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Chrysta Osborn

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Constitutional Scrutiny and Speech: Eroding the Bedrock Principles of the First Amendment

by Chrysta Osborn

I. Introduction

IN 1972, the Supreme Court declared that all constitutionally protected speech must be treated equally.[1] Above all else, the Court opined, government should not limit speech because of its content.[2] The principle of equality of speech serves the important purposes of fostering self-government,[3] and aiding citizens in their search for self-fulfillment[4] and truth.[5]

Since 1972, many Supreme Court decisions have begun to erode the principle of equality of speech.[6] When reviewing a regulation, the Court scrutinizes the regulation using various factors, such as the strength of the governmental interest, to determine the constitutionality of the regulation. Post-1972 decisions have created a scrutiny structure that differentiates between acts of speech based upon content, resulting in unequal treatment of strikingly similar speech.[7] This scrutiny structure conflicts with the principle of equality,[8] a bedrock principle of the First Amendment.[9] The scrutiny structure also detracts from the learnability of First Amendment law[10] and has a "chilling effect" on important acts of speech.[11] These adverse effects become even greater when considered in light of the recent surge in First Amendment activity by both Congress and the Court.[12]

1. Police Dep't. of Chicago v. Mosley, 408 U.S. 92, 95 (1972).
2. *Id.*
3. A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948) (discussed *infra* note 22 and accompanying text).
4. T. Emerson, Toward a General Theory of the First Amendment (1966) (discussed *infra* note 25 and accompanying text).
5. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20, 25 (1975).
6. Most notably, see Young v. American Mini-Theatres, 427 U.S. 50 (1976), in which the Court delivered a famous quote declaring that pornographic films are inherently entitled to lesser constitutional protection. *See infra* note 51.
7. *See infra* notes 92-265 and accompanying text.
8. For a discussion of the principle of equality, see *infra* notes 13-29 and accompanying text.
9. *See* Karst, *supra* note 5, at 21 (recognizing that the equality principle lies at the heart of First Amendment protection of speech).
10. *See infra* notes 85-87 and accompanying text.
11. *See infra* notes 88-91 and accompanying text.
12. *See infra* note 37.

II. EQUALITY, LEARNABILITY AND "CHILLING EFFECTS"

A. *Fundamental Values in First Amendment Law*

The principle of equality of speech lies at the heart of First Amendment protection.[13] The equality principle embraces the concept that the government may not regulate speech because of its content or viewpoint.[14] The Court announced adherence to this principle in the 1972 case of *Police Department of the City of Chicago v. Mosley.*[15]

In *Mosley*, the Court considered the constitutionality of an ordinance that prohibited picketing within 150 feet of a school during school hours. The ordinance contained an exception for peaceful labor dispute picketing. The Court struck down the ordinance because, due to the exception, the ordinance denied equal protection of the law.[16] In so doing, the Court firmly established the link between equality of speech and the First Amendment.[17] The equality principle announced in *Mosley* strikes first and foremost at regulations that discriminate based on content.[18] The Court announced its decision to apply the strictest scrutiny to such regulations.[19] Under such scrutiny, the government must prove that the regulation furthers a significant governmental interest.[20]

Embodied in the *Mosley* language are two rationales for upholding equality of speech under the First Amendment.[21] First, speech acts must be protected equally in order to aid citizens in making informed decisions about self-government.[22] Only by a free exchange of ideas can the populace educate itself and decide the proper course of action.[23] Second, equality of speech allows people to achieve self-fulfillment by expressing their own unique viewpoints and ideas.[24] Professor Emerson advocated the concept of

13. Karst, *supra* note 5, at 21.

14. *Mosley*, 408 U.S. at 95.

15. *Id.* Although the Court hinted at the principle of equality of speech in decisions as early as Fowler v. Rhode Island, 345 U.S. 67, 69-70 (1953) and Niemotko v. Maryland, 340 U.S. 268, 272 (1951), the Court did not expressly embrace the principle until *Mosley*. *See* Karst, *supra* note 5, at 26 n.33.

16. *Mosley*, 408 U.S. at 102.

17. Karst, *supra* note 5, at 28.

18. In *Mosley* the Court declared that the foremost principle of First Amendment protection of speech meant that the government "has no power to restrict expression because of its message, its idea, its subject matter, or its content. . . . [t]he essence of this forbidden censorship is content control . . . ." *Mosley*, 408 U.S. at 95-96.

19. *Id.* at 98. For a thorough discussion of the case, see Karst, *supra* note 5, at 26-29.

20. *Mosley*, 408 U.S. at 98.

21. In *Mosley* the Court supported the principle of equality, reasoning that equality was necessary "[to] permit the continued building of our politics and culture, and to assure self-fulfillment for each individual. . . ." *Id.* at 95. For a discussion of the purposes behind equality of speech, see Karst, *supra* note 5, at 23-26.

22. Alexander Meiklejohn advocated the self-government purpose of equality in FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT, *supra* note 3. Meiklejohn viewed free speech as important to the concept of self-government because the wisdom required for informed choices about government can only be found in the minds of the people, and that wisdom is enhanced by knowledge of all of the alternatives brought to light by free speech. Meiklejohn, *supra* note 3, at 19, 26-28.

23. *Id.*

24. *Mosley*, 408 U.S. at 95.

self-fulfillment in his "general theory" of the First Amendment.[25] Similarly, Professor Karst reflected that self-fulfillment stems from being able to express one's views as a fully participating citizen in democratic self-government.[26]

Scholars advance other purposes than those set forth in *Mosley* to support the equality of First Amendment speech.[27] These purposes include the need for free speech in the search for truth,[28] and free speech as a method of instilling the value of tolerance in the citizenry.[29]

Scholars also value learnability when discussing the system of First Amendment analysis.[30] Learnability requires that the Court articulate the system of analysis clearly and consistently, so that practitioners, judges, and laymen may understand the concept of First Amendment rights.[31] Those who must apply the analysis must be capable of doing so correctly in order for the system to work satisfactorily.[32]

Finally, the Court must attend to the "chilling effects" of regulations under the system of analysis it adopts. Regulation of speech, even when merely contemplated, has a chilling effect on the proscribed speech.[33] The recent Helms Amendment exemplifies the chilling effect of governmental regulation. Senator Helms introduced an amendment to ban the use of federal money to fund obscene or indecent art, in reaction to two exhibitions funded by the National Endowment for the Arts.[34] Because of the legislation, a prominent art gallery decided to cancel the showing of one of the

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25. Emerson, *supra* note 4; *see* Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 209-11 (1982).

26. Karst, *supra* note 5, at 26.

27. *See infra* notes 28-32 and accompanying text.

28. Karst, *supra* note 5, at 26.

29. L. Tribe, AMERICAN CONSTITUTIONAL LAW 793 n.23 (1988).

30. The concept of learnability is discussed more thoroughly in the context of the particular problems of the scrutiny structure, *infra* notes 85-87, 136-44 and accompanying text.

31. Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 305-07 (1981). Schauer recognized that one might make two inquiries of any system of analysis: first, is the system good or bad; and second, can people learn it. *Id.* at 306. To some extent, these principles compete. *Id.* at 306.

> Were we not concerned with learnability, we would attempt to fashion a complex code enabling us to deal adequately with all of the variations presented by particular cases. Every relevant and justifiable distinction, no matter how fine, would be built into the code . . . . "Certain very complex codes break down because ordinary people just can't keep all the distinctions, caveats, and exceptions straight in their heads."

Id. (quoting Trianowsky, *Rule-Utilitarianism and the Slippery Slope*, 75 J. PHIL. 414, 421 (1978)).

32. Schauer, *supra* note 31, at 305-06.

33. "Chilling effects" are usually discussed in conjunction with the overbreadth doctrine, *see* Tribe, *supra* note 29, at 1033-35, but the principle that people will be intimidated from exercising their right to speak applies whenever the effects of a regulation are unknown. *Id.* at 1034.

34. The issue of subsidies and First Amendment analysis is a new problem. Until recently, the only First Amendment questions concerned regulations, not subsidies. This problem is discussed in Emerson, *The State of the First Amendment As We Enter "1984"* in FREEDOM AT RISK 43 (C. Curry ed. 1988).

exhibits that prompted the furor.[35] Consequently, artists and patrons alike picketed and boycotted the gallery.[36] In the words of one of the boycotting artists, "[t]he Corcoran has been chilled."[37]

B. Criticism of the Equality Principle: Equality v. Subclassification

Not all writers agree that equality of speech and content neutrality should be guiding principles of the First Amendment.[38] Stephan argues that the concept of absolute content neutrality is wholly impractical, because such a premise is "antithetical to rational analysis" of free speech questions.[39] The basic hypothesis underlying Stephan's argument is that a natural commonsense hierarchy of speech exists, which is based on the underlying values of different types of speech.[40] Stephan argues that the concept of equality is misguided because, in its absolute form, equality fails to recognize this hierarchy.[41] Thus, a strict interpretation of equality makes it impossible to distinguish protected speech from unprotected speech, or commercial speech from noncommercial speech.[42] Such categories are intuitively entitled to different levels of protection.[43]

The scholars supporting equality of speech advocate equality for all *protected* speech, but admit the necessity of distinguishing protected from unprotected speech.[44] Where equality proponents disagree with those who advocate a classification system, however, is on the issue of whether the court should make further *sub*classifications of speech depending upon content.[45] Subclassification detracts from the equality principle by classifying and treating speech differently based on content.[46] In addition, subclassification risks oversuppression of speech because where the subcategory bounda-

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35. NEWSWEEK, Oct. 9, 1989, at 111; *see also* U.S. NEWS & WORLD REP. Sept. 25, 1989, at 22.

36. *Id.*

37. A discussion of the scrutiny structure's effects on equality, learnability, and "chilling effects" on free speech, is made timely by more than just the Helms Amendment. Congress has undertaken major legislation in the First Amendment arena, both with the Helms Amendment, *supra* note 34-35, and the flag burning statute, 18 U.S.C.A. § 700 (West Supp. 1990). Not only has Congress been active; the Supreme Court has decided several major First Amendment cases in the past year. Cases like Texas v. Johnson, U.S. 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989)(flag burning)(discussed *infra* notes 128-44 and accompanying text), Sable Communications of California, Inc. v. FCC, U.S. 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989)(indecency and obscenity)(discussed *infra* notes 122-27 and accompanying text), and Board of Trustees v. Fox, U.S. 109 S.Ct. 3028, 106 2.Ed.2d 388 (1989)(commercial speech)(discussed *infra* notes 178-187 and accompanying text) will have long-lasting effects on First Amendment analysis. With heightened levels of First Amendment activity in both Congress and the Court, the inconsistencies of scrutiny anaylsis must be corrected and the accompanying adverse affects on free speech halted.

38. *See* Stephan, *The First Amendment and Content Discrimination*, 68 Va. L. Rev. 203 (1982)

39. *Id.* at 206.

40. *Id.*

41. *Id.* at 211.

42. *Id.* at 211-12.

43. *Id.* at 206.

44. Schauer, *supra* note 31, at 286-88.

45. Stephan, *supra* note 38, at 212-13; Schauer, *supra* note 31, at 282-86.

46. *See supra* note 18 and accompanying text.

ries are unclear, scholars fear the court will give speech less protection.[47]

The system of subclassification has three primary advantages. First, if courts try to establish absolute equality for all speech, or even all protected speech, courts may leave too much speech unprotected in an effort to leave troublesome categories outside First Amendment protection.[48] Second, different types of speech may require different analyses. The tests developed for one type of speech are not easily applied to other categories of speech.[49] Third, it seems intuitively correct to classify speech.[50] The general populace believes that commonsense distinctions between types of speech exist and that some classes of speech are entitled to more protection than others.[51] The problem arises when one person's commonsense categories do not coincide with another person's.[52]

The Court has not settled the debate between equality and subclassification.[53] While repeating the principle of equality in First Amendment analysis, the Court still creates a myriad of subclassifications.[54] In *Consolidated Edison Co. v. Public Service Commission*[55] the Court reaffirmed the principle of equality.[56] The Court determined that when regulations proscribe an entire topic, or proscribe only viewpoints, strict scrutiny applies.[57] In *Consolidated Edison* the Court actually expanded the principle of equality by enlarging the pool of regulations subjected to strict scrutiny.[58]

More recently, in *Boos v. Barry*[59] the Court upheld the expansion of the equality principle set forth in *Consolidated Edison*.[60] In *Boos*, the Court struck down a law that prohibited picketing in front of foreign embassies when the picketing would tend to bring the foreign officials into discredit.[61] The Court, once again, based the decision to apply strict scrutiny on the principle of equality and the "First Amendment's hostility to content based

47. Schauer, *supra* note 31, at 290.
48. *Id.* at 286.
49. *Id.* at 287.
50. *Id.*
51. In Young v. American Mini-Theatres, the Court said:

> Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.

427 U.S. 50, 70 (1976). *See* Schauer, *supra* note 31, at 288.
52. Schauer, *supra* note 31, at 288.
53. *See* text accompanying notes 55-76.
54. *Id.*
55. 447 U.S. 530 (1980).
56. *Id.* at 537.
57. *Id.* With the *Consolidated Edison* decision, the Court ended the debate on whether regulations based on subject matter should be analyzed using content-based scrutinies. Before the decision, scholars considered a regulation content-based only if the regulation proscribed the entire topic, and not merely one subject falling within the topic. For a synopsis of the debate prior to the decision, see Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727 (1980).
58. Schauer, *supra* note 31, at 288.
59. 485 U.S. 312 (1988).
60. *Id.* at 329.
61. *Id.*

regulations."[62]

Although at times espousing a concept of equality,[63] the Court seemingly contradicts that principle in other cases. In *Young v. American Mini-Theatres*[64] the Court declared that few would go to war to protect pornographers' rights to free speech.[65] That famous quote goes a long way towards breaking down the equality of speech.[66] The Court openly recognized a hierarchy of speech and declared that some speech is entitled to less protection.[67] Cases like *Young*, which doctrinally contradict the equality principle, lie interspersed between those that uphold the principle.

C. *The Scrutiny Structure and Erosion of the Equality Principle*

The more disturbing threat to the equality principle comes not from what the Court has said openly, but what the Court has done subtly.[68] The Court's application of different scrutinies to various types of speech is disturbing because it creates a myriad of subclassifications, all of which erode the equality principle. This Comment focuses on the subtle misapplication of scrutinies[69] and the subsequent effects on the equality principle.[70]

In order to understand the misapplication of scrutinies, one must understand the decision tree structure that the Court uses to scrutinize a regulation.[71] First, the Court classifies the regulation as content-neutral or content-based.[72] Within the content-based regulations, the Court applies

62. *Id.* at 319. Curiously, the Court held that the law did not violate the Equal Protection clause, even though that ruling was not essential. *Id.* at 334. Perhaps the Court wanted to dissolve the link between the equality principles embedded in the First Amendment, and those found in the Equal Protection clause because of the different analytical structures the Court employs in the two areas of constitutional law.

63. Most recently the Court upheld the principle in U.S. v. Eichman, 58 U.S.L.W. 4744, 4776 (June 11, 1990).

64. 427 U.S. 50 (1976).

65. *Id.* at 68.

66. *Id.*

67. *Id.*

68. *See infra* notes 69-70 and accompanying text.

69. One might argue that the Court has not misapplied the scrutinies, but rather has applied them purposely in order to achieve the Court's desired results. To the extent the scrutiny application detracts from the First Amendment principles espoused by the Court, however, the Court has misapplied the scrutinies.

70. For a thorough discussion of scrutinies throughout constitututional law, see Galloway, *Means-End Scrutiny in American Constitutional Law*, 21 LOY. L.A. L. REV. 449. Galloway notes the three basic components that comprise most scrutinies: (1) scrutiny of government interests; (2) scrutiny of the effectiveness of the means chosen to further the government interests; and (3) scrutiny of alternatives to determine whether less restrictive methods are available for furthering the government interests. *Id.* at 450. Galloway also groups scrutinies into three levels: rationality review, the lowest level of scrutiny; intermediate scrutiny, which is a moderately strong review of the regulation; and intense scrutiny, which is the most rigorous scrutiny the courts apply. *Id.* at 451-56. Galloway perceives that the problems with constitutional scrutinies include confusion concerning the conceptual structure of the scrutinies, poor articulation of the various scrutinies, and overlap between the scrutinies. *Id.* at 462-90. This comment gives particular attention to the confusion concerning the conceptual structure of the scrutinies used in First Amendment law.

71. *See infra* notes 72-83 and accompanying text.

72. Tribe depicts the classification of a regulation as content-neutral or content-based as the two tracks of First Amendment law. Tribe, *supra* note 29, at 791-92.

different scrutinies to regulations dealing with commercial, noncommercial, and unprotected speech.[73] On the other branch of the tree lie the content-neutral scrutinies. The Court further breaks down content-neutral regulations into forum-based regulations, and regulations affecting combined speech and conduct.[74] Upon deciding how to classify a regulation, the Court applies the appropriate scrutiny. The scrutiny structure shown in the diagram below encompasses each of these classifications, and provides the basic scrutiny for each type of regulation.

Two disturbing facets of the scrutiny structure have evolved through Supreme Court case law.[75] First, the Court defines the scrutinies inconsistently.[76] Even after the Court classifies a regulation and chooses a type of scrutiny, the regulation is not assured treatment equal to that afforded other similarly grouped regulations.[77] Wide discrepancies exist in the Court's enunciation of each individual scrutiny, creating creating a myriad of sub-classifications that degrade the principle of equality.[78] This Comment discusses these "micro"[79] scrutiny structure inconsistencies in Section III.[80]

Second, the Court has made bizarre choices in its analysis, classifying content-neutral regulations as content-based, and vice versa.[81] Through such inconsistent classification, the Court has degraded the principle of equality, not only treating different speech differently, but also treating strikingly similar speech differently.[82] The problems stemming from the "macro" scrutiny structure are discussed in Section IV.[83]

D. *Practical Difficulties: Learnability and "Chilling Effects"*

The Court's inconsistent scrutiny structure not only erodes the equality

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73. *See infra* notes 94-196.

74. *See infra* notes 199-265.

75. The first facet, inconsistent articulation of the scrutinies, is discussed *infra* notes 92-265 and accompanying text. The second facet, inconsistent classification of regulations, is discussed *infra* notes 266-329 and accompanying text.

76. *See infra* note 77.

77. Compare, for example, the different scrutinies used for noncommercial speech regulations, which should all receive the same strict scrutiny. In Consolidated Edison Co., Inc. v. Public Service Commission, 447 U.S. 530 (1980), the Court applied the scrutiny of "a precisely drawn means of serving a compelling state interest." *Id.* at 540. In Boos v. Barry, 485 U.S. 312 (1988), the Court required that the regulation be necessary to serve a state interest and that it be narrowly drawn to achieve that end. *Id.* at 321. These two scrutinies do not imply the same level of review. Other cases differ even more substantially from the *Consolidated* scrutiny. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981)(plurality opinion). These cases and others are discussed thoroughly *infra* notes 94-144 and accompanying text.

78. *See infra* notes 92-265 and accompanying text.

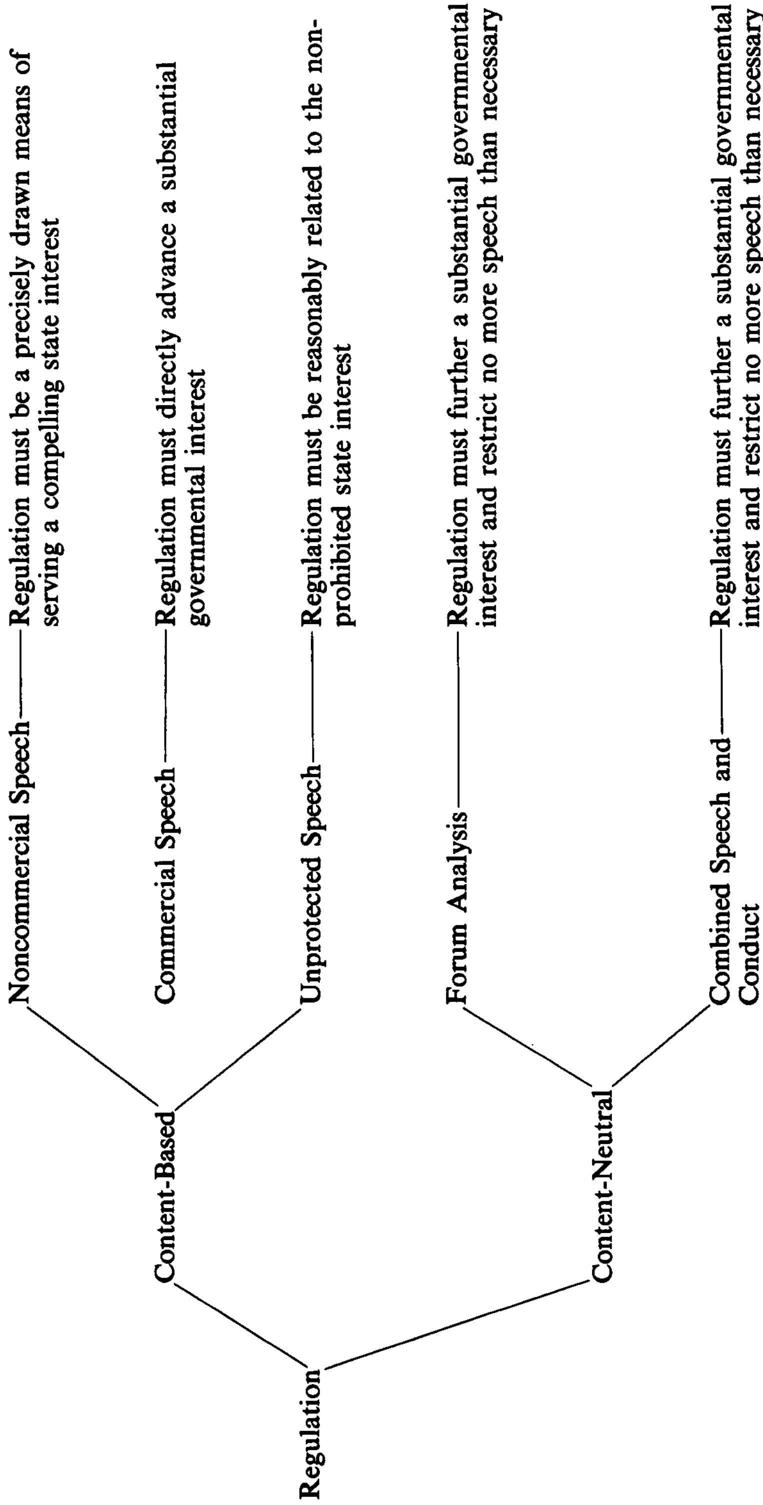
79. One author has used "macro" and "micro" as terms in First Amendment analysis in the context of government subsidies and speech. *See* Curry, *supra* note 34, at 43.

80. *See infra* notes 92-265 and accompanying text.

81. *See infra* notes 275-317 and accompanying text.

82. The Court has eroded its purported dedication to equality by using the major classifications on the decision tree. These major classifications contribute to the principles of learnability and help stem "chilling effects," however, and should therefore be retained. *See infra* notes 330-42 and accompanying text. In any case, it seems a settled principle that the Court will engage in such classification. *See* Tribe, *supra* note 29, at 791-92.

83. *See infra* notes 266-329 and accompanying text.


Regulation
Content-Based
Content-Neutral
Noncommercial Speech
Regulation must be a precisely drawn means of serving a compelling state interest
Commercial Speech
Regulation must directly advance a substantial governmental interest
Unprotected Speech
Regulation must be reasonably related to the non-prohibited state interest
Forum Analysis
Regulation must further a substantial governmental interest and restrict no more speech than necessary
Combined Speech and Conduct
Regulation must further a substantial governmental interest and restrict no more speech than necessary

principle, but also presents two practical hardships.[84] First, the inconsistencies in the current system of scrutinies render the system unlearnable.[85] The system is formulated too inarticulately and subtly for practitioners and judges to comprehend.[86] If the system were understandable, scholars would make fewer attempts to formulate a coherent concept of the First Amendment.[87]

Second, the scrutiny structure problems allow regulations to survive scrutiny more easily, thereby increasing their "chilling effects."[88] Also, because the system is unlearnable, people can never predict the constitutionality of a proposed regulation.[89] When in doubt, people will probably curtail their speech, presuming that the government acts legitimately.[90] This Comment discusses the practical problems of learnability and "chilling effects" in light of the individual scrutiny problems.[91]

III. Micro Structure Inconsistencies

In theory, after classifying the regulation on the decision tree and choosing the applicable scrutiny,[92] the Court enunciates the scrutiny and applies it to the regulation. The five basic scrutinies are grouped into content-based and content-neutral scrutinies. Content-based scrutinies tend to be more stringent than content-neutral scrutinies, but wide variations in the five basic scrutinies can be readily identified from the case law.[93]

A. *Content-Based Scrutinies: Noncommercial Speech*

When the Court decides that a regulation focuses on the content of the speech in question and the speech is noncommercial in nature,[94] the Court applies the "most exacting scrutiny"[95] to evaluate the constitutionality of the regulation. The basic scrutiny requires that the regulation be a precisely drawn means of serving a compelling state interest.[96] The Court, however, has applied other formulations.[97] The Court makes a strong presumption of

84. *See infra* text accompanying notes 85-88.
85. For a discussion of learnability, see *supra* notes 30-32 and accompanying text.
86. *See infra* note 87.
87. Schauer noted the countless law review articles on the concept of First Amendment analysis, stating that "[i]t is in no way my intention to build a new theory of the first amendment. We have too many of those already." Schauer, *supra* note 31, at 266. Schauer also noted that "every third article or student note in every other issue of any law review selected at random" attempts to build a new theory of First Amendment analysis. Likewise, this author does not intend to be nearly so bold as to formulate a First Amendment theory in a student comment, but merely to raise some important points about the erosion of existing principles by the use of poorly applied scrutinies.
88. *See infra* notes 299-317 and accompanying text.
89. *See infra* notes 92-329 and accompanying text.
90. *See supra* notes 33-37 and accompanying text.
91. *See infra* notes 92-329 and accompanying text.
92. For a discussion of the decision tree, see *supra* text p. 107.
93. *See infra* notes 94-265 and accompanying text.
94. See *supra* page 1019 for the decision tree structure.
95. Boos v. Barry, 485 U.S. 312, 321 (1988).
96. Consolidated Edison Co., Inc. v. Public Serv. Comm'n, 447 U.S. 530, 540 (1980).
97. *See infra* notes 99-144 and accompanying text.

unconstitutionality when applying this most exacting scrutiny, because noncommercial speech is the most highly valued form of speech under the Constitution.[98]

1. Consolidated Edison: *The Basic Noncommercial Scrutiny*

The Court enunciated the basic noncommercial scrutiny in *Consolidated Edison Co., Inc. v. Public Service Commission.*[99] At issue was the constitutionality of a Public Service Commission (PSC) regulation prohibiting utility companies from inserting public policy materials into customer billing envelopes. Consolidated Edison distributed pamphlets supporting nuclear power but refused to distribute pamphlets from an organization opposed to nuclear power. In response, the PSC passed a regulation to protect the customers' privacy from being subjected to the utility's political views. The Court struck down the regulation, finding that the it was not a precisely drawn means of serving a compelling state interest.[100]

The Court explained that the interest in protecting the consumers' privacy would meet the "compelling" requirement only if the pamphlets invaded that privacy in an essentially intolerable manner.[101] Because consumers could merely discard the material, the situation was not constitutionally intolerable.[102] By defining compelling to mean intolerable, the Court applied the most exacting scrutiny.[103] *Consolidated Edison* exemplifies both the basic scrutiny and the Court's predisposition to strike down a content-based, noncommercial speech regulation.[104]

2. Metromedia: *Abandoning the Consolidated Test*

The Court applied a substantially different scrutiny in *Metromedia, Inc. v. City of San Diego.*[105] The Court did not require that the regulation precisely

98. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 504-07 (1981), wherein the Court acknowledged that noncommercial speech should be accorded higher protection than commercial speech. Although this valuation of speech cannot be reconciled with the equality principle, the Court has decided many cases stressing the lower value of commercial speech. *Id.*

99. 447 U.S. 530 (1980).

100. *Id.* at 540.

101. *Id.* at 542.

102. *Id.*

103. *See Boos*, 485 U.S. at 321 (defining the scrutiny for noncommercial speech as "the most exacting").

104. Justice Stevens, in his concurring opinion, questioned the validity of the principle of equality.

> [E]very lawyer who has read . . . our cases upholding various restrictions on speech with specific reference to subject matter must recognize the hyperbole in the dictum: "But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."

Id. at 545 (Stevens, J., concurring)(quoting *Mosley*, 408 U.S. 92, 95). Stevens went on to conclude that, were that statement true, the Court could have summarily dismissed the regulation as unconstitutional because the regulation regulated based on content, rather than announcing a detailed rejection of the state's arguments regarding its interests in protecting consumer privacy. *Id.*

105. 453 U.S. 490 (1981) (plurality opinion).

serve a compelling interest, as in *Consolidated*. Rather, the Court determined the constitutionality of the regulation based on whether the regulation afforded at least as much protection to higher classes of speech as was afforded to lower classes.[106]

The regulation under scrutiny, a San Diego ordinance, prohibited all billboards except those that fell within a limited number of exceptions. After finding the regulation content-based, the Court divided its analysis into two parts, treating separately the regulation's effect on noncommercial and commercial speech.[107] First, the Court held that the regulation passed the commercial speech scrutiny.[108] Then, in a "bizarre" step of logic,[109] the Court found the ordinance unconstitutional because it offered less protection to noncommercial speech than it offered to commercial speech.[110] The Court thus applied a test that based the constitutionality of the ordinance on whether it offered at least as much protection to higher categories of speech as to lower categories.[111] The *Metromedia* test differs substantially from the

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106. *Id.* at 515. Note that by declaring speech to be of relatively higher or lower classes, the Court implicitly rejects the equality principle.

107. *Id.* at 505. The *Metromedia* opinion gives no basis for the Court's conclusion that the regulation was content-based. *Id.* Although the Court used content-based scrutinies, one could persuasively argue that the regulation was merely a content-neutral "time, place, or manner" regulation because the regulation regulated all speech without making significant distinctions based on content. *Id.* at 527 (Brennan, J., concurring). Although Justice Brennan gave little support for his conclusion that the regulation was content-neutral, Brennan applied the content-neutral scrutiny and concluded that the ordinance should still be invalidated, primarily because the city failed to show a substantial interest. *Id.* at 528. For a discussion of content-neutral scrutinies, see *infra* notes 197-265 and accompanying text.

108. 453 U.S. at 512. The Court's holding in *Metromedia*, as it pertains to commercial speech, is discussed more thoroughly *infra* notes 161-66 and accompanying text.

109. Chief Justice Burger called the plurality's analysis in *Metromedia* bizarre. *Id.* at 564 (Burger, C.J., dissenting). The gist of Burger's opinion is that the plurality struck the regulation because the regulation did not abridge enough speech, which presented some constitutional and practical problems. *Id.* at 569. First, Burger argued that it made no sense to strike down a regulation because of its exceptions, which allow speech to *escape* regulation. *Id.* at 564. Burger then noted that, under the plurality's logic, the only alternatives for cities that wished to regulate billboards would be to either ban billboards altogether or to permit all noncommercial signs, no matter how big or how hazardous to motorists and pedestrians. *Id.* Neither of these alternatives properly acknowledged the "ever-increasing menace to the urban environment." *Id.*

Justice Brennan, in his concurring opinion, made similar arguments. *Id.* at 521-40. The plurality had concluded that a single regulation cannot offer more protection to commercial speech than to noncommercial speech. *Id.* at 513 (plurality opinion). The plurality's reasoning merely encouraged cities to divide their statutes in two, having separate statutes for the two types of speech, thus eliminating the problem without really addressing the issue of constitutional protection of speech. *Id.* at 522 (Brennan, J., concurring). Brennan, moreover, found disturbing the fact that cities would thereby have substantial discretion to decide what was commercial and noncommercial speech in order to apply the appropriate regulation. *Id.* at 538. Such classification forms a vital part of judicial review of speech regulations and should not be left to the government alone. *Id.* at 539-40. "[I]t presents a real danger of curtailing noncommercial speech in the guise of regulating commercial speech." *Id.* at 536-37.

The plurality seemed to have just as much difficulty with the other justices' opinions. Justice White, writing for the plurality, devoted section VI of his opinion to attacking the "rhetorical hyperbole of the Chief Justice" and reconciling it with the plurality opinion. *Id.* at 517-21 (plurality opinion).

110. *Id.* at 515.

111. The Court has repeatedly stated that commercial speech is entitled to less constitu-

method of scrutiny that the Court employed in *Consolidated Edison*.[112]

3. Boos v. Barry: *Expanding the Continuum*

The Court returned to the general structure of the *Consolidated Edison* scrutiny in *Boos v. Barry*.[113] In *Boos*, the Court considered a regulation making it unlawful to display any sign tending to bring a foreign government into odium outside that government's embassy. The Court declared the regulation unconstitutional because it was not narrowly drawn to serve a compelling state interest.[114] Although the interest in protecting foreign officials from public ridicule was rooted in important U.S. foreign relations policy, the Court found that the regulation was not narrowly tailored.[115]

Despite the fact that the *Boos* scrutiny parallels the structure of the *Consolidated Edison* test, the actual words imply a different standard of review.[116] No longer must the regulation be precisely drawn;[117] instead, the regulation will pass scrutiny if narrowly tailored.[118] Although the Court seemingly equates such words,[119] the effect is not the same.[120]

In 1989, the Court added even more variation to the scrutiny.[121] In *Sable Communications, Inc. v. F.C.C.*[122] the Court declared unconstitutional a law that prohibited broadcast of indecent phone messages ("dial-a-porn") because the law was not the *least restrictive means* available to further a compelling governmental interest.[123] The government asserted an interest in protecting minor children from hearing indecent messages. Although recognizing the interest as a compelling,[124] the Court concluded that Congress could have restricted children's access to the messages through less restric-

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tional protection than noncommercial speech, and is therefore an inferior class of protected speech. *Id.* at 513.

112. Not only is the scrutiny that the Court employed in *Metromedia* quite different, but it obviously recognizes the lower values of certain types of speech. 453 U.S. at 513-15. This erodes the equality principle. Even though commercial speech is repeatedly recognized as being of lesser value than noncommercial speech, the Court has never framed a scrutiny in terms of the hierarchy of classes of speech. *See Metromedia*, 453 U.S. at 522 (Brennan, J., concurring).

113. 485 U.S. 312 (1988).

114. *Id.* at 329.

115. *Id.* The *Boos* Court noted that Congress had determined that the regulation making it unlawful to display certain signs outside a foreign government's embassy was no longer vital to maintain compliance with the Vienna Convention, which was the legislative purpose behind the statute. *Id.* at 325-26.

116. *See infra* note 120.

117. *Consolidated*, 447 U.S. at 540.

118. *Boos*, 485 U.S. at 329.

119. *See* U.S. v. O'Brien, 391 U.S. 367, 376 (1968).

120. Galloway characterizes the Court's articulation of the *Boos* branch of the scrutiny as careless and inconsistent. Galloway, *supra* note 70, at 466. The Court equates "narrowly tailored" with "necessary," meaning the least onerous alternative for furthering the relevant government interest. *Id.* at 467. Galloway contends that "precisely drawn" and "narrowly tailored" do not convey the same meaning as "necessary," but imply a more stringent scrutiny. *See id.*

121. *See infra* notes 122-127 and accompanying text.

122. 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989).

123. 109 S.Ct. at 2839.

124. *Id.* at 2836.

tive means.[125] The Court suggested the alternative of requiring access codes and credit cards from all callers wishing to hear the messages.[126] Exactly where the least restrictive means test fits into the "precisely drawn" and "narrowly tailored" continuum remains unclear.[127]

4. Texas v. Johnson: *Absence of a Scrutiny*

In *Texas v. Johnson*[128] the Court seemed to abandon all variations of the traditional *Consolidated Edison* scrutiny.[129] In *Johnson* the defendant violated a Texas statute prohibiting the desecration of venerated objects, by burning a United States flag outside the 1984 Republican National Convention. Although the Court paid lip service to subjecting the statute to "the most exacting scrutiny,"[130] the Court never applied any scrutiny at all.[131] The Court instead focused on the nature of the state's interest in preserving the flag as a national symbol.[132] Finding that the mere interest in preserving the flag as a symbol amounted to a governmental decree of "what shall be orthodox" in political thought,[133] the Court held that the asserted preservation interest violated the First Amendment's requirement that regulations be content-neutral.[134] The Court therefore declared the statute unconstitutional.[135]

Each of these five cases articulate variations of the scrutiny applied to content-based regulations of noncommercial speech.[136] The *Metromedia* test, requiring the regulation to offer as much protection to higher classes of speech as it affords the speech in question,[137] patently differs from the conventional strict scrutiny of *Consolidated Edison*.[138] Similarly, the complete

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125. *Id.* at 2838.
126. *Id.* at 2838-39.
127. Galloway argues that "narrowly tailored" means the least onerous alternative for furthering the government interest. Galloway, *supra* note 70, at 467. "Least restrictive means" certainly implies something similar. One might, therefore, conclude that "least restrictive means" equals "narrowly tailored," but the Court has never expressed that conclusion.
128. 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989).
129. *See supra* notes 99-104 and accompanying text.
130. 109 S.Ct. at 2543.
131. *See id.* at 2544-46.
132. *Id.*
133. *Id.* at 2546. Even though the Court in *Johnson* fails to apply a scrutiny, the Court upholds the fundamental principle of equality of speech by striking down the statute solely on equality principles. *See id.* at 2544-46. The Court had earlier hinted that the equality principle no longer has force, by the Court's explicit recognition of the lower value of commercial speech in *Metromedia*, 453 U.S. at 513. The Court seems to alternately stress the equality principle or the classification system to support the Court's holding in a particular case. Whether these two opposing considerations can be reconciled remains to be seen, but *Texas v. Johnson* clearly indicates that the equality principle has not yet died. 109 S.Ct. 2544-46.
134. 109 S.Ct at 2544-45.
135. Declaring the statute unconstitutional, the *Johnson* Court framed its decision almost entirely on whether or not the regulation was content-based, *see infra* notes 302-08 and accompanying text, and the Court failed to apply the scrutiny after classifying the regulation. *See* 109 S.Ct. at 2544-48.
136. *See supra* notes 94-135 and accompanying text.
137. *Metromedia*, 453 U.S. at 515.
138. *See supra* notes 99-104 and accompanying text.

lack of an articulated test in *Texas v. Johnson*,[139] the most recent of the cases, cannot be analogized to traditional strict scrutiny.[140] Even the more subtle differences between the tests in *Consolidated Edison*, *Boos*, and *Sable Communications*,[141] create disconcerting hierarchies of scrutiny.[142] If the Court applies different tests to different instances of purportedly equal speech, then the speech is not truly equal.[143] Such inconsistent tests, moreover, do not promote the learnability of the scrutiny system.[144]

B. Content-Based Scrutinies: Commercial Speech

When speech proposes a commercial transaction,[145] the Court applies a less stringent scrutiny to determine the constitutionality of the regulation.[146] The rationale behind applying less stringent analysis stems from the more limited constitutional protection traditionally afforded commercial speech.[147] In fact, prior to 1964, the First Amendment did not protect commercial speech. Then, in *New York Times v. Sullivan*[148] the Court granted commercial speech limited constitutional protection because the speech at issue contained political overtones.[149] It was not until *Virginia Pharmacy Board v. Virginia Consumer Council*[150] that the Court protected commercial speech in its own right.[151] In dicta, however, the Court hinted that commercial speech probably should receive less protection than noncommercial speech.[152]

1. Central Hudson: *The Basic Commercial Scrutiny*

In *Central Hudson Gas & Electric Corp. v. Public Service Commission*[153] the Court first set forth the basic scrutiny for commercial speech.[154] If the commercial speech at issue deserves protection,[155] the government must prove that the regulation directly advances a substantial governmental inter-

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139. *See supra* notes 128-44 and accompanying text.
140. *See* discussion of *Consolidated Edison*, *supra* notes 99-104 and accompanying text.
141. *See supra* notes 122-127 and accompanying text.
142. Compare the conclusion that different formulations of the scrutiny accord different treatment to regulations, with the language in *Sable Communications*, 109 S.Ct. at 2836, wherein the Court uses "carefully tailored," "least restrictive means," and "narrowly tailored" interchangeably.
143. *See supra* notes 38-67 and accompanying text for a discussion of the equality principle and classification.
144. *See supra* notes 85-87 and accompanying text for the discussion of learnability.
145. Commercial speech is defined as speech which proposes a commercial transaction. *Board of Trustees*, 109 S.Ct. at 3031.
146. See *infra* notes 153-60 and accompanying text for the basic commercial scrutiny.
147. *Metromedia*, 453 U.S. at 513.
148. 376 U.S. 254 (1964).
149. *Id.* at 266.
150. 425 U.S. 748 (1976).
151. *Id.*
152. *Id.* at 780.
153. 447 U.S. 557 (1980).
154. *Id.* at 566.
155. Even today, the Court does not always protect commercial speech. In order for commercial speech to warrant protection, the speech must concern legal activity and must not be misleading. *Id.* at 566.

est[156] and is no more extensive than necessary to further that interest.[157] The Court used this scrutiny to strike down the Commission's order prohibiting the utility from promoting the use of electricity.[158] The Court found that the regulation directly advanced the substantial interest of cutting electric consumption.[159] The regulation was not the least extensive means available to achieve the goal, however, since the regulation also prohibited the promotion of electricity-efficient devices such as heat pumps.[160]

2. *Recent Cases: Strict versus Lenient Scrutiny*

The Court considerably softened its application of the *Central Hudson* test in *Metromedia, Inc. v. City of San Diego*[161] by affording extreme deference to the city's asserted interests.[162] In *Metromedia*, the Court held the statute prohibiting billboards constitutional insofar as it pertained to regulation of commercial speech.[163] In so holding, the Court agreed with the City's assertions that the regulation directly advanced substantial goals of traffic safety and improved city appearance, without truly scrutinizing those assertions.[164] The Court found no reason to conclude that the relationship between the regulation and the goals was "unreasonable."[165] Merely requiring that the regulation reasonably fit the interest constitutes a much less stringent standard than the least restrictive means analysis employed in *Central Hudson*.[166]

The Court vacillated from strict to lenient applications of the commercial speech scrutiny in the recent cases of *Zauderer v. Office of Disciplinary Counsel*,[167] *Posadas de Puerto Rico Association v. Tourism Co.*[168] and *San Francisco Arts & Athletics v. Olympic Committee*.[169] In *Zauderer* the Court held that the Ohio disciplinary rule that prohibited the use of drawings in legal advertisements was not the least restrictive means of furthering the state interest in avoiding deceptive advertising.[170] Thus, the Court returned to the least restrictive means analysis contemplated in *Central Hudson*.[171]

In *Posadas de Puerto Rico*,[172] the Court abandoned the *Central Hudson*

156. *Id.*
157. *Id.*
158. *Id.* at 571.
159. *Id.* at 568.
160. *Id.* at 571.
161. 453 U.S. 490. For a discussion of *Metromedia*'s holdings with regard to noncommercial scrutinies, *see supra* notes 105-112 and accompanying text.
162. 453 U.S. at 509.
163. *Id.* at 512.
164. *Id.*
165. *Id.* at 509.
166. *Accord Board of Trustees*, 109 S.Ct. at 3033-34 (describing the *Central Hudson* test as a least restrictive means test.
167. 471 U.S. 626 (1985).
168. 478 U.S. 328 (1986).
169. 483 U.S. 522 (1987).
170. *Zauderer*, 471 U.S. at 644.
171. *See supra* notes 153-60 and accompanying text.
172. 478 U.S. 328.

test altogether.[173] At issue was a Puerto Rican law restricting the broadcast of gambling advertisements to residents of the island. Because the government possessed the power to eliminate gambling altogether, the Court reasoned that the government also possessed the lesser power to ban gambling advertisements.[174]

The Court returned to a more lenient scrutiny application in *San Francisco Arts & Athletics*.[175] In upholding the exclusive congressional grant of the word "Olympic" to the Olympic Committee, the Court said that the *Central Hudson* test was equivalent to the relaxed scrutiny for content-neutral time, place and manner regulations.[176] The Court thus rejected a least restrictive means application of the test.[177]

3. Board of Trustees: *Something Less than Least Restrictive Means*

The Court appears to have settled on the more lenient application of the scrutiny in its most recent holding, *Board of Trustees v. Fox*.[178] The Court upheld a university regulation prohibiting tupperware parties in dorm rooms, interpreting the scrutiny to "require something short of a least-restrictive-means standard."[179] In so doing, the Court acknowledged that one could read previous case discussions of the commercial speech scrutiny as implying a least restrictive means analysis.[180] The Court reasoned, however, that the previous cases concerned regulations that would fail the scrutiny no matter how formulated.[181] Any discussion of requiring the least restrictive means for commercial speech regulations, therefore, constituted dicta.[182]

Although the Court concluded in *Board of Trustees* that this scrutiny was less than a least restrictive means analysis,[183] the Court did not delineate the exact test.[184] Whether the Court will merely require a reasonable connection between the means and the end, as in *Metromedia*, or whether the court will revert to the *Posadas* analysis, where the power to ban an activity encompasses the power to prohibit speech concerning it, remains to be seen.

The *Board of Trustees* holding failed to eliminate the inconsistencies in the commercial speech scrutiny.[185] Without an answer to the questions, the "chilling effect" of governmental regulation will be increased.[186] As long as the inconsistencies stand, not all commercial speech will be treated equally,

173. *See supra* notes 153-60 and accompanying text.
174. *Posadas*, 478 U.S. at 345-46.
175. 483 U.S. 522 (1987).
176. *Id.* at 537 n.16.
177. *Accord Board of Trustees*, 109 S.Ct. at 3033. *See supra* text accompanying notes 178-83.
178. 109 S.Ct. 3028.
179. *Id.* at 3033.
180. *Id.* at 3034.
181. *Id.* at 3033.
182. *Id.*
183. *Id.*
184. *See id.*
185. *See supra* notes 153-84 and accompanying text.
186. *See supra* notes 88-89 and accompanying text.

nor will practictioners and judges be able to learn the system.[187]

C. Content-Based Scrutinies: Unprotected Speech

The First Amendment fails to protect certain types of speech such as obscenity,[188] defamation,[189] and "fighting words."[190] The rationale behind declaring such speech beyond the bounds of constitutional protection is that the speech possesses so little value as an expression of ideas that it does not merit protection.[191]

The Court operates with wide discretion in declaring speech unprotected.[192] After having determined that the speech is unprotected, the Court applies a rationality scrutiny to the regulation at issue.[193] Under rationality review, the Court will not strike down the regulation if the regulation is merely reasonably related to the state interest.[194] The Court gives great deference to the government under this scrutiny.[195]

Obviously, rationality scrutiny allows wide latitude in interpreting the relationships of means and ends. For this reason, it would be difficult to prove that the Court is inconsistent in applying rationality review. The rationality scrutiny is important, however, because the Court sometimes uses rationality in contexts where other scrutinies should apply.[196]

D. Content-Neutral Scrutinies: Forum Analysis

A regulation is content-neutral if it merely attempts to regulate the time, place or manner of speech without regard to the speaker's topic or point of view.[197] A content-neutral regulation is subject to relaxed scrutiny, because the regulation's main purpose is not to inhibit free expression of ideas, but merely to protect public interests like privacy.[198] Content-neutral scrutinies can be divided into two types: forum-based scrutinies, and combined speech and conduct scrutinies.

1. Forum Analysis: The Basic Test

The Supreme Court set forth the basic scrutiny for the constitutionality of content-neutral regulations in *Members of City Council v. Taxpayers for Vin-*

187. *See supra* notes 84-87 and accompanying text.
188. Miller v. California, 413 U.S. 15 (1973).
189. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
190. *Id.*
191. *Id.* at 572.
192. For discussion of a recent case declaring certain speech outside of constitutional protection, *see infra* notes 319-29 and accompanying text.
193. *See* City Of Dallas v. Stanglin, 109 S.Ct. 1591, 104 L.Ed.2d. 18 (1989). Although *Dallas* upheld a statute under rationality review that allegedly violated the right to freely associate, rather than the right of free speech, the case illustrates the principle that any unprotected expressive act is subject only to minimal due process scrutiny. *See* Tribe, *supra* note 29, at 791-92.
194. *Id.* at 1594.
195. *Id.*
196. *See infra* notes 318-29 and accompanying text.
197. *See Consolidated Edison*, 447 U.S. at 537.
198. Frisby v. Schultz, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988).

cent.[199] The elements of the scrutiny require that: (1) the regulation must further an important or substantial governmental interest; (2) the interest must be unrelated to the suppression of free expression; and (3) the incidental restriction on the protected speech must be no greater than is essential to the furtherance of that interest.[200] For the first element, the Court's opinions have ranged from requiring, at a minimum, that the interest be "clearly adequate,"[201] to an almost strict scrutiny, requiring that the interest be "compelling."[202] Similarly, the third component ranges from a deferential approach of rationality review[203] to a requirement that the regulation target the "exact evil."[204]

The act of classifying the regulation as content-based or content-neutral embodies the second inquiry, and this Comment discusses that aspect more fully in the section devoted to inconsistencies in the macro scrutiny structure.[205] This section of the Comment, therefore, focuses only on the first and third tests when analyzing the Court's decisions.

2. *Forum Analysis: The Substantiality of the Governmental Interest*

The Court in *Taxpayers* first required that a regulation further an important or substantial governmental interest.[206] At times, the Court breaks the requirement down further into two inquiries: first, does the regulation further the asserted interest, and second, is the interest important or substantial.[207]

Few cases focus on the relationship between the regulation and the asserted interest. In *Village of Schaumberg v. Citizens*[208] the Court considered a regulation prohibiting door-to-door solicitation by organizations that had overhead costs of more than 25 percent of revenues. The Court struck down the ordinance because, among other things, the regulation did not *directly* advance the asserted interest in protecting citizens from fraud.[209] Although *Schaumberg* added this prong to the scrutiny, the Court failed to employ this

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199. 466 U.S. 789 (1984).

200. *Id.* at 805. The *Taxpayers* test actually includes a fourth element, requiring that the government possess the constitutional power to enact the legislation. *Id.* at 805. A discussion of the constitutional power of the government goes beyond the purpose of this paper.

201. *Young,* 427 U.S. at 52.

202. Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788 (1985).

203. Ward v. Rock Against Racism, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).

204. Frisby v. Schultz, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988).

205. *See infra* notes 266-329 and accompanying text.

206. 466 U.S. at 805.

207. *See* Village of Schaumberg v. Citizens, 444 U.S. 620, 638-39 (1980). Arguably, the requirement that the regulation further the asserted interest would fit under the analysis regarding the tailoring of the regulation.

208. *Id.*

209. *Id.* at 638. "The 75-percent requirement is related to the protection of privacy only in the most indirect of ways." *Id.* Because the Court found that more effective means for furthering the interest existed, the Court declared the ordinance unconstitutional. *Id.* Arguably, the Court was considering the direct effects of the regulation as a part of the scrutiny branch which examines the necessity of the regulation.

test in its most recent decisions.[210] Thus, the regulation's furtherance of the asserted interest does not appear to be a key weapon in the scrutiny arsenal, but the test has not been explicitly abandoned.[211]

The most important part of forum scrutiny is the analysis of the substantiality of the governmental interest. The Court, however, is inconsistent in determining substantiality.[212] The Court has employed at least three methods of determining substantiality: first, a deferential conclusion that the interest is "clearly adequate;"[213] second, an analysis of the substantiality of the interest which accounts for the forum in which the speech occurs;[214] and third, an entirely different scrutiny dependent upon the forum classification.[215]

In *Young v. American Mini Theatres, Inc.*[216] Detroit enacted an ordinance which required adult theaters to disperse rather than concentrate in a single area of the city. Noting that the analysis for time, place, and manner restrictions applied,[217] the Court found the regulation constitutional because the City's interest in zoning was "clearly adequate" to support the limitations.[218] The ordinance treated adult theatres differently from other theatres because of the content of the material shown in the adult theaters. While such a content-based restriction would normally mandate content-based strict scrutiny, the Court upheld the ordinance under the time, place and manner scrutiny.[219] In addition, the Court ignored the requirement that the restrictions on free speech be no more restrictive than necessary. In short, the Court reduced the scrutiny to one step, requiring only that the governmental interest be adequate rather than substantial.[220]

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210. *See Taxpayers*, 466 U.S. 789; Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981).

211. *See Schaumberg*, 444 U.S. at 638-39.

212. *See infra* notes 216-37 and accompanying text.

213. Young v. American Mini-Theatres, Inc., 427 U.S. at 63.

214. *See Heffron*, 452 U.S. at 650-51.

215. *See Cornelius*, 473 U.S. at 800.

216. 427 U.S. 50 (1976).

217. *Id.* at 63 n.18.

218. *Id.* at 63.

219. *Id.* In fact, the *Young* Court spoke of the regulation as if applying the content-based scrutiny:

> In short, apart from the fact that the ordinances treat adult theaters differently from other theaters and the fact that the classification is predicated on the content of material shown in the respective theaters, the regulation of the place where such films may be exhibited does not offend the First Amendment.

Id. at 62.

220. The Court made no attempt to hide its feeling that pornographic speech deserves less constitutional protection than political speech.

> Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis from placing them in a different classification from other motion pictures.

Id. at 70-71. *See also id.* at 71 (". . . what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited. . ."), and *id.* at 71 n. 35: ("The situation

Another method of weighing the substantiality of the governmental interest is to assess it in light of the forum involved.[221] In *Heffron v. International Society for Krishna Consciousness*[222] the Court examined a statute requiring that solicitation be conducted only from specified locations on the Minnesota state fairgrounds. The Court found that Minnesota's interest in controlling crowds at the state fair was substantial enough to warrant the regulation, especially in light of the fact that the fair was a limited public forum with limited purposes.[223] The Krishnas, therefore, could not distribute literature and flowers in their traditional manner. This rather amorphous method of "considering" the forum when evaluating the substantiality of the government interest obviously allows the Court to achieve a desired outcome by placing different emphases on the forum in different cases.[224]

Sometimes the Court commits to applying entirely different scrutinies to the regulation after making a determination of the nature of the relevant forum.[225] For example, in *Cornelius v. NAACP Legal Defense and Education Fund*[226] Justice O'Connor set forth two distinct levels of governmental interest linked to the three possible types of forums.[227] When traditional public forums are involved, the asserted interest must be compelling.[228] Similarly, when the government has designated a property as a public forum the asserted interest must be compelling.[229] If the forum is non-public, however, the Court deflates the substantial interest test to a mere requirement that the regulation be reasonable.[230]

As a result of this approach, the label that the Court attaches to the forum becomes outcome determinative.[231] Few would dispute that the burden of proving reasonability of the regulation is much less onerous for the government than proving a compelling interest.[232] In fact, under this method of analysis, the Court undoubtedly has stretched to find a forum that permits application of the desired test.[233]

For example, in *Cornelius*, the NAACP wished to solicit contributions

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would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech"). The *Young* Court inferred that the speech was illegal, although protected by the Constitution. *See id.* The Court was in no way ambivalent about the contemptuously low level of constitutional protection afforded pornography. *Id.* at 71, n. 35.

221. Heffron v. International Society for Krishna Consciousness, 452 U.S. 640, 651-54 (1976).

222. 452 U.S. 640 (1976).

223. *Id.* at 651-54.

224. *See Taxpayers*, 466 U.S. at 813, wherein the Court in dicta addressed the forum analysis long after the Court found the interest substantial.

225. *See infra* notes 226-30 and accompanying text.

226. 473 U.S. 788 (1985).

227. *Id.* at 800-01.

228. *Id.* at 800.

229. *Id.*

230. *Id.*

231. By applying varying levels of scrutiny based on the type of forum, the Court makes it easier or more difficult for the regulation to pass scrutiny. *See supra* notes 94-144, 188-96 and accompanying text for a discussion of the strict scrutiny and reasonability tests.

232. *See supra* notes 94-144, 188-96 for a discussion of the strict scrutiny and reasonability tests.

233. *Cornelius*, 473 U.S. at 801.

from federal employees by means of a federal employees' newsletter designed to promote charitable contributions. The regulation at issue specifically prohibited legal defense funds from using the newsletter, and therefore barred the NAACP. Rather than deciding that the federal workplace was the relevant forum, the Court determined that the forum was the newsletter and, as such, was non-public.[234] This reasoning allowed the Court to apply the reasonability test rather than the compelling interest test.[235]

Clearly, the Court has wide discretion in determining whether a governmental interest is substantial.[236] The Court has employed this discretion to achieve vastly different results under the guise of a single scrutiny, thereby eroding the principle of equality.[237]

3. *Forum Analysis: No Greater Than Necessary*

In *Taxpayers* the Court required that the effect of a regulation on protected speech be no greater than necessary.[238] The Court has used at least three inconsistent techniques in evaluating the effect of the regulation.[239]

First, the Court has equated this test to a requirement that the regulation be narrowly tailored to achieve the desired interest.[240] In *Ward v. Rock Against Racism*[241] the Court faced a regulation requiring that performers who used New York's Central Park employ the equipment and services of the City in their productions. In holding that the regulation was a reasonable time, place, and manner restriction, the Court noted that the requirement of narrow tailoring did not imply a least restrictive means analysis.[242] Instead, the Court concluded that it should defer to the decisionmaker's judgment concerning whether the regulation was narrowly tailored, as long as the regulation was reasonably related to the asserted governmental interest.[243] This time, therefore, the Court adopted a quite lenient test to determine whether the effects of the regulation were no more burdensome than necessary.[244]

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234. *Id.*

235. *Id.* at 800-06. Similarly, in Perry Education Assn. v. Perry Local Educator's Ass'n, 460 U.S. 37 (1983), the Court placed the label of non-public forum on teachers' mailboxes and used the reasonability test to assess the constitutionality of an agreement between the school district and the Perry Local Educator's Association which allowed only that association to use the mailboxes. *Id.* at 48-49. The test of a designated public forum is whether the government has opened it to the public. *Id.* at 45. Even though the Court found that the mailboxes had been opened to the public occasionally, it designated it as a private forum. *Id.* at 46.

236. *See supra* notes 206-35 and accompanying text.

237. *See supra* notes 206-35 and accompanying text.

238. 466 U.S. at 806.

239. *See infra* notes 240-57 and accompanying text.

240. Clark v. Community for Creative Non-Violence, 486 U.S. 288, 293 (1984). In *Clark*, the Court restated the *Taxpayers* scrutiny as follows: "[the restrictions] are narrowly tailored to serve a significant governmental interest, and . . . they leave open ample alternative channels for communication of the information." *Id.* The addition of the alternative channels test is discussed *infra* notes 250-51 and accompanying text.

241. 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).

242. 109 S.Ct. at 2757.

243. *Id.* at 2759.

244. *Id.*

In contrast, the Court in *Frisby v. Schultz*[245] set forth an entirely different standard to evaluate whether the regulation was narrowly tailored, or no more restrictive than necessary.[246] In *Schultz*, anti-abortionists challenged an ordinance that prohibited picketing near individual residences. The Court held that in order to be narrowly tailored, a statute must target and eliminate no more than the exact "evil" the statute attempts to remedy.[247] Even though the regulation survived scrutiny by virtue of the Court's creative interpretation,[248] this narrow tailoring test undoubtedly restricts regulation more than the *Ward* test.[249]

In a completely different light, the Court sometimes interprets this branch of analysis to require that an alternative means of communication exist.[250] Often, the requirement of alternative means of communications seems to be an entirely separate requirement.[251] Clearly, a regulation would have more difficulty meeting the narrowly tailored test and satisfying the alternative means criterion, than the regulation would have merely passing the no more restrictive than necessary test.

In conclusion, the scrutiny for valid time, place and manner restrictions is quite ambiguous.[252] The component requiring that the regulation further a substantial governmental interest ranges from the clearly adequate test set forth in *Young*[253] to the compelling interest required for public forums in *Cornelius*.[254] Similarly, the component requiring that the regulation be no more burdensome than necessary ranges from the deferential approach of rationality review taken in *Ward*[255] to the precise evil test set forth in *Frisby*.[256] The Court appears willing to apply the specific factors necessary to achieve any desired result in a given factual situation.[257]

E. Content-Neutral Scrutinies: Combined Speech and Conduct Scrutinies

Some regulations affect a combination of protected speech and conduct.[258] When a regulation limits the conduct but has incidental effects on the speech, the Court analyzes the regulation under a more lenient scrutiny than

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245. 108 S.Ct. 2495.
246. *See id.* at 2502.
247. *Id.*
248. *Id.* at 2501. "Specifically, the use of the singular form of the words 'residence' and 'dwelling' suggests that the ordinance is intended to prohibit only picketing focused on, and taking place in front of, a particular residence." *Id.* Apparently, the protesters could not be prosecuted under the ordinance if they focused on one residential property at a time, and were careful to let the protest lapse momentarily before moving to the next residence.
249. *See supra* notes 240-44 and accompanying text.
250. *See Taxpayers*, 466 U.S. at 812 ("the findings of the District Court indicate that there are ample alternative modes of communication").
251. *See Clark*, 468 U.S. at 294; *Ward*, 109 S.Ct. at 2760.
252. *See supra* notes 199-251 and accompanying text.
253. *See supra* notes 216-20 and accompanying text.
254. *See supra* notes 225-30 and accompanying text.
255. *See supra* notes 241-44 and accompanying text.
256. *See supra* notes 245-49 and accompanying text.
257. *See supra* notes 199-251 and accompanying text.
258. *See U.S. v. O'Brien*, 391 U.S. 367 (1968).

it uses for pure speech cases.[259] *In United States v. O'Brien*[260] the Court set forth the elements for this kind of scrutiny, which matches the forum-based scrutiny set forth in *Taxpayers*.[261]

The Court has not articulated the speech/conduct scrutiny as inconsistently as the forum-based scrutinies.[262] Rather, the more lenient scrutiny the Court uses for combined speech and conduct cases serves as an important tool, enabling the Court to reach a desired holding.[263] The Court quite easily finds conduct combined with speech and applies this lenient scrutiny, thereby avoiding the strict scrutiny used for pure political speech.[264] This Comment discusses these types of classification tricks and inconsistencies discussed in depth in Section IV.[265]

IV. Macro Structure Inconsistencies

As explained in Section II, the Court employs a decision tree structure to determine the scrutiny to apply to any given factual case where regulations limit protected speech.[266] At each branch of the tree, the court must choose which path to take, ultimately arriving at the desired scrutiny.[267] Because the methods of scrutiny are of various intensities, choosing a more lenient or stricter scrutiny makes it easier or more difficult for the regulation to pass the requirements.[268] Thus, in order to achieve the desired ruling on the regulation at bar, the Court could choose to classify the regulation in a manner that allows the Court to apply the scrutiny that will support the desired result.[269]

The cases demonstrate that the Court inconsistently classifies similar regulations.[270] These inconsistencies, as a practical matter, allow the Court to apply the scrutiny that justifies the desired results.[271] The inconsistencies are of three basic types: substituting forum-based scrutinies for noncommercial speech scrutiny;[272] applying the combined speech and conduct scrutiny instead of content-based scrutiny;[273] and declaring speech outside the realm of constitutional protection.[274]

A. *Noncommercial versus Forum Scrutinies*

Recall that the basic noncommercial scrutiny requires that the govern-

259. *See infra* notes 260-65 and accompanying text.
260. 391 U.S. 367.
261. *See supra* notes 199-200 and accompanying text.
262. *See supra* notes 199-257 and accompanying text.
263. *See* TRIBE, *supra* note 29, at 827.
264. *Id.*
265. *See infra* notes 266-329 and accompanying text.
266. *See supra* page 1019 for a discussion of the decision tree.
267. *Id.*
268. *See supra* section III for a discussion of the various levels of scrutiny.
269. *See id.*
270. *See infra* notes 275-329 and accompanying text.
271. *Id.*
272. *See infra* notes 275-98 and accompanying text
273. *See infra* notes 299-317 and accompanying text.
274. *See infra* notes 318-29 and accompanying text.

ment precisely tailor a regulation to serve a compelling governmental interest.[275] Contrast that analysis with the basic forum scrutiny, which requires that: (1) the regulation furthers an important or substantial governmental interest; (2) the interest is unrelated to the suppression of free expression; and (3) the incidental restriction on the protected speech is no greater than is essential to the furtherance of that interest.[276] Clearly, the forum scrutiny demands less than the noncommercial speech scrutiny: the interest must only be substantial, rather than compelling, and the method of serving that interest must be something less than the least restrictive means required for noncommercial scrutiny.

The Court must first classify the regulation as content-based or content-neutral before applying either scrutiny.[277] If the Court classifies the regulation as content-neutral, the regulation must pass the more lenient forum scrutiny.[278] If the regulation is content-based, however, the Court uses the strict noncommercial scrutiny.[279]

Sometimes the Court does not explicity classify the regulation before applying the scrutiny.[280] In *Metromedia*[281] the Court determined that a regulation, banning both commercial and noncommercial billboards, was content-based.[282] The concurrence, however, thought the regulation treated all classes of speech more or less equally, and merely sought to regulate the manner in which the speech occured.[283] The Court, after striking down the ordinance for failing the content-based scrutinies,[284] classified the regulation as content-based by delving deeply into the list of exceptions to the regulation.[285]

Alternatively, the Court engages in mere facial analysis of regulations to decide content discrimination in cases like *Taxpayers*.[286] Recall that the ordinance at issue banned the posting of signs on public property, a situation very similar to the *Metromedia* regulation.[287] Even though this regulation affected political speech more heavily than any other class of speech,[288] the Court held that the regulation was content-neutral because the text was silent concerning any speaker's point of view.[289] In dissent, three Justices argued that the majority shouldn't so quickly accept the city's claim that the

275. *See supra* note 96 and accompanying text.
276. *See supra* note 200 and accompanying text.
277. *See* discussion of the decision tree structure, *supra* text page 1019.
278. *See supra* notes 199-257 and accompanying text.
279. *See supra* notes 94-144 and accompanying text.
280. *See infra* notes 281-85 and accompanying text.
281. 453 U.S. 490.
282. *Id.* at 516.
283. *See id.* at 526-27 (Brennan, J., concurring). Brennan adopted the time, place and manner scrutiny. *Id.*
284. *Id.* at 515.
285. *Id.* at 516.
286. 466 U.S. 789.
287. 453 U.S. at 493.
288. *Taxpayers*, 466 U.S. at 823, 823 n.3 (Brennan, J., dissenting).
289. *Id.* at 804. Compare the *Taxpayers* holding with *Boos*, in which the Court said that content-based regulations include both those that prohibit viewpoints and those that exclude an entire area of speech. *Boos*, 485 U.S. at 319.

regulation was necessary to protect aestethic interests.[290] The dissenters argued that especially when political speech is at issue, the Court should engage in a more thorough analysis of the effects of the regulation, rather than merely accept facial appearances.[291]

Cornelius provides a third illustration of the variable depths of analysis the Court gives this issue.[292] In *Cornelius* the government prohibited legal defense funds and political advocacy groups from advertising in its charity drive newsletter. After applying the forum analysis and deciding that the regulation was constitutional,[293] the Court considered how the regulation should have been classified.[294] Because the trial and appellate courts had not made a finding on that issue, the Court refused to determine whether the regulation was content-neutral.[295]

These cases demonstrate that the Court manipulates its analysis of the content-discriminatory effects of the regulation in order to apply the desired scrutiny.[296] In some cases, the Court engages in a lengthy analysis of the regulation's effect on speech.[297] In others, the Court accepts the facial appearance of the statute.[298] It becomes exceedingly difficult to predict which factors the Court will apply in a particular case in order to justify its decision.

B. Combined Speech and Conduct versus Content-Based Scrutinies

The second inconsistency in the macro scrutiny structure stems from the substitution of the combined speech and conduct scrutiny for the content-based scrutiny, which typically results in the application of a more lenient scrutiny.[299] Tribe has commented on this phenomena, noting the relative ease in finding conduct in almost all speech cases.[300] He interprets the label of "speech plus conduct" to signify the Court's intention of announcing a certain conclusion, rather than to embrace any stringent legal analysis.[301]

In *Texas v. Johnson*,[302] the Court struck down a Texas statute that prohibited destruction of venerated objects.[303] The Court based its holding on the fact that Texas failed to assert an interest unrelated to the expressive elements of the defendent's act of burning the American flag.[304] Texas as-

290. *Taxpayers*, 466 U.S. at 824.
291. *Id.* at 822-24.
292. 473 U.S. 788.
293. *Id.* at 811.
294. *Id.* at 812-13.
295. *Id.* The dissent would rule that the regulation impermissibly discriminates against viewpoints and is therefore content-based. *Id.* at 834 (Stevens, J., dissenting).
296. *See supra* notes 281-95 and accompanying text.
297. *See supra* notes 284-85 and accompanying text.
298. *See supra* notes 286-91 and accompanying text.
299. *See supra* notes 258-64 and accompanying text for a discussion of combined speech and conduct scrutiny.
300. TRIBE, *supra* note 29, at 827.
301. *Id.*
302. 109 S.Ct. 2533, 105 L.Ed.2d 342.
303. 109 S.Ct. at 2537.
304. *Id.* at 2543.

serted that the statute was necessary to prevent disturbances of the peace and to maintain the flag as a symbol of national unity. The Court performed a lengthy analysis of these asserted interests, deciding that the breach of peace interest was not implicated in the situation.[305] In addition, the Court found that the goal of preserving the flag as a symbol of unity was directly related to Johnson's expressive conduct.[306] After a lengthy analysis of the state's motive, the Court determined that the combined speech and conduct scrutiny was unwarranted, and that the regulation must survive strict scrutiny.[307] The Texas statute failed that test.[308]

In other cases, however, the Court has refused to engage in such in-depth analysis of the state's asserted interest in regulating the non-expressive elements of conduct.[309] In *United States v. O'Brien*[310] the Court upheld a federal statute prohibiting destruction of draft registration certificates.[311] The defendant burned his certificate in protest of the draft. In holding the law constitutional, the Court found that the state was merely attempting to regulate conduct unrelated to the expressive elements of such conduct.[312] The Court determined that the statute was constitutional because the state possessed a vital interest in protecting the certificates from mutilation.[313] The cards served as important proof that the individual actually registered for the draft in case of a "mix-up" in the applicant's file.[314]

These cases demonstrate that the Court will go to great lengths to reach the conclusion it desires.[315] The Court's inconsistent classification of regulations results in inequality of speech.[316] Similar regulations could survive the more lenient scrutiny for combined speech and conduct, or fail the stricter scrutiny for content-based regulations, depending on the Court's classification.[317] As a practical matter, such inconsistent classification renders the system unlearnable, because it remains difficult to distinguish between content-based regulations and regulations affecting combined speech and conduct.

C. *Protected versus Unprotected Speech*

The third inconsistency in the macro scrutiny structure stems from the

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305. *Id.* at 2542.
306. *Id.* at 2543.
307. *Id.*
308. *Id.* at 2548. Congress has recently passed a law prohibiting flag burning, hoping to avoids the defects of the Texas law. 18 U.S.C.A. § 700 (West Supp. 1990). Although the law tried to avoid implicating the expressive elements of conduct, the Supreme Court held it unconstitutional in U.S. v. Eichman, 58 U.S.L.W. 4744, 4745 (June 11, 1990)
309. *See infra* notes 310-14 and accompanying text.
310. 291 U.S. 367.
311. *Id.* at 382.
312. *Id.* at 378.
313. *Id.*
314. *Id.* The Court in *O'Brien* found the certificates important even though the certificates contained only routine biographical information, easily duplicable. *Id.*
315. *See supra* notes 275-314 and accompanying text.
316. *See supra* notes 38-67 for a discussion of equality of speech and classification.
317. *See supra* notes 275-314 and accompanying text.

Court's disturbing ability to declare speech outside the realm of First Amendment protection.[318] Once speech falls outside the realm of protected speech, the Court applies mere rationality review to any regulations affecting such speech.[319]

For example, in *New York v. Ferber*[320] the Court considered a New York statute prohibiting the distribution of child pornography. The Court found the statute to be constitutional because child pornography lies outside of First Amendment protection.[321] Although the Court had not previously declared that child pornography merited no protection, the Court in *Ferber* decided that child pornography lies outside First Amendment protection for several reasons.[322]

First, the Court found that child pornography harms the physiological, mental, and emotional health of children.[323] Second, the standard for determining what was legally obscene, and thus constitutionally unprotected, was inadequate to address the current issue.[324] Third, the value of child pornography was *de minimis*.[325] Finally, the act of declaring child pornography unconstitutional was not inconsistent with previous decisions defining unprotected speech.[326]

Concededly, the low value of child pornography was probably an easy "commonsense" call with which most people would agree.[327] The disturbing facet of *Ferber* lies not in the popularity of the decision, but its lack of methodology.[328] The erosion of equality of speech becomes most apparent when the Court abandons established methodology in favor of a mere policy decision.[329]

V. RECOMMENDATIONS

A. *Recommendations for the Macro Scrutiny Structure*

The Court should retain the major classifications of noncommercial speech,[330] commercial speech,[331] unprotected speech,[332] and forum analy-

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318. *See infra* notes 320-29 and accompanying text.
319. *See supra* notes 188-96 and accompanying text.
320. 458 U.S. 747 (1982).
321. *Id.* at 764.
322. *Id.* at 756-63.
323. *Id.* at 756-57.
324. *Id.* at 761.
325. *Id.* at 762.
326. *Id.* at 763.
327. For a discussion of the "commonsense" hierarchy of speech values, see *supra* notes 39-42 and accompanying text.
328. *See* 485 U.S. at 756-63.
329. For a criticism of the ease in defining a new category of unprotected speech, see Chayes, *The Supreme Court 1981 Term*, 96 HARV. L. REV. 4, 145-50 (1983).
330. For a discussion of noncommercial speech, see *supra* notes 94-144 and accompanying text.
331. For a discussion of commercial speech, see *supra* notes 145-87 and accompanying text.
332. For a discussion of unprotected speech, see *supra* notes 188-96 and accompanying text.

sis.[333] The fifth category, speech plus conduct, should not be retained as a category unless the Court can more clearly define its boundaries. Tribe criticized this category, denouncing it as a label that justifies a conclusion rather than a valuable tool for analysis.[334]

First Amendment analysis requires the four major classifications[335] for four reasons. First, these classifications promote learnability.[336] People more readily understand concepts that can be broken down into categories for analysis.[337] Completely abandoning these classifications would probably make the whole system even less learnable than it is currently.

Second, by promoting such understanding, the classifications help stem the "chilling effect" of governmental regulation.[338] By knowing how the Court will likely treat a regulation, the public can gauge its effects. This predictability will promote a rational reaction to governmental action, helping to eradicate future turmoil such as the art community's reaction to the Helms Amendment.[339]

Third, these major classifications may actually help preserve the principles of equality in First Amendment analysis. Were we to completely eliminate these classifications, First Amendment analysis would be left with no cogent structure. The resulting decisions would probably range from the inexplicable to the bizarre.[340] Similar regulations would not necessarily be afforded similar treatment, nor would the series of ad hoc decisions likely to emanate from the courts protect speech acts equally.

Fourth, the Court has based too many decisions on these classifications to completely abandon them. Such abandonment would put First Amendment analysis at square one, depriving us of decades of First Amendment understanding.[341] Such total abandonment can only be justified when society gains a radical new understanding of the meaning of freedom of speech, or in those infrequent times when the Court doggedly enshrines a method of anal-

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333. For a discussion of forum analysis see *supra* notes 199-257 and accompanying text.

334. TRIBE, *supra* note 29, at 827.

335. *See supra* notes 330-33.

336. For a discussion of the principles of learnability, see *supra* notes 30-32 and accompanying text.

337. *Id.*

338. For a discussion of "chilling effects", see *supra* notes 33-37 and accompanying text.

339. For a discussion of the Helms Amendment and the public's reaction, see *supra* notes 34-37 and accompanying text.

340. Indeed, Galloway suggests that the analysis is even now so vague and flexible that judges are left at large to decide cases on the basis of personal bias, leaving scrutinies to "mere after the fact rationalization for decisions made on the basis of economic and political prejudice." Galloway, *supra* note 70, at 487. Some semblance of structure helps to pin the judges to legal analysis rather than personal bias.

341. Stephan defends the major categories on the merits. Stephan, *supra* note 25 at 213-14. It is improvident to push the Court into such extreme choices, such as total equality for all speech, because "[i]f the Court could not give lesser protection to categories of speech of only moderate constitutional significance, it probably would be less inclined to honor the strategic and pragmatic reasons for extending safeguards to speech intrinsically lacking in constitutional value," resulting in less protection for most speech acts. *Id.* at 213. "That the Court may not make the right distinctions, a fear that seems to underlie the criticism of categorical analysis, does not mean that it should not attempt to do so." *Id.*

ysis that is simply unworkable.[342]

Although the Court should preserve these categories for the reasons outlined above, the system will still fail if the Court categorizes speech acts and regulations inconsistently.[343] First, the Court must cogently define the factors that differentiate one type of speech from another.[344] Second, the Court must apply the factors in a straightforward manner, rather than relegating the whole analysis to the backwaters of the opinion after announcing a conclusion.[345] First Amendment analysis, no matter how brilliantly designed, will remain disjointed and unlearnable unless the Court courageously defines terms and openly applies them.

B. Recommendations for the Micro Scrutiny Structure

A regulation restraining noncommercial speech should be a precisely drawn means of serving a compelling state interest, as required in *Consolidated Edison.*[346] First, the regulation should be "precisely drawn" rather than "narrowly tailored" to afford this most highly-valued speech the highest level of First Amendment protection available.[347] The Court should not require that the regulation be the "least restrictive means" available, however, because that method of analysis has been selectively employed in the past to announce the demise of the regulation when the Court can find no other justification for its decision.[348] In addition, "least restrictive means" analysis proves very inexact in application. One can always think of means that would be less restrictive than the ones employed, even though the alternatives may be ineffective or costly.[349] Such inexactness does nothing to promote learnability of the system, nor does the least restrictive means analysis preserve equality when it is so selectively employed.

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342. As an example of an unworkable course of analysis, see Lochner v. New York, 198 U.S. 45 (1905), recognized as one of the most misguided decisions in the history of the Supreme Court. The dissent in *Lochner* criticized the majority for enshrining its own economic values into the analysis of substantive due process. *Id.* at 72 (Harlan, J., dissenting). To abandon the classification system entirely, would leave little analysis by which to decide First Amendment cases other than the justices' personal views on what speech merited protection.

Galloway suggests that the Justices' personal views drive the decisions and the scrutiny structure even now. Galloway, *supra* note 70, at 487. Galloway analogizes the current malaise of constitutional scrutinies to the era of the four horsemen (Van DeVanter, McReynolds, Sutherland and Butler) where decisions were purportedly made on an ad hoc basis as the Justices saw fit. *Id.*

343. *See supra* notes 272-329 and accompanying text.

344. A full discussion of the multitude of factors used to distinguish one class of speech from another lies beyond the scope of this Comment, which concerns itself only with the use of the classifications. The cases discussed *supra* notes 272-329 and accompanying text, demonstrate, however, that the whole realm of classifying speech is an underdeveloped area of First Amendment law.

345. Recall that the major flaw in the Court's classification of speech acts lies in the fleeting attention the Court gives to the whole act of classification, relegating the analysis to the end of the opinion, after announcing the conclusion. *See supra* notes 275-95 and accompanying text.

346. 447 U.S. at 540.

347. The *Boos* Court set forth the "narrowly tailored" requirement. 485 U.S. at 321.

348. *See Sable Communications,* 109 S.Ct. at 2838, 106 L.Ed.2d at 133-34. *See supra* notes 101-03 and accompanying text.

349. Examples of least restrictive means analysis can be found in other areas of constitutional law, for example the dormant commerce clause cases. Tribe, *supra* note 29, at 438.

Second, the Court must avoid pinning the constitutionality of a regulation of noncommercial speech on the regulation's treatment of lower classes of speech.[350] By requiring that the regulation infringe more on lesser-valued speech than noncommercial speech, the Court can declare a regulation unconstitutional for failing to abridge *enough* speech.[351] Although such a scrutiny does promote equality of speech acts, equality is accomplished by requiring not that all speech be *protected* equally, but *infringed* equally. This cannot be the view of the First Amendment intended by either the framers or the American population.

Finally, the Court must engage in *some* type of scrutiny in these cases. The Court cannot fail to apply a standard, as in *Texas v. Johnson*,[352] if the Court wishes to uphold the principles of equality and learnability. The complete lack of a scrutiny entitles the Court to justify or condemn the regulation on whatever bases it wishes, clearly eroding the principle of equality. The lack of an articulated scrutiny also renders the system unlearnable, for the opinions without articulated scrutinies offer no guidance to lower courts or to the populace.

For commercial speech regulations, the Court should require that the regulation directly advance a substantial governmental interest.[353] When evaluating the regulation, the Court should not wholly defer to the government's assertions regarding the substantiality of its interests, as in *Metromedia*.[354] Such deference to the legislature does not promote equality of speech, for it allows the government to curtail particular speech that deserves protection at the time and in the manner the legislature sees fit, leaving other forms unregulated.

The Court should not adopt a test like that set forth in *Posadas de Puerto Rico*,[355] where the legislature's power to ban an activity necessarily includes the lesser power to prohibit speech regarding the activity.[356] Very few commercial matters lie outside the government's power of prohibition,[357] and such a scrutiny would leave much commercial speech without protection.

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350. The Court in *Metromedia* pinned the constitutionality of the regulation on the regulation's treatment of lower classes of speech. 453 U.S. at 515. Hopefully, the Court will not continue to use the *Metromedia* analysis. Even the Justices involved in the *Metromedia* plurality disagreed heartily on the decision, as evidenced by the amount of space the plurality devoted to attacking the Chief Justice's dissent as "rhetorical hyperbole." *See Metromedia*, 453 U.S. at 517-21.

351. *See Metromedia*, 453 U.S. at 540-41 (Stevens, J., dissenting).

352. 109 S.Ct. 2533, 105 L.Ed.2d 342. For a full discussion of the case, see *supra* notes 128-35 and accompanying text.

353. The Court first set forth the commercial scrutiny in *Central Hudson*, 447 U.S. at 566. For a full discussion of *Central Hudson*, see *supra* notes 153-60 and accompanying text. The Court in *Board of Trustees*, 109 S.Ct. at 3033, 106 L.Ed.2d at 403, apparently confirmed the scrutiny, acknowledging that the scrutiny requires less than a least restrictive means analysis. *See supra* notes 178-82 and accompanying text.

354. 453 U.S. 490, 512.

355. 478 U.S. 328.

356. *See supra* notes 172-74 and accompanying text.

357. For many years the Court has accepted the power of the Legislature to regulate commercial activity, under the Commerce Clause, with few barriers; because Congress possesses so much power to regulate, Congress also possesses the power to prohibit advertising.

This violates the principle of equality for the same reasons as does high deference to the legislature: the government can pick and choose which speech to regulate.

The Court sets forth two variants on how closely the commercial speech regulation must fit the ends to be achieved: either the regulation must be no more extensive than necessary,[358] which implies a least restrictive means analysis, or the Court will allow a somewhat looser fit.[359] As discussed previously, the Court should not adopt the least restrictive means analysis.[360] Least restrictive means analysis would also blur the distinction between the categories of commercial and noncommercial speech, thereby detracting from the learnability of the system of analysis. The court should therefore allow a looser fit between the means and end for commercial speech regulations.

The Court should retain the scrutiny for content-neutral regulations set forth in *Taxpayers*[361] wherein the government must prove that the regulation furthers a substantial interest and incidentally infringes upon speech no more than necessary.[362] First, when analyzing the substantiality of the interest, the Court should require that the regulation directly further that interest.[363] Such a requirement parallels the scrutiny for noncommercial speech, thus helping to promote equality of speech because the government may not curtail one type of speech more easily than another. The Court also should assess the substantiality of the governmental interest itself, rather than deferring so heavily to the legislature, as in *Young*.[364] Recall that the Court emphasizes the forum in which the speech occurs when assessing substantiality.[365] The Court should make the forum but one consideration underlying a common scrutiny for these regulations, rather than the basis for separate scrutinies.[366] Separate scrutinies erode the principles of equality and learnability, because they further classify speech based on content and complicate the scheme of analysis.

Second, when assessing the incidental impact on speech, the Court should ask whether the speaker has alternative means of communication.[367] This inquiry better addresses the issue than the very lenient deference of *Ward*[368] or the "exact evil" test of *Frisby*.[369] Extreme lenience leaves too much

358. *Central Hudson*, 447 U.S. at 566.
359. *See Board of Trustees*, 109 S.Ct. at 3033, 106 L.Ed.2d at 403. The Court failed to specify what a lesser test might resemble. *See supra* notes 178-82 and accompanying text.
360. *See supra* note 348 and accompanying text.
361. 466 U.S. 789.
362. *Id.* at 805.
363. *Schaumberg*, 444 U.S. 688. For a full discussion of *Schaumberg*, see *supra* notes 208-10 and accompanying text.
364. 427 U.S. 50, 63. For a full discussion of *Young*, see *supra* notes 216-20 and accompanying text.
365. *Heffron*, 452 U.S. at 651-54.
366. *See Cornelius*, 473 U.S. 800. For a full discussion of *Cornelius*, see *supra* notes 226-30 and accompanying text.
367. *Taxpayers*, 466 U.S. at 612.
368. 109 S.Ct. 2746, 105 L.Ed.2d 661.
369. 108 S.Ct. 2495, 101 L.Ed.2d 420.

power to the legislature to treat speech unequally, and the "exact evil" test detracts from learnability because one can always conceive of a more exact regulation.[370]

VI. CONCLUSION

Recent Supreme Court decisions have created a system of subclassifications based on two types of inconsistencies: those stemming from inconsistent enunciation of the scrutinies themselves,[371] and those stemming from inconsistent decisions on how to classify speech.[372] Whenever the Court treats equivalent speech acts differently due to inconsistencies in the case law, the Court diminishes the principle of equality of speech. The inconsistencies also render the entire system largely unlearnable. Finally, such inconsistencies tend to have a "chilling effect" on speech since the inconsistencies tend to favor the regulation rather than the protected speech.

If the Court wishes to preserve the notion of equality, learnability, and the freedom to speek one's mind, the Court must make substantial changes in the scrutiny structure. The Court can avoid the serious erosion of the principles underlying the First Amendment by clarifying the individual scrutinies and applying the scrutinies in a consistent manner. Only by avoiding the further degeneration of the scrutiny system into subclassifications can the Court preserve fundamental values.

370. Because the Court reviews unprotected speech under rationality review, the Comment makes no recommendations since rationality review is a necessarily vague test. This Comment, moreover, makes no recommendations regarding the combined speech plus conduct category, as this Comment advocates the elimination of that category. *See supra* note 334 and accompanying text.

371. *See supra* notes 92-265 and accompanying text.

372. *See supra* notes 266-329 and accompanying text.