 F.3d 831 (7th Cir. 2000).	Sexually Oriented Businesses	Gov't
52.	Artistic Entm't, Inc. v. City of Warner Robins, 223 F.3d 1306 (11th Cir. 2000).	Sexually Oriented Businesses	Gov't
53.	Int'l Ass'n of Firefighters v. City of Kansas City, 220 F.3d 969 (8th Cir. 2000).	Speech of Gov't Employees	Gov't
54.	Peavy v. WFAA-TV, Inc., 221 F.3d 158 (5th Cir. 2000).	Symbolic Conduct	Gov't
55.	Alameda Books, Inc. v. City of Los Angeles, 222 F.3d 719 (9th Cir. 2000).	Sexually Oriented Businesses	Claimant
56.	Consol. Cigar Corp. v. Reilly, 218 F.3d 30 (1st Cir. 2000).	Commercial Speech	Gov't
57.	Wise Enters. v. Unified Gov't, 217 F.3d 1360 (11th Cir. 2000).	Sexually Oriented Businesses	Gov't
58.	Time Warner Entm't Co. v. United States, 211 F.3d 1313 (D.C. Cir. 2000).	Mass Media	Gov't
59.	Humanitarian Law Project v. Reno, 205 F.3d 1130 (9th Cir. 2000).	Symbolic Conduct	Gov't
60.	Am. Target Adver., Inc. v. Giani, 199 F.3d 1241 (10th Cir. 2000).	Charitable Solicitations	Gov't
61.	Bartnicki v. Vopper, 200 F.3d 109 (3d Cir. 1999).	Private Speech	Claimant
62.	D.H.L. Assocs. v. O'Gorman, 199 F.3d 50 (1st Cir. 1999).	Sexually Oriented Businesses	Gov't
63.	Boehner v. McDermott, 191 F.3d 463 (D.C. Cir. 1999).	Symbolic Conduct	Gov't
64.	United States v. Popa, 187 F.3d 672 (D.C. Cir. 1999).	Symbolic Conduct	Claimant
65.	DiMa Corp. v. Town of Hallie, 185 F.3d 823 (7th Cir. 1999).	Sexually Oriented Businesses	Gov't
66.	Horton v. City of Houston, 179 F.3d 188 (5th Cir. 1999).	Mass Media	Claimant
67.	Rounds v. Oregon State Bd. of Higher Educ., 166 F.3d 1032 (9th Cir. 1999).	Private Speech	Gov't
68.	Schleifer v. City of Charlottesville, 159 F.3d 843 (4th Cir. 1998).	Symbolic Conduct	Gov't
69.	J & B Entm't v. City of Jackson, 152 F.3d 362 (5th Cir. 1998).	Sexually Oriented Businesses	Claimant
70.	Connection Distrib. Co. v. Reno, 154 F.3d 281 (6th Cir. 1998).	Private Speech	Gov't
71.	United States v. Wilson, 154 F.3d 658 (7th Cir. 1998).	Symbolic Conduct	Gov't
72.	BellSouth Corp. v. FCC, 144 F.3d 58 (D.C. Cir. 1998).	Mass Media	Gov't
73.	Sammy's Ltd. v. City of Mobile, 140 F.3d 993 (11th Cir. 1998).	Sexually Oriented Businesses	Gov't

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	Citation	Category	Prevailing Party
74.	Foti v. City of Menlo Park, 146 F.3d 629 (9th Cir. 1998).	Time, Place and Manner Regulations of the Public Forum	Gov't
75.	Boyle v. County of Allegheny, 139 F.3d 386 (3d Cir. 1998).	Speech of Gov't Employees	Claimant
76.	Richland Bookmart v. Nichols, 137 F.3d 435 (6th Cir. 1998).	Sexually Oriented Businesses	Gov't
77.	Z.J. Gifts D-2, L.L.C. v. City of Aurora, 136 F.3d 683 (10th Cir. 1998).	Sexually Oriented Businesses	Gov't
78.	Helguero v. City of Costa Mesa, No. 97-55686, 1998 U.S. App. LEXIS 1689 (9th Cir. Feb. 3, 1998).	Private Speech	Gov't
79.	U.S. Sound & Serv. v. Twp. of Brick, 126 F.3d 555 (3d Cir. 1997).	Sexually Oriented Businesses	Claimant
80.	Ben Rich Trading v. City of Vineland, 126 F.3d 155 (3d Cir. 1997).	Sexually Oriented Businesses	Gov't
81.	Ficker v. Curran, 119 F.3d 1150 (4th Cir. 1997).	Commercial Speech	Claimant
82.	Nunez by Nunez v. City of San Diego, 114 F.3d 935 (9th Cir. 1997).	Time, Place and Manner Regulations of the Public Forum	Claimant
83.	McDevitt v. Disciplinary Bd. of the Supreme Court, No. 96-2094, 1997 U.S. App. LEXIS 3706 (10th Cir. 1997).	Commercial Speech	Gov't
84.	Valley Broad. Co. v. United States, 107 F.3d 1328 (9th Cir. 1997).	Commercial Speech	Claimant
85.	Phillips v. Borough of Keyport, 107 F.3d 164 (3d Cir. 1997).	Sexually Oriented Businesses	Claimant
86.	Michigan State AFL-CIO v. Miller, 103 F.3d 1240 (6th Cir. 1997).	Political Contributions	Gov't
87.	Globe Newspaper Co. v. Beacon Hill Architectural Comm'n, 100 F.3d 175 (1st Cir. 1996).	Time, Place and Manner Regulations of the Public Forum	Gov't
88.	Time Warner Entm't Co. v. FCC, 93 F.3d 957 (D.C. Cir. 1996).	Mass Media	Gov't
89.	Weaver v. U.S. Info. Agency, 87 F.3d 1429 (D.C. Cir. 1996).	Speech of Gov't Employees	Gov't
90.	Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996).	Speech of Gov't Employees	Gov't
91.	Jones Intercable v. City of Chula Vista, 80 F.3d 320 (9th Cir. 1996).	Mass Media	Gov't
92.	Republican Nat'l Comm. v. Fed. Election Comm'n, 76 F.3d 400 (D.C. Cir. 1996).	Political Contributions	Gov't
93.	United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996).	Symbolic Conduct	Gov't
94.	Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 1305 (4th Cir. 1995).	Commercial Speech	Gov't
95.	Van Bergen v. Minnesota, 59 F.3d 1541 (8th Cir. 1995).	Private Speech	Gov't
96.	Time Warner Entm't Co. v. FCC, 56 F.3d 151 (D.C. Cir. 1995).	Mass Media	Gov't
97.	Am. Life League v. Reno, 47 F.3d 642 (4th Cir. 1995).	Symbolic Conduct	Gov't

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	Citation	Category	Prevailing Party
98.	Vittitow v. City of Upper Arlington, 43 F.3d 1100 (6th Cir. 1995).	Time, Place and Manner Regulations of the Public Forum	Claimant
99.	Nat'l Amusements v. Town of Dedham, 43 F.3d 731 (1st Cir. 1995).	Private Speech	Gov't
100.	US West v. United States, 48 F.3d 1092 (9th Cir. 1994).	Mass Media	Claimant
101.	Chesapeake & Potomac Tel. Co. v. United States, 42 F.3d 181 (4th Cir. 1994).	Mass Media	Claimant
102.	Ass'n of Nat'l Advertisers v. Lungren, 44 F.3d 726 (9th Cir. 1994).	Commercial Speech	Gov't
103.	Am. Library Ass'n v. Reno, 33 F.3d 78 (D.C. Cir. 1994).	Private Speech	Gov't
104.	MD II Entm't v. City of Dallas, 28 F.3d 492 (5th Cir. 1994).	Commercial Speech	Claimant
105.	Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994).	Private Speech	Gov't
106.	Fed. Election Comm'n v. Int'l Funding Inst., Inc., 969 F.2d 1110 (D.C. Cir. 1992).	Private Speech	Gov't
107.	Walsh v. Brady, 927 F.2d 1229 (D.C. Cir. 1991).	Symbolic Conduct	Gov't
108.	Hall v. Curran, 818 F.2d 1040 (2d Cir. 1987).	Private Speech	Claimant
109.	Rios v. Lane, 812 F.2d 1032 (7th Cir. 1987).	Private Speech	Gov't
110.	Glover v. Cole, 762 F.2d 1197 (4th Cir. 1985).	Time, Place and Manner Regulations of the Public Forum	Gov't
111.	Lamar Outdoor Adver., Inc. v. Mississippi State Tax Comm'n, 701 F.2d 314 (5th Cir. 1983).	Commercial Speech	Claimant