Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-abortion Protests

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In important respects, freedom of speech reinforces virtually every other important right protected by the Constitution. This is as true for privacy rights and reproductive freedom as it is for the right to racial equality and the right to practice one's religion without state interference. To cite only one obvious example, freedom of speech directly facilitates the right to have an abortion by invalidating laws that prohibit the advertising of abortion services.[1]

Despite this obvious and important truism, there is also no question that expressive activity in some circumstances may interfere seriously with the right of women to choose to have an abortion.[2] To the extent that the First Amendment can be asserted to protect expression of this kind, courts must confront a conflict between constitutionally protected interests. Complex issues of constitutional law arise when the First Amendment is raised as a shield to protect expressive activity that burdens reproductive autonomy.

This complexity has several sources. First, it is never a simple task to reconcile or balance competing interests of recognized importance when two rights are ostensibly placed in conflict.

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[1] Bigelow v. Virginia, 421 U.S. 809 (1975).

[2] Technically speaking, of course, private expressive activity can not interfere with the exercise of a constitutional right since rights are only protected against state action. *See infra* note 145 and accompanying text. Having dutifully reported this truism, however, I declare myself free to describe expressive activity as interfering with the exercise of constitutional rights in the conventionally accepted, non-technical sense of interfering with an interest that is protected by the Constitution against state abridgment. *See generally* Burson v. Freeman, 504 U.S. 191, 206 (1992) (upholding content-discriminatory prohibition of distribution of private political campaign material within 100 feet of polling place as necessary to protect right to vote against fraud and intimidation).

Second, expressive activity regarding abortion occurs in a variety of different circumstances — each of which may raise a distinct First Amendment question. Finally, free speech doctrine as a general matter is incoherent today because of the Supreme Court's fragmented and inconsistent decisions in recent years interpreting the First Amendment.[3]

The goal of this paper is to resolve three issues relating to freedom of speech and abortion rights that arise out of the civil and criminal litigation surrounding protest activity in the vicinity of clinics providing abortion services. These issues are important because of their practical consequences for the thousands of persons who seek reproductive health care at clinics or are actively involved in protesting the availability of abortion services. They are also important at a more abstract level because they force courts and commentators to grapple with difficult ambiguities regarding the meaning of freedom of speech.

The first issue relates to the constitutionality of FACE, the Freedom of Access to Clinic Entrances Act.[4] Part I of the Article describes the current state of the case law evaluating the constitutionality of FACE and explains the difficulty lower courts have experienced in determining whether FACE violates the First

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[3] There are too many examples of doctrinal incoherence in the Court's free speech cases to list in one footnote. I suggest the following areas of confusion only as illustrations and without any attempt to be comprehensive. The review of laws regulating unprotected speech has been rendered hopelessly confused since the Court decided R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). Public forum analysis is muddled and unclear. *See, e.g.*, International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992). Determining whether a law is content-discriminatory or viewpoint-discriminatory seems far more result-oriented than principled. *Compare* (or try to intelligibly compare) Boos v. Barry, 485 U.S. 312 (1988) (content-discrimination), Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985) (content-discrimination), Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (content-discrimination), *and* Greer v. Spock, 424 U.S. 828 (1976) (content-discrimination) *with* Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510 (1995) (viewpoint-discrimination). Readers are invited to add to this list at their discretion. *See* STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY & ROMANCE 3 (1990) (noting that current formulations of First Amendment law are "complicated enough to inspire comparisons with the Internal Revenue Code"); Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1249-50 (1995) (suggesting that "contemporary First Amendment doctrine is nevertheless striking chiefly for its superficiality, its internal incoherence, its distressing failure to facilitate constructive judicial engagement with significant contemporary social issues connected with freedom of speech").

[4] Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C.A. § 248 (West Supp. 1995).

Amendment. This subsection identifies the Supreme Court's recent decisions in *R.A.V. v. City of St. Paul* and *Wisconsin v. Mitchell* as the primary reason for lower court uncertainty and incoherence in resolving the constitutionality of FACE.

Parts II and III of the Article present a direct challenge to the reasoning of *R.A.V.* and *Mitchell*, particularly with respect to the Court's conclusion that the content-discriminatory regulation of unprotected speech must receive strict scrutiny. The arguments justifying the rigorous review of content-discriminatory regulation of *protected* speech are examined to see if these rationales are generally applicable to the regulation of *unprotected* speech. After establishing that strict scrutiny review of content-discriminatory laws restricting unprotected speech cannot be justified, and that the Court's holding in *R.A.V.* is thus substantially in error, the Article offers an alternative model for reviewing the regulation of expressive conduct and unprotected speech. A demonstration of the utility of this new model in addressing the constitutionality of FACE concludes the analysis.

The second issue relates to the regulation of expressive activity outside of reproductive health clinics that constitutes harassment. Part IV of the Article examines the nature of expressive harassment and identifies criteria to be used to determine whether laws prohibiting harassment comply with First Amendment guarantees. An analysis of how harassment regulations might apply to anti-abortion protests outside of reproductive health clinics concludes this section.

The final issue is whether regulatory actions to anti-abortion protests can be legitimated as a mediating response to the conflict between two constitutionally protected interests: freedom of speech and reproductive autonomy. Part V of the Article considers the validity of "constitutional compromises" adopted by states to accommodate the competing interests that are at stake when the exercise of one right interferes with the exercise of another right. This subsection concludes that carefully considered regulations attempting to implement such "compromises" should withstand constitutional review.

Because of its length, this Article is being published in two sections. The first section, published in this issue, includes Parts I, II, and III. It discusses the constitutionality of FACE and critiques the Supreme Court's decisions in *R.A.V.* and *Mitchell*. The

second section, published in volume 29, issue 4 of the *U.C. Davis Law Review,* includes Parts IV and V of the Article. It examines the regulation of harassment outside of clinics and the extent to which even protected speech may be restricted to accommodate the exercise of privacy and autonomy rights.

I. THE CONSTITUTIONALITY OF FACE, THE FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT

It is axiomatic under current free speech doctrine that not all protest activity intended to communicate a message is protected by the First Amendment. Protests in which unlawful conduct occurs or in which unprotected speech is expressed are subject to prohibition and sanction.[5] The recently enacted Freedom of Access to Clinic Entrances Act attempts to implement that constitutionally permissible objective by restricting certain disruptive and threatening activities relating to obtaining or providing reproductive health services. FACE subjects any person to civil or criminal sanction who:

> [B]y force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services.[6]

FACE, to my mind, should be upheld as constitutional against any facial challenge. As a summary of current judicial decisions, this conclusion is unexceptional. Every federal court that has reviewed the statute to date has held that it does not violate the First Amendment.[7]

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[5] *See, e.g.,* Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516 (1994) (upholding order erecting 36-foot buffer zone issued in response to petitioners' prior unlawful conduct); NAACP v. Claiborne, 458 U.S. 886 (1982) (drawing line between unlawful conduct that may be restricted and lawful conduct that is protected against restraint); NOW v. Operation Rescue, 37 F.3d 646 (D.C. Cir. 1994) (upholding injunction limiting picketing where protestors had unlawfully trespassed on private property); NLRB v. Building Serv. Employees Int'l Union, 367 F.2d 227 (10th Cir. 1966) (holding that NLRB may prohibit unlawful conduct in regulating picketing); M Restaurants v. San Francisco Local Joint Exec. Bd. of Culinary Workers, 177 Cal. Rptr. 690, 699 (Ct. App. 1982) (stating that "[i]t is well established that unlawful activities, such as violence, intimidation and obstruction, may be enjoined by the courts").

[6] 18 U.S.C.A. § 248.

[7] *See* Cheffer v. Reno, 55 F.3d 1517, 1521-22 (11th Cir. 1995); Woodall v. Reno, 47

Establishing the constitutionality of FACE, however, is much more difficult than it needs to be because of two recent United States Supreme Court decisions dealing with the regulation of hate speech and hate crimes, *R.A.V. v. City of Saint Paul*[8] and *Wisconsin v. Mitchell*.[9] FACE, in a sense, serves as a useful prism through which *R.A.V.* and *Mitchell* may be interpreted and evaluated. Indeed, what may be most noteworthy about the case law upholding FACE is that these lower court opinions help to demonstrate the significant failings and untenable reasoning of the Supreme Court's analysis in *R.A.V.* and *Mitchell*. It appears from the FACE decisions, and other cases, that the lower courts either do not understand what the majority opinion said in *R.A.V.* or, more likely, that they believe the reasoning of *R.A.V.* makes so little sense that the Court cannot have meant what it said.

Since the FACE cases depend so much on an understanding of the Court's analysis in *R.A.V.* and *Mitchell*, it is important to review these two cases with some care before considering the constitutionality of FACE directly. The majority opinion in *R.A.V.* struck down a St. Paul ordinance that prohibited certain kinds of hate speech. In doing so, the Court held that when a state regulates unprotected expression, as a general matter it cannot discriminate on the basis of content or viewpoint within the restricted category of unprotected speech.[10] Thus, a state may prohibit the expression of fighting words, but if it attempts to prohibit only those fighting words that constitute racist hate speech, the regulation will be subject to strict scrutiny and probably struck down.[11]

F.3d 656, 657-58 (4th Cir.), *cert. denied*, 115 S. Ct. 2577 (1995); American Life League, Inc. v. Reno, 47 F.3d 642, 652 (4th Cir.), *cert. denied*, 116 S. Ct. 55 (1995); United States v. Lucero, 895 F. Supp. 1421, 1424-25 (D. Kan. 1995); United States v. White, 893 F. Supp. 1423, 1437 (C.D. Cal. 1995); United States v. Dinwiddie, 885 F. Supp. 1286, 1289-90 (W.D. Mo. 1995); United States v. Brock, 863 F. Supp. 851, 856 (E.D. Wis. 1994); Riely v. Reno, 860 F. Supp. 693, 704 (D. Ariz. 1994); Cook v. Reno, 859 F. Supp. 1008, 1010 (W.D. La. 1994); Council for Life Coalition v. Reno, 856 F. Supp. 1422, 1426, 1431 (S.D. Cal. 1994); American Life League, Inc. v. Reno, 855 F. Supp. 137, 142 (E.D. Va. 1994), *aff'd*, 47 F.3d 642 (4th Cir.), *cert. denied*, 116 S. Ct. 55 (1995).

[8] 505 U.S. 377 (1992).

[9] 508 U.S. 476 (1993).

[10] *R.A.V.*, 505 U.S. at 384.

[11] *Id.* at 391.

Prior to its decision in *R.A.V.*, the Court had never before indicated that discriminatory restrictions within a category of unprotected speech must be reviewed under strict scrutiny.[12] Moreover, many existing regulations restricting unprotected speech, the constitutionality of which had never been doubted, appear to discriminate on the basis of the content of speech in apparent violation of *R.A.V.*'s principle. Accordingly, the majority opinion in *R.A.V.* described a long list of exceptions to its core holding.[13]

While these exceptions invite confusion as to their scope and application, a point Justice White reiterated in his concurrence,[14] they do reinforce one important component of the *R.A.V.* holding. The *R.A.V.* holding as written cannot be limited to viewpoint discrimination alone. It applies with equal rigor to

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[12] *Id.* at 400 (White, J., concurring). *See also* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 196 n.27 (1983) [hereinafter *Content Regulation*] (arguing that Supreme Court's cases requiring rigorous review of content-discriminatory speech regulations were never "intended to extend to low value [unprotected] expression").

[13] Justice Scalia's majority opinion lists the following exceptions to the general rule that content or viewpoint discrimination within a category of unprotected speech must receive strict scrutiny:

1. Strict scrutiny is not required "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable." *R.A.V.*, 505 U.S. at 388. Scalia posits that "no significant danger of idea or viewpoint discrimination exists" in such circumstances because the defining reason why an entire category of speech is determined to be unprotected in the first place is understood to be sufficiently neutral that it does not create any risk of suppressing ideas. *Id.*

2. Strict scrutiny is not required when the subclass of speech that is the subject of content discrimination "happens to be associated with particular 'secondary effects' of the speech." *Id.* at 389. Again, content discrimination of this kind creates no risk of suppressing ideas because the justification for the regulation, the goal of eliminating secondary effects of speech, does not directly refer to the content of the speech at issue. *Id.*

3. Strict scrutiny is not required if "a particular content-based subcategory of a proscribable class of speech" is "swept up incidentally within the reach of a statute directed at conduct rather than speech." *Id.* Since the government's target in these circumstances is the conduct being regulated, not the message that the conduct expresses, such regulations do not suppress ideas as such. *Id.* at 389-90.

4. Strict scrutiny is not required if the state prohibits the expression of unprotected speech directed at a specific class of individuals. *Id.* at 392.

5. Finally, strict scrutiny is not required under an all-purpose exception that exempts all content-discriminatory regulations "so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." *Id.* at 390.

[14] *Id.* at 411 (White, J., concurring).

either content or viewpoint discrimination within a category of unprotected speech.[15] The exceptions confirm this interpretation of the *R.A.V.* opinion because so many of them, and Justice Scalia's illustrations of their meaning, involve content discrimination, but not viewpoint discrimination.

Consider, for example, those laws as to which "the basis for content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable."[16] All of the examples Justice Scalia offers to demonstrate this exception involve content discrimination, not viewpoint discrimination. These include a law prohibiting "only that obscenity which is the most patently offensive in its prurience,"[17] a law criminalizing threats of violence against the President,[18] and a law regulating price advertising in one industry but not others.[19] Obviously, if the holding of *R.A.V.* was intended to apply only to viewpoint-discriminatory laws, there would have been no reason to list all of these content-discriminatory examples as illustrative exceptions to the First Amendment's "prohibition against content discrimination."

The holding of *R.A.V.* is limited in one respect that is critically important to the constitutional review of FACE. The rule of *R.A.V.* applies differently to restrictions on unprotected speech than it does to restrictions on conduct. This distinction is difficult to understand and explain. However, it is the only way to make sense out of the reasoning of *R.A.V.* itself and, more importantly, the Court's discussion of *R.A.V.* in *Wisconsin v. Mitchell*,[20] a case upholding the constitutionality of a hate crimes statute.

In *R.A.V.*, the Court stated that "[w]here the government does not target conduct on the basis of its expressive content,

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[15] Most commentators discussing *R.A.V.* recognize this explicitly. *See, e.g.*, Steven H. Shiffrin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America*, 80 CORNELL L. REV. 43, 50-51 (1994). I emphasize that *R.A.V.* requires strict scrutiny for content discrimination as well as viewpoint discrimination within a category of unprotected speech only because some of my students, and an occasional colleague, try to read *R.A.V.* as if it applies exclusively to viewpoint discrimination in a futile attempt to make sense of the opinion.

[16] *R.A.V.*, 505 U.S. at 388.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] 508 U.S. 476 (1993).

acts are not shielded from regulation merely because they express a discriminatory idea or philosophy."[21] Since the St. Paul ordinance was directed at the message communicated by proscribed fighting words, not at conduct unrelated to expression, it did not fall within this exception. In *Mitchell*, on the other hand, the Court used similar language to distinguish *R.A.V.* and uphold a Wisconsin statute that enhanced the penalty for racially motivated assaults. "[W]hereas the ordinance struck down in *R.A.V.* was explicitly directed at expression," the Court explained, "the statute in this case is aimed at conduct unprotected by the First Amendment."[22]

In what sense, however, was the hate crimes statute upheld in *Mitchell* directed at conduct while the St. Paul ordinance struck down in *R.A.V.* was directed at speech? Or to put it another way, are there other differences between these two laws that might account for this disparity in result? One possible distinction relates to the Court's discussion of motive in *Mitchell* and the emphasis it places on the legitimacy of taking the perpetrator's motives into account in proscribing conduct. The Court's focus on motive in *Mitchell*, however, cannot adequately distinguish the reasoning of *R.A.V.*

Both the St. Paul ordinance and the Wisconsin statute are directed at bias-motivated behavior. The statute in *Mitchell* punishes the perpetrator of aggravated battery who selects his victim because of the victim's race. Thus, the statute "enhances the maximum penalty for conduct motivated by a discriminatory point of view more severely than the same conduct engaged in for some other reason or for no reason at all."[23] Similarly, the ordinance struck down in *R.A.V.* was directed at fighting words that contained messages of "'bias-motivated hatred.'"[24] By punishing only persons who knew or had reason to know that the fighting words they expressed would arouse anger or resentment on the basis of race, St. Paul was clearly focusing its law on the speakers' motives as well as their language.[25] Thus, the differ-

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[21] *R.A.V.*, 505 U.S. at 390.

[22] *Mitchell*, 508 U.S. at 487.

[23] *Id.* at 485.

[24] *R.A.V.*, 505 U.S. at 392.

[25] *Id.* at 377. One might argue that by punishing persons who had "reason to know," but were not actually aware of the effect their speech would have, St. Paul's ordinance

ence in result in *R.A.V.* and *Mitchell* cannot be explained by arguing that the law in one case was directed at motive while the law in the other was not. Instead, we must ask why a law directed at belief-motivated conduct is less problematic for First Amendment purposes than a law directed at belief-motivated speech.

The Court's analyses in *R.A.V.* and *Mitchell* are also linked by a common analogy – Title VII's ban on racial and gender discrimination in employment. Here, however, the common ground is of more help in reconciling the two decisions. In support of its holding in *Mitchell*, the Court notes that Title VII is directed at the offending employer's discriminatory motive in making employment decisions. Nonetheless, Title VII does not violate the First Amendment. Thus, the Court concludes, a law directed at bias-motivated conduct may be constitutional.[26] The Court distinguishes Title VII's restrictions on the use of sexually derogatory fighting words from the St. Paul ordinance struck down in *R.A.V.* on similar grounds. Title VII is directed at conduct, race and gender discrimination in employment. To the extent that it restricts speech in prohibiting discrimination, it does so only when the prohibited speech constitutes the very conduct that is proscribed.[27]

These references to Title VII begin to explain the distinction between belief-motivated speech and conduct on which the decisions in *R.A.V.* and *Mitchell* are based. Speech can constitute conduct. Beliefs can motivate conduct. In either case, the conduct in question, sexually derogatory fighting words that constitute employment discrimination or racially motivated assaults, can be engaged in to express a message. The fact that either form of conduct may be expressive in nature, however, does not mean that it cannot be prohibited without violating the First Amendment. As long as the state has a legitimate basis for prohibiting the speech that constitutes conduct or bias-motivated

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regulated negligently-expressed as well as deliberately-intended hate speech. While that possibility exists, the Court clearly interpreted the ordinance to be directed at bias-motivated expression. Further, it is unlikely that the Court's analysis would change if the "reason to know language" was excised from the statute. Certainly, the Court did not suggest that the inclusion of this language was relevant to its analysis.

[26] *Mitchell*, 508 U.S. at 486.

[27] *R.A.V.*, 505 U.S. at 389.

conduct in question, and it is directing its regulatory attention at the conduct dimension of the restricted activity, a law prohibiting either form of conduct will be upheld.

A law prohibiting speech itself, however, even if it is directed at unprotected speech, will be treated differently. If speech is not independently proscribable as conduct, as fighting words in general are not, its prohibition necessarily implicates the First Amendment.[28] Because laws regulating speech that is not independently proscribable as conduct always result in the restriction of expressive content, laws regulating such speech, like the St. Paul hate speech ordinance struck down in *R.A.V.*, will always raise distinct First Amendment concerns.

Moreover, these First Amendment concerns *cannot* be avoided by focusing a regulation on the speaker's motives rather than the content of her speech. This is, perhaps, the critical distinction between *R.A.V.* and *Mitchell*. A law regulating conduct that may or may not be expressive in nature can be limited in its application to persons who act with particular motives while

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[28] Justice Scalia is simply wrong when he suggests to the contrary that fighting words represent "a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey," and are thus, a "non-speech," content-neutral "element of communication, . . . analogous to a noisy sound truck." *R.A.V.*, 505 U.S. at 393, 386 (emphasis added). Fighting words can not be independently proscribed as a form of conduct without regard to their expressive content. People who doubt this assertion must ask themselves whether they believe a loud, passionate, in-your-face statement of the words "I think you are a wonderful human being" constitutes fighting words. Of course, this statement is unlikely to inspire the person being addressed to punch the speaker in the nose. The statement does not really constitute fighting words. But that is the point. We cannot identify fighting words without considering what a person says as well as how she says it.

Indeed, it is hard to believe that Scalia truly believes his own argument on this point. Elsewhere in his opinion, Scalia explains why he thinks that the St. Paul Ordinance discriminates among fighting words on the basis of viewpoint. He uses as an illustration two people carrying signs, one of which states that "all 'anti-Catholic bigots' are misbegotten" while the other employs similar pejorative language to describe "all 'papists.'" *Id.* at 391-92. Scalia argues that the St. Paul ordinance is viewpoint-discriminatory because it would only prohibit the latter fighting words. *Id.* But surely Scalia does not believe that carrying signs, the only mode of expression mentioned in his example, constitutes the expression of fighting words by itself. In this example, if either person is using fighting words, we know they are doing so because of the content of what they are saying.

While fighting words in general do not constitute conduct for First Amendment purposes, specific fighting words in a particular context may be regulated as conduct. Thus, sexually derogatory fighting words that create a hostile working environment are not regulable as conduct because they are fighting words; they are regulable as conduct because they function as a form of gender discrimination in employment.

remaining content-neutral. The state may have a legitimate reason, unrelated to the suppression of ideas, for prohibiting the non-expressive exercise of the conduct when the actor is motivated by a specific intent. In this circumstance, if the state also punishes the same belief-motivated conduct on those occasions when it does express a message, the Court will accept the state's explanation that the prohibition of the conduct, when it is engaged in for an expressive purpose, is incidental to the furtherance of the state's initially legitimate objective. It is for this reason that the Court upheld the hate crimes statute at issue in *Mitchell* as a content-neutral regulation of conduct. It is for this same reason that the statute would be upheld as a content-neutral regulation of conduct even if it was applied to a bias-motivated assault that was intended to communicate a message.

The same argument is unavailable, however, if the state is regulating speech that communicates a message itself. Here, for both conceptual and practical reasons, a law directed at belief-motivated expression will be reviewed as a content-discriminatory law. As a conceptual matter, a law directed at belief-motivated speech cannot target anything other than the message the speech communicates. Whatever the speaker is intending to accomplish with her speech, it is her speech and nothing else that is being used to implement her goal. There is no non-speech activity, no non-expressive conduct, that can be distinguished as the legitimate focus of the law. As a practical matter, if a law directed at a speaker's motive was permitted to circumvent First Amendment doctrine prohibiting content-discriminatory regulations of speech, freedom of speech would be fundamentally undermined. Speech would receive no more protection than it did in 1919 when laws prohibiting "any language intended to incite resistance to the United States or promote the cause of its enemies" were regularly upheld.[29] By directing its regulation at the speaker's purpose or intent instead of her message, the state could effectively silence the expression of "dangerous ideas" under deferential review.

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[29] *See* Abrams v. United States, 250 U.S. 616, 618-19 (1919) (upholding application of Espionage Act of 1918 to defendants convicted of distributing circulars criticizing American military intervention in Russia).

Thus, *R.A.V.* and *Mitchell* rest on a distinction between conduct and speech, not a distinction between motive and content. If the St. Paul ordinance struck down in *R.A.V.* was rewritten to more closely parallel the language used in Wisconsin's hate crimes statute regarding its targeting of motive, the ordinance would still be unconstitutional. A law prohibiting placing symbols on private or public property with the intent to arouse anger or resentment on the basis of race or a law prohibiting expressing fighting words to a person because of the victim's race would each violate the First Amendment under the authority of *R.A.V.*

Finally, as the Court makes clear, this distinction between speech and conduct applies even if the prohibited speech and the prohibited conduct cause equivalent harms. Thus, in *Mitchell*, the fact that "bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest" is found to provide "an adequate explanation for [Wisconsin's] penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases."[30] In contrast, Justice Stevens's argument that St. Paul's hate speech ordinance is directed at avoiding the "qualitatively different" injuries caused by hate speech, essentially the same kind of distinct injuries that are caused by bias-motivated assaults, is dismissed as just so much "word play."[31] When bias-motivated speech itself is being regulated, the legitimate goal of avoiding these same harms cannot immunize a discriminatory regulation from rigorous scrutiny.

Thus, *Mitchell* and *R.A.V.* together present a framework that sharply distinguishes between unprotected speech and conduct. Laws regulating the former, whether they focus on the speaker's message or intent, are subject to the First Amendment's prohibition against both content and viewpoint discrimination. Laws regulating the latter are not. As will be clear shortly, I do not believe that this distinction provides an adequate foundation for the review of laws regulating unprotected speech and expressive conduct. It is, unfortunately, the foundation on which the Court has elected to base its First Amendment analyses and for that

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[30] *Mitchell*, 508 U.S. at 488.

[31] *R.A.V.*, 505 U.S. at 392.

reason must be taken into account in determining the constitutionality of FACE.

A. The Impact of R.A.V. *on the Constitutionality of FACE*

This acute distinction between unprotected speech and conduct should cause considerable difficulty for the lower courts reviewing the constitutionality of FACE. Indeed, of the many First Amendment arguments offered by anti-abortion protestors to challenge the constitutionality of FACE, two related claims are grounded on this distinction and, accordingly, warrant careful attention. Both claims assert that FACE is unconstitutional because it involves prohibited content discrimination.

Protestors contend that in prohibiting obstructive behavior that prevents patients or staff from entering or leaving a clinic, and in prohibiting threats of force directed at clinic patients or staff, FACE distinguishes among the purposes or motives of the individuals engaging in these restricted activities. Not everyone who blocks a clinic entrance or threatens its staff violates FACE. For example, FACE would not apply if militant union activists blocked the entrance of a clinic to protest the low wages that the clinic pays its janitorial staff. FACE would also not apply if economic zealots threatened clinic staff for driving Japanese-made cars to the office. An anti-abortion group that blocks the entrance of the same clinic or threatens its staff in the exact same way, but for different reasons, however, will be subject to FACE's sanctions.[32]

On its face, then, FACE can be invoked only against those individuals who physically obstruct ingress to or egress from a facility or threaten its staff *because* the persons using the facility are attempting to provide or obtain reproductive health services. Of the three examples mentioned above, only the anti-abortion group is using force and threats because abortion services are being provided within the clinic. Thus, enforcing FACE requires direct reference to the content or purpose of the protest at

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[32] *See, e.g.*, American Life League, Inc. v. Reno, 47 F.3d 642, 650 (4th Cir.), *cert. denied*, 116 S. Ct. 55 (1995); United States v. Brock, 863 F. Supp. 851, 862-63 (E.D. Wis. 1994); Riely v. Reno, 860 F. Supp. 693, 700 (D. Ariz. 1994); Council for Life Coalition v. Reno, 856 F. Supp. 1422, 1427-28 (S.D. Cal. 1994).

issue to determine whether a violation of the statute has occurred.

Litigants challenging the constitutionality of FACE, citing *R.A.V.* for support, contend that these content-discriminatory restrictions on obstructive or threatening protest activity must meet strict scrutiny or be struck down.[33] The lower courts have

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[33] *See, e.g., Brock*, 863 F. Supp. at 856-57; *Riely*, 860 F. Supp. at 700-04.

The protestors' argument is not nearly as straight forward as it may seem at first glance. There is a sense in which the very idea of content- or viewpoint-discriminatory regulations of conduct seems to be counter-intuitive. *See Riely*, 860 F. Supp. at 701 (finding no "authority for the proposition that the First Amendment doctrine proscribing content- and viewpoint-based regulation applies to the regulation of . . . unexpressive conduct and unprotected speech"). Most conduct, of course, is not explicitly expressive in nature and most laws regulating conduct have nothing whatsoever to do with restricting expression. A law prohibiting burglary, for example, does not regulate expression in any way. *See* James Weinstein, *Hate Crime and Punishment: A Comment on* Wisconsin v. Mitchell, 73 OREGON L. REV. 345, 373-76 (1994).

A law regulating conduct will raise First Amendment concerns, however, if the conduct in question is either expressive in nature or is directed at expressive activities *and* the regulation relates in some way to the message that the conduct is communicating or affects. *See generally* Post, *supra* note 3, at 1249-56. Thus, a law prohibiting throwing stones at Republicans is viewpoint-discriminatory because it regulates conduct that is directed at persons expressing (or representing) a particular point of view. A law prohibiting throwing stones at persons engaged in political debate of any kind seems content-discriminatory because it regulates conduct that is directed at persons expressing various views on a subject of discourse. A law prohibiting the throwing of stones at anyone has no apparent First Amendment dimension to it on its face. Whether the First Amendment should be invoked at all when the law happens to be applied against someone engaged in stone throwing for expressive purposes is an interesting question, *id.* at 1279-81, that cannot be fully addressed in this Article.

Similarly, a law banning throwing garbage in the streets as a way of protesting the city's new tax to finance municipal garbage disposal services is viewpoint-discriminatory. A law banning throwing garbage in the streets for the purpose of expressing any political position is content-discriminatory. More on point, a law prohibiting blocking the entrances to hospitals as a way of communicating a message about health care policy is also content-discriminatory.

A law prohibiting people from blocking the entrances to hospitals that is focused on the motive of the obstructors is more complicated because not all acts of obstruction or motives for engaging in an act of obstruction are expressive in nature. *See* Weinstein, *supra*, at 348-60. A person blocking the emergency entrance to a hospital because he believes that there are too many people in the world and by blocking access to medical care he will cause some people to die is either evil or insane, but his conduct is not particularly expressive. Thus, a law prohibiting obstructing access to hospitals for the sole purpose of denying people access to health care and causing them harm may be neither content- nor viewpoint-discriminatory.

On the other hand, if the intent of protestors blocking the entrance to a hospital is to communicate their condemnation of the kind of medical procedures performed in the facility to prospective patients as well as to prevent patients from receiving the problematic

uniformly and correctly rejected this challenge regarding the FACE provisions prohibiting obstruction. Their reasoning is straight-forward and repeated without significant variation. Physically blocking people from entering or leaving a building is

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treatment, the conduct at issue is at least in part expressive in nature. More importantly, if the law prohibiting obstructing entrances to hospitals only applies to persons who block entrances because of the controversial treatment provided by specific facilities, the law's focus on motive arguably raises First Amendment concerns because of its discriminatory nature. Thus, the protestors challenging FACE argue that when it is clear that conduct has an expressive dimension to it and only certain persons engaging in the conduct for purposes related to expressive goals are subject to sanction, the First Amendment is clearly implicated. *See generally* Michael S. Paulsen & Michael W. McConnell, *The Doubtful Constitutionality of the Clinic Access Bill*, 1 VA. J. SOC. POL'Y L. 261, 282 (1994); Jill W. Rose & Chris Osborn, Note, *Face-ialneutrality: A Free Speech Challenge to the Freedom of Access to Clinic Entrances Act*, 81 VA. L. REV. 1505, 1532-33 (1995) [hereinafter *Face-ialneutrality*].

Unfortunately for the protestors, their argument regarding content-discriminatory obstruction flies in the face of the distinction between speech and conduct that the Court adopted in *R.A.V.* and *Mitchell*. The similarity between enhancing the penalty for assault only when the offender has selected his victim because of the victim's race and prohibiting the use of force and obstruction only when it is directed at persons because they seek or provide reproductive health services is too close to be avoided. Some racially motivated assaults are intended to express a message as well as to physically injure the victims. They may communicate a general message of racial inferiority or racial hatred or a more specific exclusionary message threatening people because of where they choose to work or live. *See Face-ialneutrality*, *supra*, at 1517 n.75. Other assaults may have no purpose other than to cause physical harm to the victims.

The conduct prohibited by FACE may also be expressive in nature and intended to communicate a message about the morality and legality of abortion. That is hardly the only purpose for such activity, however. The use of force to injure clinic patients and staff, and the obstruction of access to clinics, serve the dual purpose of preventing abortions from occurring and punishing people who in engage in what are perceived to be immoral acts. Thus, there is an independent basis unrelated to suppressing expression for proscribing the motivated conduct being restricted by FACE just as there is an independent basis for proscribing the particularly motivated assaults restricted by hate crimes statutes. Under the reasoning of *R.A.V.* and *Mitchell*, in such circumstances the state may prohibit specifically motivated conduct as long as it does not direct its regulation at the message that the proscribed conduct communicates. The fact that some of the proscribed conduct is engaged in for expressive purposes is essentially irrelevant to the Court's analysis. *See supra* notes 27-29 and accompanying text.

The protestors are surely correct that there is a very real sense in which FACE is a content-discriminatory regulation of expressive conduct. When conduct may or may not be engaged in for expressive purposes, a regulation directed at the actor's motive is almost certainly going to discriminate and punish conduct engaged in to communicate one message but not others, at least to some extent. That content-discriminatory effect is exactly what FACE accomplishes. The same unavoidable effect occurs, however, when a hate crimes statute is directed at conduct that may or may not be engaged in for expressive purposes. As *Mitchell* makes clear, that impact is not enough to invalidate such regulations on First Amendment grounds.

conduct, not speech. While this conduct, like any conduct, may be engaged in to express a message, obstructing people from entering a building is not conventionally expressive conduct such as writing or speaking. Therefore, the state may consider the motives of a person obstructing patients and staff to determine whether or how severely that conduct should be punished. Laws of this kind are constitutional because regulations of motive-based conduct do not violate the First Amendment in the same way that content-discriminatory regulations of speech do. Several federal court decisions support this conclusion including, most recently and directly, *Wisconsin v. Mitchell*.[34] When conduct, not speech, is at issue, *Mitchell*, not *R.A.V.*, is the controlling precedent, and the challenged law should be upheld.[35]

The *Mitchell* and *R.A.V.* holdings distinguishing between laws directed at conduct and laws directed at speech made it relatively easy for lower courts to reject challenges to the obstruction provision of FACE. The same distinction between speech and

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[34] *See, e.g., Mitchell*, 508 U.S. at 486-88 (distinguishing impermissible content-based regulation of constitutionally protected expression from regulation of motive-based conduct which First Amendment does not protect); Hishon v. King & Spaulding, 467 U.S. 69, 78 (1984) (upholding Title VII prohibition of racial discrimination in employment against First Amendment challenge); International Bhd. of Elec. Workers v. NLRB, 341 U.S. 674, 705 (1951) (upholding prohibition of picketing intended to further unlawful objectives); *American Life League*, 47 F.3d at 650 (noting that "Congress may enact laws to punish proscribable conduct even though the conduct is motivated by certain biases or beliefs"), *cert. denied*, 116 S. Ct. 55 (1995); United States v. J.H.H., 22 F.3d 821, 826 (8th Cir. 1994) (upholding civil rights laws prohibiting conduct intended to deprive victims of their legal rights); *Brock*, 863 F. Supp. at 862 (rejecting argument that motive requirement makes conduct regulation content-based). The Supreme Court has also on occasion upheld laws prohibiting conventionally expressive conduct if the activity is intended to accomplish particularly problematic objectives. But these cases received a more careful First Amendment analysis. *See, e.g.*, Cox v. Louisiana, 379 U.S. 559 (1965) (upholding statute criminalizing picketing or parading near state courthouse "with the intent of interfering with, obstructing, or impeding the administration of justice").

[35] *See Mitchell*, 508 U.S. at 486-90 (distinguishing laws controlling conduct from laws controlling speech); *see also Riely*, 860 F. Supp. at 702-03 (explaining that law directed at regulating conduct does not violate First Amendment even if it is restricted to acts performed with specific intent); Cook v. Reno, 859 F. Supp. 1008, 1010 (W.D. La. 1994) (holding that when "[v]iolence is the target of [the] statute, not speech," rights of speech and assembly are not implicated by motive-based law); *Council for Life Coalition*, 856 F. Supp. at 1428 (noting distinction between "invalid laws explicitly directed at protected expression, such as the city ordinance reviewed in *R.A.V.*, and valid laws aimed at unprotected conduct as is the case [with FACE]").

conduct, however, should have made it more difficult to uphold the provisions of FACE that prohibit threats of force.

FACE imposes various penalties upon any person who by force, threat of force, or physical obstruction injures, intimidates, or interferes with any person because that person is or has been obtaining or providing reproductive health services. Two of these prohibited activities, the use of force and physical obstruction, seem quite clearly to be conduct. But what about someone who uses a threat of force to intimidate a person seeking to have an abortion at a clinic?[36] Isn't an intimidating threat pure speech, albeit unprotected speech? And if it is unprotected speech, content-discriminatory regulations that prohibit only certain threats, as the relevant provision in FACE does, must be evaluated differently and more rigorously than the other provisions in FACE that regulate conduct.[37]

Prior to *R.A.V.*, there may have been little need to distinguish between laws regulating conduct and laws regulating unprotected speech because both conduct and unprotected speech were understood to be equivalently beyond the scope of First Amendment protection. Either could be prohibited at the government's

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[36] FACE defines intimidation as placing another person "in reasonable apprehension of bodily harm . . . to herself or . . . another." 18 U.S.C.A. § 248(e)(3).

[37] One may attempt to avoid this result by arguing that a law prohibiting threats directed at persons because they are obtaining or providing reproductive health services is content-neutral, not content-discriminatory. This argument is unpersuasive, however, if *R.A.V.* is good law. As noted previously, unlike a law directed at belief-motivated conduct, a law directed at belief-motivated speech cannot target anything other than the message that the speech communicates. There is no non-speech activity that can be distinguished as the purpose of the law. Thus, a law prohibiting belief-motivated speech and a law prohibiting the content of speech cannot be successfully distinguished.

Again, the same substantive law can be written in different ways. A statute might prohibit directing threats or fighting words at others because of the victim's race or it might prohibit using threats or fighting words with the knowledge that they will arouse in others anger or fear on the basis of race or gender. More specifically, a statute might prohibit directing threats or fighting words at others because the victim is obtaining or providing reproductive health services or it might prohibit using threats or fighting words with the knowledge that they will arouse in others anger or fear on the basis of obtaining or providing reproductive health services. Either of the two laws related to reproductive health, I suggest, is the functional equivalent of FACE. Both laws would apply to the same speech. While the reach of the two laws might differ marginally because it is at least theoretically possible that the state could prove a violation of the former law without using the perpetrator's speech to establish intent, it is difficult to believe that such a distinction carries enough constitutional weight to justify upholding the law under a deferential standard of review.

discretion. After *R.A.V.* and *Mitchell*, however, the distinction between conduct and unprotected speech becomes critical because motive-based, content-discriminatory regulations of unprotected speech will receive strict scrutiny, while similar regulations of unprotected conduct will not. Given this recent precedent, one would have assumed that the lower courts reviewing FACE would evaluate the anti-threat provision of FACE under strict scrutiny or undertake the more complex task of trying to demonstrate that FACE fit within one of the several exceptions to rigorous review listed in *R.A.V.*[38]

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[38] For example, one could argue that FACE falls within the exception to the prohibition against content discrimination that applies "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable" since "no significant danger of idea or viewpoint discrimination exists" in that circumstance. *R.A.V.*, 505 U.S. at 388. "Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class." *Id.*

To illustrate the operation of this exception, Justice Scalia explains:

> [T]he Federal Government can criminalize only those threats of violence that are directed against the President - since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President.

Id. (citations omitted).

Unfortunately, despite this example, there is considerable ambiguity as to the meaning and scope of this exception. One could argue with some justification that "the reasons why threats of violence are outside the protection of the First Amendment . . . have special force when applied" to persons attempting to exercise their constitutional rights of reproductive autonomy. The analogy between threats against the President and threats against people who are trying to exercise their constitutional rights seems reasonable enough to arguably justify upholding FACE within the auspices of this exception.

On the other hand, in the abortion conflict as it presently exists in the United States, threats of violence related to reproductive health services are predominately directed against those seeking to have abortions or who provide abortion services. There seem to be far fewer threats and overt acts against individuals who provide services that are alternatives to abortion (such as medical care during childbirth) or who counsel women to carry their pregnancy to term. Thus, while the decision to protect the President against threats of violence may be neutral and irrelevant to the particular beliefs of any particular president, it is more difficult to contend that "no significant danger of idea or viewpoint discrimination exists" when threats of violence against those seeking or providing reproductive health services are prohibited. In that case, the provisions in FACE prohibiting threats of force may not fall within this exception to the strict scrutiny requirements of *R.A.V.*

One response to this challenge is to question whether a law prohibiting threats against the President is really as neutral and free from the taint of viewpoint discrimination as Justice Scalia suggests. Those who threaten the President are probably more likely to reflect

B. The Case Law Adjudicating the Constitutionality of FACE

Remarkably, none of the seven courts upholding FACE against First Amendment challenge engaged in the analysis required by *R.A.V.* Six did not even come close. The Fourth Circuit's opinion, *American Life League, Inc. v. Reno*,[39] holding FACE constitutional, has been particularly influential and deserves special attention. The Fourth Circuit begins its analysis by arguing that FACE is content- and viewpoint-neutral because it "punishes anyone who engages in the prohibited conduct" if they have the requisite intent, regardless of the content or viewpoint of the message their conduct might be trying to convey.[40]

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politically extreme views on the right or the left that question the value of democratic and representative government. Thus, a law protecting the President against threats may involve an inherent bias in favor of orderly and relatively moderate political change. *See generally* Frederick M. Lawrence, *Resolving the Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech*, 68 NOTRE DAME L. REV. 673, 693 (1993) (noting that "[o]ne could easily argue that the predominant way in which a presidential assassination differs from any other murder, and the reason it is punished more severely, is that it is the quintessential expression of a deeply held (and dangerous) opinion about the President and/or our system of government"). Accordingly, both a law prohibiting threats against the President and a law prohibiting threats against abortion providers should receive the same level of review since both laws create similar risks "that the suppression of ideas is afoot." *R.A.V.*, 505 U.S. at 390.

The problem with this argument is not that it is wrong on its merits but that it casts substantial doubt on the validity of the Court's reasoning and holding in *R.A.V.* If laws falling within the exceptions to the *R.A.V.* prohibition against content discrimination create the same risks of viewpoint discrimination and the suppression of ideas as laws regulating unprotected speech that do not fall within these exceptions, the *R.A.V.* analysis begins to fall apart at the seams. Without the availability of the myriad exceptions described in the majority opinion, one must choose between two alternatives. Either all content-discriminatory regulations of unprotected speech must receive strict scrutiny — a result that would unreasonably hamstring government regulation of unprotected speech — or we must concede that the risks associated with the content-discriminatory regulation of unprotected speech are simply not so severe that they merit rigorous review. *See infra* notes 118-41 and accompanying text.

The validity of these arguments remains speculative at this time as does the narrower question of the utility of the *R.A.V.* exceptions for reviewing the constitutionality of FACE. For the most part, the courts adjudicating the constitutionality of FACE did not focus on these exceptions in reaching their conclusions. *See infra* notes 53-63 and accompanying text.

[39] 47 F.3d 642 (4th Cir.), *cert. denied*, 116 S. Ct. 55 (1995).

[40] *Id.* at 649. The argument has been raised by some commentators that FACE is not simply content-discriminatory with regard to its prohibition of threats, but that it is actually viewpoint-discriminatory. Professor Michael Paulsen, for example, has raised the question whether FACE may be viewpoint-discriminatory because it will prohibit a pro-life protestor from threatening a woman seeking an abortion, but it will not punish someone

accompanying the woman who threatens that pro-life protestor. Thus, in a verbal altercation outside of a health facility, FACE will punish speakers on one side of the argument for using threats, but it will not restrict the use of threats by speakers on the other side.

I believe the Fourth Circuit and other courts are correct when they conclude that FACE is not viewpoint-discriminatory in prohibiting threats. FACE is not viewpoint-discriminatory because the interactional inequality that Professor Paulsen describes will occur regardless of the position on abortion held by the participants in the argument. The woman seeking an abortion is protected against threats because she is seeking reproductive health care, not because she is pro-choice. Thus, FACE protects certain people not because of their points of view, but rather because they are engaging in activities that we as a society value particularly.

A hypothetical may help to clarify this point. Assume fanatic "zero population growth" activists threaten women who seek obstetrical services, insisting that all women should have abortions rather than bringing any more children into the world. These threats are prohibited by FACE (because FACE's term "reproductive health services" subsumes obstetrical services), even though threats against the zero population growth activists would not be prohibited. As this example demonstrates, FACE prohibits the use of threats against patients seeking reproductive health services whether the threats are employed by people who support decisions to have an abortion or oppose that choice.

It is true, of course, that when society identifies certain activities that are especially worthy of protection, it is making value judgments. But as long as the activities are not defined too narrowly, and are not explicitly expressive in nature, these value judgments cannot be equated with viewpoint discrimination. Thus, while we could redraft (and broaden) FACE to outlaw threats directed at "any person because she is involved in abortion-related expression," our failure to do so doesn't render FACE viewpoint discriminatory. I do not think that whenever a state wants to protect a non-expressive activity (such as reproductive health services) against threats, it is constitutionally obligated to protect expression opposing that activity at the same time.

While FACE will result in unequal consequences in certain circumstances, not all inequality is of constitutional significance. Certainly, when we pass a law protecting a particular activity against unlawful interference, we are suggesting that we value that activity more than we do the unlawful interference. But is that really such a controversial conclusion? If we punish threats directed at persons because they are exercising their religion, or voting, or are exercising any other legal or constitutional right, we protect those people who exercise rights from threats, but we do not protect the people who are making threats to discourage the exercise of rights. It is not viewpoint discrimination (at least not constitutionally problematic viewpoint discrimination) to say that people who make threats are not themselves worthy of protection against threats.

Of course, one might argue in response to my example that we are also not protecting people who choose not to vote or who do not practice a religion from threats — we are allowing threats designed to force people to begin voting or praying. But just as FACE defines "reproductive health services" in a way that includes services that a woman needs whether she terminates her pregnancy or gives birth, a law that prohibits the threatening of persons because they are practicing their religion would probably be applied to protect atheists as well. If it did not, I would argue that such a law should be extended to do so. And perhaps a too-narrowly drawn definition of "religion (to exclude atheists) would raise viewpoint discrimination problems (just as FACE would be more problematic if its definition of reproductive health services were limited to abortion.)

The court recognizes, however, that the plaintiffs challenge this conclusion and contend that FACE's intent requirement itself is content-discriminatory. Since FACE applies only to persons who engage in the proscribed activities *because* their target is attempting to provide or obtain reproductive health care, the plaintiffs point out that threatening protests promoting environmental or labor issues will not violate the Act, while anti-abortion protests will be subject to sanction. By focusing on the actors' motives for protesting, FACE is, in essence, directed at the content of the protestors' message.[41]

The court's answer to these contentions is ambiguous and arguably merges two different arguments together. The court's primary response is that the plaintiffs ignore "the distinction between what the Act does and does not regulate."[42] Like the hate crimes statute upheld in *Mitchell* and like Title VII's prohibition against racial discrimination in employment, FACE regulates conduct, not speech. Even if what is being regulated involves conduct engaged in to communicate a message, the government can prohibit such conduct as long as it does not "tar-

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The key point is that even a law that clearly and explicitly defines religion broadly (to include atheism) would not solve the objection that Professor Paulsen raises. Threats against a person going to church (or not going to church) would be subject to sanction under such a law, but threats against a person because he uses threats to interfere with religious worship (or nonworship) would still not be subject to sanction. This kind of asymmetry is unavoidable if we are going to permit regulation of threats in any particular context rather than across the board. Indeed, it may not be an exaggeration to say that every threat regulation (short of a ban on all threats) is asymmetrical and creates the kind of discriminatory consequence that Paulsen questions. It simply cannot be, however, that all the anti-threat laws on the books are constitutionally problematic.

There is, of course, a separate but related point about FACE and viewpoint discrimination. Facial viewpoint neutrality does not necessarily guarantee viewpoint neutrality in practice. It may well be that pro-life protestors make more use of threats than do pro-choice protestors and are therefore more likely to be punished under FACE. Facially neutral laws may often result in disparate effects because of real-world differences between different groups of speakers. It is commonly accepted, however, that unequal impact typically does not transform a viewpoint-neutral law into a viewpoint-discriminatory one for constitutional purposes. *See infra* notes 86-89, 161 and accompanying text.

[41] *See American Life League*, 47 F.3d at 650 (stating that "plaintiffs say those protesting at clinics on labor and environmental issues would not violate the Act" and therefore FACE is content-based); *see also Riely*, 860 F. Supp. at 700 (explaining that "[p]laintiffs also argue that FACE is an impermissive, content-based restriction on speech because it prohibits blocking a facility entrance in protest to abortion but does not prohibit blocking a facility entrance in protest to animal research").

[42] *American Life League*, 47 F.3d at 650.

get conduct on the basis of its expressive elements."[43] Here, from the court's perspective, Congress is not targeting the expressive elements of the plaintiffs' conduct. Instead, it has simply determined that conduct engaged in for certain motives — the "intentional interference with access to reproductive health services" — is more dangerous and injurious than similar conduct engaged in for different purposes.[44]

If *R.A.V.* and *Mitchell* are correctly decided, however, the Fourth Circuit's analysis of FACE rests on problematic and unsubstantiated premises. Most importantly, the court seems to assume without explanation or analysis that threats are conduct, not speech, for First Amendment purposes. That assumption is hardly an obvious one. While there are some lower court decisions that describe threats as conduct, the majority of opinions categorize threats as unprotected speech, either as a form of "fighting words," or as a separate class of unprotected speech in its own right.[45] Moreover, the *R.A.V.* opinion itself

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[43] *Id.*

[44] *Id.* at 651.

[45] There is a literal legion of cases holding or suggesting that threats may be punished because they constitute some form of unprotected speech. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927-28 (1982) (evaluating speech that "might have been understood . . . as intending to create a fear of violence" to determine if it constituted "fighting words" or fell within any other category of unprotected speech); Watts v. United States, 394 U.S. 705, 707 (1969) (explaining that statute prohibiting threats against life of President "makes criminal a form of pure speech" that "must be distinguished from what is constitutionally protected speech"); United States v. Hayward, 6 F.3d 1241, 1258 (7th Cir. 1993) (Flaum, J., concurring) (explaining that threats are unprotected speech, not conduct, because "threats have undeniable expressive content (indeed, speech qualifies as a threat by virtue of the message it expresses)"), *cert. denied*, 114 S. Ct. 1369 (1994); United States v. Kosma, 951 F.2d 549, 554-55 (3d Cir. 1991) (recognizing that other courts found threats against President to be unprotected expression, and concluding that even if defendant's letters "furthered public debate on the workings of our government, . . . their marginal political value was outweighed by the compelling national interest in protecting the Chief Executive"); Shackelford v. Shirley, 948 F.2d 935, 938-39 (5th Cir. 1991) (explaining that "threats made with specific intent to injure and focused on a particular individual easily falls into that category of speech deserving of no first amendment protection" in that such threats fall "outside the realm of . . . public dialogue"); United Food & Commercial Workers Int'l Union v. IBP, Inc., 857 F.2d 422, 432-34 (8th Cir. 1988) (holding that Nebraska statute prohibiting "interference with any person's exercise of his or her lawful right to work by . . . using threatening language . . . for the purpose of influencing such person to quit or refrain from seeking certain employment" regulates speech and can only be upheld against First Amendment challenge if it is limited to fighting words); United States v. Gilbert, 813 F.2d 1523, 1529-30 (9th Cir. 1986) (explaining that "threats of intimidation . . . to murder whites who aid blacks," if expressed

with requisite intent, constitutes one of "types of expression which by their nature inflict injury or tend to incite an immediate breach of the peace [and] are . . . unprotected" by First Amendment), *cert. denied*, 484 U.S. 860 (1987); United States v. Crews, 781 F.2d 826, 832 (10th Cir. 1986) (recognizing "the distinction between protected political speech and unprotected threats" and concluding that, even when threats have political overtones "a compelling government interest in protecting the President justifies imposition of criminal liability when it is reasonably clear that the defendant was not engaged in political advocacy"); United States v. Velasquez, 772 F.2d 1348, 1356-58 (7th Cir. 1985) (suggesting that limited scope of statute prohibiting threats of retaliation against government witnesses "takes it out of the realm of social or political conflict where threats to engage in behavior that may be unlawful may nonetheless be part of the marketplace of ideas, broadly conceived to embrace the rough competition that is so much a staple of political discourse"), *cert. denied*, 475 U.S. 1021 (1986); Wurtz v. Risley, 719 F.2d 1438, 1441 (9th Cir. 1983) (holding that Montana statute prohibiting any person from threatening to commit criminal offense is directed at speech, not conduct); United States v. Howell, 719 F.2d 1258, 1261 (2d Cir. 1983) (explaining that whatever limited contribution threat to kill President may make to debate on public policy issues, it is outweighed by "the compelling governmental interest in protecting the safety of the Chief Executive"), *cert. denied*, 467 U.S. 1228 (1984); United States v. Carrier, 672 F.2d 300, 305 (2d Cir.) (holding that speech threatening life of President is not protected because it "brings about certain evils which Congress has a right to prevent"), *cert. denied*, 457 U.S. 1139 (1982); Lucero v. Trosch, 904 F. Supp. 1336 (S.D. Ala. 1995) (noting that "it is widely recognized that true threats of force are not cloaked in the protections afforded other types of speech by the First Amendment"); Jermosen v. Coughlin, 878 F. Supp. 444, 451 (N.D.N.Y. 1995) (noting that "threats of violence fall within a category of speech unprotected by the First Amendment"); United States v. McDermott, 822 F. Supp. 582, 590-91 (N.D. Iowa 1993) (suggesting that threats are category of unprotected speech); United Steelworkers of Am. v. Dalton, 544 F. Supp. 282, 285-87 (E.D. Va. 1982) (upholding law prohibiting interference with right to work "by the use of force, threats of violence or intimidation, or by the use of insulting or threatening language . . . to induce [a person to quit or refrain from employment]"); Collins v. Vitek, 375 F. Supp. 856, 859 n.5 (D.N.H. 1974) (dismissing prisoner's First Amendment challenge to punishment he received for threatening to burn down prison on grounds that such speech constituted fighting words); Masson v. Slaton, 320 F. Supp. 669, 672 (N.D. Ga. 1970) (analogizing threats to shouting fire in crowded theater, inciting riots, and other forms of unprotected speech).

But see United States v. Kelner, 534 F.2d 1020, 1027 (2d Cir.) (suggesting that threats may be punished consistent with First Amendment when they are so "unequivocal, unconditional, immediate and specific as to the person threatened" that they become part of violent conduct itself and can be prohibited as such), *cert. denied*, 429 U.S. 1022 (1976); United States v. Bellrichard, 779 F. Supp. 454, 461 (D. Minn. 1991) (analyzing threats as both conduct and speech in suggesting that "[w]ords are part of the communicative interaction between persons, and they can constitute threatening conduct or unprotected speech acts which may have an effect as direct as a punch in the jaw"), *aff'd*, 994 F.2d 1318 (8th Cir.), *and cert. denied*, 114 S. Ct. 337 (1993).

In many cases, the critical issue that controls whether a person making a threat can be punished without violating the First Amendment is the distinction between a "true threat" and "political hyperbole." Watts v. United States, 394 U.S. 705, 707-08 (1969). Only the former can be sanctioned. *Id.* Whether a statement constitutes a "true threat" is a question of fact for the jury to be resolved in favor of the prosecution if a reasonable person would construe the defendant's statement as a serious expression of an intention to cause serious

describes threats of violence as a class of proscribable speech and justifies the constitutionality of laws prohibiting threats against the President under an exception to the general rule against content- and viewpoint-discriminatory regulations of unprotected speech.[46]

Nor is the Fourth Circuit's analogy to Title VII a helpful comparison. Title VII prohibits conduct — the act of denying persons employment or discriminating against them with regard to the conditions of their employment because of their race or gender. While that conduct might be implemented in part through speech, it is obvious that the expression used by an employer to inform a candidate that she will not be hired is incidental to the conduct the law sanctions. Indeed, one can practice racial discrimination in employment by simply hiring

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bodily harm to another. *See* United States v. Khorrami, 895 F.2d 1186, 1192 (7th Cir.) (stating whether statement constitutes "true threat" is question of fact decided by jury), *cert. denied*, 498 U.S. 986 (1990); Martin v. United States, 691 F.2d 1235, 1240 (8th Cir. 1982) (explaining question of whether language constitutes threat is issue of fact which jury decides), *cert. denied*, 459 U.S. 1211 (1983).

[46] *R.A.V.*, 505 U.S. at 388. It may be that, under a sophisticated First Amendment analysis, certain threats might be considered conduct while other kinds of threats are construed to be speech for constitutional purposes. Professor Greenawalt, for example, distinguishes between conditional and unconditional threats in evaluating the constitutionality of threat regulations. Conditional threats are "situation-altering." As such, because they *do* something rather than *say* something, they fall outside a principle of free speech. KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE, 57-63, 94-99 (1989). Pure, unconditional threats, on the other hand, raise more serious First Amendment issues. Despite the disturbing impact pure threats may cause, "[s]ince these threats involve particular assertions of fact, what one plans to do on some future occasion, they fall within the broad range of communications to which a principle of free speech applies." *Id.* at 91.

A discussion of the merits of this analysis and its utility for constitutional adjudication is obviously beyond the scope of this Article. More importantly, even if one accepts Greenawalt's argument and recognizes certain threats to be action and other threats to be speech (although potentially proscribable speech), the issue raised by Justice Scalia's analysis in *R.A.V.* remains to be confronted. Should content discrimination within the category of threats recognized as proscribable, unprotected speech be reviewed substantially more rigorously than content discrimination among threats determined to be conduct or action and outside the First Amendment's coverage? Pursuant to a merging of Greenawalt's and Justice Scalia's reasoning, a law enhancing the penalty for an unconditional threat to kill someone because of their race would receive strict scrutiny because it involves content discrimination within a category of unprotected speech. A law enhancing the penalty for conditionally threatening to kill people unless they leave town to maintain the racial purity of a community, in contrast, would constitute a regulation of conduct and receive less stringent review.

someone else without ever saying anything to the rejected applicant.[47]

Threats, on the other hand, are punished precisely because of the message they communicate and the apprehension of that message by the speaker's victim. There is no underlying conduct as to which the threatening message is incidental. It is the

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[47] If the Fourth Circuit in *American Life League* was attempting to argue that FACE is constitutional under one of the exceptions to the strict scrutiny requirement set out in *R.A.V.* because the regulation of unprotected speech by FACE is incidental to the statute's primary focus on regulating conduct, that contention is also unpersuasive. It is important to carefully define the meaning of the term "incidental" as it is used by Justice Scalia in describing this particular exception to the rule of *R.A.V.* requiring strict scrutiny review. When Justice Scalia suggests that rigorous review is unnecessary when a proscribable class of speech is "swept up incidentally" by a statute directed at conduct, I do not think he intends to sustain all laws that primarily regulate conduct but also apply to unprotected speech. The mere fact that a content-discriminatory regulation of unprotected speech is part of a broad statutory scheme that prohibits mostly conduct should have little bearing on the standard of review to be applied to the part of the statute directed at speech. If a law prohibiting racist fighting words standing alone deserves strict scrutiny, the reasons why it does are in no way altered by the legislature adding the law to a statute prohibiting racist assaults. The fact that the speech prohibiting provision and the assault prohibiting provision happen to be included in the same statute can not have constitutional significance.

What Justice Scalia is referring to in his exception, I suggest, is a statute directed at conduct that "incidentally" covers fighting words, or some other form of unprotected speech, because the speech being prohibited constitutes the very conduct that is being prohibited. Thus, sexually derogatory fighting words directed at an employee can be prohibited under Title VII because the use of those fighting words creates a hostile working environment that in itself is recognized to be a form of employment discrimination.

Accordingly, FACE can not escape the strict scrutiny review required by *R.A.V.* under the theory that FACE is primarily directed at conduct such as violence and obstruction and only incidentally regulates threatening speech. Threats are not an act of violence or obstruction in the same sense that racist or sexually derogatory fighting words directed at an employee can be understood to be a form of employment discrimination. *See* United States v. Hayward, 6 F.3d 1241, 1259-60 n.1 (1993) (Flaum, J., concurring) (arguing that provision of Fair Housing Act does not fall within speech incidentally swept up by statute directed at conduct exception in *R.A.V.* because § 3631 "regulates threats directly, not merely as an instance of some broader practice such as 'treason' or 'discrimination'"); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1830-32 (1992) (explaining that speech incidentally swept up by statute directed at conduct exception in *R.A.V.* can not be taken literally so that "the general nature of a government ban on conduct that interferes with the war effort would . . . exempt from strict First Amendment scrutiny an application of the ban to . . . antiwar publications whose communicative impact interferes with the war effort"). *See generally* Post, *supra* note 3, at 1258 (arguing that where case law limits State's ability "to regulate media in order to prevent disorder or to expunge offense. . . [State] should not be able to evade this jurisprudence simply by folding these very purposes into a general regulation of conduct").

threatening message itself that is prohibited and nothing else. Certainly, threats have far more of the characteristics of speech than the physical assaults punished by the hate crimes statute reviewed in *Mitchell* that was upheld because it was directed at conduct.[48]

The Fourth Circuit may also have been suggesting a second argument. Its analysis may imply that a law directed at an actor's motive is distinct from a law directed at the message the person is trying to communicate. Thus, motive requirements in general should be considered content- and viewpoint-neutral because they are not directed at the communicative impact of expression, regardless of whether the statute at issue regulates speech or conduct.[49]

There is some promise in this approach, but as stated, it is flatly inconsistent with the reasoning of *R.A.V.* and *Mitchell* and would seriously undermine First Amendment guarantees. The Supreme Court's hate speech and hate crimes decisions explicitly state that the critical difference in these cases is between conduct and speech, between "fighting" and "fighting words."[50] Indeed, as noted previously, the Court made it clear in *R.A.V.* that a law regulating speech and directed at a speaker's motive is constitutionally unacceptable. The St. Paul ordinance at issue in *R.A.V.* violated the First Amendment precisely because it prohibited only those fighting words "that contain . . . messages of 'bias-motivated' hatred and in particular, . . . messages 'based on virulent notions of racial supremacy.'"[51]

Moreover, recognizing a distinction between a law directed at a speaker's motive and a law directed at a speaker's message would trivialize the holding of *R.A.V.* and nullify its impact. States would be able to avoid the substantive limits *R.A.V.* placed

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[48] Indeed, it makes no more sense to argue that threats of force can be collapsed into the use of force than that incitement to violence can be collapsed into the act of violence itself. Thus, a law prohibiting any political speech that directly and immediately incites violence must receive strict scrutiny under *R.A.V.* notwithstanding the fact that it is part of a statute prohibiting political assassinations.

[49] American Life League, Inc. v. Reno, 47 F.3d 642, 650 (4th Cir. 1995).

[50] *See supra* notes 21-22 and accompanying text.

[51] *R.A.V.*, 505 U.S. at 392 (quoting Minnesota Supreme Court's opinion in *In re* R.A.V., 464 N.W.2d 507, 508, 511 (1993)).

on hate speech codes by drafting their statutes in only slightly different form. Under this reasoning a city could enact a law that punishes anyone who expresses fighting words to a victim because of the victim's race. Since, in enforcing such a law, the most pertinent evidence for determining a speaker's intent would be the words she expressed, the state would almost exclusively punish those people using insulting fighting words related to their victim's race. Virtually the same distinction between racist and non-racist fighting words the Court condemned in *R.A.V.* would now withstand constitutional scrutiny as long as the law at issue was directed ostensibly at the speaker's intent instead of her message.[52] The Court's decision in *R.A.V.* may have been wrong on the merits, but it was certainly not intended to be futile.

Several courts reviewing FACE have explicitly followed the Fourth Circuit's lead. The Eleventh Circuit in *Cheffer v. Reno* simply accepted the Fourth Circuit's analysis without elaboration.[53] The district court in *United States v. White* also accepted the Fourth Circuit's reasoning.[54]

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[52] The problems created by courts upholding laws directed at the motive or intent of the speaker are demonstrated by judicial decisions sustaining telephone harassment statutes. Several courts have concluded that telephone harassment statutes regulate conduct, not speech, and receive little if any First Amendment protection because the statutes prohibit the use of the telephone with an intent to harass the person being called. *See, e.g.*, Thorne v. Bailey, 846 F.2d 241 (4th Cir.), *cert. denied*, 488 U.S. 984 (1988); Gormley v. Director, Conn. State Dep't of Probation, 632 F.2d 938 (2d Cir.), *cert. denied*, 449 U.S. 1023 (1980). Because courts often determine that the caller acted with the intent to harass primarily by examining the content of the telephone conversation that is alleged to constitute harassment, this analysis allows the state to punish speech while avoiding First Amendment scrutiny of any kind. *See* Alan E. Brownstein, *Hate Speech and Harassment: The Constitutionality of Campus Codes that Prohibit Racial Insults*, 3 WM. & MARY BILL RTS. J. 179, 194-96 (1994).

It is possible, of course, that the state might determine a speaker's motive without examining the content of his message. Not only is this an unlikely possibility in most cases, it is also beside the point. The problem with this kind of a motive analysis is not that the state will always need to examine the speaker's statements to determine if he has the requisite intent to violate the law, it is that the state can circumvent the First Amendment by indirectly punishing the speaker's expression under the rubric of determining that he uttered protected or unprotected speech with unlawful intent.

[53] Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995).

[54] United States v. White, 893 F. Supp. 1423, 1435-37 (C.D. Cal. 1995) (arguing that defendants could cite no authority "to support their contention that FACE's regulation of unprotected *conduct* even implicates their rights of expression" while substantial precedent is to the contrary) (emphasis added).

Other lower courts considered the issues more independently but also either ignored or misinterpreted the argument that FACE unconstitutionally discriminates on the basis of the content of speech within a category of unprotected speech. In *Cook v. Reno*,[55] for example, the district court simply insisted that FACE "does not criminalize speech at all" and found the statute to be "completely neutral in all respects."[56] In *Council For Life Coalition v. Reno*,[57] the district court began to grapple with the issue but ended up tying itself in a knot of inconsistent conclusions. First the court argued that "FACE proscribes only conduct" and as such is constitutional under the Supreme Court's analysis in *Mitchell*.[58] In response to the plaintiffs' argument that FACE also prohibits "threats of force," and to that extent should be reviewed under strict scrutiny as *R.A.V.* requires, the court insisted on applying a two dimensional analysis that recognized only unprotected conduct and protected expression. Since threats of violence were not protected speech, the court concluded, they must be proscribable conduct.[59] It seems to never have considered the idea that a third category, unprotected speech, existed and that courts were supposed to review the regulation of unprotected speech differently than the regulation of conduct. It is as if the holding of *R.A.V.* relating to unprotected speech had been rendered invisible.[60]

The court in *Riely v. Reno*[61] seemed to have its vision similarly restricted by doctrinal blinders. There, the court concludes correctly that threats are not protected by the First Amendment, but loses its way when the relevance of *R.A.V.* is raised. The court appears to recognize the core holding of *R.A.V.* It acknowledges that even if a statute applies only to fighting words, it would still be unconstitutional if it discriminates on the basis of content or viewpoint. The court also states correctly, citing

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[55] 859 F. Supp. 1008 (W.D. La. 1994).

[56] *Id.* at 1010.

[57] 856 F. Supp. 1422 (S.D. Cal. 1994).

[58] *Id.* at 1426.

[59] *Id.* at 1427-28.

[60] With regard to plaintiffs' argument that FACE involved content discrimination, the court argued that the statute was "subject-specific" but it was also viewpoint-neutral and did not discriminate on the basis of content. *Id.* at 1427.

[61] 860 F. Supp. 693 (D. Ariz. 1994).

Mitchell, that "unlike the statute in *R.A.V.*, FACE is largely directed at regulating conduct that is unprotected by the First Amendment."[62] Then after recognizing and conceding that FACE does not only regulate conduct but restricts speech as well, the court inexplicably suggests that such restrictions are constitutional because the speech at issue, threats of violence, is not protected by the First Amendment.[63]

The only FACE decision that has forthrightly and directly discussed the relationship between FACE and *R.A.V.*, particularly as it pertains to FACE's prohibition of threats, is *United States v. Brock*.[64] The *Brock* court recognized the distinction created by *R.A.V.* and *Mitchell* between regulations directed at conduct and regulations directed at unprotected speech.[65] It also recognized that a prohibition of threats might constitute a content-discriminatory regulation of unprotected speech and require the rigorous review of FACE.[66] Ultimately, however, the court relied on recent authority within its own and other circuits determining that civil rights laws prohibiting threats are directed at conduct, not speech. Because conduct is not subject to the *R.A.V.* rule against content discrimination, it decided to uphold FACE under deferential scrutiny.[67]

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[62] *Id.* at 703.

[63] After arguing that FACE is distinguishable from *R.A.V.* because FACE is primarily directed at conduct rather than speech, the district court stated: "It is true that FACE also prohibits pure speech in the form of threats of force that place another in reasonable apprehension of bodily harm. However, . . . such threats are not protected by the First Amendment." *Id.* at 703 n.7. The court never explained exactly why the regulation of unprotected speech is not subject to the holding of *R.A.V.*

[64] United States v. Brock, 863 F. Supp. 851 (E.D. Wis. 1994).

[65] *Id.* at 863-64.

[66] *Id.* at 864 n.26.

[67] The *Brock* court cited United States v. Hayward, 6 F.3d 1241 (7th Cir. 1993), United States v. Lee, 6 F.3d 1297 (8th Cir. 1993), and United States v. J.H.H., 22 F.3d 821 (8th Cir. 1994). In *Hayward*, defendants burned crosses on the lawn of a white couple who occasionally entertained black friends at their home in order to express the message that black people were not welcome in the community. Defendants were convicted of violating 42 U.S.C. § 3631(b), which prohibits the use of force or threats of force to intimidate any person from participating in any activity related to the sale, rental, or occupancy of housing because of the victim's race. The defendants argued that § 3631 was a content-discriminatory regulation of speech and, as such, its application to their expressive activities must be reviewed under strict scrutiny. *Hayward*, 6 F.3d at 1249.

Judge Manion's opinion upholding the defendants' conviction is difficult to understand. It begins by recognizing that the defendants' conduct was expressive in nature but concludes that expressive conduct that promotes "fear, intimidation, and psychological

injury" is similar to fighting words and lacks First Amendment protection. *Id.* at 1249-50. Thus, the Court's initial analysis seems to suggest that cross burning engaged in to communicate a threatening message should be characterized as a form of unprotected speech. That conclusion, of course, would not be inconsistent with the defendants' First Amendment claims since content-discriminatory regulations of unprotected speech after *R.A.V.* must receive strict scrutiny.

The court quickly shifts away from this approach, however, and determines that strict scrutiny is not required. Section 3631(b) is not directed at the expressive element of cross burning because the statute prohibits threats and intimidation. Cross burning as a means of threatening or intimidating others is conduct, not speech, for First Amendment purposes. *Id.* at 1250. Thus, "[t]he statute . . . is aimed at curtailing wrongful conduct in the form of threats or intimidation, and not toward curtailing any particular form of speech." *Id.* Accordingly, because threats are conduct and not speech, *Mitchell* rather than *R.A.V.* is the controlling authority. *Id.* To the extent that "expressive speech" is involved in threats prohibited by § 3631(b) it can be incidentally swept up within the scope of a statute that is directed at conduct without violating the First Amendment. *Id.* at 1251.

Judge Flaum's concurring opinion in *Hayward* presents a more cogent analysis, but one that is frankly dubious of the Court's reasoning in *R.A.V. Id.* at 1258. Judge Flaum recognized the similarity between the St. Paul hate speech ordinance struck down in *R.A.V.* and § 3631. "Like the ordinance [declared unconstitutional in *R.A.V.*], section 3631 selects a subclass of threats from the larger proscribable class of all threats apparently on the basis of the message conveyed — because they express hostility to the idea that blacks and whites should share housing together." *Id.* at 1260. He also rejected Judge Manion's contention that § 3631's prohibition of threats could be upheld as the incidental sweeping up of speech by a statute directed at conduct. *Id.* at 1260 n.1.

Judge Flaum seemed to believe that § 3631 deserves to be upheld, despite the content-discriminatory distinction it draws, because the harm caused by threats based on the victim's race or gender are more harmful than other threats. He also recognized, however, that a similar argument presented in defense of the St. Paul hate speech ordinance had been explicitly rejected in *R.A.V. Id.*

With that alternative foreclosed by Supreme Court authority, Judge Flaum ultimately determined that § 3631 is constitutional by resorting to a different exception in *R.A.V.*, the distinction between a law prohibiting unprotected speech directed at a particular group and a law prohibiting unprotected speech that expresses a message of hatred toward a particular group. *Id.* The St. Paul ordinance struck down in R.A.V. prohibited expressions of hatred; Judge Flaum interprets § 3631, on the other hand, to focus "neither on the content of the threat nor on the effect that it is likely to cause in the listener, but rather on the choice of the victim or on the motive of the person making the threat." *Id.* at 1261. Although he questioned the legitimacy of this distinction, describing it, alternatively, as seemingly "illusory" or as "a distinction without a difference," Flaum accepted it as the only approach left open by *R.A.V.* to uphold a law he believed to be constitutional under "traditional First Amendment principles." *Id.* at 1261-62.

The Eighth Circuit found itself trapped in the same doctrinal quagmire. In United States v. Lee, 6 F.3d 1297 (8th Cir. 1993) (en banc), the court reversed the conviction of another cross-burning defendant who had been charged with violating 18 U.S.C. § 241, which prohibits persons from conspiring to injure, oppress, threaten, or intimidate anyone in the free exercise of, or because they have exercised, their constitutional or legal rights. After summarizing the decisions in *R.A.V.* and *Mitchell*, the court concluded that § 241 discriminated on the basis of the content of speech because its application was dependant on the communicative impact of the defendant's conduct. Because threatening and

The *Brock* court's uneasiness with its own conclusion is palpable and it places responsibility for this doctrinal uncertainty where responsibility rightly belongs — on the Supreme Court's opinion in *R.A.V.* After noting that the Supreme Court's "categorical distinction between statutes that are 'directed at speech'

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intimidating one or more persons through conduct intended to harm, frighten, punish or inhibit the exercise of their legal rights "relates to the communicative impact and emotive impact of speech," the enforcement of the statute is related to the suppression of expression. *Id.* at 1298-1301. Nonetheless, § 241 could be constitutionally applied to cross burning or other symbolic expression if its application was limited to unprotected speech, expression directed to inciting, and likely to result in, imminent lawless conduct or threats of physical violence. Because the trial court's instruction to the jury was not carefully limited to either category of unprotected speech in this case, however, the defendant's conviction was reversed and remanded for a new trial consistent with the court's opinion. *Id.* at 1302-04.

Four judges dissented on the ground that cross-burning engaged in to threaten or intimidate others is conduct, not speech. Section 241, they reasoned, is directed at conduct, not expression, and as such, does not violate the First Amendment. *Id.* at 1310 (McMillian, J., concurring).

The majority's analysis in *Lee* appears to be inconsistent with the reasoning and holding of *R.A.V.* Even if cross-burning constitutes unprotected speech, content-discriminatory regulations within a category of unprotected speech must receive strict scrutiny. Accordingly, § 241 could only be upheld under some lesser standard of review if the court determined that it did not discriminate on the basis of content within a category of unprotected speech or if it fit within one of the *R.A.V.* exceptions. The *Lee* majority, however, does not discuss either contention.

A subsequent panel of the Eighth Circuit did nothing to alleviate this confusion. In United States v. J.H.H., 22 F.3d 821 (8th Cir. 1994), the young man known as R.A.V., whose conviction for violating the St. Paul ordinance was reversed by the U.S. Supreme Court, and his cross-burning cohorts, were convicted of violating 18 U.S.C. § 241 and 42 U.S.C. § 3631. *Id.* at 821-24. The court distinguished *R.A.V.* and upheld the convictions on the grounds that both federal statutes were directed solely at a specific "mode of expression," threats of violence and intimidation. Therefore, whether either statute discriminated on the basis of content or not was irrelevant to their constitutionality since neither law posed any significant danger of idea or viewpoint discrimination. *Id.* at 825.

Again it is difficult to be clear about the court's reasons for upholding these convictions. The court may be suggesting that a law directed at threats is different than a law directed at fighting words, but it provides no support for such a conclusion. Alternatively, the implication of *J.H.H.* may be that neither 18 U.S.C. § 241 nor 42 U.S.C. § 3631 involve content-discrimination of any kind or content-discrimination that creates a risk that the suppression of ideas is afoot. But the court says nothing to defend this conclusion either.

Finally, the court may believe that these sections apply to the manner of expression rather than its content. While that distinction would clearly be a legitimate basis for distinguishing *R.A.V.*, neither of these two federal laws appears to be directed at the way that proscribable threats are communicated. What is prohibited is "threats" without any indication that a purely verbal threat of violence is not subject to sanction under either law.

and those that are 'directed at conduct' is likely to be difficult to apply and open to manipulation,"[68] the *Brock* court explains that this ambiguous distinction may nonetheless have been made necessary by the Court's unorthodox reasoning in *R.A.V.* itself: "[P]erhaps the categorical approach is the only way to reconcile the rather radical holding of *R.A.V.* with the legitimate government interest in selectively punishing certain groups or individuals."[69]

II. THE PROBLEM WITH *R.A.V.* AND *MITCHELL*

The recent cases evaluating the constitutionality of FACE, important as they may be, are not the only lower court decisions indicating judicial reluctance to implement *R.A.V.*'s holding and reasoning. Several other First Amendment cases, such as the civil rights decisions cited in *Brock*,[70] demonstrate either resistance to the Supreme Court's hate speech analysis or uncertainty about how courts are supposed to evaluate the regulation of unprotected speech today.[71] In all of these cases, the lower courts are

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[68] *Brock*, 863 F. Supp. at 864 n.26.

[69] *Id.* (citing Judge Flaum's concurring opinion in *Hayward*, 6 F.3d at 1257-58).

[70] *See* cases cited *supra* note 67.

[71] In State v. Talley, 858 P.2d 217 (Wash. 1993), for example, the state supreme court upheld Washington's malicious harassment statute despite defendants' argument that they were being prosecuted under a content-based speech regulation that violated the First Amendment. *Id.* at 221. The Court distinguished *R.A.V.* because the law at issue was directed at and only regulated conduct, not speech. *Id.* The Washington statute stated:

> (1) A person is guilty of malicious harassment if he maliciously and with the intent to intimidate or harass another person because of, or in a way that is reasonably related to, associated with, or directed toward, that person's race, color, religion, ancestry, national origin, or mental, physical, or sensory handicap:
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> (a) Causes physical injury to another person; or
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> (b) By words or conduct places another person in reasonable fear of harm to his person or property or harm to the person or property of a third person. Such words or conduct include, but are not limited to, (i) cross burning, (ii) painting, drawing, or depicting symbols or words on the property of the victim when the symbols or words historically or traditionally connote hatred or threats toward the victim, or (iii) written or oral communication designed to intimidate or harass because of, or in a way that is reasonably related to, associated with, or directed toward, that person's race, color, religion, ancestry, national origin, or mental, physical, or sensory handicap. However, it does

struggling with the same problem. *R.A.V.* requires that a law like FACE prohibiting both conduct, such as force and obstruction, and unprotected speech, such as threats, must receive bifurcated review with the regulatory provisions restricting speech subject to heightened review. While the courts' various rationalizations for failing to provide the rigorous scrutiny required may differ, what remains constant is the lower courts' unwillingness to comply with the standard of review *R.A.V.* mandates.[72]

> not constitute malicious harassment for a person to speak or act in a critical, insulting, or deprecatory way unless the context or circumstances surrounding the words or conduct places another person in reasonable fear of harm to his or her person or property or harm to the person or property of a third person; or
>
> (c) Causes physical damage to or destruction of the property of another person.

WASH. REV. CODE ANN. § 9A.36.080(1) (West 1993). I leave it to the reader to determine whether she believes this law can be upheld as constitutional, if the Court's decision in *R.A.V.* means what it says.

Other cases demonstrate similar confusion. In United States v. McDermott, 822 F. Supp. 582 (N.D. Iowa 1993), *aff'd in part, rev'd in part*, 29 F.3d 404 (1994), defendants challenged their indictment under 18 U.S.C. § 241 for burning a cross as part of a conspiracy to threaten African-Americans and prevent them from using a public park. *Id.* at 583-84. Despite the court's apparent recognition of *R.A.V.*'s holding requiring strict scrutiny of content-discriminatory regulations of unprotected speech, the court ignored *R.A.V.* in rejecting defendants' First Amendment argument. *Id.* at 586-87. Instead, the court concluded that even if § 241 is content-based, it could be constitutionally applied to "true threats" because such threats were unprotected speech. *Id.* at 590-91. The court's analysis was further complicated, however, by its determination that § 241 is content-based because it discriminates between threats and other categories of speech. *Id.* at 590 n.7. The critical issue suggested by *R.A.V.*, whether § 241 is content-based in only prohibiting threats directed at people because they exercised their legal rights, is not even discussed.

After the defendants were tried and convicted, the Eighth Circuit affirmed their conviction on one count but reversed on the other. United States v. McDermott, 29 F.3d 404, 405 (1994). The court, following its en banc decision in *United States v. Lee*, focused on whether the trial instructions to the jury had made it clear that the defendants must have threatened to use force against their victims to be convicted. *Id.* at 407. Since threats of force are unprotected speech analogous to speech that incites imminent lawless action, cross-burning that constituted a threat of force could be punished without violating First Amendment guarantees. *Id.* at 406. Again, the court did not discuss whether § 241 discriminated on the basis of content in prohibiting only certain threats.

[72] The conclusions reached by all of these courts are not intrinsically unreasonable. There may be a cogent and persuasive basis for distinguishing threats from fighting words or incitement to imminent lawless acts and concluding that the former is more properly characterized as conduct than speech. The suggestion to the contrary in *R.A.V.* is, after all, dicta, although there are numerous lower court decisions that support Scalia's conclusion that threats are unprotected speech. *See supra* note 45 (listing cases holding or suggesting that threats can be punished as unprotected speech). Similarly, there may be grounds for

Ultimately, I believe the lower courts' failure to apply *R.A.V.* correctly in adjudicating FACE and various civil rights statutes is grounded on a fundamental error in the Supreme Court's analysis. Courts do not follow *R.A.V.* because doing so would make no sense. Content-discriminatory regulations of unprotected speech do not merit strict scrutiny. Imposing such a rigorous standard of review on the regulation of unprotected speech would require courts to strike down far too many reasonable attempts to legislate carefully in the area of unprotected speech.

The critical dichotomy that justifies heightened review for certain regulations and more deferential review of others is not the distinction between speech and conduct, as Justice Scalia asserts in *R.A.V.* and the Court confirms in *Mitchell.* While that distinction has a role to play in First Amendment analysis and is relevant to the review of regulations focusing on the actor's motive, the Court's emphasis on whether speech or conduct is being regulated is overstated. Instead, it is the difference between content-neutral, content-discriminatory, and viewpoint-discriminatory regulations that more fundamentally determines the applicable standard of review. Content-neutral regulations of unprotected speech and conduct should be upheld as long as the law is minimally rational. Content-discriminatory regulations of both unprotected speech and expressive conduct should be evaluated under the same standard of review, a standard similar to the multi-factor balancing test used to evaluate content-neutral regulations of protected speech.[73] On the other hand,

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arguing that statutes such as 18 U.S.C. § 241 or 42 U.S.C. § 3631(b) do not discriminate on the basis of the content of threats or that they fit within one of the exceptions to strict scrutiny set out in *R.A.V.* What is surprising is the lack of any effort on the part of the lower courts to make these arguments in anything more than a conclusory form, if at all.

I interpret this lack of a willingness to directly engage the reasoning of *R.A.V.* as a sign that the lower courts are either unsure of its meaning or are reluctant to accept its radical undercutting of legislative authority in regulating unprotected speech. Thus, I am far from convinced that there is a new, reasoned consensus on the part of lower courts that threats are conduct rather than speech. The only virtue of such a conclusion, although it is not stated explicitly, is that it enables courts to avoid the holding of *R.A.V.*

[73] *See* Ward v. Rock Against Racism, 491 U.S. 781 (1989). The *Ward* Court stated:

> [The] government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "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."

courts should review viewpoint-discriminatory regulations of either unprotected speech or expressive conduct under strict scrutiny.[74]

Justice Scalia is surely correct in *R.A.V.* when he argues that in some circumstances the First Amendment prohibits the regulation of even unprotected speech.[75] Undoubtedly, a law prohibiting obscenity or fighting words derogating right-wing political ideas but not left-wing political ideas would be unconstitutional. But so would a law enhancing the penalty imposed on an aggressor who physically assaulted Democrats while providing a lesser sanction for those who perpetrated physical assaults on Republicans. The fact that the behavior prohibited by the latter law involves conduct and not speech would hardly justify upholding the law under lenient scrutiny. Instead, the law would cer-

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Id. at 791 (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

[74] Content discrimination, as opposed to viewpoint discrimination, is typically understood to refer to subject matter distinctions. Thus, a ban on political speech but not scientific discourse is content-discriminatory, while a law prohibiting expression supporting socialism while allowing speech endorsing capitalism is viewpoint-discriminatory. Less commonly, content discrimination is understood to refer to language choices. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 750-51 (1978) (noting FCC prohibition of indecent prerecorded monologue involved content discrimination, not viewpoint discrimination, because same message could be communicated using less offensive language).

In urging that courts focus on the difference between content and viewpoint discrimination instead of the difference between unprotected speech and conduct, I recognize that the former distinction is not always easy to apply. Recent cases have created considerable uncertainty as to whether a given law will be categorized as content discrimination or viewpoint discrimination. *See, e.g.*, Rosenberger v. Rector of the Univ. of Va., 115 S. Ct 2510, 2512-14 (1995) (concluding that university regulation refusing to subsidize "religious activities, philanthropic contributions and activities, political activities, activities that would jeopardize University's tax exempt status [and activities] which involve payment of honoraria or similar fees, or social entertainment or related expenses" is viewpoint-discriminatory rather than content-discriminatory); Boos v. Barry, 485 U.S. 312, 319 (1988) (construing regulation prohibiting display of any sign within 500 feet of foreign embassy, if sign tended to bring that government into "public odium" or "disrepute," to be content discrimination rather than viewpoint discrimination because all signs critical of any foreign government were restricted); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 38, 49 (1983) (holding that regulations permitting only one of two competing unions access to school mail system involved "distinctions in access on the basis of subject matter and speaker identity," but not viewpoint discrimination).

On the other hand, the distinction between speech and conduct is also not an easy one to draw in many cases as the FACE cases themselves demonstrate regarding the status of threats. *See supra* notes 45-46 and accompanying text (discussing problem of categorizing threats as either conduct or unprotected speech).

[75] *R.A.V.*, 505 U.S. at 385.

tainly be struck down on the ground that it violated the First Amendment. The critical point is that a viewpoint-discriminatory law may seriously burden freedom of speech regardless of the nature of the activity that is being regulated.

Conversely, a law prohibiting political fighting words and a law prohibiting physical assaults in which the victim is selected because of his political beliefs should be upheld under less than stringent review despite the fact that both laws involve content discrimination. It should make no difference that the former law regulates unprotected speech while the latter law regulates conduct. Both laws are viewpoint-neutral despite the fact that they are subject specific. Both laws can be defended as attempts to accomplish legitimate objectives in an even-handed way.[76] Neither law intrinsically favors one side or the other on any contested public issue.

Thus, the primary weakness of the *R.A.V.* analysis is not its recognition that certain kinds of restrictions on unprotected speech may violate the First Amendment. Nor is there anything problematic about Justice Scalia's legitimate concern about governmental intrusion into the marketplace of ideas. Where Scalia does err is in his application of First Amendment doctrine to unprotected speech.

What is wrong with *R.A.V.* and *Mitchell* is the Court's failure to carefully consider the reasons *why* certain kinds of speech regulations are more problematic and, accordingly, more rigorously reviewed than others.[77] Without that foundation, doctrinal constraints that may sensibly be applied to certain kinds of speech restrictions, such as the rule that the content-discriminatory regulation of protected speech must be rigorously reviewed, risk being extended to cover other kinds of laws, those involving the content-discriminatory regulation of unprotected speech, for

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[76] A ban on both political fighting words and political assaults can be justified as a means of preventing political debate from deteriorating into insult-driven brawls. The need to maintain civility and order even during hotly debated political disputes is obviously an important foundation for democratic self-government.

[77] The Court in *R.A.V.* and *Mitchell* never even bothered to explain why the fact that a law was directed at conduct rather than unprotected speech should make a difference with regard to the standard of review applied to the law. It is certainly not self-evident that there will never be any danger that "official suppression of ideas is afoot" when a law is directed at conduct. *See* Weinstein, *supra* note 33, at 350-55.

example, for which they are largely unsuitable. Indeed, it is only by returning to foundational principles and examining them critically that the conceptual error that underlies the Court's reasoning in *R.A.V.* can be properly understood.

A. Justifying the Rigorous Review of Discriminatory Speech Regulations

Why do content- and viewpoint-discriminatory laws receive such rigorous scrutiny? All regulations of speech, whether they are viewpoint-discriminatory, content-discriminatory, or content-neutral, have the effect of suppressing ideas and information. They all make it more difficult for individuals to communicate their messages. If we think about the issue solely in conventional, quantitative terms, viewpoint- and content-discriminatory regulations, because of their more precise and limited scope, probably restrict *less* speech than content-neutral laws, which may often extend far more broadly and interfere with many more messages.[78]

Nonetheless, despite the narrowness of the burdens they impose, viewpoint- and content-discriminatory regulations of speech are recognized to be particularly hazardous to First Amendment guarantees. The danger inherent in such laws is not based on the magnitude of the burden they place on speech. Rather, it is

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[78] *See, e.g.*, Geoffrey R. Stone, *Content Neutral Restrictions*, 54 U. CHI. L. REV. 46, 54 n.35 (1987) [hereinafter *Content Neutral Restrictions*] (arguing that content-neutral restrictions may reduce total information available to public more than content-based restrictions); *Content Regulation*, *supra* note 12, at 197 (same); Kathleen M. Sullivan, *Discrimination, Distribution and Free Speech*, 37 ARIZ. L. REV. 439, 447-48 (1995) (explaining that while it is "tempting" to argue that content-discriminatory laws "wipe out more speech" then content-neutral laws, that is not always true — "a flat ban on all billboards wipes out more speech as a quantitative matter than a ban only on billboards critical of current representatives"). Obviously, this is not always the case, particularly if the comparison is between content-discriminatory and content-neutral regulations. Some content-neutral regulations can be very narrow in their scope and certain content-discriminatory laws may regulate very broadly. There is a sense, however, in which content-discriminatory laws are recognized as being more precise than their content-neutral counterparts. When a content-discriminatory law is challenged on constitutional grounds, for example, a content-neutral alternative a court might consider for comparative purposes to test the veracity and substantiality of the state's asserted purpose would commonly extend the coverage of the law. *See, e.g.*, Carey v. Brown, 447 U.S. 455, 466-67 (1980) (striking down content-discriminatory regulation of residential picketing that excluded labor picketing from its coverage on grounds that labor picketing was neither less problematic nor more valuable than other subjects of picketing restricted by law).

the nature of the impact and the purpose of such laws that explains the rigorous scrutiny they receive under current doctrine.

1. The Danger of Distortion in Public Discourse

Content- and viewpoint-discriminatory regulations are constitutionally pernicious, in the words of Geoffrey Stone, primarily because they "distort public debate" in our society.[79] They "excise" particular information or messages from the marketplace of ideas and in doing so manipulate the discussion and resolution of public policy issues by the polity.[80]

While both content- and viewpoint-discriminatory regulations of protected expression receive strict scrutiny, it is generally recognized that viewpoint discrimination represents the greater constitutional evil.[81] Thus, for example, in particular circumstances such as the regulation of speech in a non-public forum, viewpoint-discriminatory restrictions will still receive strict scrutiny while content-discriminatory limits on speech in the same location will be upheld as long as they are reasonable.[82]

This distinction cannot be explained by reference to the diminishing effect of excising information or messages from the marketplace of ideas because both forms of regulation produce that result. Indeed, a content-discriminatory ban on all political speech excises even more information and messages than a

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[79] *Content Neutral Restrictions*, *supra* note 78, at 55; *Content Regulation*, *supra* note 12, at 198.

[80] *See Content Neutral Restrictions*, *supra* note 78, at 55; *Content Regulation*, *supra* note 12, at 198; Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 101 (1978) [hereinafter *Subject-Matter Restrictions*]; *see also* Simon & Schuster v. New York Crime Bd., 502 U.S. 105, 115 (1991) (noting that rationale behind prohibiting content-discrimination is that it "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace").

[81] *See, e.g.*, *Subject-Matter Restrictions*, *supra* note 80, at 83 (explaining that it is more difficult to justify stringent scrutiny of "subject-matter" speech regulations than viewpoint-discriminatory speech regulations); Sullivan, *supra* note 78, at 446 (noting that "[v]iewpoint discrimination is so clearly the cardinal First Amendment sin that legislatures now will take pains not to be caught at it").

[82] *See, e.g.*, Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 811 (1985) (upholding viewpoint-neutral exclusion of speakers from nonpublic forum); Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 54-55 (1983) (holding that differential access to non-public forum provided rival unions was constitutional provided it did not involve viewpoint discrimination).

viewpoint-discriminatory ban on left-wing or right-wing speech. Thus, whatever makes viewpoint-discriminatory laws particularly distorting and inconsistent with First Amendment principles, it must be something other than the fact that these laws make the marketplace of ideas substantively smaller than it would otherwise be.

Viewpoint-discriminatory laws are uniquely violative of the First Amendment because they directly empower one side of a debate with weapons that are denied to the proponents of the other side. This distorts the ability of the participants to fairly compete on the merits of their ideas.[83] Justice Scalia recognizes this distinguishing quality of viewpoint-discriminatory laws in *R.A.V.* when he argues that the state has no authority "to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules."[84]

Content-discriminatory laws do not create the same kind of distortion in public discourse because the regulatory classification that the government employs does not distinguish directly between competing ideas or perspectives. It is ludicrous to suggest, for example, that the proponents of non-political speech are unfairly empowered when political speech alone is prohibited. There is simply no conflict between political and non-political speech that will be skewed by government intervention.[85]

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[83] *See Content Regulation*, *supra* note 12, at 223 (explaining that viewpoint-based speech regulation has "greater potential to distort public debate" than content-neutral law because it disproportionately disadvantages one point of view while leaving opposing messages unrestricted).

[84] *R.A.V.*, 505 U.S. at 392.

[85] *See Content Regulation*, *supra* note 12, at 241 (arguing that subject matter regulations of speech are "less likely than viewpoint-based restrictions to distort public debate in a viewpoint-differential manner"); *Subject-Matter Restrictions*, *supra* note 80, at 102-03, 108-12 (explaining that subject matter restrictions on speech are less likely to distort debate and skew thinking of community than viewpoint-discriminatory regulations because they do not directly disadvantage particular side of debate). Professor Martin Redish makes a similar point in sharply criticizing the suggestion that subject-matter classifications abridge freedom of speech because they violate equality principles embedded in the First Amendment. Redish writes:

> [W]hen distinctions are drawn between commercial and political speech or between fighting words, libel or obscenity and other forms of expression, it makes little sense to criticize the distinctions solely because different forms of speech are receiving unequal treatment. Such forms of expression do not compete with one another, as, for example, do opposite positions on the Vietnam War or the defense budget. Those who do not receive protection for their

It is true that content-discriminatory laws may be the result of deliberate manipulation that is intended to distort the marketplace of ideas and skew debate in favor of one side or the other.[86] That is also true of content-neutral laws, however, and it is by no means clear that content-discriminatory laws are always substantially more vulnerable to such abuses than content-neutral ones. Indeed, both content-neutral and content-discriminatory laws can be used to indirectly influence debate in a similar manner that can be easily contrasted with the direct distortion created by viewpoint-discriminatory laws.[87]

If we consider the abortion debate, for example, it is obviously unconstitutional to prohibit only anti-abortion messages in traditional public fora, while allowing speech supporting the right of women to have an abortion to be expressed in those same fora. The unequal impact of that law on the ability of the

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> commercial or libelous utterances are no worse off because other forms of speech are protected, and would be no better off if the other forms were also denied protection. This is not true when government prohibits the expression of only one viewpoint on a particular issue. In that case, the prohibited expression is harmed, in an equal protection sense, because competing views are allowed to be heard, and would be better off if the competing views were also prohibited.

Martin Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 139 (1981) (footnotes omitted).

[86] *See Subject-Matter Restrictions*, *supra* note 80, at 110 (noting that "[i]n practice, [subject matter restrictions] will often disadvantage one 'side' of an issue more than the other, depending upon which 'side' is more likely to be affected by the restriction"); Cass R. Sunstein, *Half-Truths of the First Amendment*, 1993 U. CHI. LEGAL F. 25, 41-42 (1993) (suggesting that "content-based restrictions are peculiarly likely . . . to have intolerable skewing effects on the system of free expression", but that this "presumption should not . . . be pressed too hard").

[87] *Subject-Matter Restrictions*, *supra* note 80, at 110 (pointing out that many content-neutral speech restrictions, such as laws banning all street demonstrations, will have "the same viewpoint-differential impact" on controversial public policy issues, such as war in Vietnam, "as a more limited subject matter restriction directed specifically against speech about the war"). *See also* Redish, *supra* note 85, at 130-31 (arguing that content-neutral speech regulations may have equally negative impact on marketplace of ideas as content-discriminatory restrictions because "[i]ndividuals who have heard one side of an issue may well be precluded from learning the other by content-neutral restrictions"); *Content Regulation*, *supra* note 12, at 217-18 (noting that facially neutral restrictions often have uneven effects); Sunstein, *supra* note 86, at 42 (recognizing that "[t]here are cases in which content-neutral restrictions are especially damaging, and cases in which content-based restrictions are not so bad"). *But see Content Regulation*, *supra* note 12, at 199-200 (arguing that content-neutral restrictions do not distort public debate to same degree as content-based restrictions because they "limit the availability of only particular means of communication").

two sides of the abortion debate to influence public opinion is flagrant. If a law is passed prohibiting the expression of all speech relating to reproductive health issues in traditional public fora, however, it is far less clear that this law empowers one side of the abortion debate and disables the other. Both sides use traditional public fora for expressive purposes and are disabled by this law.

If we narrow the content-discriminatory law so that it prohibits only speech relating to reproductive health issues in traditional public fora adjacent to reproductive health clinics, the impact of the law changes again. Now, the alleged even-handedness of the law can be forcefully challenged. The new law arguably disables anti-abortion protestors more severely than it does supporters of the right to have an abortion, since the former group finds the sidewalks adjacent to clinics to be a particularly advantageous and valuable site for their expression. This is the same kind of unfair distortion in effect that renders viewpoint-discriminatory laws so problematic.

The arguable unfairness created by this law, however, is not a result of content discrimination alone. It results at least as much from the location specific nature of the law. A content-neutral law that prohibited all expressive activity adjacent to reproductive health clinics would produce almost the exact same kind of unequal impact. Both the content-discriminatory law and the content-neutral law are problematic because the two sides of the abortion debate have different needs and assign different values to particular opportunities for expression. The fact that only the former law is directed on its face at the communicative impact of speech does not necessarily mean that it contributes to greater inequality and distortion of the marketplace of ideas.[88]

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[88] Thus, so-called "bubble zone" or "buffer zone" statutes or injunctions clearly have a disproportionate impact on anti-abortion expression. Nonetheless, they are regularly recognized to be content-neutral and are reviewed as such by courts. *See, e.g.*, Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2523 (1994) (affirming content-neutral injunction creating 36-foot protest-free "buffer zone" in front of reproductive health clinic); Sabelko v. City of Phoenix, 68 F.3d 1169, 1173 (9th Cir. 1995) (upholding content-neutral ordinance creating "bubble zone" within 100 feet of health care facility in which demonstrators must withdraw eight feet from any person asking them to do so); Pro-Choice Network v. Schenck, 67 F.3d 377, 381 (2d Cir. 1995) (en banc) (affirming injunction creating content-neutral "buffer zone" in which demonstrations are prohibited within 15 feet of entrance to reproductive health clinic); New York State NOW v. Terry, 886 F.2d 1339, 1363

In one sense, the argument just presented seems counter-intuitive. Content-discriminatory laws *seem* so much more problematic than content-neutral laws. A law banning all political speech, for example, surely has a greater distorting effect on public debate than a law prohibiting the use of loudspeakers. Indeed, it does, but the reason for the obviously greater distortion resulting from a law banning political speech is not grounded entirely on its content-discriminatory nature. A law banning speech related to Mother Goose Rhymes, for example, is far less distorting than a law prohibiting all leafletting, rallies, and demonstrations in traditional public fora despite the content-discriminatory nature of the former law.

Many of the arguments suggesting that content-discriminatory laws are more dangerous and distorting than content-neutral laws seem to involve a comparison of apples and oranges. When a broad prohibition against the expression of some valued subject of speech is compared to a narrow prohibition limiting some relatively marginal method of communicating, it is hardly

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(2d Cir. 1989) (holding that speech restrictions in injunctions are content-neutral), *cert. denied*, 495 U.S. 947 (1990); Medlin v. Palmer, 874 F.2d 1085, 1086 (5th Cir. 1989) (upholding content-neutral ordinance creating 150-foot quiet zone around medical facilities); Portland Feminist Women's Health Ctr. v. Advocates For Life, Inc., 859 F.2d 681, 687 (9th Cir. 1988) (affirming injunction creating 12-foot protest-free zone in front of reproductive health clinic); Fischer v. City of St. Paul, 894 F. Supp. 1318, 1326 (D. Minn. 1995) (finding restriction based on illegality of activity, not content of speech); Edwards v. City of Santa Barbara, 883 F. Supp. 1379, 1385 (C.D. Cal.) (explaining that law restricting protests outside of health care facilities remains content-neutral notwithstanding fact that anti-abortion protests inspired its adoption or that it "has a disproportionate effect on people with anti-abortion views"), *vacated*, 70 F. 3d 1277 (9th Cir. 1995); Planned Parenthood Shasta-Diablo, Inc. v. Williams, 898 P.2d 402, 403 (Cal. 1995) (upholding content-neutral injunction restricting protest activity to public sidewalk across street from family planning clinic); Hirsh v. City of Atlanta, 401 S.E.2d 530, 533 (Ga. 1990) (noting that injunction restricts manner, not content, of speech), *cert. denied*, 501 U.S. 1221, *and cert. denied*, 502 U.S. 818 (1991); Horizon Health Ctr. v. Felicissimo, 638 A.2d 1260, 1267-68 (N.J. 1994) (noting that injunction protecting medical facility applies irrespective of subject-matter); Bering v. Share, 721 P.2d 918, 925-26 (Wash. 1986) (noting that location restrictions do not involve content regulation), *cert. denied*, 479 U.S. 105 (1987).

But see Cheffer v. McGregor, 6 F.3d 705, 710-11 (11th Cir. 1993) (holding that injunction issued against Operation Rescue and those acting in concert with it is viewpoint-based); Thomason v. Jernigan, 770 F. Supp. 1195, 1201 (E.D. Mich. 1991) (holding that vacating public pedestrian and parking access to cul-de-sac in front of Planned Parenthood clinic for purpose of controlling anti-abortion protests is content-discriminatory); Fargo Women's Health Org., Inc. v. Lambs of Christ, 488 N.W.2d 401, 408 (N.D. 1992) (suggesting that "an attempt to enjoin *peaceful* pro-life demonstrations outside an abortion clinic is an attempt to enjoin the expression of specific ideas").

surprising that the content-discriminatory law is found to be more dangerous than the content-neutral one. It is important to remember, however, that if the variables are reversed, the result will be reversed as well. A broad prohibition restricting the use of effective and important means of communicating will distort public debate much more than a narrow restriction of a trivial subject of discourse.[89]

If the breadth and value of what is being regulated is held constant, the two types of regulation may be equally distorting. I am not at all certain, for example, that a ban on all political speech in traditional public fora is substantially more distorting than a ban on all leafletting, loudspeakers, signs, rallies, and picketing in traditional public fora. At least the case for greater distortion in the above example remains to be made. Similarly, it is not clear that a content-discriminatory ban on all political speech in city parks between the hours of five o'clock and seven o'clock in the evening on Sundays is more distorting than a content-neutral ban on all public expression of any kind in the park during the same period.

Also, it is important to recognize that a skeptical examination of the "special" risks associated with content-discriminatory laws need not deny the conclusion that such laws have a greater distorting effect on public debate than content-neutral laws. The arguments presented above do not depend on the premise that there is *no* difference between content-discriminatory and content-neutral laws with regard to their propensity to cause the same kind of effects as, or to mask, viewpoint discrimination. It is sufficient to establish that whatever difference exists is not so substantial that this distinction alone can explain and justify the varying standards of review that the courts apply.

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[89] Professor Sunstein provides the following illustration:

> Suppose, for example, that government forbids all speech in airports, train stations, and bus terminals. Here we will have a fundamental intrusion on processes of public deliberation. Indeed, one of the most effective strategies of tyrants is to limit the arenas in which public deliberation can take place. Surely this sort of intrusion is more severe than what arises when, for example, small public universities ban a narrow category of racial hate speech. The content-neutral restriction may seriously restrict the number of expressive outlets and thus impair the system of democratic deliberation.

Sunstein, *supra* note 86, at 42.

A content-discriminatory law, such as a law banning picketing related to labor disputes, may distort public debate to a greater extent than a law banning picketing at certain times and in specific locations. But this distinction should not be overstated. A law banning picketing of any kind in front of a manufacturing establishment is content-neutral, but probably almost as disadvantageous to union speech as a similar law prohibiting only picketing related to labor disputes. Indeed, a law prohibiting only pro-union picketing in front of manufacturing establishments may be only marginally more distorting than the content-neutral law. Not many anti-union activists, after all, spend their time picketing in front of manufacturing establishments.

Thus, we see yet again that a narrow, underinclusive content-discriminatory law may create a real risk of hidden viewpoint discrimination, but it is the time, place, and manner limitations that do the lion's share of the viewpoint-discriminatory work in such laws. It is these time, place, and manner constraints in conjunction with content discrimination that narrow the scope of these laws and make them underinclusive in a way that disadvantages one side of a dispute but not the other. Standing alone, carefully crafted but facially neutral time, place, and manner restrictions may be almost as effective as narrowly stated content-discriminatory laws in unfairly influencing public debate.

If the above analysis is correct, and the distorting effect of content-discriminatory laws may be closer in kind and magnitude to the impact of content-neutral laws than it is to the impact of viewpoint-discriminatory laws, then what accounts for the courts' commitment to the rigorous scrutiny of content-discriminatory regulations of protected speech? There are several parts to the answer.

2. Other Hazards of Content Discrimination

a. The Not-So-Special Nature of Content-Discriminatory Laws

To begin with, it is important to recognize that the constitutional prohibition against content discrimination is much more porous than the almost impenetrable barrier raised by the First Amendment against viewpoint discrimination. Content-discriminatory laws regulating most public property, virtually all public land other than streets and parks, will be upheld under low

level "reasonableness" review.[90] Regulations restricting the content of what is popularly described as lesser protected speech, such as commercial speech or indecent speech, receive relatively deferential review.[91] Content-discriminatory laws regulating speech that creates "secondary effects" may be upheld without rigorous scrutiny.[92] In brief, in many cases in which the value of the speech at issue seems to be particularly low or the government's rationale for regulating speech seems particularly plausible or justified, the rigor of the review provided content-discriminatory laws is reduced. Thus, one explanation for the courts' allegedly special concern about content-discriminatory regulations suggests that this concern is really not as special as it may seem at first glance.[93]

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[90] *See, e.g.*, Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 797 (1985) (upholding order preventing advocacy groups from participating in federal charity drive as "reasonable," viewpoint-neutral, content-discriminatory, regulation of speech in non-public forum).

While a majority of the Court apparently agrees that viewpoint-neutral regulations of speech in non-public fora need only be "reasonable" to be upheld, there is less of a consensus on how a public forum may be distinguished from a non-public forum. *See* International Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 677 (1992) (Kennedy, J., concurring) (challenging plurality's contention that only public property reserved by custom and tradition for expressive purposes constitutes public forum).

[91] *See, e.g.*, Posados de Puerto Rico Ass'n v. Tourism Co., 478 U.S. 328, 340 (1986) (reviewing content-discriminatory ban on advertisements for casino gambling under lenient standard of review applied to commercial speech regulations); FCC v. Pacifica, 438 U.S. 726, 738 (1978) (upholding content-discriminatory reprimand issued to radio station broadcasting "dirty words" under deferential standard of review).

Professor Shiffrin deserves the credit for first pointing out a related anomaly in Scalia's argument in *R.A.V.* Scalia appears to require strict scrutiny review of content-discriminatory regulations within a category of unprotected speech, such as fighting words, while tolerating a lower standard of review for content-discriminatory regulations within a category of "lesser" protected speech, such as commercial speech. Professor Shiffrin asks:

> [I]f relaxed standards are employed to deal with subject matter discrimination within a category of *protected* speech (even recognizing that commercial speech is less protected than other forms of protected speech), how can one justify strict scrutiny for the examination of subject matter discrimination within a category of *unprotected* speech?

Shiffrin, *supra* note 15, at 51 (emphasis added).

[92] *See* Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46 (1986) (holding that because city's primary concerns were with adult theater's secondary effects on community, court should review dispersal zoning ordinance restricting locations of adult theaters as content-neutral without applying strict scrutiny).

[93] *See* SHIFFRIN, *supra* note 3, at 23 (noting that "government is permitted to depart from content neutrality in a wide variety of important circumstances; indeed, [F]irst

b. The Risks of Improper Motive and Directing Laws at the Communicative Impact of Speech

If content-discriminatory laws do not involve a sufficiently increased propensity for indirect viewpoint discrimination to justify the heightened review they receive, there must be other concerns with these kinds of regulations that explain why courts subject them to rigorous scrutiny. Professor Stone's analysis of the justifications for rigorously reviewing content-discriminatory laws probably remains the most definitive discussion of this issue. I have already alluded to one of the justifications Stone identifies, the propensity of content-discriminatory laws to distort public debate by excising certain information and perspectives from public discourse.[94]

Stone also describes two other concerns that help to explain the rigor of the review applied to content-discriminatory regulations of protected speech. First, content- and viewpoint-discriminatory regulations often reflect an improper motive on the part of the government adopting such laws. The government is trying to suppress speech because it disagrees with the ideas being expressed. That objective, of course, is starkly inconsistent with First Amendment values.[95]

Second, content- and viewpoint-discriminatory laws are directed at the communicative impact of speech.[96] This concern overlaps the risk that discriminatory regulations reflect an improper motive. Government directs laws at the communicative impact of speech for either of two reasons. The government may fear how people will react to the speech at issue. It fears, for example, that people will believe and be influenced by bad ideas.[97] Alternatively, the government believes that people will be offended or angered by what a speaker says and it acts to silence the speaker

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[A]mendment law is rife with judgments about the value of speech").

[94] *See supra* notes 79-80, 83-85 and accompanying text.

[95] *Content Neutral Restrictions, supra* note 78, at 55-56; *Content Regulation, supra* note 12, at 227-31; *Subject-Matter Restrictions, supra* note 80, at 103-04.

[96] *Content Neutral Restrictions, supra* note 78, at 56-57; *Content Regulation, supra* note 12, at 207-17.

[97] *Content Regulation, supra* note 12, at 212-13.

on the listeners' behalf.[98] Both objectives, again, directly contradict accepted First Amendment principles.

3. Factoring Out Viewpoint Discrimination

Professor Stone's analyses of the justifications for rigorously reviewing discriminatory speech regulations, astute as they are, are only of limited utility in resolving the problems that *R.A.V.* presents. Stone, for the most part, examines content- and viewpoint-discriminatory laws together as if they represented one form of problematic speech regulation. The thesis of this Article, however, is that the content-discriminatory regulation of unprotected speech should be reviewed differently than viewpoint-discriminatory regulations. Thus, Stone's discussion represents a good starting place for trying to understand why content-discriminatory regulations require careful scrutiny. The justifications he cites, however, will have to be re-examined to determine how well they work when viewpoint-discriminatory restrictions on speech are factored out of the analysis.[99]

The primary problem with discriminatory speech regulations, as noted previously, is that they distort public debate. We have seen that content-discriminatory regulations do not have the same directly unequal impact as viewpoint-discriminatory regulations in this regard. Content-discriminatory regulations do not excise one perspective or point of view from the debate leaving the opposing position unchallenged the way that viewpoint-discriminatory regulations do. If the concerns about debate distortion do not justify the rigorous review of content-discriminatory laws, what alternative explanation supports this result?

a. Secondary Distortion — Diminishing the Marketplace of Ideas

Content-discriminatory regulations *do* directly manipulate public debate, but they do so in a different way than viewpoint-dis-

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[98] *Id.* at 213-15.

[99] Stone discusses the applicability of his analysis to content-discriminatory regulations that are viewpoint-neutral on their face (which he refers to as subject-matter restrictions) in a separate article. *See Subject-Matter Restrictions*, *supra* note 80; *see also Content Regulations*, *supra* note 12, at 239-42. Since his argument does not always coincide with mine I will refer to it in footnotes for comparative purposes.

criminatory regulations. Content discrimination excises information and entire subjects of discussion from public discourse. While one side of a debate is not unfairly debilitated, the entire marketplace of ideas is weakened. The scope and richness of public discussion is artificially restricted. All else being equal, for First Amendment purposes, more speech, wider discussion, and new topics of analysis are always preferable to a restricted world of expression in which part of the domain of thought and speech has been placed off limits to the polity. Content-discriminatory laws are problematic for First Amendment purposes because they substantively diminish the marketplace of ideas.[100] In essence, content discrimination threatens to shrink the unregulated, information supermarket that provides abundant consumer choices into a mismanaged convenience store that offers minimal, stale, and colorless selections.

b. Revisiting Improper Motives — The State's Role in Valuing Speech

With regard to the second justification for rigorously reviewing discriminatory speech regulations, Stone's suggestion that such laws reflect improper motives of the government, content-discriminatory regulations must also be distinguished from those that are viewpoint discriminatory. By enacting content-discriminatory laws that are not viewpoint-discriminatory, the government does not directly and precisely suppress those ideas with which it disagrees. The shift from viewpoint to content discrimination

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[100] The diminishment of the marketplace of ideas is not exclusively the result of content-discriminatory laws, of course. To the extent that content-neutral speech regulations also "reduce the total quantity of expression, they necessarily undermine the 'search for truth', impede meaningful participation in 'self-governance,' and frustrate individual 'self-fulfillment.'" *Content Regulation*, *supra* note 12, at 193. *See also* Redish, *Content Distinction*, *supra* note 85, at 128-31 (critiquing distinction between content-based and content-neutral restrictions).

Content-discriminatory regulations diminish the marketplace of ideas in a specific "content-differential" way, however, because they limit the substance of expression, not simply the time, place, and manner in which it occurs. Thus, content-discriminatory restrictions "leave the public with only an incomplete — and perhaps inaccurate — perception of their social and political universe." *Subject-Matter Restrictions*, *supra* note 80, at 101. *See generally* Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (stating that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge").

generalizes the law's scope and mitigates its utility for punishing unacceptable ideas. To be sure, content discrimination can mask viewpoint discrimination and can produce viewpoint-discriminatory effects. We have seen, however, that the same can be said of content-neutral laws that receive significantly more deferential scrutiny. Once we are focusing on indirect effects, content-discriminatory laws do not uniquely skew public debate.[101] Nor are they uniquely intended to serve debate distorting purposes.

Content-discriminatory laws do suggest a different and independently inappropriate motivation of government, the state's

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[101] In his article on subject matter restrictions, Stone argues that narrowly focused content-discriminatory laws are more likely to reflect the government's improper motive of suppressing ideas with which it disagrees than are content-neutral laws. The generality of the content-neutral law (which by definition applies on its face to all subjects of expression), Stone suggests, makes it much less likely that such a law will be an attempt to distort debate by indirectly limiting the expression of a particular perspective. *See Subject-Matter Restrictions, supra* note 80, at 110-11 (suggesting that "the very pervasiveness of the distorting impact of [content-neutral laws] reduces the risk that they were actually adopted in an effort to disadvantage any particular viewpoint" while "with . . . narrowly defined subject-matter restrictions . . . the viewpoint-differential effect is sharply limited in scope, thus increasing the risk of improper legislative motivation"); *see also Content Regulation, supra* note 12, at 241 (arguing that subject-matter restrictions are less likely than viewpoint based regulations "to implicate constitutionally disfavored justifications or to be the product of improper motivation," but they are more likely than content-neutral regulations to implicate those concerns).

While this argument has some merit, I do not think it can carry as much of the load of justifying the rigorous review of content-discriminatory laws as Stone and others assign to it. It is true that some narrowly focused content-discriminatory laws, a ban on speech related to labor disputes in traditional public fora, for example, may strongly suggest an improper motive to disadvantage a particular point of view, such as support for unions. This is so because unions may have a substantially greater need to engage in expressive activity to marshall support for their cause than their adversary in a labor dispute. Other narrowly directed content-discriminatory regulations restricting speech on controversial subjects, including laws prohibiting speech relating to reproductive health and abortions, may not imply an improper motive, however, because both sides of the abortion debate are heavily engaged in justifying their positions through a variety of expressive mediums and the laws at issue would have a more even-handed impact.

Moreover, many narrowly focused content-neutral laws, such as a ban on picketing in front of reproductive health clinics or in front of manufacturing facilities, are equally likely to be grounded on the improper motive of burdening a specific message. While a law prohibiting picketing in front of reproductive health clinics is formally neutral and applies in theory to all subjects of speech, in real terms, its primary and predictable impact will be to disadvantage anti-abortion protestors. The content-neutral law restricting speech outside of reproductive health facilities will apply to many more subjects of expression than its content-discriminatory counterpart. The formal generality of the neutral law, however, cannot alter the fact that its impact on the abortion debate will disproportionately burden the anti-abortion side.

belief that it has some special role or expertise in determining the value of speech. To the contrary, as a people, we mistrust the government's evaluation of the worth of speech and its willingness to substitute its judgment for that of individuals in deciding whether speech has merit and utility. We do not trust the government to conclude for us what subjects of speech are particularly valuable or worth our attention. Moreover, we demand respect for our own choices and for our capacity to make those choices. What we say, and what we choose to see and hear, determines in an important sense who we are. That decision belongs to the individual, not the state. Determining the subjects of our discourse[102] and the audiences we will join is part of our basic autonomy. By enacting content-discriminatory

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The neutral law may be equally burdensome to labor activists, environmental demonstrators, and any other group that for one reason or another wants to protest the operation of a reproductive health facility. Notwithstanding that result, as long as the law does *not* limit the useful expressive opportunities of speakers supporting abortion rights, but does limit access to protest sites that are valuable to speakers who oppose abortion, the law has a viewpoint-discriminatory effect. Laws that result in foreseeable viewpoint-discriminatory effects lead to reasonable suspicion about the government's purpose in enacting the law.

Perhaps the universe of content-discriminatory laws likely to reflect improper governmental motives is marginally larger than the universe of content-neutral laws that appear to be invidiously motivated, but the difference is hard to measure and seems divorced from the problems that courts confront in adjudicating the constitutionality of specific laws on a case-by-case basis. That is to say, in any single case, it will be difficult to predict how likely a law is to reflect improper motives simply by being told the law is either content-discriminatory or content-neutral on its face.

Other scholars, however, seem to agree with Stone's suggestion that content-discriminatory laws are more likely to reflect improper governmental motives than content-neutral laws. Professor Kathleen Sullivan, for example, writes that while content-neutral laws may also conceal improper motives, they "are far less likely to have been driven by censorial purposes. The fact that a law applies generally to speakers of all viewpoints, or to speakers and non-speakers alike, creates political safeguards against censorship. When you round up a whole herd, it is difficult to say that anyone's ox in particular is being gored." Sullivan, *supra* note 78, at 448.

[102] *See Content Regulations, supra* note 12, at 198 n.32 (explaining that content-discriminatory laws interfere with self-fulfillment function of First Amendment "because they severely limit the opportunities for self-expression"); *Subject-Matter Restrictions, supra* note 80, at 104 (arguing that "[a]ny government effort to suppress speech because the government . . . does not trust the individual to decide 'wisely'" how he will use information he receives undermines role of system of free expression in enhancing "personal growth, self-realization, and the development of individual autonomy").

The same concern applies to forms of content-discrimination other than subject-matter regulations. Language choices are also an expression of personal autonomy. *See, e.g.*, Cohen v. California, 403 U.S. 15, 18 (1971) (holding that Constitution protects public display of offensive language on clothing).

laws, the government impermissibly intrudes into the process by which people define themselves. Thus, the distinctive improper purpose motivating content-discriminatory laws is not the goal of suppressing bad ideas, but rather a paternalistic vision of the state in which citizens are reduced to the status of children.[103]

This same argument can be made regarding the instrumental value of speech for the resolution of public policy debates. We reject content-discriminatory laws because we do not trust the government to correctly evaluate what people need to know to decide how our society should be governed.[104] The government's perspective may be biased, even if officials are not consciously aware of their own predispositions, and therefore its vision will often be more limited than the choices of an unrestrained market.[105]

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[103] *See, e.g.*, C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966, 990-1009 (1978) (arguing that constitutional free speech receives constitutional protection because it "fosters individual self-realization and self-determination"); Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878-81 (1963) (arguing that "assuring individual self-fulfillment" is one key justification for protecting freedom of speech); Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 900-03 (1994) (recognizing autonomy as one of values furthered by First Amendment in that "descriptive autonomy accounts for the elevated scrutiny applied to content-based regulation of speech" while ascriptive autonomy explains in part constitutional concerns about governmental paternalism in deciding what citizens can say or hear); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593-94, 625-29 (1982) (suggesting that self-realization value that freedom of speech promotes is inherent moral principle underlying democratic form of government); *Content Regulations*, *supra* note 12, at 228 (noting that "in our constitutional system, the protection of free expression is designed to enhance personal growth, self-realization, and the development of individual autonomy").

[104] *See, e.g.*, Police Dept. v. Mosley, 408 U.S. 92, 96 (1972) (noting that First Amendment prohibits content-discrimination because government "may not select which issues are worth discussing or debating in public facilities"); SHIFFRIN, *supra* note 3, at 20 (explaining emphasis in free speech cases on government's "failure to appreciate the worth of free speech to democratic institutions"); *Content Regulation*, *supra* note 12, at 212-13 (stating government's "highly paternalistic" restriction of expression, which may provoke unlawful or undesirable behavior, "is at odds with the notion of free expression"); *Subject-Matter Restrictions*, *supra* note 80, at 104 (explaining that "any attempt by government to squelch 'undesirable' ideas or information necessarily usurps the right of the people to make such decisions for themselves and thus conflicts with [a] central premise of the free speech guarantee").

[105] *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 80-86 (1982) (arguing that government bias and self-interest explain why state cannot be trusted to effectively regulate speech); *Content Neutral Restrictions*, *supra* note 78, at 56 (arguing that "when a restriction is content-based, the risk of improper motivation is especially high, for governmental officials considering the adoption of such a restriction will often, consciously or unconsciously, be influenced by their opinions about the merits of the restricted speech").

A broad ban on political speech, for example, reduces sources of information available to the public and opportunities for subjecting ideas to the crucible of public discussion. While not directly viewpoint-discriminatory, a ban of this kind would have the effect of protecting the status quo by dampening political discussion in general. The problem is not so much that a ban on private political speech leaves the government free to pursue its own expressive agenda while private critics are silenced. Even if the state did not promote its own policies through government speech, prohibiting political expression would be intolerable. Expression is the primary tool that connects isolated people experiencing discontent and enables them to organize around mutual interests. A content-discriminatory ban on political expression, or political expression on a particular subject such as civil rights, blatantly interferes with and disrupts such possibilities.[106]

> The argument against content-discrimination parallels the conventional justification of freedom of speech, as explained by John Stuart Mill and others, that speech facilitates the discovery of truth. Professor Greenawalt writes:
> [In its] standard form, the truth-discovery justification combines a contained optimism that people have some ability *over time* to sort out true ideas from false ones with a realism that sees that governments, which reflect presently dominant assumptions and have narrow interests of their own to protect, will not exhibit exquisite sensitivity if they get into the business of settling what is true.

GREENAWALT, *supra* note 46, at 17. Content-discrimination as opposed to viewpoint-discrimination interferes with the discovery of truth, not because it involves the suppression of ideas that the government believes to be false, but because it involves the suppression of information and subjects of discourse that the government believes to be useless, disturbing, or subject to misinterpretation.

[106] *See, e.g.*, Thornhill v. Alabama, 310 U.S. 88, 95 (1940) (explaining that "[a]bridgment of freedom of speech and of the press . . . impairs . . . opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government"); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 528-38 (tracing history of idea that freedom of speech is "essential to the process by which the electorate turns out of office those who fail to discharge their trusts"); Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CAL. L. REV. 761, 785-86 (1986) (acknowledging value of freedom of speech in enabling public to monitor and resist governmental abuses of power).

c. Revisiting Communicative Impact — The Overly Protective State

The final justification Stone posits turns on the fact that content-discriminatory laws are directed at the communicative impact of speech. The state fears how people will react if they are allowed to hear suppressed speech. When it enacts content-discriminatory laws, however, the state is not directly concerned that people will be influenced by the kind of "bad ideas" that would be silenced through viewpoint discrimination. First Amendment doctrine aside, there is no reason for the state to suppress all speech on a subject, including messages it supports, in order to eliminate a dangerous point of view. Rather, in deciding to enact a content-discriminatory regulation, the state presumably fears that people will misinterpret, be confused by, or make inappropriate use of most information expressed on some subject of discussion. The disrespect directed at the citizenry by laws intended to keep people ignorant and uninformed to counter that risk, while different from the disparagement of the polity communicated by viewpoint discrimination, is also blatantly inconsistent with First Amendment values.[107]

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[107] The state's decision to ban a subject of discourse rather than a specific viewpoint often reflects a different motive than protecting people against disfavored points of view (assuming, of course that the standard of review applied to different kinds of speech regulations is factored out of the decision). Indeed, if the government's purpose is to suppress a particular viewpoint, it is unclear why the state would choose to enact a content-discriminatory law rather than one that was precisely directed at the offending point of view. While the ostensible even-handedness of the content-discriminatory law may serve to convince the polity that the government is not deliberately attempting to distort debate on an issue and forestall one form of political reaction to the government's decision, the broader coverage of the content-discriminatory law will increase resentment against the law because it impacts more speakers. Further, the content-discriminating law may even prohibit speech that supports the government's position on the underlying public policy question.

See generally SHIFFRIN, *supra* note 3, at 178 n.37 (noting that government may attempt to restrict speech not because it disagrees with message being communicated but because it doubts ability of citizens to correctly interpret or evaluate expression at issue); Post, *supra* note 3, at 1278 (describing how Court has implemented principle "that participants in public discourse are to be regarded as autonomous" by rejecting state paternalism and insisting that "information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them") (quoting Linmark Assoc. v. Township of Willingboro, 431 U.S. 85, 97 (1977)); *Content Regulation*, *supra* note 12, at 212-13, 228 (explaining that government may not restrict speech "because it does not trust its citizens to make wise or desirable decisions if they are exposed to such expression").

Stone's second concern with laws directed at the communicative impact of speech is more complicated and requires further discussion. Stone suggests that there is something problematic about the state's objective of protecting people from speech that they find offensive, or allowing the majority to use the state to protect most citizens from being confronted with speech they do not want to hear.[108] This concern makes some sense when the government engages in viewpoint discrimination because only one side of a debate is protected against offensive speech. It is difficult to explain, however, why this objective is inconsistent with the First Amendment when content-discriminatory laws are at issue. Presumably, there is nothing inherently valuable or positive about expression that offends people or the experience of being offended.[109] Nor is it likely that the Constitution empowers speakers to conscript unconsenting individuals into joining their audience. Further, the same autonomy concerns that prevent the state from prohibiting speakers from expressing their views and audiences from hearing them ought to allow the state to facilitate listeners in escaping from expression they do not want to hear. In some limited circumstances that may require permitting the state to force a speaker to end a conversation in order to protect a "captive audience's" autonomy.[110]

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[108] *Content Regulation*, *supra* note 12, at 214-15.

[109] As the Supreme Court explained in Terminiello v. Chicago, 337 U.S. 1 (1949):

> [A] function of Free Speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

Id. at 4. The high purpose the Court refers to in this often quoted passage, however, is not the objective of causing offense or disturbing tranquility itself. It is the purpose of searching for truth, or identifying the best public policy, or protecting the "processes of collective self-determination" intrinsic to American democracy from censorship. Post, *supra* note 3, at 1275-78. While the pursuit of these goals may require the shattering of previously respected beliefs and uncritical complacency, a condition which is emotionally disturbing for many people, it would be foolish to construe the costs we must incur to find the truth to be of independent value. There is nothing intrinsically useful or praiseworthy about offending people or making them angry. Negative emotional reactions are simply a price that sometimes must be paid if speech is to serve a critical function in our society.

[110] Stone recognizes this limitation on requiring the rigorous review of laws that protect citizens against speech they deem offensive. He argues for more deferential review of laws

Restrictions on offensive speech are problematic under the First Amendment when the state attempts to prevent a speaker from talking to someone who wants to hear the speaker's views in order to protect the sensibilities of third parties to the conversation. The state cannot prevent A from talking to B, who wants to hear A's message, in order to protect the sensibilities of C, who is deeply offended by what A has to say. The problem with content-discriminatory laws of this kind is not that they protect C from hearing a message she wants to avoid. It is that in many cases such a law not only insulates C from speech that offends her, but in doing so the law interferes with A's speech to B as well.[111]

4. The Need For Additional Justifications

As modified in the above discussion, Stone's justifications explain why content-discriminatory laws raise serious First Amendment concerns that are distinct from the problems associated with viewpoint-discriminatory laws. Do these concerns also adequately justify the heightened review that content-discriminatory laws receive in comparison to the scrutiny directed at content-neutral laws? I think they do with regard to the problem of government substituting its conclusions as to the value of speech for that of citizens. Content-neutral laws do not raise the same autonomy concerns or reflect the same disrespect for the judgment of citizens as content-discriminatory laws.[112]

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that "enable[] individuals who do not wish to receive the communication to avoid exposure without interfering with the right of individuals who wish to receive the communication to do so." *Content Regulation*, *supra* note 12, at 237 n.155.

[111] I discuss this issue at some length in a previous article. The argument in the text is a summary of the earlier work. *See* Brownstein, *supra* note 52, at 189-92.

[112] Particular content-neutral laws, of course, may not reflect the values of important groups within society and may even be repudiated by the majority. Citizens may sharply disagree, for example, with the state's conclusions about appropriate or restricted locations and mediums of expression. These disagreements, however, except for extreme examples, do not seem as intrusive and disrespectful of citizen autonomy as do conflicts regarding the prohibition of subjects of expression. The state's determination that loudspeakers or signs on utility poles cause too much noise or are unaesthetic and distracting may reflect an inaccurate cost-benefit analysis that undervalues these means of communication. But laws like these do not reflect the same kind of disrespectful paternalism as a state decision banning books about celebrated outlaws in American history because the readers of such works might be induced to engage in similar unlawful behavior.

It is less clear, however, that content-discriminatory laws diminish the scope and richness of the marketplace of ideas in comparison with content-neutral laws. Again we are confronted with the problem of comparing laws of varying scope regulating subjects of speech, or the means and location of speech, of differing value. A content-neutral law that limits public debate to a barely audible whisper but allows all subjects of interest to be discussed may diminish the marketplace of ideas as much as a law prohibiting certain subjects of discourse while allowing permitted subjects of discussion to be shouted from the rooftops.

a. Increasing the Difficulty of Regulating Speech

In the end, examining the purpose of content-discriminatory regulations and the effect of such regulations on public debate does not provide us an adequate justification for regulating content-discriminatory laws much more rigorously than content-neutral laws. An additional piece needs to be added to the puzzle to make this argument fully persuasive. A constitutional regime that permits content-discriminatory regulations of speech makes it too easy for government to restrict expression. The issue here is one of process, not substance. The breadth and general applicability of content-neutral laws may make them difficult to enact because they impair the expressive activities of politically powerful groups within society. A general ban on picketing outside commercial or medical establishments may provoke sufficient political resistance from unions, for example, that the law will not be adopted. A law that prohibits picketing at medical facilities only when the picketing is motivated by opposition to the health services the facilities provide, on the other hand, will be contested by a more limited constituency. Thus, by rigorously reviewing content-discriminatory laws, we prevent government from excluding politically powerful groups from the coverage of its neutral speech restrictions and, thereby, increase the political difficulty of burdening expression in general.[113]

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[113] *See* Carey v. Brown, 447 U.S. 455, 460 (1980) (striking down law which barred picketing residences or dwellings but exempted "peaceful picketing of a place of employment involved in a labor dispute"); Police Dept. v. Mosley, 408 U.S. 92, 94 (1972) (holding city

The process argument suggested here is widely accepted. As is true of legislation on virtually any subject, the more widespread the burdens imposed by a law, the more difficult it is to obtain support for the passage of the law.[114] Generality requirements constrain government from regulating unfairly, but in doing so, they also constrain government from regulating at all. Thus, by limiting the government's ability to restrict expression precisely, judicial intolerance of content-discriminatory laws reduces the likelihood that *any* speech regulation will be adopted. Since almost all laws restricting protected speech by their nature reduce the scope and richness of public debate, we further First Amendment values by making it more difficult for government to restrict speech.

b. The Value of Content-Neutral Laws

There is a second, related, process-based argument that supports the courts' constitutional preference for content-neutral laws. The broader coverage of the content-neutral law not only makes it more difficult to enact, it also suggests that the legislature's evaluation of the costs and benefits that allegedly justify the law's enactment are more worthy of respect. If a law burdens the very citizens who support its enactment, by depriving them of valuable interests, the contention that the law's benefits outweigh its burdens seems plausible on its face. Certainly, we can be more confident of that conclusion than the alternative. We are rightfully dubious of the value of a law that exacts no cost from the many for the privilege of burdening the few.[115]

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ordinance unconstitutional because it made impermissible distinction between labor picketing and other peaceful picketing).

[114] *See* Railway Express Agency v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) (stating that "nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected").

[115] *See Content Neutral Restrictions*, *supra* note 78, at 76 (noting that "[t]he more speakers in a community are affected, the more government would be forced to ensure its purposes truly were substantial before it enacted the restriction").

Probably the most commonly discussed constitutional principle that reflects this basic principle is the Takings Clause. *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415

Moreover, we review content-neutral laws more deferentially than content-discriminatory laws, not only because we are more trusting of content-neutral laws due to their generality,[116] but

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(1922) (explaining that if public can obtain private property without paying for it, "the natural tendency of human nature" is to continue to do so "until at last, private property disappears"); Richard A. Epstein, *Ruminations on* Lucas v. South Carolina Coastal Council: *An Introduction To Amicus Curiae Brief*, 25 LOY. L.A. L. REV. 1225, 1251 (1992) (arguing that South Carolina land use regulation prohibiting construction on petitioner Lucas's lot constitutes "taking" because "the only way South Carolina could prove the importance that it attaches to adding a restrictive covenant over the Lucas land to its chain of beachfront properties is to pay for it"); *see generally* Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 620 (1984) (discussing "Fiscal Illusion" to which governmental bodies are subject because political decision making reflects equally weighted votes and majority rule while "the efficient outcome weighs individual preference according to willingness to pay for government output – usually measured in dollars").

The analysis is also routinely applied to explain equal protection doctrine. *See* JOHN H. ELY, DEMOCRACY & DISTRUST 170 (1980) (noting that "the function of the Equal Protection Clause . . . is largely to protect against substantive outrages by requiring that those who would harm others must at the same time harm themselves – or at least widespread elements of the constituency on which they depend for reelection").

[116] The virtue of the more general applicability of content-neutral laws referred to in the text is distinct from Stone's argument that content-neutral laws are less likely to reflect an improper motive than content-discriminatory laws. *See supra* note 78. Stone's analysis is grounded on the idea that the range of subjects of speech that are technically restricted by a content-neutral law reduces the likelihood that the government is intending to suppress any particular idea or body of information. *See Subject-Matter Restrictions*, *supra* note 80, at 111 (arguing that "[t]he more diffuse the impact [of a law regulating speech], the greater the probability that the restriction serves a governmental purpose unrelated to the suppression of disfavored ideas"). I indicated previously that this distinction is weakened when one moves from the abstract to the pragmatic and discovers that certain narrow, content-neutral laws as a practical matter burden far fewer, and more viewpoint specific, speakers than their theoretical coverage suggests. *See supra* note 101. Thus, a content neutral law regulating expression in the vicinity of reproductive health facilities raises legitimate concerns that the law was enacted to disadvantage anti-abortion speakers, despite the range of protests that are technically subject to the law's speech restrictions. Because the law is not likely to hinder the expressive activities of speakers who support abortion rights, its facial neutrality will not eliminate the suspicion of governmental favoritism created by its viewpoint-discriminatory effect. *See supra* note 101.

Moreover, the generality of content-neutral laws supports an altogether different reason for providing such laws more deferential review than is applied to content-discriminatory laws. A law that burdens the people who support its adoption provides a common sense, process basis for believing that its objective outweighs its costs. *See supra* notes 114-15 and accompanying text. That conclusion may indirectly suggest that the law was not intended to serve an improper purpose to a limited degree. Whatever inference of proper motive may be suggested by this argument is of limited force, however, because many laws serve multiple purposes. Thus, the fact that a land use regulation was adopted to serve legitimate environmental goals related to reduced residential density in a community does not negate the possibility that the law was also intended to prevent racial minorities from living in the

because we recognize that some content-neutral laws are necessary to the organization of an orderly society.[117] It is almost impossible to imagine how a society committed to freedom of speech could avoid chaos of Babel-like proportions without being able to adopt some meaningful time, place, and manner regulations. The utility of content-discriminatory laws seems less obvious and, thus, more open to dispute.

B. The Inapplicability of the Justifications for Rigorously Reviewing Content-Discriminatory Laws to the Regulation of Unprotected Speech

The arguments that support strict scrutiny of content-discriminatory laws, discussed above, are varied. No single explanation is persuasive by itself, but cumulatively a strong case can be made for rigorous review. Justifying the rigorous review of content-discriminatory regulations restricting protected speech in comparison to the more deferential scrutiny applied to content-

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community by raising the cost of housing.

The more valuable inference we can draw from a process-based analysis of the social utility of a law has more to do with the law's justification than its motive. If we trust that the benefits of a law exceed its cost, the law serves at least one legitimate purpose that may outweigh its improper objectives and impact. Thus, a law prohibiting residential picketing may reflect some bias against anti-abortion protestors despite its facially neutral scope. The fact that the law was passed despite its effect on labor and civil rights protestors, however, suggests that the positive value of the law was understood to outweigh the significant burdens the law imposed on these other groups. That positive value may help to justify incurring the risk that the law also reflected an improper purpose.

Of course, it is always possible that a community is so committed to the suppression of an unpopular message that it will cut off its nose to spite its face and suppress acceptable expressive activity solely to further invidious goals. Process-based justifications of a law's social utility do not guarantee that a law actually furthers the public good. They only create an inference to that effect.

It is also true that the cost-benefit argument for providing more lenient review to content-neutral laws than content-discriminatory laws is vulnerable to some of the same criticism I directed at Professor Stone's generality argument. If the scope of a content-neutral law is only broad in abstract terms and, practically speaking, only one group will even have any interest in using the medium or location of expression being restricted, it seems clear that almost no one is sacrificing their own interests by supporting the adoption of the law. The relatively lenient review of these content-neutral laws can not be justified because of their facial, but not factual, generality regardless of whether generality is thought to be related to proper motives or process based inferences regarding a law's social utility.

[117] *See Content-Neutral Restrictions*, *supra* note 78, at 74-76 (recognizing essential utility of content-neutral regulations of speech and that "[t]he extension of strict scrutiny to all content-neutral restrictions would threaten society with chaos").

neutral laws, however, is only half of the battle. Standing alone, this conclusion does little to support or undermine the Court's holding in *R.A.V.* The remaining critical question is whether any of the justifications that persuade courts to carefully evaluate content-discriminatory regulations of protected speech apply with significant force to the regulation of unprotected speech. Virtually none of them do! Almost all of the concerns about content-discriminatory laws pertain primarily, if not exclusively, to the regulation of protected speech.

1. Excising Subjects of Expression for Improper Reasons

a. Rigorously Reviewing Speech Regulations to Protect Individual Autonomy

From the perspective of the speaker or the listener, the expression of protected speech is valued because it contributes to the development or fulfillment of an individual's identity.[118] Almost by definition, however, it is clear that unprotected speech does not serve a similar function. We do not need to express or hear unprotected speech to develop our identity. The determination that speech is unprotected and can be eliminated by the state in its entirety establishes that such expression plays a dispensable role in an individual's development.[119]

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[118] *See supra* notes 102-03 and accompanying text.

[119] *See generally Content Regulation, supra* note 12, at 194 (noting that as general matter in identifying categories of unprotected speech, "the Court begins with the presumption that the First Amendment protects all communication and then creates areas of nonprotection only after it affirmatively finds that a particular class of speech does not sufficiently further the underlying purposes of the First Amendment").

Of course, one may challenge the Court's contention that any category of unprotected speech is entirely worthless and useless. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-16, at 918-19 (2d ed. 1988) (criticizing Court's reasoning that obscenity is inherently harmful and valueless and suggesting to contrary that "suppression of the obscene persists because it tells us something about ourselves that some of us, at least, would prefer not to know").

Arguments of this kind, however, challenge the basic predicate on which the reasoning of *R.A.V.* is based. The central question addressed and answered by the Court in *R.A.V.* presupposes the worthlessness and harmfulness of unprotected speech. It is whether content-discriminatory regulations within a category of speech must receive strict scrutiny when the category of speech itself is so valueless or dangerous that it can be suppressed in its entirety. Obviously, if the state is not regulating expression within a category of unprotected speech because all speech is of sufficient value to warrant rigorous constitutional protec-

In constitutional terms, the utility of unprotected speech to the First Amendment value of self-realization is so marginal that we leave it to the legislature's discretion to determine whether such speech should be tolerated at all. Accordingly, it ought to make no difference if that discretion is exercised through content-discriminatory or content-neutral regulations. Since no subject expressed through the vehicle of unprotected speech serves the goal of personal self-determination in a legitimate way, prohibiting the use of certain threats, fighting words, or obscenity does not impair the development of individual autonomy in any way that matters.[120]

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tion, the entire issue of the standard of review to be applied to content-discriminatory regulations of unprotected speech changes dramatically, if it does not disappear entirely.

Another way to handle the objection that a category of unprotected speech is not as worthless as the Court suggests is by narrowing the scope of what may be regulated as unprotected speech. *See e.g.*, Harry Kalvin, Jr., *The Metaphysics of The Law of Obscenity*, 1960 SUP. CT. REV. 1, 13 (1960) (arguing that "if the obscene is constitutionally subject to ban because it is worthless, it must follow that [what can be banned as obscene] can include only that which is worthless").

[120] The contention that unprotected speech does not further the self-realization or self-determination function of the First Amendment seems difficult to justify on the surface. The individuals who use unprotected speech certainly believe in many cases that they are expressing themselves authentically when they engage in such expressive activity. Why isn't the decision to express unprotected speech a part of the personal autonomy the First Amendment protects?

Perhaps the most persuasive response to this criticism recognizes that speech receives constitutional protection not only because it furthers individual self-determination, but because of the way that it does so. Many forms of non-expressive conduct are also self-realizing, but are not protected by the Constitution. Speech receives its special constitutional status because of the way it "fosters individual self-realization and self-determination without improperly interfering with the legitimate claims of others." Baker, *supra* note 103, at 966.

Speech is constitutionally protected when the only "harm" it causes results from "people 'mentally' adopt[ing] perceptions or attitudes." *Id.* at 998. It is unprotected when it operates through "coercion" of others and "manifestly disregards the other's will or the integrity of the other's mental processes." *Id.* at 1001. Thus, the same respect for personal autonomy that justifies protecting speech because of its self-determining function also justifies the unprotected status of speech that defeats the autonomy of others.

The more difficult issue, of course, is determining what kinds of speech are so unacceptably coercive that they do not deserve First Amendment protection. Threats and fighting words are relatively easily categorized as coercive and invasive. Obscenity raises more difficult issues, but certainly there is an argument that it has a coercive impact on the sensibilities and behavior of its audience. *See infra* note 127.

Finally, it may be argued that certain expression is so inherently noxious that it is more appropriately categorized as self-destructive rather than self-realizing. Again, critics of obscenity may deny the self-realizing function of hard-core pornography on this ground as well. *See* Kalvin, *supra* note 119, at 13 (describing hard-core pornography as "at best, fanta-

b. Rigorously Reviewing Speech Regulations to Prevent the Government from Undermining the Scope and Richness of Public Discourse

The same argument can be made with regard to the instrumental value of speech for the resolution of public policy debates. We reject content-discriminatory laws regulating protected speech because we do not trust the government to evaluate what people need to know to decide how our society should be governed. The government's perspective may be biased and its vision will often be more limited than the choices in an unrestrained market.[121] Once again, however, as was true for the dignitary value of speech, content-discriminatory laws are problematic in this way only if they restrict protected speech. We do not need to express or hear threats of violence, fighting words, or obscenity on any subject in order to more effectively discuss public policy issues. Indeed, public debate is often hindered by such expression. Therefore, there is no reason to be concerned about the loss of instrumentally valuable expression when the government engages in content discrimination in restricting unprotected speech.[122]

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sies of sexual prowess and response unrelated to . . . serious human concern[s] and, at worst, a degrading, hostile, alien view of the sexual experience").

[121] *See supra* notes 104-06 and accompanying text.

[122] *See, e.g.*, Paris Adult Theater v. Slaton, 413 U.S. 49, 67 (1973) (stating that obscene material, by definition, "lacks any serious literary, artistic, political or scientific value"); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (recognizing some speech is "of such slight social value . . . that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality"); Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940) (noting that "resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution"); *see also* SHIFFRIN, *supra* note 3, at 21 (noting that certain categories of speech are "deemed to be beneath the protection of the First Amendment in large part because of judicial assessments that they lack value").

It is at least arguable that fighting words constitute a special kind of unprotected speech that requires a different analysis. In essence, one might argue that "fighting words" are not really unprotected speech at all. Since deciding Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), the Court has seemed to go out of its way to distance itself from the doctrine and has consistently refused to uphold convictions grounded on the expression of "fighting words." *See, e.g.*, City of Houston v. Hill, 482 U.S. 451, 461 (1987) (affirming invalidity of city ordinance prohibiting interference with policemen on ground that First Amendment protects significant amount of "verbal criticism and challenge directed at police officers"); Lewis v. City of New Orleans, 415 U.S. 130, 131-32 (1974) (reversing conviction of individual charged with expressing profanity at police officer because ordinance

Put simply, content-discriminatory laws restricting unprotected speech do not dampen public discussion. There is no regulation of unprotected speech, for example, that can serve as a counterpart to the prohibition of political discussion. Unprotected speech by definition does not communicate information and ideas in an effective or legitimate way. We lose little, if anything, of value by limiting the use and availability of political obscenity, political fighting words, or political threats. Content-discriminatory restrictions of unprotected speech take nothing from society that it needs because unprotected speech is not an appropriate mechanism for challenging the status quo.

Thus, Justice Scalia's contention that there is something constitutionally problematic about a ban on political obscenity,[123] for example, is simply wrong. Expression of this kind serves no legitimate purpose. Since a ban on political obscenity is viewpoint-neutral, and does not empower any group in competition with an ideological opponent, Scalia at the very least owes us an explanation as to how such a law undermines First Amendment values. The inherent bias in favor of the status quo that results from restricting protected political speech is irrelevant here. Certainly, Scalia cannot be worried that government will use obscene expression to pursue its own goals while private critics are limited to less prurient imagery. Nor can he seriously believe that the unavailability of political obscenity in public debate will be missed and its loss regretted. If Scalia is serious when he suggests that a ban on political obscenity will skew debate in some significant way, he must offer us more of an explanation than the Court provides in *R.A.V.* to demonstrate why this is so.[124]

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prohibiting cursing at police officer was overbroad). Given the lack of support for construing fighting words to be unprotected speech in the case law, and the recognized risk that punishing fighting words may mask attempts to suppress harshly critical, but nonetheless clearly protected, political speech, perhaps fighting words have a more legitimate role in the marketplace of ideas than their current status suggests.

The argument is not entirely without merit, but it is of little utility in explaining or mitigating the Court's reasoning in *R.A.V.* Although the holding of *R.A.V.* is specifically directed at the content-discriminatory regulation of fighting words, the thrust of Scalia's analysis and the opinion's numerous illustrations of content-discriminatory regulations within other categories of unprotected speech make it clear that the impact of the decision cannot be limited to one particularly problematic kind of unprotected speech.

[123] *R.A.V.*, 505 U.S. at 385.

[124] Scalia presumably would argue that a ban on political obscenity may mask an at-

2. Regulating Speech to Limit Communicative Impact

a. Protecting People from Their Own Judgment

Government acts paternalistically and shows disrespect for its citizens when it prohibits protected speech because of its communicative impact.[125] No such message of contempt, however, is communicated by the suppression of unprotected speech. The decision to prohibit fighting words and threats does not suggest that the state believes that individuals are incapable of properly evaluating information and rational argument. Instead, it reflects the state's concern that certain speech is deliberately intended to bypass rational analysis and to provoke an immediate and emotional response such as uncontrolled anger or fear.[126]

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tempt to suppress ideas. The problem with that analysis is that it is predicated on the idea that content-discriminatory laws are substantially more likely to mask viewpoint discrimination than content-neutral laws. That idea, however, cannot be assumed without justification. *See supra* notes 86-90 and accompanying text.

Scalia also seems to miss the point that content-neutral laws may have a significant viewpoint-discriminatory impact on speech in Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516 (1994). Scalia argues that content-neutral injunctions should receive the same level of scrutiny as content-discriminatory statutes because both forms of regulations create similar risks. The problem with either speech restriction "is not that it is *always* used for insidious, thought control purposes, but that it *lends itself* to use for those purposes." *Id.* at 2539. Content-neutral injunctions have this impact because:

> [W]hen a judge, on the motion of an employer, enjoins picketing at the site of a labor dispute, he enjoins (and he *knows* he is enjoining) the expression of pro-union views. Such targeting of one or the other side of an ideological dispute can not readily be achieved in speech-restricting general legislation except by making content the basis of the restriction.

Id. at 2538. One may only wonder what Scalia believes a city council thinks it is doing when employers ask it to pass a content-neutral *ordinance* prohibiting picketing in front of manufacturing facilities. It is hard to believe that the council would not know that they are primarily prohibiting "the expression of pro-union views." Similarly, cities and states that enact content-neutral ordinances restricting speech in front of reproductive health clinics are certainly aware that they are primarily regulating anti-abortion protests.

[125] *See supra* notes 101-11 and accompanying text.

[126] As commentators have recognized, the justification for allowing the state to prohibit the speaker's "fighting words" rather than insisting that the state punish violent reactions to insulting speech rests on behavioral assumptions about the power of speech to produce irrational responses.

> The Court in *Chaplinsky* appears to have adopted the view that, at least in the context of a direct confrontation, the connection between words and violent reactive conduct is so tight that the very utterance of some words may trigger uncontrollable violent impulses on the part of the addressee of the words. The

Even the suppression of obscenity can be defended without assuming governmental disrespect of its citizens. Because of the erotic focus of this kind of speech, concerns about the publication of obscenity do not reflect a negative evaluation of the citizen's capacity to reason or evaluate information and ideas.[127] Moreover, the prohibition of obscenity is arguably grounded on a distinctly respectful vision of the citizenry that emphasizes the moral rectitude and rationality of the community and reflects the state's concern that obscene expression degrades its producer as well as its audience.[128]

> view that the utterance of certain words causes an act of violence beyond the volitional control of the actor suggests, therefore, that the law is incapable of controlling these violent impulses except through the proscription of the triggering words themselves.

Mark C. Rutzick, *Offensive Language and the Evolution of First Amendment Protection*, 9 HARV. C.R.-C.L. L. REV. 1, 8 (1974).

[127] *See, e.g.*, Paris Adult Theater I v. Slaton, 413 U.S. 49, 67 (1973) (distinguishing obscenity from speech that appeals to "reason and intellect"); GREENAWALT, *supra* note 46, at 153 (suggesting that justification for arguing that pornography should be suppressed "relies on a combination of factors: the dominant aim to stimulate rather than communicate; the largely unconscious quality of the messages communicated; and the harmfulness of those messages"); Frederick Schauer, *Speech and 'Speech'—Obscenity and 'Obscenity': An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 922-23 (1979) (arguing that certain forms of pornography do not "constitute communication in the cognitive sense" because pornography "possesses so few mental attributes that it has none of the characteristics of the intellectual process constituting the core of the constitutional definition of speech"); Cass Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 602-08 (1986) (explaining that pornography "does not have the special properties that single out speech for special protection" because it is designed to "produce sexual arousal" and is "directed solely to [the] noncognitive capacities" of its audience).

Catharine MacKinnon argues that pornography causes men to injure women:

> [N]ot because they are persuaded by its ideas or even inflamed by its emotions, or because it is so conceptionally or emotionally compelling, but because they are sexually habituated to its kick, a process that is largely unconscious and works as primitive conditioning, with pictures and words as sexual stimuli . . . .
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> This is not to object to primitiveness or sensuality or subtlety or habituation in communication . . . . It is to question the extent to which the First Amendment protects unconscious mental intrusion and physical manipulation, even by pictures and words . . . . It is also to observe that pornography does not engage the conscious mind in the chosen way the model of "content," in terms of which it is largely defended, envisions and requires.

CATHARINE A. MACKINNON, ONLY WORDS 16 (1993).

[128] *See generally* Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 394 (1963) (explaining that suppression of obscenity is supported because it "has a deleterious effect on the individual from which the community should protect him"

b. Protecting People from Offense

The state violates the First Amendment when it uses content-discriminatory regulations of protected speech to prevent one person from speaking to a potentially consenting audience out of concern that other people may receive the message and be offended by it. The autonomy interest and sensibilities of the offended party do not outweigh the interests of the speaker and those members of the community who would like to hear what the speaker has to say.[129] Once again, however, this concern has little, if any relevance to the regulation of unprotected speech.

First Amendment doctrine recognizes no special virtue in speech that is experienced as offensive by some members of the audience. We do not protect the content of offensive speech because we value the discomfort it causes in and of itself. Speech that causes offense is protected primarily because we appreciate and support the speakers' interest in expressing their message and the rights of the audience that consents to hear it.

That appreciation and support does not exist, however, when unprotected speech is expressed. The speaker's interest in using threats, fighting words, or obscenity has no constitutionally cognizable value. Nor is there an audience for unprotected speech whose interest in having access to such communications outweighs the disutility of unprotected speech for those who are disturbed by it. Obviously, there is no class of individuals that

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and because it will corrupt entire community's morality).

[129] Professor David A.J. Richards describes the choice available to a listener:

> [F]reedom of expression protects the interest of the mature individual, with developed capacities of rational choice, in deciding whether to be an audience to a communication and in weighing the communication according to his own rational vision of life . . . . It is a contempt of human rationality for any other putative sovereign, democratic or otherwise, to decide to what communications mature people can be exposed.

David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974).

Taken to its logical extreme, such stringent respect for personal autonomy would undermine the justifications for several categories of unprotected speech, including obscenity. Thus, the continued recognition by the Court that obscenity and other forms of unprotected speech may be suppressed demonstrates that constitutional doctrine accepts some limits on the scope of personal autonomy. *See infra* note 130.

wants to experience the fear created by threats of violence or to be insulted by fighting words. While an audience that desires access to obscene pornography does exist, the classification of obscenity as unprotected speech demonstrates that such desires merit no respect as a constitutional matter. Again, by definition, unprotected obscenity is the kind of communication as to which we allow C to silence A, by banning A's speech altogether, even though B remains a receptive consumer of A's expression.[130]

3. Process Justifications for Rigorously Reviewing Content Discrimination

The process concerns that support the rigorous review of content-discriminatory laws also are persuasive only when protected speech is the subject of regulation. Our collective interest in increasing the difficulty of enacting speech regulations by forcing the government to generalize the burden it imposes on expression is grounded on the premise that we are better off with more speech and fewer limitations on expression.[131] That is true if we are discussing protected speech, but not if unprotected speech is at issue. There is no reason to think we are particularly better off with more rather than less unprotected speech. If anything, we might prefer more restrictions to less regulation of expression of this kind.[132] Who would seriously

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[130] In regulating obscene expression, we often silence A even when A takes precautions to make sure that C will not inadvertently hear what A has to say. *See Paris Adult Theatres I*, 413 U.S. at 57 (disapproving of theory "that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only").

[131] *See supra* notes 100, 114-15 and accompanying text.

[132] Indeed, Justice Scalia's opinion in *R.A.V.* strongly suggests that we are better off prohibiting all expression within a category of unprotected speech rather than discriminating on the basis of content and restricting only certain unprotected expression. Scalia argues that the St. Paul hate-speech ordinance cannot withstand strict scrutiny because its use of content-discrimination is not necessary to the furtherance of the compelling state interest of protecting the basic human rights of historically victimized minorities. A law prohibiting all fighting words "would have precisely the same beneficial effect." *R.A.V.*, 505 U.S. at 396. "In fact," Scalia adds, "the *only* interest distinctly served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out." *Id.* (emphasis added).

The inescapable inference from this argument, of course, is that there is *nothing* of value to be gained by allowing some fighting words to be expressed and only regulating those that the city council considered to be especially harmful. It is precisely because fight-

argue that our society would be better off with more threats, more fighting words, more libel, or more obscenity?

For similar reasons, forcing the state to generalize the scope of speech restrictions by rigorously reviewing content discrimination does not increase the trustworthiness of the political process when unprotected speech is being regulated as it does when protected speech is burdened. We trust laws that spread costs widely and burden those who support their enactment because we appreciate the power of self-interest. Individuals will not sacrifice interests they value and accept painful burdens unless they believe that the resulting public benefits are sufficiently important to justify that cost.[133] Since the opportunity to engage in protected speech has both dignitary and instrumental value, a willingness to accept the loss of expressive opportunities demonstrates the community's belief in the necessity of the regulation causing the loss.

No such inference can be fairly drawn from the regulation of unprotected speech because the community enacting such laws does not view the inability to engage in unprotected speech as a sacrifice or lost opportunity. This conclusion rests in part on doctrine. Unprotected speech is defined by courts as having no social utility. Indeed, there are so few categories of unprotected speech and the categories of unprotected speech are so narrowly defined precisely to insure that only speech lacking all social value may be proscribed in its entirety.[134]

More importantly, the need to express unprotected speech is rejected by the polity itself. Unprotected speech involves acts of

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ing words have no First Amendment value that Scalia can so confidently assert that a more general prohibition of fighting words is a satisfactory content-neutral alternative to the St. Paul ordinance. If the regulation of protected speech was at issue and the law under review prohibited the distribution of leaflets that were likely to be discarded as litter by recipients because of the offensiveness of their subject, I would not expect the Court to suggest that the state's interest could be adequately served by a law banning all leafletting.

[133] *See supra* notes 114-16 and accompanying text.

[134] Thus, for example, the Court has repeatedly refused to uphold the conviction of defendants who allegedly expressed fighting words. *See supra* note 122 and accompanying text. Similarly, the definition of obscenity is as detailed and convoluted as it is to insure that it only applies to sexually graphic material that "taken as a whole, lacks serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 18 (1973). *See also* Jenkins v. Georgia, 418 U.S. 153, 160 (1974) (explaining that definition of obscenity in *Miller* was "intended to fix substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to such a determination").

moral turpitude, coercion, or lies.[135] For the most part, people do not regulate activities of this kind with the understanding that they are burdening their own behavioral choices when they do so. Accordingly, their willingness to extend the scope of restrictions on unprotected speech involves no self-sacrifice and creates no inference that public benefits outweigh private costs.

The accuracy of this contention can be illustrated by examining conventional criminal legislation. Compare a narrowly focused murder statute that imposes capital punishment for certain heinous homicides with a more broadly inclusive statute that substantially expands the number of capital offenses. There is little reason to assume that the broader statute represents a more authentically determined cost-benefit analysis because it applies to more people than the narrower law. Since most of us neither anticipate committing any kind of murder nor view murder as a valuable tool toward achieving our goals, whatever it is that influences our judgment as to the proper scope of capital murder statutes, self-sacrifice is not part of our calculus. The concern that we are depriving ourselves of some valued opportunity has no bearing on our collective judgement.

Indeed, the converse argument is probably more accurate. Since most voters consider themselves more likely to be victimized by criminals than perpetrating violent crimes themselves, the narrowly drawn murder statute may reflect a greater sense of sacrifice from the citizenry than the broader law. By limiting the scope of capital cases, we may be increasing our own vulnerability to violent assaults, the very kind of result that supports substantial deference to the political process.

Most content distinctions within a category of unprotected speech are like criminal laws in this respect. They are grounded primarily on the harm that such speech is perceived to cause. Most people do not view threats or fighting words as useful tools

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[135] *See, e.g.*, Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 497 (1985) (explaining that sexually graphic expression is only obscene if it appeals to "a shameful or morbid interest in nudity, sex, or excretion"); United States v. Hayward, 6 F.3d 1241, 1258 (7th Cir. 1993) (Flaum, J., concurring) (noting that "threats interfere with the rights of individuals to be free from the fear of violence; they are disruptive and costly to society; and they usually contribute little or nothing to the marketplace of ideas"); SHIFFRIN, *supra* note 3, at 20 (summarizing theory of obscenity cases "that the distribution of obscene material is not protected under the First Amendment because it debases human personality").

that they are reluctantly surrendering to promote the public good. Indeed, they probably consider themselves more likely to be victimized by threats and fighting words than gainfully using such expression. Thus, if there is any self-sacrifice that can be inferred from the regulation of unprotected speech, it occurs when society elects *not* to prohibit the *entire* category of such speech, and instead, restricts only particularly problematic threats or fighting words. That is why a narrow, content-based restriction of fighting words should be understood to reflect a legitimate evaluation of the special harm caused by the prohibited speech. Like narrow prohibitions punishing other criminal acts, regulations of this kind are as likely to reflect a concern for proportionality in punishment and the efficient allocation of criminal justice resources as they are to reflect the desire to suppress particular ideas.

When a specific category of threats is designated for special prohibition or punishment, such as a ban on threats of violence directed at persons because they are exercising their constitutional rights, the government will typically justify the law by arguing that the prohibited threats are particularly harmful. There is seldom any suggestion that threats are valuable or even benign expression. Within the sphere of activity that the government may constitutionally suppress, we typically provide the government considerable discretion to determine what kind of anti-social or criminal behavior is especially dangerous and harmful. Because the regulation of unprotected speech restricts expressive behavior that merits suppression in its entirety, it is difficult to understand why some deference, even if it is something less than the extreme deference extended to the government in developing criminal legislation, should not apply here as well.

4. The Need For Content-Neutral Laws

The final justification for reviewing content-neutral laws more deferentially than content-discriminatory laws relates to the perceived need for content-neutral regulations. Such laws are not simply socially useful, they are necessary in order to promote basic First Amendment values. Robust public discourse requires a legal foundation providing sufficient order and stability to

allow citizens to express speech clearly and to be heard.[136] For the most part, content-discriminatory laws serve other purposes that seem less essential to the proper functioning of society.[137] Accordingly, for very practical reasons, we can accept that most content-discriminatory laws will be struck down under strict scrutiny, but we cannot tolerate a regime that places similar constraints on all time, place, and manner regulations.

Yet again, this justification has little bearing on the regulation of unprotected speech. Content-neutral restrictions on the expression of unprotected speech are not essential to the efficient ordering of the marketplace of ideas. We are not concerned that unprotected expressive activities will unreasonably interfere with each other unless they are organized under time, place, and manner rules. Nor is it clear that content-discriminatory limits on unprotected speech are so easily dispensed with. Indeed, the extraordinary number of exceptions to the rule against content discrimination that Justice Scalia recognizes in *R.A.V.* demonstrates both the utility and conventional acceptance of such restrictions.[138]

Finally, content-discriminatory regulations of unprotected speech may often serve a salutary purpose that neutral regulations do not. The contours of unprotected speech categories are vague and ambiguous. Therefore, to the extent that laws prohibit an entire category of unprotected speech, such as a law banning all obscenity or a law banning all fighting words, the vagueness of the law will inevitably create a chilling effect that extends into the realm of protected expression. Under a general statute of this kind, for example, some people will be deterred from expressing angry and critical speech protected by the First

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[136] *See supra* notes 116-17 and accompanying text.

[137] *See Content-Neutral Restrictions*, *supra* note 78, at 76 (arguing that because content-based laws do not serve same order and stability purposes as content-neutral laws, rigorous review of content-based laws "does not impose nearly the same costs [on society] as would wholesale invalidation of content-neutral laws").

[138] Scalia's list of constitutionally valid, content-discriminatory regulations of unprotected or lesser protected speech includes restrictions on threats against the President, particularly prurient obscenity, price advertising within one industry but not another, the location of adult movie theatres, and sexual derogatory fighting words in the workplace. *R.A.V.*, 505 U.S. at 388.

Amendment out of concern that their speech will be construed to be proscribed fighting words.[139]

Content-discriminatory regulations may not eliminate this chilling effect entirely, but they can mitigate it. In part, this mitigation occurs because subject-specific regulations of unprotected speech have limited coverage and leave some fighting words unrestricted. More importantly, content-discriminatory regulations give speakers additional guidance as to what they are prohibited from saying.[140] To cite a simple example, a law that prohibits the use of specific ethnic epithets as personal insults in face-to-face interactions provides a more precise standard to be obeyed than a law prohibiting the use of personal insults in face-to-face encounters that are likely to provoke violent retaliation.[141]

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[139] *See* Brownstein, *supra* note 52, at 212 n.117.

[140] A content-discriminatory regulation limiting expression within a category of unprotected speech not only has the virtue of reducing the chilling effect created by a generic ban on the entire category of unprotected speech; it also limits enforcement official and jury discretion to determine exactly what speech falls within the statutory prohibition. Since the definitions adopted by courts to describe categories of unprotected speech are as ambiguous as they are, a generic ban will inevitably provide officials and juries considerable opportunity to pick and choose among the messages that arguably fall within the relevant prohibition. By denying the legislature the power to precisely identify what speech is to be restricted, the task of identifying exactly what speech may be punished as fighting words, for example, will fall to government agents and juries by default. Thus, far from avoiding the risk that a fighting words statute will be used to suppress ideas, "Justice Scalia's suggestion [in *R.A.V.*] that a fighting words statute is a content-neutral alternative to the St. Paul ordinance authorizes the ad-hoc application of such a statute's terms to distinctive messages." Shiffrin, *supra* note 15, at 59.

[141] A law prohibiting ethnic insults, or more precisely a law prohibiting insulting language related to a person's race or ethnic background, may be properly categorized as content-discrimination rather than viewpoint-discrimination. A civility statute prohibiting all abusive language is certainly viewpoint-neutral despite its facial discrimination between insults and compliments. While a law prohibiting only ethnic insults applies to a subcategory of insulting language, the line between what is prohibited and what is permitted does not directly pertain to different points of view. Insults related to a person's weight, intelligence, or economic class are not prohibited, but these insults do not represent a viewpoint that is in conflict with ethnic vulgarities.

While it is true, as Justice Scalia implies in *R.A.V.*, that a law banning ethnic insults would allow the victim of such expression to direct insults at the racist speaker without sanction as long as the responsive insults were focused on the speaker's bigotry and not his race, *R.A.V.*, 505 U.S. at 391, that result by itself does not establish that the law banning ethnic insults is viewpoint discriminatory. A law banning insults related to a person's immutable characteristics but allowing insults directed at a person's beliefs or expression or behavior would produce the same result. It is difficult to contend that such a law is viewpoint-discriminatory, however, simply because in particular verbal interactions it can have the

III. REWRITING *R.A.V.* — FOCUSING ON VIEWPOINT DISCRIMINATION

When one reads the majority opinion in *R.A.V.*, one almost senses that Justice Scalia understands that there is no real necessity for requiring courts to strictly scrutinize content-discriminato-

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effect of disadvantaging one speaker and benefiting another. *See supra* notes 40, 86-89; *see also* Brownstein, *supra* note 52, at 205-06.

Part of the confusion in distinguishing content from viewpoint discrimination is the result of overlapping conflicts within the context of a particular debate. Thus, on its face a regulation attempting to restore civility to a bitterly divided polity heatedly arguing a controversial issue should be construed to be content-discriminatory, not viewpoint-discriminatory. A law prohibiting the use of fighting words or threats in a labor dispute or in discussions relating to abortion would fall within this category. Its purpose is not to empower one side or the other in the debate but to limit the abusive expression on both sides. *See infra* notes 161-62. Similarly, a law prohibiting the use of fighting words in racial disputes attempts to control hurtful speech in an evenhanded way. Both white racists and black racists would be equally restricted in their speech. That, in essence, is what some ostensibly neutral hate speech statutes attempt to accomplish. People ought to be able to discuss affirmative action, for example, without vilifying each other with racial insults while doing so.

The problem arises when a third party enters the fray and uses fighting words against either or both sides of the conflict. Thus, a person condemning white or black racist participants in an ethnic altercation for their bigotry may not be restricted by the law prohibiting the use of fighting words in racial disputes because the new conflict he has entered involves a dispute about bigotry, not race. While there *is* a sense in which the immoderate spokesperson for tolerance is advantaged by the law, the effect is indirect and can typically be circumvented with a little ingenuity on the part of the aggrieved racist. Thus, if the circumstance arises, as Justice Scalia apparently fears, that a bigot is being insulted because of his hatred of Catholics by a Catholic, but is prevented from responding with anti-Catholic epithets by a hate speech ordinance prohibiting anti-religious fighting words, the bigot's verbal hands are not completely tied. He can still vilify his opponent for supporting tolerance and opposing bigotry.

A second source of confusion arises from the reality that certain forms of unprotected speech, such as fighting words, are by definition negative expressions toward whatever subject or point of view they are directed. There simply are no positive, complimentary fighting words. Thus, a law prohibiting the expression of fighting words related to reproductive health may be a content-discriminatory, but viewpoint-neutral, attempt to restore some measure of civility to the abortion debate. Neither side of the abortion conflict is empowered or advantaged by such a regulation. Nonetheless, the law appears to be viewpoint-discriminatory in a technical sense because it only restricts negative aspersions about either pro-choice or pro-life advocates while imposing no limits on the positive statements that may be directed at either group. Despite this formal appearance of viewpoint discrimination, on a substantive level I believe a law banning fighting words related to reproductive health is a viewpoint-neutral law. *See* Boos v. Barry, 485 U.S. 312, 319 (1988) (construing District of Columbia regulation prohibiting display of any sign within 500 feet of foreign embassy, if sign tended to bring government represented by embassy into public "odium" or "disrepute," to be content-discriminatory, not viewpoint-discriminatory, because "an entire category of speech — signs or displays critical of foreign governments" was restricted without regard to policies or politics of particular nations).

ry regulations of unprotected speech. As he became aware of the number of situations in which such content-discriminatory laws are reasonably and legitimately employed by government, he must have felt like a Dutch boy running out of fingers to stick in the leaking dike. Each situation demanded the creation of a new exception to the rule of the case. Finally, as the number of exceptions to the rule requiring rigorous review grew larger and larger, there reached a point at which it became clear that this opinion was too top heavy to stand and needed to be revised. Scalia's apparent solution to the problem, however, the creation of an all-purpose exception at the end of the opinion that allows for more deferential review "so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot,"[142] is clearly too little help and too late.

Bluntly, this all-inclusive exception is too indeterminate to be useful.[143] Moreover, it misses the point. All regulations of speech create some possibility of suppressing one message as

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[142] *R.A.V.*, 505 U.S. at 390.

[143] From Justice Scalia's perspective, the basic premise that supports subjecting content-discriminatory laws to strict scrutiny is the suspicion that such laws may reflect the improper motive of suppressing ideas. Strict scrutiny is an appropriate response to those suspicions because courts can not determine directly whether improper motives materially influenced the enactment of the challenged law because of the problems associated with direct judicial inquiries into legislative motive. Thus, the presumption created by strict scrutiny provides a means of ferreting out precisely those laws that are invidiously motivated without undertaking an intrusive and speculative examination of the state's objectives. *See Subject-Matter Restrictions*, *supra* note 80, at 104-07.

Given this predicate, an exception to the rule requiring strict scrutiny review for all those content-discriminatory laws that do not risk suppressing ideas seems to be internally inconsistent. On the one hand in implementing Scalia's exceptions, courts are considered to be capable of identifying content-discriminatory laws that reflect improper motives and are directed to single those laws out for strict scrutiny. On the other hand, courts subject content-discriminatory laws to strict scrutiny precisely because they lack the ability to identify improperly motivated content-discriminatory laws through any other means.

In addition to its conceptual incoherence, Justice Scalia's all purpose exception to the strict scrutiny requirement raises unresolved practical difficulties. Just how limited a risk of improper motive must exist before a court can confidently decline to apply strict scrutiny to a content-discriminatory regulation of unprotected speech? In light of the fact that many of Scalia's explicit exceptions in *R.A.V.* appear to include statutes that create very "realistic possibilities that official suppression of ideas is afoot", *R.A.V.*, 505 U.S. at 390, but which are nonetheless immunized from rigorous scrutiny, lower courts are provided virtually no useful guidance as to how they are to determine when a statute falls within Scalia's generic exception to the *R.A.V.* holding.

opposed to another, including most of the exceptions to the rule against content discrimination recited in *R.A.V.*[144] In order to permit government to do its job, while providing manageable standards for the courts to use in reviewing legislation, we must tolerate that risk in those circumstances in which government flexibility is generally useful and the threat of distortion is acceptably limited. Content-neutral laws are one such circumstance. Content-discriminatory regulations of unprotected speech are another.

Certainly, Scalia shows little uneasiness about risking the suppression of ideas in other circumstances. He seems unconcerned, for example, that content-discriminatory regulations of *protected* speech in nonpublic fora can be reviewed under a "reasonableness" standard.[145] Given this doctrinal background,

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[144] Few aspects of the Court's reasoning in *R.A.V.* are as perplexing as its insistence that the exceptions to the rule against content-discrimination detailed in the opinion do not create a "realistic possibility" that "official suppression of ideas is afoot." Content-discriminatory regulations of speech that are justified as attempts to reduce the "secondary effects" of expression obviously create the risk that the state is attempting to suppress offensive speech. Certainly, there is a real risk that dispersal zoning ordinances restricting the location of adult movie theaters reflects the legislature's moral condemnation of sexually graphic films as much as it does a concern with the secondary effect of neighborhood deterioration. *See* Alan E. Brownstein, *Illicit Legislative Motive in the Municipal Land Use Regulation Process*, 57 U. CIN. L. REV. 1, 84-95 (1988) (discussing likelihood that dispersal zoning ordinance upheld was grounded on antipathy toward, and intent to suppress, adult films).

Similarly, the incidental prohibition of speech by laws directed at conduct is hardly immune from suspicion. A ban on sexually derogatory fighting words in the workplace clearly creates a risk that it will be applied to suppresses expression approving the subordination of women. *See* Volokh, *supra* note 47, at 1793-98, 1829-32. A law that prohibits fighting words directed at the members of a particular group can also be used to censor particular messages. A statute prohibiting fighting words directed at gays and lesbians might be adopted in part to suppress the expression of homophobic ideas.

Professor Steven Shiffrin's comment on the obvious dissonance between the exceptions Justice Scalia recognizes in *R.A.V.* and Scalia's ostensible concern about the possibility that the suppression of ideas is afoot is embarrassingly accurate. Shiffrin writes:

> This description of the case law breathes new life into the expression about ostriches hiding their heads in the sand. When the government outlaws threats against the President, advertisements for casino gambling or alcoholic beverages, or the burning of draft cards, or when it engages in a campaign of zoning adult theaters out of neighborhoods, no one but a person wearing a black robe with a strong will to believe or befuddle could possible suppose that "[t]here is no realistic possibility the official suppression of ideas is afoot."

Shiffrin, *supra* note 15, at 57.

[145] *R.A.V.*, 505 U.S. at 390 n.6. (citing with approval Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 78 (1985)).

Scalia's surprising contention that content-discriminatory regulations of unprotected speech are so risky that they must receive strict scrutiny is simply implausible and unpersuasive. It is no wonder that the lower courts are so consistent in circumventing the product of such a faulty premise.

Scalia is on much firmer ground when he argues that viewpoint-discriminatory laws limiting unprotected speech must receive strict scrutiny.[146] The problem with such laws, however, is not simply that they suppress ideas. Viewpoint-discriminatory restrictions of speech do more than that. They silence one side of a debate while allowing the other side unchallenged domination of the marketplace of ideas. The state stacks the deck to control which player has the winning hand when the game of public policy debate is over.

Viewpoint-discriminatory restrictions of unprotected speech create a similar kind of distortion but operate differently. Preventing the dissemination of ideas through the use of unprotected speech doesn't deprive society of any positive communications that deserve to be expressed or heard. It doesn't even restrict a legitimate medium of expression and, thereby, burden the means by which communication can occur. Rather, viewpoint discrimination within categories of unprotected speech abridges freedom of speech because it distorts the marketplace of ideas by empowering one side of an ideological conflict with dangerous weapons that are denied to its opponents.[147]

The key point here is that unprotected speech has no clear positive function in the exchange of ideas. Like many forms of recognized criminal conduct, its uses are essentially negative and hurtful. The unfairness of allowing only one side of a debate to use unprotected speech does not violate the First Amendment because threats and fighting words are beneficial speech that the government is restricting. It violates the First Amendment because the government is allowing one side of a debate to abuse its opponents. To the extent that such regulations silence debate, the silencing does not pertain to the threats and fighting words that the regulated party is directly prohibited from ex-

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[146] *Id.* at 391 (explaining that St. Paul hate speech ordinance "goes even beyond mere content discrimination to actual viewpoint discrimination").

[147] *See supra* notes 83-84 and accompanying text.

pressing. The speech that is arguably silenced or discouraged (albeit indirectly) is the legitimate communications of those regulated parties who retreat from the forum of public debate because they have been rendered defenseless against the abusive tactics of their adversaries.[148]

Unprotected speech is very much like hitting below the belt in a boxing match. Since such conduct adds nothing to the sport, an inattentive referee who allows both fighters in a boxing match to occasionally commit fouls may deserve some criticism. On the other hand, some laxity in enforcement may be excused because too stringent enforcement of the rule would discourage fighters from using legitimate body blows. (The analogy to overly restrictive prohibitions against the use of unprotected speech that chill legitimate discourse should be obvious.) What is intolerable and totally destroys the contest is a referee who deliberately allows one fighter alone to commit fouls. The government engages in just such unacceptable interference with expressive debate when it enacts viewpoint-discriminatory laws restricting unprotected speech.

As should be clear from this analogy, it is entirely irrelevant that the viewpoint-discriminatory regulation of unprotected speech is directly restricting speech, and not conduct, just as it is entirely irrelevant that the prohibition against hitting below the belt in a boxing match directly restricts punching. The box-

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[148] Viewpoint-discriminatory regulations restricting protected speech injure the silenced speaker (and society as a whole) more than content-discriminatory regulations because one side of the debate, the side opposing the silenced speaker, gets critical advantages in influencing public opinion. The favored viewpoint dominates discussion because it is the only message on the subject permitted to be expressed and it is protected against critical commentary. The silenced speaker and society would be best served if all points of view could be expressed; but if an open marketplace of ideas can not be provided, a regulation suppressing all speech on the subject would be more fair and less distorting than a viewpoint-discriminatory restriction.

Viewpoint-discriminatory restrictions of unprotected speech are only marginally less dangerous and subversive of First Amendment values because they do not directly suppress constructive messages supporting any point of view. They still distort debate by allowing only one side of a controversy to engage in hurtful and destructive expression that may intimidate and discourage the opponent's message or its audience. The consequences of such discrimination may be indirect, but they can be severe and debilitating. If proponents of one ideological perspective are permitted to insult, harass, heckle, humiliate, and threaten their expressive adversaries but are protected against similar treatment, an imbalance in constructive speech on the issue in conflict is almost certain to result.

ing match would even be more unfairly refereed if one boxer, but not the other, was allowed to carry a gun into the ring and shoot his opponent. Similarly, a law that allows Republicans to physically assault Democrats but punishes Democrats for physically retaliating against their assailants is probably even more violative of First Amendment principles than a law allowing Republicans, but not Democrats, to use fighting words in public debates. What is constitutionally offensive about such a law has nothing to do with whether speech or conduct is being regulated. It has nothing to do with whether what is being regulated is expressive or not.[149] What is critical is that the law has made one class of belief holders and speakers uniquely vulnerable to private abuse. That inequality of treatment violates the First Amendment.

To be fair to the Court, there is nothing in *Mitchell*, the case in which the Court upholds a hate crimes statute because it regulates conduct but not speech, that explicitly states that the Court would uphold a viewpoint-discriminatory law enhancing the sentence for aggravated assault. The law in *Mitchell*, which enhances the penalty for an aggravated assault if the perpetrator selects his victim because of the victim's race, would seem to involve content discrimination not viewpoint discrimination, to the extent that it involves discrimination related to expression at all.[150] Certainly, victims of racist assaults do not represent a distinct viewpoint or ideological position. Further, while the perpetrators of racist assaults in some cases may be attempting to communicate a message with their conduct, that conclusion is neither necessary nor probable. There is a difference between acting out of racial hatred and expressing a message of racial hatred.[151]

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[149] *See* Post, *supra* note 3, at 1259-60 (recognizing that First Amendment may be implicated by regulation of conduct whether or not conduct at issue is "communicative in nature").

[150] While the Court does state that the law at issue in *Mitchell* enhances "the maximum penalty for conduct motivated by a discriminatory point of view more severely than the same conduct engaged in for some other reason or for no reason at all," *Mitchell*, 113 S. Ct. at 2194, there is no suggestion in the opinion that the defendant's conduct was understood to be expressive in nature or that the law under review was directed at the message communicated by an assault. *See supra* notes 21-31, 33 and accompanying text. Thus, one could argue that the law in *Mitchell* is a content-neutral regulation of conduct.

[151] It is possible to argue that laws prohibiting acts of violence intended to express mes-

At most, one might imply that viewpoint-discriminatory regulations of conduct are constitutional from the Court's emphasis in *Mitchell* on the fact that the hate crimes statute only regulated conduct as the basis for distinguishing *Mitchell* from *R.A.V.*[152] It is hard to believe that the Court would uphold a law enhancing the penalty for an assault intended to injure persons who support abortion rights while leaving the penalty unchanged for those who assault anti-abortion activists. The reasoning of *Mitchell* technically leaves the resolution of this issue open, however, since the Court fails to identify when the regulation of motive-based conduct would raise serious First Amendment concerns.

There is a final irony underlying and undermining the Court's distinction between unprotected speech and conduct. Unprotected speech is by its nature degrading, hurtful, or dangerous and can be prohibited in its entirety without withdrawing anything of value from the marketplace of ideas or society in general. The same cannot be said for conduct that is not conventionally used for expressive purposes, but which might on some occasions be employed to communicate a message. The range of conduct that may be used for expressive purposes includes both benign and harmful behavior.[153]

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sages of racial hatred are content-discriminatory rather than viewpoint-discriminatory. The very idea of committing acts of violence to express a message of racial tolerance seems so anomalous that it is difficult to accept the notion that the government is attempting to silence bigots by permitting people of good will to assault them without sanction. In essence, such a law might be reasonably construed to prohibit expressive violence related to racial issues. Still, a more secure way to enact a law prohibiting acts of violence to express messages of racial hatred without violating the First Amendment would be to prohibit expressive violence related to racial issues.

An alternative approach to reviewing laws of this kind would be to consider them to be directed at conduct alone, not the message being communicated by the conduct. The punishment of an act of violence intended to express a message of racial hatred would be subject to sanction as an act of racial hatred. The perpetrator's motive in attempting to express a message of racial hostility would only be relevant as support for the conclusion that the assailant had selected his victim because of the victim's race. Again, if that is the state's objective, a preferable solution is available. The state should prohibit acts of violence in which the assailant selects his victim because of the victim's race since such a law will punish both non-expressive and expressive acts of racist violence and can be defended as a content-neutral regulation of conduct.

[152] *Mitchell*, 508 U.S. at 487 (explaining that "whereas the ordinance struck down in *R.A.V.* was explicitly directed at expression . . . the statute in this case is aimed at conduct unprotected by the First Amendment").

[153] *See, e.g.*, Clark v. Community for Creative Non-Violence, 468 U.S. 288, 289 (1984)

Some forms of expressive conduct, such as political assassination or terrorism, have only harmful consequences. Accordingly, a content-discriminatory regulation of conduct that prohibits killing people as a means of communicating any political message, for example, takes nothing away from any speaker that is even remotely considered to be a legitimate means of expression. Such a law can be analogized to the content-discriminatory regulation of unprotected speech and should be upheld without rigorous scrutiny.

Other forms of conduct that might occasionally be used for expressive purposes, however, are much more benign in their nature. One can imagine a campaign urging homeowners to plant yellow roses in their front yards to signify their support for peace or racial tolerance. A content-discriminatory law banning the planting of flowers for the purpose of communicating a political message raises far more serious constitutional concerns than the ban on political assassinations or a ban on political fighting words. This law would withdraw an unorthodox but legitimate means of expressing a message from the universe of permissible discourse.

The law banning political flower planting is ostensibly viewpoint-neutral on its face and does not directly empower one group at the expense of its ideological adversary. Yet it reduces legitimate expressive opportunities with regard to a particular subject of discourse and creates the risk that the government is regulating expressive conduct for improper reasons. As such, the law should be reviewed, at a minimum, under the multi-factor balancing test used to evaluate the constitutionality of content-neutral laws restricting conventionally recognized means of communication, for example, laws limiting leafletting or picketing.[154] Thus, not only does a content-discriminatory law regulating unprotected speech deserve less rigorous scrutiny than a similar law regulating protected expression, but content-discrimi-

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(holding that First Amendment does not protect persons desiring to express ideas by sleeping in park); Tinker v. Des Moines, 393 U.S. 503, 514 (1969) (holding regulation prohibiting wearing arm bands to school to express opposition to war in Vietnam violative of students' First Amendment rights); United States v. Hayward, 6 F.3d 1241, 1250-51 (7th Cir. 1993) (affirming conviction of defendant for burning cross on victim's law to express threatening message), *cert. denied*, 114 S. Ct. 1369 (1994).

[154] *See supra* note 73.

natory laws regulating unprotected speech arguably deserve less rigorous protection than some content-discriminatory laws regulating expressive conduct.

An alternative framework focusing on the distinction between content and viewpoint discrimination is not only more securely grounded on fundamental First Amendment principles, it is far less complicated and easier to administer as well. Under this approach, all viewpoint-discriminatory laws receive strict scrutiny, regardless of the nature of the regulated activity. Courts would treat protected speech, unprotected speech, harmful conduct, and benign conduct the same. The content-discriminatory regulation of protected speech would also receive strict scrutiny as it does now. Content-discriminatory regulations of unprotected speech or expressive conduct and content-neutral regulations of conventional expressive activity, whether pure speech or conduct, would all be reviewed under a multi-factor balancing test. Content-neutral regulations of unprotected speech or conventionally non-expressive conduct would receive minimum rationality review.

While the intrinsically harmful nature and low social utility of unprotected speech suggests that it deserves less rigorous constitutional protection than benign forms of conduct engaged in for expressive purposes, the fact remains that all forms of content discrimination create some risk that debate will be distorted in favor of one expressive group or another. That potential effect supports a level of review for content-discriminatory restrictions of unprotected speech no less rigorous than the multi-factor balancing test applied to content-neutral time, place, and manner regulations of protected speech.

The same standard of review should be applied to content-discriminatory regulations of conduct engaged in for expressive purposes as well. While one might argue that this standard is too rigorous for laws prohibiting flagrantly harmful conduct such as political assassinations, the use of the multi-factor balancing test is supported here, as it is when unprotected speech is restricted, because of the potentially distorting effect of content-discriminatory regulations of any kind. It is also supported by the difficulty courts would experience if they were asked to distinguish regulations restricting benign conduct from laws limiting harmful conduct on their face and to apply a more

lenient standard of review for regulations of the latter forms of behavior.

Courts should experience little difficulty upholding clearly legitimate regulations of harmful expressive conduct, such as the prohibition of political assassination, under this standard. The state obviously has a strong interest in limiting political violence because of its capacity to undermine the stability of the political system. The conduct being suppressed is indefensible and it goes without saying that there are alternative and preferable means of communicating a message than murder.

This standard also provides an adequate basis for striking down unnecessary content-discriminatory restrictions on benign expressive conduct. The state will have a difficult time justifying the regulation of clearly benign conduct.[155] It is difficult to imagine an important state interest furthered by a law banning political flower planting, for example.[156] To be sure, the regu-

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[155] Of course, not every regulation of conduct would be reviewed under a multi-factor balancing test. As noted previously, most regulations of conduct do not involve expression in any way, *see supra* note 90, and would receive conventional minimal rationality review. Thus, a ban on political flower planting is easy to identify as a content-discriminatory regulation of conduct that invokes First Amendment review. A general ban on flower planting for health reasons to reduce the amount of pollen in the air is equally easy to recognize as a content-neutral regulation, entirely unrelated to expression. Aesthetic controls on flower planting, on the other hand, might raise First Amendment concerns and be more difficult to evaluate in the same way that dress codes in schools may involve discriminatory restrictions on expressive conduct.

[156] One might argue that a law prohibiting political flower planting should receive strict scrutiny under the conventional *O'Brien* test instead of being subjected to a multi-factor balancing test because the law, on its face, is related to the suppression of expression. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968). The *O'Brien* Court held:

> [A] governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the government 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.

Id. While I recognize the force of this argument, if it is carried to its logical conclusion, a law enhancing the penalty for political terrorism and assassination, acts of murder intended to communicate a political message, should also receive strict scrutiny. This result might be avoided by insisting that certain kinds of conduct are so pernicious and hurtful that they can never be used for expressive purposes and will receive no First Amendment protection in any circumstance. *See generally* Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984) (suggesting that "violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection"). This solution creates problems of its own, however. Courts will have to

lation of activities that might be more legitimately restricted than growing flowers may create difficult cases when those activities are engaged in for expressive purposes. Yet there is no way to avoid tough cases in evaluating the regulation of expressive conduct as the current case law in this area demonstrates.[157]

More importantly, the difficulty courts confront in reviewing the regulation of expressive conduct does not necessarily result from the content-discriminatory nature of the challenged laws. The Court's decision in *United States v. O'Brien*,[158] upholding a law prohibiting the burning of draft cards, may be justly criticized,[159] but the law at issue in that case was facially neutral. The problem with reviewing laws of this kind is that the state often is willing and able to prohibit, and justify the punishment of, the conduct in question, whether it is engaged in for expressive purposes or not. In these multiple motive situations, the state's invidious purpose to suppress a distinct protected message or point of view expressed through conduct, an illegitimate purpose that would require striking the offensive law down, can be difficult to establish.

The content-discriminatory regulation of expressive conduct raises different problems. Because of its focus on the message expressed by the conduct or on the expression of the victim of the conduct, content-discriminatory laws disclose on their face that the communicative impact of the conduct is not entirely irrelevant to its regulation. What courts must inevitably determine in these situations is whether the reference to content reflects an invidious and unconstitutional attempt to silence a

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develop criteria for identifying those acts that will never be covered by the First Amendment even if they are engaged in for expressive purposes. Moreover, if we adopt this approach we are still left with the dilemma of determining how to evaluate a law that prohibits left wing terrorism, but not right wing terrorism.

[157] *See, e.g.*, United States v. Eichman, 496 U.S. 310, 312 (1990); Texas v. Johnson, 491 U.S. 397, 399, 406 (1989) (striking down flag burning statutes on grounds that they regulate expressive conduct because of content of message being conveyed). The flag burning cases construe the statutes at issue to discriminate on the basis of viewpoint, not content. I cite them simply to demonstrate the complexity of evaluating expressive conduct cases under current standards.

[158] 391 U.S. 367 (1968).

[159] For commentary criticizing the Court's decision in *O'Brien*, see TRIBE, *supra* note 119, at 824-25, and Melville B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29, 39-42 (1973).

message, or whether the content of the message and the conduct used in its delivery taken together cause a kind of injury that the state may legitimately attempt to avoid.

The decision to select one standard of review or another to resolve this question will depend in significant part on whether one believes that laws of this kind often further legitimate state interests. This Article's thesis suggests that applying strict scrutiny to content-discriminatory regulations of conduct presumes too strongly that most laws of this kind deserve to be struck down.[160] It also suggests that applying a highly deferential standard of review would have the opposite effect and unreasonably facilitate government in restricting expressive conduct by virtually guaranteeing that almost all laws of this kind would be upheld. A multi-factor balancing test is the only standard that recognizes both the government's need for flexibility in this area as well as First Amendment concerns regarding the costs of content-discriminatory conduct regulations — including the indirect distortion of public debate, and the withdrawal of unconventional but legitimate means of expression from public discourse.

IV. DETERMINING THE CONSTITUTIONALITY OF FACE

Under such a framework of review, the constitutionality of FACE would be easily determined. FACE does not discriminate on its face on the basis of viewpoint.[161] It is content-discrimina-

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[160] Hate crime statutes, such as the Wisconsin law reviewed in *Mitchell*, would not necessarily be included here because such laws are not technically content-based. Other regulations of conduct, however, might be more explicitly directed at expressive content. If X attacks Y, an African-American, for the purpose of communicating to other African-Americans the message that they are unwelcome in X's community, I do not believe that a content-based law prohibiting such conduct must be reviewed under strict scrutiny. *See supra* notes 153-59 and accompanying text.

[161] *See, e.g.*, Cheffer v. Reno, 55 F.3d 1517, 1521 (11th Cir. 1995); American Life League, Inc. v. Reno, 47 F.3d 642, 648-51 (4th Cir.), *cert. denied*, 116 S. Ct. 55 (1995); United States v. Lucero, 895 F. Supp. 1421, 1424 (D. Kan. 1995); United States v. White, 893 F. Supp. 1423, 1435-37 (C.D. Cal. 1995); United States v. Dinwiddie, 885 F. Supp. 1286, 1289 (W.D. Mo. 1995); United States v. Brock, 863 F. Supp. 851, 861 n.19 (E.D. Wis 1994); Riely v. Reno, 860 F. Supp. 693, 702-04 (D. Ariz. 1994); Cook v. Reno, 859 F. Supp. 1008, 1010 (W.D. La. 1994); Council for Life Coalition v. Reno, 856 F. Supp. 1422, 1427 (S.D. Cal. 1994); American Life League, Inc. v. Reno, 855 F. Supp. 137, 143-44 (F.D. Va. 1994), *aff'd*, 47 F.3d 642 (4th Cir.), *and cert. denied*, 116 S. Ct. 55 (1995).

tory with regard to the prohibition of threats and, at least arguably, content-discriminatory with regard to the prohibition of obstruction because it is limited to activities directed at persons because they are seeking or providing reproductive health services.[162] The standard of review applied to content-discriminatory regulations of expressive conduct or unprotected speech is the same. The courts would apply the multi-factor balancing test currently used to evaluate content-neutral time, place, and manner regulations of protected speech.

The three elements of this standard of review all support the constitutionality of FACE. The government's interest in protecting access to reproductive health services is substantial because

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It is almost certainly true that FACE will have a viewpoint-discriminatory impact despite its facial neutrality. Anti-abortion activists using force, obstructive tactics, or threats are far more likely to be subject to sanction under FACE than are protestors who support the right to have an abortion. The disproportionate impact of FACE does not invoke strict scrutiny for two reasons. First, the government did not enact FACE for the purpose of suppressing or burdening anti-abortion messages. FACE exists and results in disproportionate sanctions against anti-abortion protestors because only one side of the abortion debate has engaged in a consistent pattern of unlawful conduct. *See infra* note 164. For similar reasons the so-called "Ku Klux Klan Acts" in the late 1800s were not viewpoint-discriminatory because they were applied most commonly to white racists who assaulted black people. The disproportionate impact of these laws resulted from the fact that white racists were engaged in a campaign of intimidation and violence against black people and not the other way around.

Second, as has been noted, it is not uncommon for content-neutral laws to disproportionately burden one group of speakers more than another. That result has seldom been accepted as a justification for raising the level of scrutiny applied to the law, however. *See, e.g.*, Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2524 (1994) (explaining that injunction which only covers "people with a particular viewpoint does not itself render the injunction content or viewpoint based" when only members of that group are engaged in unlawful conduct that renders necessary issuance of injunction); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (noting that "a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others").

[162] *See, e.g., Council for Life Coalition*, 856 F. Supp. at 1427 (noting that FACE is "subject specific" although it is viewpoint-neutral); *American Life League*, 855 F. Supp. at 143 (suggesting that FACE is "subject specific" but "nevertheless viewpoint neutral"); *see also supra* notes 37-41 and accompanying text. *But see, e.g., Cheffer*, 55 F.3d at 1521 (arguing that FACE is not content-based); *American Life League*, 47 F.3d at 650-51 (holding that FACE does not discriminate on basis of content); *Lucero*, 895 F. Supp. at 1425 (holding that FACE prohibits conduct rather than content of viewpoint).

As noted, it is not at all clear that a prohibition against motive-based obstruction is even content-discriminatory. As long as obstructing the entrance to reproductive health clinics can have a non-expressive purpose, under *Mitchell*, banning obstruction may be a content-neutral regulation of conduct. *See supra* note 33.

of the importance of such services to the health of women,[163] and the factual record detailing repeated attempts by third parties to interfere with the availability of reproductive health services.[164] Additionally, the Constitution itself recognizes the importance of decisions of this nature.[165] FACE is reasonably tailored and attempts to protect care providers and patients against disruptive conduct and unprotected speech while avoiding undue interference with protected expression on the part of anti-abortion protestors.[166] Finally, because FACE only prohibits force, threats of force, and physical obstruction, ample alternative avenues of communication remain available to anti-abortion speakers that are in no way limited by federal law.[167]

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[163] *See, e.g., Madsen*, 114 S. Ct. at 2526 (implicitly agreeing with Florida Supreme Court that government "has a strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy"); *American Life League*, 47 F.3d at 651 (citing *Madsen* in recognizing importance of women's interests in access to reproductive health facilities); *White*, 893 F. Supp. at 1436 (endorsing Fourth Circuit's argument that FACE serves substantial governmental interest of protecting women from violence and harm in obtaining reproductive health services).

[164] *See, e.g., American Life League*, 47 F.3d at 652 n.3 (suggesting that government's concern about "the national campaign of violent and obstructive pro-life protests" was legitimate basis for enacting FACE); *Lucero*, 895 F. Supp. at 1423 (acknowledging extensive documentation of violence, threats, and acts of physical obstruction at reproductive health facilities carried out by opponents of abortion); *White*, 893 F. Supp. at 1426-27 (describing interstate campaign of violence targeted at reproductive health providers and their patients); *Dinwiddie*, 885 F. Supp. at 1288-89 (noting reports listing "scores of murders and killings in the context of protests and obstructions around" reproductive health facilities); *Brock*, 863 F. Supp. at 860-61, 866 (recognizing extensive evidence of blockades and harassment at reproductive health care clinics); *Riely*, 860 F. Supp. at 700 (reporting congressional findings that between 1977 and 1993, more than 1000 acts of violence have been committed against abortion providers).

[165] *See* Planned Parenthood v. Casey, 505 U.S. 833, 847-49 (1992); Roe v. Wade, 410 U.S. 113, 154-56 (1973); *see also American Life League*, 47 F.3d at 651-52 (recognizing that government has substantial interest in protecting constitutional right of women to have abortion); *Lucero*, 895 F. Supp. at 1424 (stating that government has strong interest in protecting from violence persons seeking to exercise constitutional right to terminate or continue pregnancy); *White*, 893 F. Supp. at 1436 (same).

[166] *See, e.g., American Life League*, 47 F.3d at 652; *Lucero*, 895 F. Supp. at 1424; *White*, 893 F. Supp. at 1436-37; *Brock*, 863 F. Supp. at 866.

[167] *See, e.g., American Life League*, 47 F.3d at 652; *Lucero*, 895 F. Supp. at 1424; *White*, 893 F. Supp. at 1437; *Brock*, 863 F. Supp. at 866.