The Mode in the Middle: Recognizing a New Category of Speech Regulations for Modes of Expression

Alan Howard*

I. INTRODUCTION 48
II. RECOGNIZING MODE-BASED REGULATIONS AS A DISTINCT CATEGORY OF SPEECH REGULATIONS 50
A. *The Distinction Between Laws Regulating the Mode of Expression and Those Regulating the Underlying Message* 52
III. PLACING REGULATIONS OF THE MODE OF EXPRESSION IN A MIDDLE CATEGORY WITH A MIDDLE STANDARD OF REVIEW 60
IV. THE MODE CASES 66
A. *Categories of Partially Protected Speech* 67
1. The Sexually Explicit Zoning cases 67
2. The Nude Dancing Cases 76
3. Speech Deemed Harmful to Minors 79
4. Profanity 81
B. *Categories of Unprotected Speech* 85
1. Obscenity 86
2. Child Pornography 87
C. *Other Regulations of Mode that the Court Inappropriately Sees as Content-Based Regulations* 89

* Professor of Law, St. Louis University School of Law. B.S. Cornell University, 1969; J.D., University of Chicago Law School, 1972. I presented an earlier draft of this article at a faculty workshop at St. Louis University School of Law where I received helpful comments from several of my colleagues, including Eric Claeys, Roger Goldman, Joel Goldstein, Tim Greaney, and Dennis Tuchler. I want to single out my brother, Bruce Howard, for special recognition. Bruce, formerly a member of the University of Southern California Law Faculty, and now a partner in the Los Angeles law firm, Latham & Watkins, generously found time to discuss with me various aspects of the article during its period of gestation and to make valuable comments on subsequent drafts.

V. CONCLUSION 90

I. INTRODUCTION

This article advocates that the United States Supreme Court adopt a new category with a new standard of review under the First Amendment for regulations that address the mode of a speaker's expression. By mode, I mean the *way* a speaker expresses his or her message, as opposed to the message itself. A speaker's mode includes the words or representations that a speaker uses to convey what he or she is thinking or feeling, such as vulgar language, sexually explicit pictures, or even "symbolic conduct."[1] I mean to distinguish the mode of speaking from the underlying thought or feeling being expressed, such as opposition to a war or the plot and characters of a story. To put it simply, this article focuses primarily on the age-old distinction between form and substance.[2] Currently, instead of analyzing the mode of expression, the

[1] The Court has extended First Amendment protection not only to verbal (words) and nonverbal representational (musical notes and images) forms of expression but also to conduct where the Court finds "an intent to convey a particularized message was present, and in the surrounding circumstances, the likelihood was great that the message would be understood by those who viewed it." Spence v. Washington, 418 U.S. 405, 410-11 (1974). Examples of non-verbal, non-representational conduct to which the Court has extended First Amendment coverage include burning a draft card, *United States v. O'Brien*, 391 U.S. 367 (1968), or an American flag, *Texas v. Johnson*, 491 U.S. 397 (1989), dancing erotically in the nude, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) and sleeping during a protest in a national park, *Clark v. Community For Creative Non-Violence*, 468 U.S. 288 (1984).

[2] The fundamental distinction between form and substance was identified and much debated by ancient philosophers, including notably Plato and Aristotle. In the *Republic*, Plato distinguished between idealized truths, which he called forms and which in this article I am analogizing to the substance or the underlying message of a speech item, and the various real world manifestations of such forms, which in this article I am analogizing to modes. PLATO, REPUBLIC 503b-509b, 509d-511-b, 514-518d. In other words, Plato would say there is a pure form of a chair, similar to its definition, which one can grasp conceptually, and then, in the physical world, the many specific examples of chairs, which one can observe with one's senses. Similarly, this article argues that there is a meaning to a message, which one can grasp conceptually, like a Platonic form, and the mode of the message, which is the particular presentation of the message which the speaker crafted to express the message. I am not suggesting, as Plato did, that the form is somehow an ideal, and the expression of the form in the real world less perfect, like a photocopy of a painting is a poor representation of the purer and better original. Rather, my point is that the meaning of the message is an incorporeal idea that is communicated to the listener in the real world in a specific mode of presentation, involving a certain choice of words or a certain choice of paint strokes and colors. Virtually the same message could be communicated with different words or strokes. Similarly, the Aristotelian distinction between form and substance is usually expressed as a distinction between matter and form. ARISTOTLE, METAPHYSICS 1013120-1013b30, 1038b5-1039. Under this distinction, matter is itself a characterless abstraction until it takes a particular form or shape in the natural-physical world. Translating this to the terminology employed in this article, I would analogize Aristotelian matter to the meaning of a speech item, and the Aristotelian form to the mode of a message. The inverted use of the word "form" in Plato and Aristotle is a bit confusing, but the fundamental distinctions are understandable.

Supreme Court makes two other distinctions in this area: (1) speech is deemed either protected or unprotected,[3] and (2) the regulations under review are deemed either content-based or content-neutral. This article argues that the Court's first distinction is not helpful and should be abandoned and that the second is too limited and should be modified by the addition of a new category. In cases involving the regulation of the mode of a speaker's expression, the simplistic distinction between content-based and content-neutral has not served the Court well. Warring opinions and inconsistent decisions have produced a splintered jurisprudence. Neither the Court nor any Justice has achieved a coherent analysis to guide lower courts in deciding similar cases.[4] This article is organized into three sections. Section II discusses the distinction between regulations of the mode of expression and the two categories of regulations currently recognized by the Supreme Court – content-based and content-neutral. I explain why the Court's content-based/content-neutral distinction miscategorizes numerous government regulations of speech, and why mode regulation would provide a more precise and accurate category in many cases. In Section III, I explain why the recognition of the new category of mode regulations should lead to the adoption of a new standard of review for these cases. I do this by examining why different standards of review for different kinds of speech regulation are appropriate under the First Amendment, and why a new standard of review is appropriate for the mode cases. I argue that the

---

Indeed, the potential confusion itself highlights the difference between ideas and the words used by various speakers to express them.

[3] The genesis of the Court's "protected-unprotected speech" distinction is often traced back to dictum authored by Justice Murphy in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Justice Murphy sought to place outside the scope of First Amendment protection what he saw as four "well-defined" and "narrowly limited" classes of speech that historically governments had proscribed. *Id.* at 571-72. The four categories of "unprotected speech" he identified were (1) obscenity (2) profanity (3) libelous speech and (4) insulting or "fighting" words. *Id.*

The Court both has added to and subtracted from Murphy's list. In addition to the categories Murphy identified, other categories of unprotected speech that the Court recognizes include: (1) incitement to unlawful activity, *Brandenburg v. Ohio*, 395 U.S. 444 (1969); (2) child pornography, *New York v. Ferber*, 458 U.S. 747 (1982); (3) false, deceptive or overbearing commercial speech, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), and military secrets, *Near v. Minnesota*, 283 U.S. 697 (1931). As to two of Justice Murphy's categories – profanity and libelous speech – the Court now, in certain cases, extends First Amendment protection. *See e.g., Cohen v. California*, 403 U.S. 15 (1971) (holding that an anti-war protester has a First Amendment right to wear in public a jacket containing the words "Fuck the Draft"); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (holding that (unintentional) libelous statements directed at the official conduct of public officials are protected by the First Amendment).

[4] *See infra* Section III.

Court should afford the mode category a middle standard of review, half-way between the strict scrutiny used for content-based regulations[5] and the deferential scrutiny used for content-neutral regulations aimed at the methods by which speakers distribute their speech to others, often called "time, place and manner" regulations.[6] Finally, in Section IV, I review several specific groups of cases in which the Court has failed to recognize the existence of the mode category, and, as a result, has failed to achieve a coherent formulation and application of First Amendment doctrine. More specifically, I identify several analytical mistakes that the Court has made in these cases, largely because of its failure to recognize the mode category. In each of these groups, I suggest the analytical approach and the standard of review that the Court could and should use, based on the recognition and use of the mode category.

II. Recognizing Mode-Based Regulations as a Distinct Category of Speech Regulations

Since the 1970s, the distinction between content-based and content-neutral laws has been one of the hardiest and most reliable doctrines in First Amendment jurisprudence.[7] If the U.S. Supreme Court deems a law regulating speech to be content-based, it subjects that law

---

[5] *See, e.g.,* United States v. Playboy Entm't Group Inc., 529 U.S. 803, 813 (2000) ("[A] content-based restriction can stand only if it satisfies strict scrutiny."); City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 455 (2002) ("A restriction based on content survives only on a showing of necessity to serve a legitimate and compelling governmental interest, combined with least restrictive narrow tailoring to serve it.").

[6] *See, e.g.,* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 244 (1990) ("[Content neutral] time, place and manner restrictions are not subject to strict scrutiny. . .") (White, J., concurring in part and dissenting in part).

[7] The distinction's origin dates to a 1972 decision, *Police Dep't of Chicago v. Mosley,* 408 U.S. 92 (1972). Initially the Court applied the distinction in cases where the government was regulating the distribution of speech within a public forum. *See, e.g.,* Cary v. Brown, 447 U.S. 455 (1980). In later cases the Court has expanded its use of the distinction to other kinds of speech regulations. *See, e.g.,* Consolidated Edison v. Public Serv. Comm'n, 447 U.S. 530 (1980); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Simon & Schuster, Inc. v. Members of New York State Crime Victims Board, 502 U.S. 105 (1991). Although there are cases since the 1970s where the Court did not begin its analysis by employing the distinction, *see, e.g.,* Reno v. American Civil Liberties Union, 521 U.S. 844 (1997), the Court has stated that it sees the distinction as a key threshold determination the Court normally should make for purposes of determining the appropriate standard of review courts should use in their review of a First Amendment challenge. *See, e.g.,* City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) where Justice Brennan observed that in any First Amendment case:

> The Court's first task is to determine whether the ordinance is aimed at suppressing the content of speech, and if it is, whether a compelling state interest justifies the suppression (citations omitted). If the restriction is content-neutral, the court's task is to determine (1) whether the governmental objective advanced by the restriction is substantial, and (2)

to strict scrutiny review and almost always strikes down the restriction.[8] If the Court finds such a law to be content-neutral, the Court adopts a more deferential standard and, in most such cases, upholds the regulation.[9] In its initial cases, the Court had little trouble agreeing whether a regulation was content-based or content-neutral.[10] Things changed in

---

whether the restriction imposed on speech is no greater than is essential to further that objective.

Id. at 821 (Brennan, J., dissenting). On occasion a justice has criticized the Court when it did not begin its analysis by using the distinction. *See* Justice O'Connor's criticism of the majority for its failure to apply the distinction in *City of Ladue v. Gilleo,* 512 U.S. 43 (1994):

> The normal inquiry that our doctrine dictates is, first, to determine whether a regulation is content-based or content-neutral, and then, based on the answer to that question, to apply the proper level of scrutiny (citations omitted).

Id. at 59 (O'Connor, J., concurring).

[8] As Justice Souter explained:

> A restriction based on content survives only on a showing of necessity to serve a legitimate and compelling governmental interest, combined with least restrictive narrow tailoring to serve it; since merely protecting listeners from offense at the message is not a legitimate interest of the government , strict scrutiny leaves few survivors.

City of Los Angeles v. Alameda Books, Inc,. 535 U.S. 425, 455 (2002) (Souter, J., dissenting) (citations omitted). A rare case where the Court, applying strict scrutiny, upheld a content-based law is *Burson v Freeman*, 504 U.S. 191 (1992).

[9] The Court has upheld most regulations regulating speech that it has defined as content neutral. In those it struck down, it used an intermediate standard of review, less than strict scrutiny but more stringent than rationality review. The Court's decision whether to subject its review of a content neutral regulation to intermediate or mere rationality review has depended on the following factors: (1) the *nature of the property* onto which the distributor of speech has access (a) Schneider v. New Jersey, 308 U.S. 147 (1939), United States v. Grace, 461 U.S. 171 (1983) (a public forum) (intermediate); (b) City of Ladue v. Gilleo, 512 U.S. 43 (1994) (distributors' own property) (intermediate); (c) Adderley v. Florida, 385 U.S. 39 (1966), Perry ED. Assn. v. Perry Local Educators' Assn., 460 U.S. 37 (1983) (a non-public forum) (mere rationality); (d) Rowan v. U.S. Post Office Dep't, 397 U.S. 728 (1970), Hudgens v. NLRB, 424 U.S. 507 (1976) (another's private property) (mere rationality); (2) the *nature of activity* to which the regulation is targeted (a) the mode of expression: *see, e.g.,* Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (arm bands); Gooding v. Wilson, 405 U.S. 518 (1972) (opprobrious words) (intermediate); (b) the method of distribution: *see, e.g., Schneider,* 308 U.S. at 147 (leafleting); Edwards v. South Carolina, 372 U.S. 229 (1963) (demonstrating); *Grace*, 461 U.S. at 171 (picketing) (intermediate); (c) other kinds of conduct: *see, e.g.,* United States v. O'Brien, 391 U.S. 367 (1968) (draft card destruction); City of Erie v. PAP's A.M., 529 U.S. 277 (2000) (public nudity); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984) (camping) (mere rationality); (3) the *nature of the regulation* (a) *see, e.g., Schneider* 308 U.S. at 147 (total ban); Martin v. Struthers, 319 U.S. 141 (1943) (total ban) (intermediate); (b) *see, e.g.,* Ward v. Rock Against Racism, 491 U.S. 781 (1989) (time, place or manner regulation) (mere rationality).

[10] Thus, for example, all of the justices defined as "content-based" any regulation that facially distinguished on the basis of viewpoint or subject matter. *See, e.g.*, Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980). Likewise all of the justices defined as "content-neutral" any law that regulated the methods by which speakers distributed speech to others. *See, e.g.,* Heffron v. Int'l Soc'y for Krishna Consciousness Inc., 452 U.S. 640 (1981), and any law that regulated conduct that conventionally individuals did not engage in for expressive purposes. *See, e.g.,* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984).

1986 in *City of Renton v. Playtime Theatres, Inc.*[11] In *City of Renton*, the Court reviewed a zoning ordinance that regulated the location of adult theaters, but not that of theaters showing more PG-rated fare. Four Justices classified this regulation as content-based, while the other five concluded it was content-neutral. The breakdown of consensus over the characterization of the regulation in *City of Renton* has carried over to other First Amendment cases, and over the years has produced a panoply of confusing and often incoherent analyses.[12] The premise of this article is that these cases, which have disrupted the Court's traditional application of the content-based/content-neutral distinction, all fall into a third category: cases involving regulations of the mode of expression. In this first section, I explain the distinction between laws regulating the mode of expression and those regulating the underlying message of the expression. I also examine the distinction between laws regulating mode of expression and those regulating the time, place and manner of the distribution of the speech, which are normally deemed content-neutral by the Court and afforded a deferential standard of review.

A. *The Distinction Between Laws Regulating the Mode of Expression and Those Regulating the Underlying Message*

There is a difference between the message a speaker is trying to communicate and how he chooses to communicate that message. It is the difference between form and substance.[13] A speaker may choose to express his love for another by writing a poem, by singing a song or playing an instrument, by painting a picture, by performing a dance, or in innumerable other ways. In each case the message is essentially the same. What is different is the mode of the expression. A regulation of the underlying message would say the speaker cannot express his love for another person. A regulation of the mode of expression would, for example, prohibit the speaker from performing a "love" dance naked.

This simple distinction is well recognized in legal doctrine, although admittedly not without some controversy. In several free-speech cases, Justices have recognized a difference between what in this article I define as the speaker's "mode of expression" and the mode's embedded message. For example, in *Cohen v. California*,[14] Justice Harlan for the majority relied on the distinction when he emphasized that the Court would have viewed the state's actions differently and as

[11] 475 U.S. 41 (1986).
[12] *See* discussion of cases *infra* Section III.
[13] *See supra* note 2 .
[14] 403 U.S. 15 (1971).

more objectionable if what California was seeking to suppress was Cohen's anti-war message rather than simply the crude manner in which he sought to express his message.[15] Likewise, Justice Stevens for the majority in *FCC v. Pacifica Foundation*[16] stated that the Court would have come out the opposite way if it had believed that the FCC had sought to sanction the station's airing of Carlin's monologue because the Commission opposed Carlin's underlying message as opposed to the way Carlin had sought to express his commentary.[17] In explaining why it was less objectionable for the government to regulate a speaker's mode of expression as opposed to the speaker's underlying message, Justice Stevens noted that "a requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication."[18] And for Justice Stevens, regulating words was not the same thing as regulating messages because, as he explained, "there are few, if any, thoughts that cannot be expressed by the use of less offensive language."[19]

In several cases, Justice Stevens has recognized the same distinction between mode and message for determining when the government can regulate speech on the basis of "offensiveness." In his concurring opinion in *Consolidated Edison Co. v. Public Service Commission of New York*,[20] Justice Stevens argued that whether or not the government could regulate speech simply because some adults found the speech to

---

[15] Justice Harlan acknowledged that the Court would have sided with Cohen if the majority had found that California had prosecuted him for his anti-war views:

> . . . [T]he State certainly lacks power to punish Cohen for the underlying content of the message the inscription conveyed. At least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected.

Id. at 18 (internal citation omitted). It was obvious to Justice Harlan, however, that the state's motivation for prosecuting Cohen was based entirely on the *way* Cohen sought to convey his message. *Id.* ("The conviction quite clearly rests upon the asserted offensiveness of the words Cohen used to convey his message to the public.")

[16] 438 U.S. 726 (1978).

[17] Justice Stevens noted:

> If there were any reason to believe the Commission's characterization of the Carlin monologue as offensive could be traced to its political content – or even to the fact that it satirized contemporary attitudes about four letter words – First Amendment protection might be required. But that is simply not the case.

Id. at 746. (Stevens, J., plurality opinion) (footnote omitted). Although Carlin's monologue did present a point of view, i.e., that four letter words are "harmless" and our attitudes towards them are "essentially silly" it was evident to Justice Stevens that "the Commission objects, not to this point of view, but to the way in which it is expressed." *Id.* at 746, n. 22.

[18] *Id.* at 743, n. 18.

[19] *Id.*

[20] 447 U.S. 530 (1980).

be offensive depended on what about the speech the majority found objectionable. He explained:

> But a communication may be offensive in two different ways. Independently of the message the speaker intends to convey, the form of his communication may be offensive – perhaps because it is too loud or too ugly in a particular setting. Other speeches, even though elegantly phrased in dulcet tones, are offensive simply because the listener disagrees with the speaker's message.[21]

Justice Stevens acknowledged that if the government was offended by what the speaker said, it would be a clear violation of the First Amendment for the government to regulate the speech.[22] On the other hand, if the majority's objection was simply to the offensive way in which the speaker expressed himself, then, Justice Stevens argued, the First Amendment might allow the government to require that the speaker utilize a less offensive mode of expression on at least some occasions.[23]

Similarly, in *Board of Education, Island Trees Union Free School District No. 26 v. Pico by Pico*,[24] Justice Rehnquist sought to distinguish between the speaker's mode of expression and underlying message by rejecting an attempt by the petitioner to equate the regulation of vulgar words with the suppression of any idea.[25]

On the flip side, occasionally a Justice has referenced the distinction to justify his conclusion that a particular regulation violates the First Amendment by stating that he might have voted to uphold the regulation if, instead of targeting what speakers said, the regulation instead regulated the manner by which they sought to communicate their message. Thus, in *Bolger v. Youngs Drug Products Corp.*,[26] the majority struck down a federal statute that prohibited sending unsolicited advertisements for contraceptives through the mail. In his separate concurrence, Justice Stevens noted:

---

[21] *Id.* at 546-48 (Stevens, J., concurring in the judgment) (footnote omitted).

[22] As Justice Stevens explained: "The fact that the offensive form of some communication may subject it to appropriate regulation surely does not support the conclusion that the offensive character of an idea can justify an attempt to censor expression." *Id.* at 548 (Stevens, J., concurring in the judgment).

[23] *See, e.g.*, FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (sustaining the authority of the federal government to prohibit the daytime airing over the airwaves of programming that contains the repetitive use of four letter words). *See also* Rowan v. U.S. Post Office Dep't, 397 U.S. 728 (1970) (upholding a federal law that allows recipients of mail they find to be offensive to request a post office order having their names removed from the mailer's mailing list).

[24] 457 U.S. 853 (1982).

[25] *See infra* note 118.

[26] 463 U.S. 60 (1983).

> The statute . . . censors ideas, not style. It prohibits appellee from mailing any unsolicited advertisements of contraceptives no matter how unobtrusive and tactful; yet it permits anyone to mail unsolicited advertisements of devices intended to facilitate conception no matter how coarse or grotesque.[27]

These brief citations demonstrate that occasionally in free-speech cases, certain Justices have recognized the distinction between regulations of the mode of speech and regulations of the underlying message. However, the members of the Supreme Court ultimately have failed to grasp the fundamental importance of this distinction, and in those few cases in which the Court has recognized the distinction, have failed to apply the distinction in a proper and systematic manner. This article recommends that the distinction between mode and message be adopted as a threshold basis for determining the applicable standard of review in First Amendment cases, and that the Court recognize that the distinction applies in many more situations than those in which it has been recognized to date.

Beyond the Court's many references to the distinction between mode and message in its free-speech cases, essentially the same distinction is critical in another area of law: copyright.[28] Copyright protection does not apply to any "idea, concept, principle" or similar content contained in a work, but only to the particular (original) expression of the idea.[29] The reason for this is the fear that protecting an underlying idea, and not just its particular expression, would unduly burden the marketplace of ideas and stifle other speakers.[30]

---

[27] *Id.* at 84 (Stevens, J., concurring in the judgment). Justice Stevens emphasized that:

> It matters whether a law regulates communications for their ideas or for their style. Government suppression of a specific point of view strikes at the core of First Amendment values. In contrast, regulations of form and context may strike a constitutionally appropriate balance between the advocate's right to convey a message and the recipient's interest in the quality of his environment.

Id.

[28] *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 344-45 (1991) ("The most fundamental axiom of copyright law is that no author may copyright his ideas or the facts he narrates."); Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (". . .it [copyright law] distinguishes between ideas and expression and makes only the latter eligible for copyright protection").

[29] 17 U.S.C. § 102(b) (1990).

[30] *See* Harper & Roe Publishers, Inc. v. Nation Enters., 471 U.S. 539, 582 (1985) (Brennan, J., dissenting) ("Were an author able to prevent subsequent authors from using concepts, ideas, or facts contained in his or her work, the creative process would wither, and scholars would be forced into unproductive replication of the research of their predecessors."); Sony Corp. of America v. Universal City Studios, Inc. 464 U.S. 417, 429 (1984) (The idea/expression dichotomy is dictated by the First Amendment as it allows authors to control and exploit their expression while at the same time allowing for the free flow of ideas and information). *See also Eldred,* 537 U.S. at 219.

As mentioned above, the distinction between mode and message can be complex. Often a message is intertwined with and cannot easily be separated from its expression. When one considers Picasso's *Guernica*, it is hard to conceive of separating the mode of the expression from the message. And yet it is conceivable that one could articulate in words the gist of what Picasso intended to communicate about the Spanish Civil War when he painted the *Guernica*. Admittedly, the more abstract a work of art, the harder it is to think of synonyms. In part, this is because the more abstract the speaker's expression is, the more difficult it is to understand the particularized message being communicated. What is the message in a modern dance? In a photograph? In an abstract painting?[31] Concededly, some modes of expression may be so intertwined with the particular message the speaker is seeking to convey that requiring the speaker to alter his mode of expression runs the risk of altering the message itself.[32]

Some Justices have expressed a concern about whether mode and message can be separated. Justice Harlan writing for the Court in *Cohen* cautioned that "we cannot indulge the facile assumption that one can forbid particular words without also running the risk of suppressing ideas in the process."[33] Justice Brennan in his dissent in *Pacifica Foundation* went further to maintain that "[t]he idea that the content of a

---

[31] Indeed the more abstract the expression the greater the likelihood that the speaker is not attempting to communicate any particularized message but rather is simply seeking to be expressive. *See* Christopher L.C.E. Witcombe, *Art for Art's Sake* (1997), http://www.arthistory.sbc.edu/artartists/modartsake.html. In his dissent in *Texas v. Johnson*, 491 U.S. 397 (1989), one of the Court's flag burning cases, Chief Justice Rehnquist questioned whether flag burners are seeking to communicate any particularized message: "Far from being a case of 'one picture being worth a thousand words,' flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others." *Id.* at 432.

[32] The merger doctrine of copyright law recognizes that there exist cases where the speaker's mode of expression and message are so intertwined that they cannot in fact be separated. Veeck v. Southern Bldg. Code Congress Intern, Inc., 293 F.3d 791, 820-21 (5th Cir. 2002). An example of such a "merger" between mode and message is a line on a map to represent a gas line. Kern River Gas Transmission Co. v. Coastal Corp., 899 F.2d 1458 (5th Cir. 1990).

[33] Cohen v. California, 403 U.S. 15, 26 (1971). *See also* Justice Kennedy's opinion in *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 805 (1996): "In scientific programs, the more graphic the depiction (even to the point of offensiveness), the more accurate and comprehensive the portrayal of the truth may be. Indecency often is inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power." Justice Harlan also raised as a concern that there could be cases where the government "might . . . seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." *Cohen*, 403 U.S. at 26. It is primarily because of this concern that I argue in this article that courts need to subject to closer review mode regulations than regulations directed merely at the time, place or manner by which individuals distribute speech to others. *See infra* notes 48-51 and accompanying text.

message and its potential impact on any who might receive it can be divorced from the words that are the vehicle for its expression is transparently fallacious."[34] Less categorically, Justice O'Connor in her opinion for the Court in *City of Erie v. Pap's A.M.*,[35] one of the Court's nude dancing cases, expressed a similar concern that there may be cases in which "banning the means of expression so interferes with the message that it essentially bans the message."[36]

There is the separate danger, as Justice Harlan noted for the Court in *Cohen*, that even if an alternative phrasing may communicate a speaker's abstract ideas as effectively as those words he is forbidden to use, it is doubtful that the sterilized message will convey the emotion that is an essential part of some if not most communications.[37] As Justice Harlan implies, the Court has recognized that the First Amendment protects the expression of feelings as well as the expression of thoughts.[38] Justice Harlan is correct that a speaker may have chosen one mode over other modes because the speaker believed the chosen method best allowed the speaker to convey the emotional force of his or her feelings. However, Justice Harlan is incorrect if he is also implying that a speaker cannot communicate essentially the same feeling in more than one way. Whereas *Cohen* sought to convey the depth of his anti-war feelings about the Vietnam War by using profanity, O'Brien sought to convey the same sense of outrage about the same war by burning his draft card. Were someone to have seen both Cohen's jacket and O'Brien's act, the person would have concluded that while

---

[34] FCC v. Pacifica Foundation, 438 U.S. 726, 773 (1978) (Brennan, J., dissenting).

[35] 529 U.S. 277 (2000).

[36] *Id.* at 293.

[37] Justice Harlan wrote:

> Additionally, we cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated.

Cohen v. California, 403 U.S. 15, 25-26 (1971).

[38] *See* Board of Educ., Island Trees Union Free School Dist. v. Pico by Pico, 457 U.S. 853, 868 ("officials cannot suppress expressions of feeling with which they do not wish to contend") (Brennan, J., announcing the judgment of the Court); *See also* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 805 (1996) ("In artistic or political settings, indecency may have a strong communicative content, protesting conventional norms or giving an edge to a work by conveying 'otherwise inexpressible emotions'.") (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) (citation omitted).

each had utilized a different mode of expression, both sought to express basically the same feeling of antipathy toward the Vietnam War.

On balance, therefore, the distinction between mode and message remains valid and useful. More importantly, as discussed in Section III, the distinction would enable the Court to avoid several major analytical mistakes and achieve a far more coherent analytical framework in cases involving First Amendment challenges to regulations of the mode of expression.

B. *The Distinction Between Laws Regulating Mode of Expression and Those Regulating the Time, Place and Manner of the Distribution of the Speech*

There is also a difference between the mode by which people express themselves and the method by which they distribute their speech to others. As mentioned above, the mode of speech is the particular words, musical notes, pictures and the like that a speaker uses to convey his or her ideas and feelings. The distribution of speech is the mechanical method of delivering the speech to recipients. Generally, cases regarding a "time, place and manner restriction" involve government regulation of the methods by which speakers distribute their speech to others and not the mode by which they convey their thoughts and feelings.[39]

The Court has recognized a distinction between speech and the ways by which speech is distributed. The Court at times has defined the latter as "speech-related conduct,"[40] or as "protected First Amendment Activity"[41] a concession that what the government is regulating is not technically speech. Appropriately, however, in light of the instrumen-

---

[39] Examples of time, place and manner regulations targeting the method by which individuals distribute speech to others to which the Court has subjected to First Amendment review include: (1) time restrictions, *see, e.g.,* Grayned v. City of Rockford, 408 U.S. 104 (1972) (regulating when protestors can demonstrate next to a school); Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994) (restricting when protestors can protest adjacent to an abortion clinic); (2) place restrictions, *see, e.g.*, Heffron v. Int'l Soc'y for Krishna Consciousness Inc., 452 U.S. 640 (1981) (restricting where leafleters can stand at a state fair); Lee v. Int'l Soc'y for Krishna Consciousness Inc., 505 U.S. 830 (1992) (banning the distribution of literature inside an airport terminal); (3) manner restrictions, *see, e.g.,* Ward v. Rock Against Racism, 491 U.S. 781 (1989) (regulating the use of loudspeakers in a public park); Kovacs v. Cooper, 336 U.S. 77 (1949) (regulating the use of sound trucks on city streets).

[40] *See, e.g.,* Hill v. Colorado, 530 U.S. 703, 707 (2000) ("At issue is the constitutionality of a 1993 Colorado statute that regulates *speech-related conduct* within 100 feet of the entrance to any health care facility") (emphasis added).

[41] *See, e.g.*, Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 656 (1981) (Brennan, J., concurring in part and dissenting in part) (identifying as three types of protected First Amendment activity: distribution of literature, sale of literature, and solicitation of funds).

tal purposes of the First Amendment,[42] the Court has extended First Amendment protection to cover the methods by which people distribute speech to others.[43] However, as previously noted, such protection has generally involved a much more deferential standard of review than that applied to regulations which directly concern the content or formulation of the speech.[44]

From both the speaker's and the market's perspective, content and mode are also generally more important than the method of distribution.[45] So long as the message gets to the intended audience, neither the speaker nor the audience should care much about the logistics of the delivery. A speaker denied the right, for example, to post a campaign

[42] Both the Supreme Court and First Amendment scholars have highlighted the indispensable role free speech plays, for example, in the processes by which people obtain knowledge and govern themselves. For judicial authority recognizing the importance free speech plays in the process for advancing knowledge and discovering truth, see, *e.g.,* Whitney v. California, 274 U.S. 357, 375 (1927) ("[f]reedom to think as you will and to speak as you think are indispensable to the discovery and spread of political truth") (Brandeis, J., concurring). For scholarly authority, see, *e.g.,* JOHN STUART MILL, ON LIBERTY, 31-99 (Gryphon Editions 1992) (1859); THOMAS EMERSON, THE SYSTEM OF FREEDOME OF EXPRESSION, 6 (Random House 1971). For judicial authority recognizing the way in which free speech fosters the process of collective deliberation, *see, e.g,* Mills v. Alabama, 384 U.S. 214, 218 (1966) ("[t]here is practically universal agreement that a major purpose of . . . [the First] Amendment was to protect the free discussion of governmental affairs"). For scholarly authority, *see, e.g.,* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (Harper Collins Publishers 2000) (1948); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (The Free Press 1993).

[43] Methods by which speakers distribute speech to which the Court has extended First Amendment protection include: (1) mail, *see* Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988); (2) loudspeakers, *see* Saia v. New York, 334 U.S. 558 (1948); (3) newsracks, *see* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988); (4) billboards, *see* Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981); (5) yard signs, *see* City of Ladue v. Gilleo, 512 U.S. 43 (1994); (6) leafleting, *see* Schneider v. New Jersey, 308 U.S. 147 (1939); (7) canvassing door to door, *see* Martin v. City of Struthers, 319 U.S. 141 (1943); (8) broadcasting, *see* Columbia Broad., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973); (9) cable, *see* Denver Area Educational Telecomms. Consortium Inc. v. FCC, 518 U.S. 727 (1996) (10) Internet, *see Reno v. ACLU,* 521 U.S. 844 (1997); (11) movie theaters, *see* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); (12) demonstrating, *see* Edwards v. South Carolina, 372 U.S. 229 (1963); (13) speaking from a soapbox, *see* Feiner v. New York, 340 U.S. 315 (1951).

[44] *See supra* note 9 and accompanying text.

[45] Some speakers might be willing to give up a particular mode of expression in exchange for being allowed to use a particular method of distribution. For example cigarette companies presently are banned from advertising on television. To be allowed to do so, cigarette companies might well agree not to use in their ads images such as "Joe Camel" that the government believes are designed both to glamorize smoking and to entice underage smokers. Of course, the lust to advertise over the airwaves for some companies might be so powerful that these companies might even agree to modify their message as a condition for being able to advertise on televison or radio.

poster on a public utility pole[46] will normally be able to find alternative methods of distribution.[47] By contrast, a speaker told not to criticize the government, or not to do so with the words he wanted to use, will be permanently stifled to a certain degree. So long as the speaker is free to determine the message, and the way the message is expressed, the marketplace of ideas should get the benefit of the message, even if the government restricts the particular time, place or manner by which the message reaches the audience.[48] Moreover, the Court's recognition that the First Amendment values speaker self-actualization likewise supports giving greater recognition to the speaker's mode of expression than to the methods by which speakers distribute their speech to others.[49]

III. Placing Regulations of the Mode of Expression in a Middle Category with a Middle Standard of Review

The Court has explained that its purpose for drawing a distinction between content-based and content-neutral regulations is to assist the Court in determining the appropriate standard of review it should apply to First Amendment challenges to particular government regulations.[50] The Court wants to concentrate its time and effort by looking most closely at those regulations where the likelihood is greatest that

---

[46] *See* Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) (upholding the authority of a city for aesthetic reasons to prohibit the attaching of signs to utility poles).

[47] *Id.* at 812 ("The Los Angeles ordinance does not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public property is prohibited") (footnote omitted). Moreover, the likelihood is remote that by regulating the method by which speakers distribute speech to others, the government incidentally will suppress any message the speaker is seeking to convey. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 562-63 (1981) (Burger, C.J., dissenting) ("The messages conveyed on San Diego billboards – whether commercial, political, social, or religious – are not inseparable from the billboards that carry them. These same messages can reach an equally large audience through a variety of other media: newspapers, television, radio, magazines, direct mail, pamphlets, etc.").

[48] Of course, speakers may choose one method of distribution over others for reasons that they deem to be very important, including matters of cost and convenience. *See e.g.,* City of Ladue v. Gilleo, 512 U.S. 43, 57 (1994) ("Residential signs are an unusually cheap and convenient form of communication"). In the end, however, what speakers care most about in their selection of a means by which to distribute their speech is that they are able to select a method that allows them to reach those to whom they are most interested in reaching in a timely fashion.

[49] *See infra* note 60 and accompanying text.

[50] *See supra* note 7. *See also* Frisby v. Schultz, 487 U.S. 474, 481 (1988) ("[t]he appropriate level of scrutiny is initially tied to whether the statute distinguishes between prohibited and permitted speech on the basis of content").

the government engaged in covert censorship.[51] For obvious reasons, the Court finds regulations that facially discriminate on the basis of what speakers say (content-based) to be more suspect[52] than regulations that merely regulate the time, place or manner by which speakers distribute their speech to others (content-neutral).[53] Accordingly, the

[51] Today the Court sees as its primary task in its enforcement of the First Amendment guarantee of freedom of speech to be that of rooting out covert censorship. Just as the Court continues to believe that governmental racism still exists but is harder to detect because governments now know better than to acknowledge that racism was a motivating factor in their enactment or enforcement of policy, so too the Court believes that at times governments still engage in censorship but similarly seek to hide what they know to be an illegitimate basis for government action. *See infra* note 52.

[52] The Court's reason for finding that a regulation that facially discriminates on the basis of what speakers say constitutes *prima facie* evidence of covert censorship has been explained perhaps most clearly by Professor Geoffrey Stone:

> Anyone with any knowledge of human nature should naturally assume that the decision to adopt almost any content-based restriction might have been affected by an antipathy on the part of at least some legislators to the ideas or information being suppressed. The logical assumption, in other words, is not that there is not improper motivation but, rather, because legislators are only human, that there is a substantial risk that an impermissible consideration has in fact colored the deliberative process.

Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 106 (1978). The Court has expressed the same view in several cases. Consol. Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y., 447 U.S. 530, 536 (1980) (Souter, J., dissenting) ("[W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views'") (citation omitted); City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 455 (2002) ("Because content-based regulation applies to expression by very reason of what is said, it carries a high risk that expressive limits are imposed for the sake of suppressing a message that is disagreeable to listeners or readers, or the government."); City of Ladue v. Gilleo, 512 U.S. 43, 60 (1994) ("[c]ontent based speech restrictions are especially likely to be improper attempts to value some forms of speech over others, or are particularly susceptible to being used by the government to distort public debate").

[53] In *Alameda Books, Inc.*, Justice Souter explained why, as a comparative matter, the Court is less suspicious of content-neutral time, place and manner restrictions than those that are content-based:

> The comparatively softer intermediate scrutiny is reserved for regulations justified by something other than content of the message, such as a straightforward restriction going only to the time, place or manner of speech or other expression. It is easy to see why review of such a regulation may be relatively relaxed. No one has to disagree with any message to find something wrong with a loudspeaker at three in the morning. . the sentiment may not provoke, but being blasted out of a sound sleep does.

City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 455-56 (2002) (internal citation omitted) (Souter, J., dissenting). Justice Powell likewise in *Consol. Edison Co. v Public Serv. Comm'n,* 447 U.S. 530 (1980) offered a similar explanation for why the Court needs to look more carefully at content-based regulations than at content-neutral regulations:

> [T]he essence of time, place and manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals. No matter what its message, a roving sound truck that blares at 2 a.m. disturbs neighborhood tranquility. A restriction that regulates only the time, place or manner of

Court has examined the former kinds of regulations more closely than the latter.

The Court should subject regulations that target modes of expression to a standard of review that is in between the standards the Court presently uses when reviewing regulations that target messages and those aimed at the methods of distribution. There are two basic reasons why a regulation of a mode of expression should be subjected to a middle level of scrutiny. First, mode-of-expression regulations should be treated as a distinct, middle category because they raise a moderate risk of government censorship. As noted above, the primary purpose of the First Amendment's protection of speech is to restrict government censorship. By censorship, I mean the intentional effort of a government to shape the course of discussion in the marketplace of ideas by limiting the freedom of certain speakers to express certain ideas or feelings.[54] At the heart of the First Amendment is the presumption that the government is often tempted to censor what speakers want to say.[55]

---

speech may be imposed so long as it is reasonable. But when regulation is based on the content of speech, governmental action must be scrutinized more carefully . . .

Id. at 536.

[54] The Court has recognized in numerous cases that the *core evil* the First Amendment was designed to prohibit is governmental censorship. FCC v. Pacifica Foundation, 438 U.S. 726, 745-46 (1978) ("[I]t is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas"); Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); FCC v. League of Women Voters of California, 468 U.S. 364, 383-384 (1984) ("A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a 'law . . . abridging the freedom of speech, or of the press.'"); Young v. American Mini Theaters, Inc., 427 U.S. 50, 63 (1976) ("[T]he use of streets and parks for the free expression of views on national affairs may not be conditioned upon the sovereign's agreement with what a speaker may intend to say."); City of Los Angeles v. Alameda Books, Inc. 535 U.S. 425, 455 (2002) (Souter, J., dissenting) ("[m]erely protecting listeners from offense at the message is not a legitimate interest of the government. . .").

[55] The classic explanation for the government's propensity to engage in censorship was offered by Justice Holmes in *Abrams v. United States*, 250 U.S. 616 (1919):

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises.

Id. at 624.

Moreover, self-interest and/or the instinct of self-preservation oftentimes will motivate those in power to censor their critics even when they believe the criticism is well founded. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 n. 11 (1978) ("Freedom of expression has particular significance with respect to government because '[i]t is here that the state has a special incentive to repress opposition and often wields a more effective

Therefore, when the government regulates speech on the basis of its content, the First Amendment strongly suspects the government is trying to suppress speech messages it opposes. When the government bans all loud speaking next to a hospital, it is less likely that the government is trying to censor certain speech messages than just trying to protect the sleep of patients.[56] Thus, the First Amendment distinction between content-based and content-neutral regulation is based on the perceived risk of censorship. The regulations with a high risk of censorship, "content-based regulations," need strict scrutiny to uncover and stop unconstitutional censorship.[57] The regulations with a much lower risk of censorship, "content-neutral regulations," require less scrutiny because they are less likely to have been adopted for illegitimate censorial purposes. Mode-of-expression regulations involve a moderate risk of censorship. As such, they require a middle level of scrutiny. At the risk of oversimplifying, suppose that a content-based regulation has a 99% risk of having been adopted for censorial purposes, and a typical content-neutral time/place/manner regulation has only a 1% risk. It would be appropriate to subject the former to strict scrutiny to ferret out the true intent of the regulators on a case-by-case basis, but for reasons of time management and judicial resources to subject the latter to a less time consuming, more deferential standard. A mode-of-expression regulation might be seen as having a 50% risk of being censorship, and thus it would be appropriate to apply a middle level of scrutiny.

---

power of suppression'") *See also* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982).

[56] *See supra* note 53.

[57] Again, the reasons for why the Court subjects content-based classification to strict scrutiny review are similar to the reasons that support the Court's similar stringent review of race-based classifications. *See supra* note 51. Recently Justice O'Connor in *Johnson v. California*, 543 U.S. 499 (2005), restated the Court's rationale for looking carefully at racial classifications:

> The reasons for strict scrutiny are familiar. Racial classifications raise special fears that they are motivated by an invidious purpose. Thus, we have admonished time and again that "absent searching judicial inquiry into the justification for such race based measures, there is simply no way of determining. what classifications are in fact motivated by illegitimate notions of racial inferiority or simply racial politics." We therefore apply strict scrutiny to all racial classifications to "smoke out" illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.

Id. at 505-06 (citations omitted).

The Court's reasoning for subjecting content-based regulations to searching judicial inquiry is the same. The Court sees content-based regulations raising the same special fear that they were enacted to further an illegitimate purpose, that being censorship. *See supra* note 51.

Second, even if there was no intent to censor, by its very nature a regulation of the mode of an expression has less impact on the marketplace of ideas than a regulation of the underlying content of a message, but more impact on the marketplace of ideas (and clearly on speaker self-actualization) than a regulation that is merely aimed at the method by which the speaker has sought to distribute his speech to others. Unlike a regulation of the message itself (e.g., "thou shalt not criticize the government"), a regulation of a mode just limits how the message can be expressed (e.g., "do not criticize the government by burning your draft card or by using profanity – find some other way to communicate the same message"). On the other hand, the mode regulation has more impact on the speaker's self-expression and the marketplace of ideas than a restriction, for example, on when and where an individual is allowed to leaflet. A regulation which prohibits public nude dancing arguably restricts the dissemination in the marketplace of ideas of whatever message is intended by the nude dancer[58] more than a restriction that says that public nude dancing can occur only in adult clubs and only after 9 P.M. The mode of an expression is more intertwined with the underlying message of an expression than its method of distribution. Matthew Brady could fairly argue that even 1000 words cannot do justice to one of his photographs. Similarly, to tell Picasso that he can speak in favor of either side in the Spanish Civil War, but not by painting *Guernica*, clearly frustrates his ability to express himself. Such regulations of the mode of expression certainly threaten free speech values more than a rule restricting exhibitions of art to certain hours of the day or inside a humidity-controlled room. And, as stated above, the risk of censorship of such mode or anti-painting laws can also be characterized as "middle." A general law against painting is less likely to represent an intent to censor a particular speaker or point of view than a law which says painters cannot paint works with anti-government messages. On the other hand, a law that targets erotic dancing is more likely to represent an intent to censor particular speakers and messages than a law that simply restricts when and where erotic dancers can dance, but not how.

This article's argument that regulations of mode should be afforded a more deferential scrutiny than regulations of underlying messages is admittedly based on the premise that the core purpose of the First Amendment guarantee of freedom of speech is to restrict gov-

[58] But again, if the government allows the nude dancer to perform the same dance wearing pasties and a G string, the dancer will still be able to communicate the same or close to the same erotic message that the dancer was seeking to convey by dancing in the nude.

ernment censorship.[59] But clearly the First Amendment guarantee of freedom of speech has other purposes as well. Another purpose or benefit of the constitutional protection of free speech is the protection of a speaker's self-actualization.[60] A speaker may feel more fulfilled and more free if he or she is permitted to express a view one way – for example, by burning a draft card – than another. A law which says the speaker can protest a war in almost any way, so long as he doesn't burn a draft card, may not significantly stifle the theoretical ability of the speaker to get his message out to his intended audience. But such a law may severely affect the speaker's feeling that he is free to shape his speech the way he desires. In the case of an artist such as Picasso and his masterpiece, *Guernica*, the self-actualization involved in creating the mode of the message may be a more meaningful experience to the speaker, and maybe even to the art-loving but apolitical audience, than the particular anti-war message being conveyed.

When one considers this aspect of the First Amendment, it may make less sense to afford a more deferential standard of review to a regulation of a mode than to the underlying message. An artist might argue that the strictest First Amendment scrutiny is needed to identify

---

[59] *See supra* note 54 and accompanying text.

[60] First Amendment scholars, and to a lesser extent individual justices, have argued that a principal function of the First Amendment guarantee of freedom of speech is to protect speech as a means of self-realization and self-fulfillment. *See* Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982); EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989); THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1971); FREDERICK SCHAUER, FREE SPEECH, A PHILOSOPHICAL ENQUIRY, Ch. 4 (1982); Whitney v. California, 274 U.S. 357, 375 ("Those who won our independence believed that the final end of the State was to make men free to develop their faculties . . . . They valued liberty both as an end and as a means.") (Brandeis, J., concurring); Board of Education v. Mergens, 110 S. Ct. 2356, 2378 (1990) (Marshall, J., concurring) ("[t]o assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship"). Perhaps the clearest recognition by a Supreme Court justice of speaker self-expression as a First Amendment value is found in Justice Marshall's concurrence in *Procunier v. Martinez*, 416 U.S. 396, 422 (1974):

> The First Amendment serves not only the needs of the polity but also those of the human spirit – a spirit that demands self-expression. Such expression is integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic desire for recognition and affront the individual's worth and dignity. . . Such restraint may be the greatest displeasure and indignity to a free and knowing spirit that can be put upon him. . When the prison gates slam behind an inmate, he does not. . . become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end; nor is his quest for self-realization concluded. If anything, the needs for identity and self-respect are more compelling. . . . Whether an O. Henry writing his short stories in a jail cell or a frightened young inmate writing his family, a prisoner needs a medium for self-expression. It is the role of the First Amendment, and this Court to protect those precious personal rights by which we satisfy such basic yearnings of the human spirit.

Id. at 427-428 (Marshall, J., concurring) (internal quotation marks and citations omitted).

and stop laws which stifle creative freedom in the personal choice and design of a mode of expression. In the end, it boils down to how one defines the core values of the First Amendment guarantee of freedom of speech. This author agrees with the current prevailing view of the Court that the primary purpose of the First Amendment guarantee of freedom of speech is to limit government censorship of debate and to protect the marketplace of ideas from government control.[61] Compared to this core value, the speaker's desire for unfettered choice of mode is secondary – secondary, but still real. As such, a law which is shown to be non-censorial might still be struck down under the First Amendment because the benefit of the law is outweighed by the damage to the speaker's freedom of mode. But if the law restricts not only the mode of speech but also the underlying message, then the risk of censorship is so high that a strict scrutiny standard should apply. As for the regulation of the mode of expression, a middle category of review is appropriate for at least two reasons. First, there is a middle risk of censorship, and second, even when there is no censorship, there is an impact on a secondary value of the First Amendment guarantee of freedom of speech: the freedom of the speaker to choose his mode of expression.

IV. The Mode Cases

In this section I discuss several groups of cases involving government regulations of the mode of expression. The failure of the Justices to treat them as distinct mode cases caused numerous problems not the least of which was division within the Court. In addition, I explain how employing the middle "mode" doctrine would enable the Court to apply a more coherent analysis in each case.

I have divided the group of cases into two categories: partially protected and unprotected. I have done so because the Court now distinguishes between what it views as categories of partially but not fully protected speech (e.g., speech harmful to minors and profanity) and what it views as categories of speech that are entirely outside the scope of First Amendment protection (e.g., obscenity and fighting words). As I argue in this article, the Court mistakenly sees both categories as ones of content when, in fact, in most cases[62] both are categories of modes of expression.

---

[61] *See supra* note 54.

[62] While some of the Court's categories of unprotected speech are not categories of modes of expression, several are. I include within the categories of unprotected modes of expression: obscenity, child pornography, fighting words and incitement to riot. Those other categories of unprotected speech the Court has recognized that I do not classify as mode-based are all categories of "unprotected information." Examples include libel, military

A. *Categories of Partially Protected Speech*

1. The Sexually Explicit Zoning Cases

In a series of cases from 1976 to 2002, the Court struggled and failed to reach a consensus on First Amendment analysis of zoning ordinances which targeted theaters showing sexually explicit movies. In the first two cases, in 1976 and 1986, all nine Justices felt compelled to determine at the outset whether the ordinances were "content-based" or "content-neutral." In the most recent case, in 2002, three Justices broke from this simplistic either-or analysis and created a new middle category which they called "content-correlated." This article argues that all of the Justices in all three cases made the same fundamental mistake – they failed to recognize that the zoning laws regulated the mode of the expression, rather than the content of the messages being expressed. If they had employed this distinction, I suggest, they would all have seen that a middle level of scrutiny would have been appropriate.

In the 1976 case, *Young v. American Mini Theaters*,[63] all nine Justices thought the zoning regulation was "content-based" because it distinguished between "adult" and "non adult" movie theaters.[64] For four of the Justices, that was reason enough to subject the ordinance to strict scrutiny review and, applying such review, to then strike down the law.[65] But the other five Justices, while agreeing that the ordinance was "content-based," found reasons for why they did not need to apply strict scrutiny review to the ordinance. Their application of a more deferential standard of review led them to uphold the constitutionality of the regulation, though "content-based." Four of these Justices found it

---

secrets, and false and misleading commercial speech. Although these categories target what speakers say as opposed to how they express themselves, none of them suppress what speakers are thinking or feeling. Rather they target information the government legitimately can suppress because the information is either false or, if truthful, would jeopardize important societal interests such as national security.

[63] 427 U.S. 50 (1976).

[64] In the first paragraph of his opinion, Justice Stevens framed the issue for the Court as follows: "The principle question presented by this case is whether that statutory classification [one that differentiates between X- and PG-rated movies] is unconstitutional because it is based on the *content* of communication protected by the First Amendment." *Id.* at 52 (emphasis added). Whatever their differences with Justice Stevens, the four dissenting justices did not disagree with his characterization of the challenged regulation as content-based. Justice Stewart began his dissent by noting that "The Court today holds that the First and Fourteenth Amendments do not prevent the city of Detroit from using a system of prior restraints and criminal sanctions to enforce *content-based* restrictions on the geographic location of motion picture theaters that exhibit nonobscene but sexually oriented films." *Id.* at 84 (Stewart, J., dissenting) (emphasis added).

[65] See the dissenting opinion authored by Justice Stewart and joined by Justices Brennan, Marshall, and Blackmun. Id. at 84-85.

unnecessary to subject the zoning ordinance to strict scrutiny review because it targeted speech with "lower value."[66] As noted by the five other Justices, this analysis itself contravenes the First Amendment doctrine that prohibits the government from regulating speech based on the perceived value of its subject matter or content.[67] Justice Powell,

---

[66] In Part III of the opinion written by Justice Stevens, and joined by Justices White, Rehnquist and Chief Justice Burger, Justice Stevens wrote:

> Moreover, even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser magnitude that the interest in untrammeled political debate that inspired Voltaire's immortal comment. 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 for placing them in a different classification from other motion pictures.

Id. at 70-71 (plurality opinion).

Even earlier in Part I of his opinion, Justice Stevens, writing for five justices, defended his rejection of the challenger's vagueness challenge on the basis of his assessment that the zoning ordinance targeted speech that while not outside the scope of First Amendment protection, was, however, undeserving of full-blown First Amendment protection:

> Since there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance, and since the limited amount of uncertainty in the ordinances is easily susceptible of a narrowing construction, we think this is an inappropriate case in which to adjudicate the hypothetical claims of persons not before the Court.

Id. at 61.

[67] To the dissenting justices, the primary reason Justices Stevens, White, Rehnquist, and Chief Justice Burger upheld the Detroit zoning ordinance was because they thought the speech targeted by the ordinance, while not falling within any category of unprotected speech, was nonetheless lacking in sufficient social worth to warrant full-blown First Amendment protection. Justice Blackmun noted: "As to the third reason, that 'adult' material is simply entitled to less protection, it certainly explains the lapse in applying settled vagueness principles, as indeed it explains this whole case. *Id.* at 96 (Blackmun, J., dissenting). Likewise Justice Stewart wrote:

> By refusing to invalidate Detroit's ordinance the Court rides roughshod over cardinal principles of First Amendment law, which require that time, place, and manner regulations that affect protected expression be content neutral except in the limited context of a captive or juvenile audience. . . In place of these principles the Court invokes a concept wholly alien to the First Amendment. Since '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.' the Court implies that these films are not entitled to the full protection of the Constitution. This stands "Voltaire's immortal comment" on its head. For if the guarantees of the First Amendment were reserved for expression that more than a "few of us" would take up arms to defend, then the right of free expression would be defined and circumscribed by current popular opinion. The guarantees of the Bill of Rights were designed to protect against precisely such majoritarian limitations on individual liberty.

the fifth Justice, who likewise subjected the regulation to less than strict scrutiny review,[68] did so by claiming that the Court should be less concerned about content-based zoning regulations than other kinds of content-based regulations.[69] None of the other eight Justices endorsed this position. In the next sexually explicit zoning case the Court agreed to review in 1986, Justice Powell himself abandoned reliance on this rationale, although Justice Kennedy, who replaced Justice Powell on the Court, made the same argument in the third case decided by the Court in 2002. Like Justice Powell, however, Justice Kennedy was unable to get any other justice to agree with the analysis. Frankly, the argument makes little sense. If a city passed a zoning law that forbade opponents of a certain governmental policy from living in a certain neighborhood, would the law be entitled to less than strict scrutiny under the First Amendment because it involved zoning rather than some other form of regulation?[70]

In *American Mini Theaters* all of the Justices could be faulted for their analyses. First, all nine Justices can be criticized for categorizing the ordinance as content-based and for failing to see that it regulates the mode of the speech, not the content of the message. This failure led four of the Justices – the dissenters – to make the further mistake of

---

Id. at 85-86 (Stewart, J., dissenting) (internal footnote omitted).

[68] Justice Powell reviewed the Detroit zoning ordinance under the four part test of *United States v. O'Brien,* a test that in practice has functioned no differently than mere rationality review and has been a test that the government has never failed to pass. *See generally* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis,* 88 HARV. L. REV. 1482 (1975); Dean Alfange, Jr., *Free Speech and Symbolic Conduct: The Flag Draft-Card Burning Case,* 1968 SUP. CT. REV. 1. Not surprisingly, Justice Powell found Detroit's ordinance as passing the *O'Brien* test. Young v. American Mini Theaters, 427 U.S. 50, 79-82 (1976) (Powell, J., concurring).

[69] Justice Powell saw Detroit's zoning ordinance as posing a lesser threat to First Amendment values than other kinds of speech regulations, and for that reason he believed it unnecessary to subject the ordinance to strict scrutiny review. To Justice Powell, a law that merely restricts where speech can be disseminated does not threaten free speech values in the same way as do laws that restrict what people say or that restrict the ability of listeners to hear what speakers say. A law that restricts where movie theaters can be located is analogous to a law that regulates where bookstores can be located or where leafleters can handbill. Such laws do not implicate the core concern of the First Amendment. Justice Powell wrote, "Our cases reveal, however, that the central concern of the First Amendment in this area is that there be a free flow from creator to audience of whatever message a film or book might convey." *Id.* at 77. Justice Powell did not see Detroit's regulation as implicating the core concern because, as he observed: "In this case, there is no indication that the application of the Anti-Skid Row Ordinance to adult theaters has the effect of suppressing production of or, to any significant degree, restricting access to adult movies." *Id.*

[70] At the end of his opinion in *American Mini Theaters,* even Justice Powell acknowledged that a government could engage in covert censorship by the enactment of a zoning regulation. *Id.* at 84 (Powell, J., concurring) ("[C]ourts must be alert to the possibility. . . of using the power to zone as a pretext for suppressing expression").

subjecting a mode-based regulation to strict scrutiny review, when more appropriately they should have subjected the regulation to intermediate review. Although Justice Stewart equated the regulation to the one which the Court struck down in *Police Department of Chicago v. Mosley*,[71] the regulations are very different. The Chicago ordinance was content-based. Facially, it distinguished on the basis of the topic on which speakers sought to picket. The Detroit ordinance, in contrast, was mode-based. Facially, it applied to all topics, but distinguished between sexually and non-sexually-explicit speech.

The five Justices in the majority also made additional analytical missteps. As noted previously, four felt compelled to unconstitutionally denigrate the value of the regulated speech in order to justify their failure to apply strict scrutiny to what they saw as a content-based regulation. The fifth, Justice Powell, used a different but no less objectionable ploy to not apply strict scrutiny to what he also saw as a content-based regulation. His way out was simply to make an exception for content-based *zoning* regulations, an illogical distinction that has garnered almost no support.[72]

Ten years later, the Court revisited the sexual explicit speech zoning issue in *City of Renton v. Playtime Theatres, Inc.*,[73] but with no more success. As with *American Mini Theaters*, in *City of Renton* eight Justices[74] repeated the mistake of thinking that they had to decide first whether the zoning regulation was content-based or content-neutral. In so doing, they again failed to recognize that the zoning ordinance regulated the mode of speech, not the content of the message or the mere time, place or manner of the distribution of the speech. Whereas in *American Mini Theaters* all nine Justices labeled the regulation "content-based," this time, six Justices[75] labeled the ordinance as "content-neutral" and two defined it as "content-based."[76]

---

[71] *Id.* at 84, n. 2.

[72] *See supra* notes 67-70 and accompanying text.

[73] 475 U.S. 41 (1986).

[74] Justice Blackmun, the ninth justice, simply concurred in the result. *Id.* at 55. Because he did not explain why he voted to sustain an ordinance that was similar to the one he had voted to strike down ten years earlier, it is unclear as to whether or not he still saw zoning regulations that target adult movies as content-based. It is also unclear whether or not he subjected the regulation to the same strict scrutiny review he had used in striking down Detroit's zoning regulation in *American Mini Theaters*. One can infer from his unwillingness to join Justice Rehnquist's majority opinion, however, that he objected to something the majority said. Did he disagree with the majority's characterization of the City of Renton ordinance as "content-neutral?" Or with the majority's subjection of the ordinance to less than strict scrutiny review, with both conclusions, or with something entirely different?

[75] Justices Rehnquist, White, Powell, Stevens, O'Connor and Chief Justice Burger.

[76] Justices Brennan and Marshall.

The fact that the six-Justice majority in *City of Renton* labeled as "content-neutral" a regulation that was almost identical to one that five of these same Justices had defined as "content-based" in *American Mini Theaters* ten years earlier demonstrates the inadequacy of the simplistic distinction. To make matters worse, the basis for the majority's new position in *City of Renton* was a hopelessly flawed mangling of basic principles of constitutional analysis, and was immediately and correctly branded as such by the dissent. Before *City of Renton*, a law was deemed to be content-based if, on its face, it distinguished speech based on what the speaker sought to say – a seemingly simple, almost definitional test. For the first time, in *City of Renton*, a majority of the Justices held that a regulation that clearly distinguished speech based on what the Court in *American Mini Theater* had considered content (i.e., sexually explicit or "adult" speech versus other kinds of speech) was not "content-based" because the *purpose* of the regulation related to a non-speech so-called "secondary effect." In this case Justice Rehnquist said the regulation was content-neutral because the purpose of the regulation against the adult theaters was, among other things, to reduce crime associated with adult movies (a secondary effect), not to restrict the movies themselves (a primary effect).[77]

The fundamental flaw of this "secondary effects" test was precisely identified by Justice Brennan in his dissent. Justice Brennan wrote, "the fact that adult theaters may cause harmful 'secondary' land use effects may arguably give Renton a compelling reason to regulate such establishments; it does not mean, however, that such regulations are content neutral."[78] Traditional First Amendment constitutional analysis is composed of two separate phases – first, determine the standard of review, and second, apply the standard. Justice Brennan's dissent points out that the majority's secondary effects test imports into the threshold first analysis – what standard to apply — a factor that properly belongs in the second-phase analysis of whether the law is justified. Such a premature consideration of a phase-two factor in a phase-one analysis undermines the purpose of the two-part test, which is to apply strict scrutiny to those laws which raise a high risk of censorship and deferential scrutiny to those which raise a low risk of censorship. Before *City of Renton*, the Court employed a simple proposition that a law that treated different speech differently because of its content

[77] *See* Boos v. Barry, 485 U.S. 312, 321 (1988) ("Regulations that focus on the direct impact of speech on its audience present a different situation. Listeners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*").

[78] City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 56 (1986) (Brennan, J., dissenting).

raised a high risk of censorship and needed strict scrutiny, while laws that did not distinguish speech based on its content raised a lower risk and were entitled to deferential scrutiny. Only after the level of scrutiny was determined would the Court, employing the appropriate standard of review, ask whether there was in fact censorship, and whether the purpose of the law justified the impact on speech. In *City of Renton,* the Court uses the purpose of the law to determine the standard of review.

The fallacy underlying this approach becomes even more obvious when one compares it to the two-part analysis in the Equal Protection Clause of the Fourteenth Amendment. Under the Equal Protection Clause, the Court first asks if a law employs a suspect classification such as race. If the answer is yes, the Court then applies a strict scrutiny test.[79] In the second phase, the Court considers the purpose of the law. If there is a legitimate non-racist purpose, such as a "secondary effect," if you will, the Court might uphold the law in spite of the law's use of the suspect racial categorization that triggered the use of the strict scrutiny review standard. Consider, for example, a law which said only whites would be tested for a certain disease which science had established did not afflict members of non-white races. On its face the law distinguishes on the basis of race, and thus triggers strict scrutiny review. But since the purpose of the law is simply to use medical resources efficiently, arguably a compelling need, the law could be upheld under the second phase of the analysis. The law is racially based, so it triggers strict scrutiny. But it has a useful non-racist purpose, so it may be upheld notwithstanding its employment of a racial classification.[80]

If one were to apply the Court's *City of Renton* secondary effects analysis, one would categorize the law as nonracial and apply a deferential standard of review, because the law, although race-based, had a non-racist purpose. But this categorization short-circuits and undermines the purpose of the two-part test, which is to apply strict scrutiny to facially racial laws because such laws are inherently more likely to have been enacted for an illegitimate racist purpose and thus need to be reviewed more carefully.[81] Similarly, laws which are content-based should be subjected to strict scrutiny review under the First Amendment because they are more likely to involve censorship than content-neutral laws.[82] As Justice Brennan said, a compelling non-censorial

[79] City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

[80] *See, e g.,* Grutter v. Bollinger, 539 U.S. 306 (2003).

[81] *See supra* note 57.

[82] *See supra* note 52.

purpose for a content-based law does not make it content-neutral, it just makes it a constitutional content-based law.[83]

However, it is the thesis of this article that both the majority and the dissent in *City of Renton* are wrong. They both erred because they failed to recognize that the law in question regulated the mode of the speech, not the underlying message, and thus a middle level of scrutiny should have applied. This is because the zoning regulation regulated on the basis of the mode of the speech, not the content of the message (strict scrutiny) or the mere time, place or manner of the distribution of the speech (deferential scrutiny). Under my middle-category analysis, what the Court in *City of Renton* should have done was to recognize that the regulation regulated the "mode" of the expression. As stated above, such a mode case raises a moderate risk of censorship, and thus should be subjected to a middle level of scrutiny. The dissent was wrong to subject the zoning regulation to strict scrutiny review, but the majority also was wrong to subject the regulation to what amounted to mere rationality review.

A standard between strict and deferential scrutiny is most appropriate in these cases. Presumably, speakers with viewpoints on sex will still be able to express their viewpoints, even in neighborhoods with restrictions like those the *City of Renton* adopted. But they will not be able to do so using the mode of expression of sexually explicit speech. Such a mode of expression restriction poses a greater threat to First Amendment values than a regulation telling theater owners not to show movies that are too loud, but poses less of a threat to First Amendment values than a regulation that tells theater owners not to show movies that contain a pro-sex viewpoint. The mistake that all of the Justices in *City of Renton* made was that they thought they needed to place the regulation in one or the other extreme category. But by seeing that the challenged classification distinguished between modes of expression, as opposed to either ideas or solely between methods by which individuals distribute their speech, the Court could have subjected the regulation to a middle "mode" standard of review. That debate over content-neutral versus content-based which befuddled and divided the Court in *City of Renton* was an unnecessary debate. It is like a debate over whether a teenager is a child with a mandatory 8 P.M. bedtime or an adult with no curfew. This article suggests a middle category: the mode regulation is a teenager with a 10 P.M. bedtime.

[83] *See supra* note 78 and accompanying text.

Finally, in 2002, in *City of Los Angeles v. Alameda Books, Inc.*,[84] a small group broke from the pack and recognized a middle category for the sexually explicit speech zoning ordinance. Justices Souter, Stevens and Ginsburg took the encouraging step of arguing that the regulation occupied "a kind of limbo."[85] Their analysis came tantalizingly close to the thesis proposed in this article, but fell just short.[86] Justice Souter could have built a consensus around his middle position if he had argued that the middle category raised a middle risk of censorship because it targeted the mode of the speech, not the underlying message or the method by which individuals distribute their speech to others. Characterizing the ordinance as "content-correlated"[87] just reinforced the Court's traditional mistake of seeing regulations solely in terms of their relationship to content. By recognizing the mode of the speech as a distinct element from content, Justice Souter would have composed a much more logical basis for the status of his new middle category.

Aside from the breakthrough of the Souter group of three, the other Justices in *Alameda* just repeated the same mistakes as in the prior decisions. Justices O'Connor, Scalia, Thomas and the Chief Justice followed the majority in *City of Renton* and applied the secondary

---

[84] 535 U.S. 425 (2002).

[85] *Id.* at 457 (Souter J., dissenting).

[86] Thus, Justice Souter correctly challenged the plurality's characterization of the Los Angeles ordinance as "a kind of time, place and manner regulation," because he recognized that the Los Angeles ordinance did not simply regulate the method by which people distribute speech but confined its regulation to theaters that exhibited movies which contained sexually explicit scenes. *Id.* at 456. Justice Souter observed:

> Although this type of land-use restriction has even been called a variety of time, place, or manner regulation, equating a secondary-effects zoning regulation with a mere regulation of time, place, or manner jumps over an important difference between them. A restriction on loudspeakers has no obvious relationship to the substance of what is broadcast, while a zoning regulation of businesses in adult expression just as obviously does. And while it may be true that an adult business is burdened only because of its secondary effects, it is clearly burdened only if its expressive products have adult conduct.

Id. at 456-57 (Souter, J., dissenting) (internal citation omitted). However, Justice Souter failed to recognize that what the Los Angeles ordinance was targeting was the mode of expression. Instead he incorrectly saw the ordinance as referencing what speakers were saying rather than how they were expressing themselves and for that reason, he concluded that "this kind of regulation, though called content- neutral, occupies a kind of limbo between full-blown, content-based restrictions and regulations that apply without any reference to the substance of what is said." *Id.* at 457 (Souter, J., dissenting).

[87] "It would in fact make sense to give this kind of zoning regulation a First Amendment label of its own, and if we called it content-correlated, we would not only describe it for what it is, but keep alert to a risk of content-based regulation that it poses." *Id.* (Souter, J., dissenting). While Justice Souter is wrong in his belief that "content-correlated" describes accurately the nature of sexually explicit zoning regulations, he is correct that such regulations pose some risk of censorship and for that reason the Court needs to review them somewhat carefully.

effects test to call the regulation content-neutral.[88] Justice Kennedy followed the approach Justice Powell had taken in *American Mini Theaters*. While finding the ordinance "content-based,"[89] Justice Kennedy thought it unnecessary to subject the regulation to strict scrutiny review because he found zoning regulations to be less suspect by nature than other forms of regulation, such as taxes or criminal prohibitions.[90] Justice Kennedy can be faulted in the same way Justice Powell can be faulted for failing to recognize that these adult movie zoning regulations draw a distinction on the basis of mode of expression, and for that reason the Court should look at them more carefully than if they imposed the same location restriction on all movie theaters.[91]

In all three sexually explicit speech zoning cases the Court demonstrated the major failings caused by not recognizing mode-based regulations as a distinct category of speech regulation. First, the Court mistakenly assumed that all regulations subject to First Amendment review can be classified neatly as either "content-based" or "content-neutral." Second, some of the Justices, in order to justify applying a deferential standard of review, thought it appropriate to denigrate the value of certain speech, comparing sexually-oriented speech unfavorably to political speech. Third, a majority of the Court attempted to resolve the threshold question of whether a regulation is content-based or content-neutral by asking the second step question of whether the regulation can be *justified* by non-content-based purposes. Fourth, some Justices sought to avoid the problem of applying strict scrutiny to what

---

[88] And like the majority in *City of Renton*, the plurality voted to sustain the regulation after subjecting it to what again amounted to mere rationality review. *Id.* at 429 (plurality opinion).

[89] Like the dissent, Justice Kennedy also criticized the majority's characterization of the Los Angeles ordinance as "content-neutral," finding the designation as "imprecise" and as "something of a fiction" *Id.* at 445, 448. As he explained, "[w]hether a statute is content-neutral or content-based is something that can be determined on the face of it; if the statute describes speech by content then it is content-based." *Id.* at 448. Justice Kennedy's methodology for defining regulations as content-based or content-neutral is consistent with that the Court took prior to *City of Renton* and is at odds with the majority's adoption in *City of Renton* of the secondary effects purpose approach. While the justice can be commended for his criticism of the plurality's content-neutral characterization of adult theater zoning ordinances as well as his assertion that "whether a statute is content-neutral or content-based is something that can be determined on the face of it," *id.*, Justice Kennedy, however, can be faulted for his conclusion that zoning regulations that distinguish between sexually and non-sexually explicit speech should be labeled as content-based. Finally, because such regulations are in fact mode-based, Justice Kennedy was also correct to conclude that the "ordinance is not so suspect that it must be subject to the strict scrutiny that content-based laws demand in other instances." *Id.* at 447.

[90] *Id.* at 449.

[91] *See supra* notes 67-70 and accompanying text.

they saw to be a content-based regulation by simply excepting from such review one kind of regulation – zoning regulations.

As I will discuss in the following sections, one or more of these failures reappears whenever the Court attempts to analyze whether a regulation of a mode of expression violates the First Amendment.

2. The Nude Dancing Cases

The Court's failure to recognize that a government restriction applied only to the mode of an expression as opposed to the underlying message also hampered the Court's analysis in *Barnes v. Glen Theatre, Inc.*[92] and *City of Erie v. Pap's A.M.*,[93] two cases dealing with the application of public indecency statutes to nude dancing. The public indecency statutes did not target the message underlying or inherent in the affected dances, be that message a general erotic expression (such as a striptease)[94] or a specific story (such as an anecdote about a nudist colony). Instead, application of the laws to the dances targeted the way the dancers were able to communicate their messages. This is the same distinction between mode regulation and message regulation that is the thesis of this article. This failure by the Justices in the nude dancing cases to recognize the regulations as "mode-based" rather than "content-based" or "content-neutral" led the Court to make many of the same mistakes that plagued the Court in the sexually explicit speech zoning cases. And like in *American Mini Theaters* and *Alameda,* the Justices' failure to see these cases as mode cases largely explains their inability to adopt an approach that the majority could support.

---

[92] 501 U.S. 560 (1991).

[93] 529 U.S. 277 (2000).

[94] It could be argued that certain mode restrictions, such as bans on dancers removing the last stitch of clothing, do major damage to the underlying message. A striptease dancer could argue that the point of his or her dance is that a patient viewer gets the reward of full nudity at the end. Requiring the dancer to wear some covering, even at the end of the dance, arguably defeats the message. Or an advocate of full nudity could argue that the inability to conduct a protest in the nude undermines the core meaning of the protest, which might be that full public nudity is acceptable and we shall all find a way to accept it. But the fact that a mode restriction might severely affect the speaker's underlying message does not change the fact that the government adopting the mode restriction is less likely to be engaged in censorship than a government which adopts a message-based restriction. A message-based ban on speech which suggests that patient audiences will be rewarded with full nudity or speech which supports the position that full nudity is acceptable and the public should accept it is clearly more likely to be the product of state censorship than a law against all public nudity. Therefore, this article advocates the position that a mode-based restriction should get an intermediate level of scrutiny because it is only moderately likely to reflect censorship, not because it is always less likely to chill the ability of a speaker to communicate his or her message. However, because a motivated and creative speaker will usually be able to find alternative ways to express his or her message, it is generally true that a mode-based restriction will ultimately chill less speech than a message-based restriction.

With the exception of Justice Souter in *City of Erie,* all of the Justices (including Justice Souter in *Barnes*) repeated the major mistake that all of them made in the sexually explicit speech zoning cases by believing they only had two choices in selecting the applicable standard of review – content-based/strict scrutiny or content-neutral/mere rationality review. As in the zoning cases, the Justices were divided as to which choice was correct. Once again, a minority concluded in both cases that the appropriate standard of review was strict scrutiny because these Justices found the regulations to be "content-based."[95] And as the Justices found in the zoning cases, strict scrutiny review led them to find the application of public nudity laws to nude dancing violated the First Amendment.

But again, as occurred in the zoning cases, a majority of the Justices in both cases opted to subject the regulations to less than strict scrutiny review, although they could not agree on the reasons for doing so. For some of them, their choice of deferential review followed from their determination that the regulations were "content-neutral."[96] Others who similarly opted for deferential review did so, however, by ignoring the First Amendment entirely.[97] And as was the outcome in the zoning cases, for these Justices, with the exception of Justice Souter in *City of Erie*,[98] their application of deferential review led them to vote to uphold the application of public nudity bans to nude dancing.

---

[95] Those characterizing the statute as "content-based" in *Barnes* were Justices White, Marshall, Blackmun and Stevens. Those characterizing the statute in *City of Erie* as "content-based" were Justices Stevens and Ginsburg.

[96] Those characterizing the statute as "content-neutral" in *Barnes* were Justices O'Connor, Kennedy, Rehnquist and Souter. Those characterizing the statute in *City of Erie* as "content-neutral" were Justices O'Connor, Kennedy, Breyer, Souter and Chief Justice Rehnquist.

[97] In *Barnes*, Justice Scalia saw no need to subject the statute to any First Amendment review because the statute, facially, did not target expression as such. As he explained:

> All our holdings (though admittedly not some of our discussion) support the conclusion that "the only First Amendment analysis applicable to laws that do not directly or indirectly impede speech is the threshold inquiry of whether the purpose of the law is to suppress communication. If not, that is the end of the matter so far as First Amendment guarantees are concerned. . . ."

(quoting *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 622-623 (C.A.D.C., 1983) (en banc) (Scalia, J., dissenting)). Barnes v. Glen Theatre, Inc., 501 U.S. at 578 (Scalia, J., concurring in the judgment).

In *City of Erie*, as he had done in *Barnes*, Justice Scalia (along with Justice Thomas) voted to uphold the challenged regulation "not because it survives some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all." City of Erie v. Pap's A.M. , 529 U.S. at 307-308 (Scalia, J., concurring in the judgment) (quoting *Barnes*, 501 U.S. at 572).

[98] Although he characterized the laws in both *Barnes* and *City of Erie* as content-neutral, in *City of Erie* Justice Souter applied to the challenged ordinance a standard of review that

Those Justices applying deferential review did so by repeating the analytical missteps they took in the zoning cases. For example, the Justices who chose to treat the public nudity ban and its application to nude dancing as "content-neutral" did so partly by repeating the mistake of assessing the value of the speech in question. As in the zoning cases, here too they judged sexually explicit speech as less valuable than other speech.[99] But this time, as arguably these same Justices had done in *City of Renton,* they also defended their "content-neutral" characterization by way of the secondary effects test. As discussed above, this test is based on the false logic that a content-based regulation should be treated as content-neutral if there is a non-censorial purpose for the regulation.[100]

Those Justices who saw the application of the public nudity law to nude dancing as content-based similarly repeated mistakes they made in the zoning cases. They believed that all speech regulations fell within the two categories of "content-based" (strict scrutiny) or "con-

---

he conceded was more stringent than that he had applied to the statute in *Barnes.* Justice Souter acknowledged somewhat sheepishly:

> Careful readers, and not just those on the Erie City Council, will of course realize that my partial dissent rests on a demand for an evidentiary basis that I failed to make when I concurred in *Barnes.* I should have demanded the evidence then, too, and my mistake calls to mind Justice Jackson's foolproof explanation of a lapse of his own, when he quoted Samuel Johnson, "Ignorance, sir, ignorance."

City of Erie, 529 U.S. at 317 (internal citation omitted). Justice Souter should be applauded for his decision to rachet up the standard of review (from mere rationality to intermediate review) in cases where the government seeks to enforce a general law regulating conduct not conventionally engaged in by individual for expressive purposes but where the government knows that the defendant engaged in the proscribed conduct for expressive purposes. The reason for subjecting such prosecutions to more careful review is that the prosecution (although not the law) directly targets defendants in those cases where the government knows the defendant engaged in the proscribed conduct as a mode of expression. The government's awareness that it is prosecuting someone for conduct the defendant engaged in for expressive purposes is reason enough to view the government's action as raising a middle risk of censorship. Justice Souter adopted the same more stringent (intermediate) standard of review he used in *City of Erie* in *Alameda* (another case involving the enforcement of a statute against a particular mode of expression).

[99] In *Barnes,* those denigrating the social worth of nude dancing were Justices O'Connor, Kennedy and Chief Justice Rehnquist (who said of erotic nude dancing that "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so"), *Barnes,* 501 U.S. at 565-566 (plurality opinion) and Justice Souter (who found equally applicable to erotic nude dancing what the plurality in *American Mini Theatres* had said about the social worth of adult movies i.e., – "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate.") *Id.* at 584 (Souter, J., concurring in the judgment). In *City of Erie,* the justices denigrating the social worth of erotic nude dancing were again Justices O'Connor, Kennedy and Chief Justice Rehnquist, but now joined also by Justice Breyer. *City of Erie,* 529 U.S. at 289, 294 (plurality opinion).

[100] *See supra* notes 76-81 and accompanying text.

tent-neutral" (deferential review). And like the dissenting Justices in the zoning cases, their "content-based" characterization of the application of the public nudity ban to nude dancing led them to apply strict scrutiny review and find the governmental actions to be unconstitutional.

The dissenting Justices in these nude dancing cases, however, made other mistakes, in addition to those made by the dissenters in the zoning cases. In *City of Renton*, the dissenting Justices rejected the secondary effects test for defining regulations as either content-based or content-neutral. Here, the dissenters seem to accept the appropriateness of the test for determining whether a regulation was "content-based" or "content-neutral."[101] They found the purpose behind the enactment of the public nudity ban in *City of Erie* and the enforcement of the public nudity ban in *Barnes* was to combat primary effects, i.e., various negative impacts of erotic messages on viewers. The inappropriateness of applying strict scrutiny to mode regulations is even greater in these nude dancing cases than it is in the zoning cases because the risk of censorship is smaller in the nude dancing cases than in the zoning cases. It is smaller because the public nudity bans on their face do not even target speech (unlike the sexually explicit zoning cases), but only reach speech on a non-discriminatory basis as part of its application.[102]

3. Speech Deemed Harmful to Minors

In cases involving regulations of sexually explicit speech deemed harmful to minors,[103] the Court again failed to recognize the "mode"

---

[101] *See City of Erie,* 529 U.S. at 322 (Stevens, J., dissenting). As seen from his opinions in *City of Renton* and *Boos v. Barry,* Justice Brennan (as well as Justice Marshall who joined both opinions) never subscribed to the secondary effects test for defining regulations as either content-based or content-neutral. Among the current justices, only Justice Kennedy has questioned the appropriateness of the test for distinguishing between content-based and content-neutral regulations. *See supra* note 89. Two other justices – Stevens and Ginsburg – would confine the test to sexually explicit zoning cases. *See City of Erie,* 529 U.S. at 319-323 (Stevens, J., dissenting).

[102] As noted previously, Justices Scalia and Thomas have argued that general laws that regulate conduct including those that ban public nudity should not be subject to any First Amendment review. *See supra* note 96.

[103] In the Child Online Protection Act (COPA), 47 U.S.C. §231, Congress created what Justice Stevens described as "a new category of criminally punishable speech that is 'harmful to minors'." Ashcroft v. ACLU, 542 U.S. 656, 675 (2004) (Stevens J., concurring in part and dissenting in part). Although Justice Stevens credits COPA with fashioning a new category of partially protected speech defined as "harmful to minors" speech, and which category he sees as "novel and nebulous," *id.,* in fact COPA's definition of "harmful to minors" speech is modeled on the definition of unprotected obscenity set out in *Miller v. California,* 413 U.S. 15, (1973). *See* 47 U.S.C. §231(e)(6). It is also similar to the definition of unprotected child obscenity that the Court upheld in *Ginsberg v. New York,* 390 U.S. 676 (1968).

focus of the regulations and as a result made several of the same analytical mistakes discussed above. The cases involved various federal statutes that have sought to keep sexually explicit speech away from minors over such media as telephones,[104] cable[105] and the Internet.[106] Once again, in all of these cases the speech being regulated was not the underlying message speakers were seeking to communicate, but the sexually explicit speech used to convey the message. The laws presumably would have allowed any information about sex, so long as sexually explicit language was not used in making the communication. For this reason, these regulations are mode-based, not content-based or content-neutral, and subject to intermediate scrutiny. Instead, the Justices in these cases labeled these regulations as content-based and subjected them to strict scrutiny review. For the majority in some of these cases, "strict in theory" translated into "fatal in fact."[107] Those wanting to uphold some of these regulations recognized some exception to their general prohibition against content-based regulation.[108] But again, both sides were led astray by their failure to realize that these laws did not directly regulate content at all. They regulated the mode of the expression, namely the mode of sexually explicit expression. They regulated the "how" of the speech, not the "what" of the speech.

The Justices' employment of the secondary effects test in these "speech deemed harmful to minors" cases has had some Justices (i.e.,

---

[104] *See* Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989).

[105] *See* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996); United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000).

[106] *See, e.g.*, Reno v. ACLU, 521 U.S. 844 (1997); Ashcroft v. ACLU, 535 U.S. 564 (2002); Ashcroft v. ACLU, 542 U.S. 656 (2004).

[107] *See, e.g., Reno*, 521 U.S. 844;. *Playboy Entm't*, 529 U.S. 803; Ashcroft v. ACLU, 542 U.S. 656 (2004).

[108] In one important respect these more recent "harmful to minors" cases can be distinguished from the earlier discussed sexually explicit speech cases (i.e., the zoning and nude dancing cases). In all three groupings of cases the Court was split over whether or not the challenged laws violated the First Amendment. In the sexually explicit zoning and nude dancing cases, however, those justices who voted to uphold the restrictions did so by applying to the regulations a level of scrutiny that was more deferential than strict scrutiny. They justified their more deferential review either by denigrating the social worth of the challenged speech, or by finding some other means (e.g., the secondary effects test) for labeling the regulations as "content-neutral," or doing both. In these later "harmful to minors" speech cases, all nine justices labeled the regulations as "content-based" and applied strict scrutiny review. Presumably all of the justices, with the possible exception of Justice Kennedy, arrived at their content-based conclusion by applying the secondary effect test, under which all of the laws would be found to be content-based because their purpose is to combat what the justices define as a "primary effect." Those justices who voted to sustain these regulations, it should be noted, did not indicate that they were influenced by any assessment that speech deemed harmful to minors lacks high social value similar to the lower value assessment some of these same justices have made with respect to sexually explicit movies and erotic nude dancing. Arguably they could have done so, but they did not.

Stevens and Rehnquist) going back and forth between content-based and content-neutral. In *American Mini Theaters,* both Justices labeled the law targeting sexually explicit speech as "content-based," but then in *City of Renton* they both labeled the same law as "content-neutral." In these "harmful-to-minor" cases, these same Justices once again saw such laws as "content-based." Concededly, the secondary effects test provided the means by which to make that judgment. But such flip-flops by Justices illustrate once again the incoherence of the secondary effects test. All of the laws draw the identical line between sexually explicit and non-sexually explicit speech, so how can some be content-based and others content-neutral?

4. Profanity

In the 1970s and 1980s the Court similarly had difficulty reaching any consensus over how to apply the First Amendment to regulations that targeted another category of offensive speech: profanity. In one case, *FCC v. Pacifica Foundation*,[109] the Court agreed to decide whether the FCC had the power to prohibit a radio station from airing George Carlin's twelve-minute monologue, "Dirty Words," during afternoon hours. Again, a divided Court with no opinion garnering majority support upheld, by the vote of five to four, the FCC's regulatory authority.[110] The major disagreements among the Justices were the same ones that divided the Justices two years earlier in *American Mini Theaters.* As in *American Mini Theaters,* all nine Justices saw the targeting of indecent speech by the FCC as content-based,[111] even though what the regulation targeted was not Carlin's underlying message, but simply the way he had sought to communicate his message. In *American Mini Theaters,* the labeling of the challenged regulation as content-based meant to four of the Justices – Justices Stewart, Brennan, Marshall and Blackmun – that the ordinance must be subjected to strict scrutiny review and that under such review, the ordinance violated the First Amendment. In *Pacifica*, two of those Justices – Justices Brennan

[109] 438 U.S. 726 (1978).

[110] Justice Stevens delivered the opinion for the Court except for Parts IV-A and IV-B in which only Justice Rehnquist and Chief Justice Burger joined. Justice Powell wrote a concurrence joined by Justice Blackmun. Justice Brennan wrote a dissent that Justice Marshall joined. Justice Stewart wrote a dissent joined by Justices Brennan, White and Marshall.

[111] *Pacifica* was decided eight years before the Court in *City of Renton* fashioned its "secondary effects" test for determining whether or not a regulation is content-based. Presumably, those justices who now use the "secondary effects" test to determine whether to label a regulation as content-based or content-neutral would still define the federal government's regulation of indecent speech in *Pacifica* as content-based since the FCC justified its regulation of Carlin's monologue on the basis of shielding homeowners and children from the "primary effects" of exposure to the speech.

and Marshall – adopted the same analysis with the same result. Justice Stewart, who authored the primary dissent in *American Mini Theaters*, also dissented in *Pacifica,* but rested his decision on non-First Amendment grounds.[112] It was the fourth *American Mini Theaters* dissenter – Justice Blackmun – who switched sides in *Pacifica* by joining Justice Powell's concurrence, a decision that had Justice Blackmun inexplicably repudiating the strict scrutiny stance he had endorsed just two years earlier in *American Mini Theaters.*[113]

Justice Powell's approach in *Pacifica* was similar to that which he adopted in *American Mini Theaters.* As he had done two years earlier, here too he found ways to sustain what he saw as a content-based regulation without subjecting the regulation to strict scrutiny review or having to subscribe to the lower value rationale used by other Justices. In *Pacifica,* three of the four Justices who fashioned the lower value approach in *American Mini Theaters* used the same approach of denigrating the social worth of the regulated speech as their way out of having to subject to strict scrutiny review what they saw as a content-based regulation.[114] However, in *Pacifica* the three lost Justice White, who joined Justice Stewart's dissent (which again rested on non-First Amendment grounds.)[115] And, as occurred in *American Mini Theaters*, several Justices challenged the plurality's claim of authority to judge the value of a category of protected speech.[116]

---

[112] Justice Stewart interpreted the federal statute (18 U.S.C. §1464 (1976)) pursuant to which the FCC acted against the radio station as narrowly authorizing the FCC to regulate obscene speech but not a separate category of non-obscene, indecent speech. *Id.* at 777 (Stewart, J., dissenting).

[113] In *City of Renton,* Justice Blackmun likewise seemed to repudiate the position he had taken in *American Mini Theaters. See supra* note 74.

[114] In *Pacifica,* those denigrating Carlin's monologue were Justices Stevens, Rehnquist and Chief Justice Burger. Justice Stevens wrote:

> It is true that the Commission's order may lead some broadcasters to censor themselves. At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern.

FCC v. Pacifica Found. 438 U.S. 726, 743 (1978).

[115] That Justice White joined Justice Stewart's dissent does not necessarily mean that in 1978 he was repudiating his endorsement two years earlier of judges making assessments about the social worth of otherwise protected speech. Justice White simply may have agreed with Justice Stewart that the federal statute on which the FCC was relying for is authority to regulate profanity over the airwaves did not confer such authority.

[116] Justices Powell and Blackmun gave as their reason for not joining Justice Stevens' opinion in its entirety their opposition to justices assuming the power to assess the social value of what speakers say:

> I do not join Part IV-B, however, because I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most "valuable" and hence deserving of the most

Once more, however, all of the Justices mistakenly felt that they only had two choices for the standard of review: full strict scrutiny because of the apparent content-basis of the regulations, or deferential scrutiny because of various dubious means by which these Justices were able to satisfy themselves that the regulation, although content-based, should nonetheless be treated as if it was content-neutral.[117] Instead, the Court should have recognized that the regulation only limited Carlin's mode of expression and not his message. Carlin was free to express any ideas he wished, including any view about vulgar words. He just could not use certain profane words repetitively to do so.

Because there is a middle risk that the government has acted censoriously when it regulates the mode of expression, the Court needs to look closely enough at the regulation to ensure that the government acted for non-censorial motives. Thus, Justice Brennan concluded that the FCC's enforcement of its policy was based on a desire to shield children from exposure to certain ideas, which would have been reason enough to find a violation of the First Amendment even though the regulation was directed at mode, not message.[118]

Four years later, the Court reviewed another attempt by government to regulate vulgar speech. In *Board of Education v. Pico,*[119] a 1982 case involving the removal of vulgar books from a school library, the Court followed the basic logic of the mode/content distinction, but suffered through an unnecessarily obscure debate among the plurality, a concurrence and the dissent, due to the Justices' failure to recognize clearly and employ the mode of expression doctrine. Thus, Justice

---

> protection, and which speech is less "valuable" and hence deserving of less protection. . . In my view, the result in this case does not turn on whether Carlin's monologue, viewed as a whole, or the words that constitute it, have more or less "value" than a candidate's campaign speech. This is a judgment for each person to make, not one for the judges to impose upon him.

Id. at 761 (Powell, J., concurring in part and concurring in the judgment) (internal citations omitted). Similarly, Justices Brennan and Marshall took the plurality to task for assuming the authority to assess the social worth of speech whose content all of the justices found to be within the scope of First Amendment protection:

> For the second time in two years. . . the Court refuses to embrace the notion, completely antithetical to basic First Amendment values, that the degree of protection the First Amendment affords protected speech varies with the social value ascribed to that speech by five Members of this Court.

Id. at 762-763 (Brennan, J., dissenting) (internal citations omitted).

[117] As Justice Brennan observed, the Court, although it characterized the FCC's sanction of the radio station as content-based, did not subject the federal government's actions to strict scrutiny review since the majority "apparently believes that the FCC's disapproval of Pacifica's afternoon broadcast of Carlin's 'Dirty Words' recording is a permissible time, place and manner regulation." *Id.* at 763.

[118] *Id.* at 768.

[119] 457 U.S. 853 (1982).

Brennan for the plurality argued correctly that it was less offensive to the First Amendment to regulate on the basis of the use of vulgar words than on the basis of political content.[120] But he did not sufficiently explain why. In a separate concurrence Justice Blackmun made basically the same point, again without explaining his basis for the distinction.[121] This lack of clarity regarding the distinction in both opinions made them vulnerable to the dissent's attack, in which Justice Rehnquist incorrectly argued that regulations that target "perceived vulgarity" of language are just as "content-based" as regulations that are aimed at "pernicious political ideas" the books espouse.[122] The main point of the mode doctrine is that regulations that target how an idea is expressed are *not* based on content in the same way as are regulations that draw distinctions based on what message is being expressed.[123] What makes *Pico* a difficult case for deciding what level scrutiny to apply to the school board's decision to remove certain books is that the school board's stated policy was vague on its face. It was unclear

---

[120] To Justice Brennan, whether the school board's decision to remove certain books from the school library denied students any First Amendment rights depended upon what it was about the books that the school board found objectionable: it was clear to Justice Brennan that local school boards may not remove books from school libraries simply because they dislike the ideas contained in those books, but permissible factors include whether the books are "pervasively vulgar" or "educationally unsuitable." *See id.* at 859, 871 (plurality opinion).

[121] To Justice Blackmun whether the school board's decision to remove certain books from the school library denied students any First Amendment rights likewise turned on whether the school board was motivated by censorial or non-censorial objectives. Like Justice Brennan, Justice Blackmun read the First Amendment to mean that "school officials may not remove books for the *purpose* of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials' disapproval of the ideas involved." *Id.* at 879-880. (Blackmun, J., concurring in part and concurring in the judgment). On the other hand, Justice Blackmun saw nothing in the First Amendment to prohibit school boards from being able to "choose one book over another, without outside interference, when the first book is deemed. . . better written. . ." *Id.* at 880 (Blackmun, J., concurring in part and concurring in the judgment).

[122] Justice Rehnquist said of the distinction Justice Brennan had sought to draw:

> It is difficult to tell from Justice Brennan's opinion just what motives he would consider constitutionally impermissible. I had thought that the First Amendment proscribes content-based restrictions on the marketplace of ideas. . . Justice Brennan concludes, however, that a removal decision based solely upon the "educational suitability" of a book or upon its perceived vulgarity is "perfectly permissible." But such determinations are based as much on the content of the book as determinations that the book espouses pernicious political views.

Id. at 917 (Rehnquist, J., dissenting) (internal citations omitted).

[123] *See also* Bethel School Dist. v. Fraser, 478 U.S. 675 (1986) where Chief Justice Burger for the Court observed that in *Pico* on the question whether the First Amendment placed any limit on the authority of public schools to remove books from a public library that "all Members of the Court, otherwise sharply divided, acknowledged that the school board has the authority to remove books that are vulgar." *Id.* at 684.

whether the policy targeted only poorly written or vulgar works, or went further to apply to books in which the school board found one or more of the author's underlying messages to be unsuitable in some respect for secondary school students. Unlike *Pacifica,* in which the FCC policy was directed at "indecent speech," the school board regulations at issue in *Pico* were more vague as to their scope; i.e., whether they were concerned only with how authors wrote and not with what they wrote. If, as the majority seemed to find, the school board policy targeted not only the authors' modes of expression, but also their underlying messages, then by applying the mode of expression doctrine outlined in this article, the majority would have had an easier time supporting the winning position and the dissent would have had even less basis for objection. The correct analysis, according to this article, is to recognize that a regulation allowing a school board to ban a book from a library because it expresses "un-American ideas" is not identical to one that limits the school board's discretion to ban books that express any idea with the use of vulgar or sexually explicit language. The former regulation targets what speakers say, whereas the latter targets how they say it.

B. *Categories of Unprotected Speech*

In addition to the partially protected speech categories just discussed, the Court has identified certain categories of what the Court has labeled as "unprotected speech." And as it did with the partially protected speech cases, so too with these unprotected speech categories the Court has viewed them as categories of unprotected *content.*[124] In fact, as to some of the categories, they are in reality cases where the government actually was seeking to suppress the speaker's mode of expression, not the speaker's underlying messages.[125] And here, too, the Justices have made similar mistakes to those they have made in the partially protected speech cases.

---

[124] *See, e.g.,* Justice Stevens' argument in *American Mini Theatres* that the Court's recognition of "unprotected speech categories" is inconsistent with a broad content neutrality principle that would preclude the government from regulating expressive activity predicated on content:

> The question of whether speech is, or is not, protected by the First Amendment often depends on the content of the speech. Thus, the line between permissible advocacy and impermissible incitation to crime or violence depends, not merely on the setting in which the speech occurs, but also on exactly what the speaker had to say. Similarly, it is the content of the utterance that determines whether it is a protected epithet or an unprotected "fighting comment."

Young v. American Mini Theatres, 427 U.S. 50, 66 (1976) (plurality opinion).

[125] *See supra* note 62.

1. Obscenity

In the case of obscenity, the government is regulating mode, not message – it is telling a speaker not to use obscene images in communicating any message, whatever it is. Under such a regulation, the speaker is free to communicate the message itself, whether that message is that sex is good, or that two characters in a story had sex, or whatever other message might be communicated. The leading obscenity case is *Miller v. California.*[126] In later cases, *Miller* has been described by the Court as a case in which the Court upheld a content-based regulation by fashioning yet another "exception" to the general rule against content-based regulations.[127] The exception is based on three factors, one of which is a finding that the targeted speech "lacked serious social value."[128] As stated above, it is anathema to the First Amendment for the government, including a court, to judge the value of what speakers say.[129] Moreover, in this case it was not necessary to

---

[126] 413 U.S. 15 (1973).

[127] *See, e.g.,* Justice Stevens' statement in *FCC v. Pacifica Foundation,* 438 U.S. 726, (1978), that government suppression of obscenity is as an example of a content based regulation that the Court has approved: "obscene materials have been denied protection of the First Amendment because their content is so offensive to contemporary moral standards." *Id.* at 745 (plurality opinion).

More recently, in *Ashcroft v. ACLU,* 535 U.S. 564, 574 (2002) Justice Thomas for the majority similarly identified obscene speech as a category of speech content but one that the government could suppress, notwithstanding the First Amendment requirement that the government regulate speech in a content-neutral manner:

> As a general matter, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content". . . However, this principle, like other First Amendment principles, is not absolute. . . Obscene speech, for example, has long been held to fall outside the purview of the First Amendment.

Id. at 573-574 (internal citations omitted).

[128] In *Miller,* the Court set forth the governing three-part test for assessing whether material is obscene and thus unprotected by the First Amendment. Miller v. California, 413 U.S. 15 (1973). Part three of the test requires the government to establish that the proscribed speech "taken as a whole, lacks serious literary, artistic, political or scientific value." *Id.* at 15. In *Pope v. Illinois,* 481 U.S. 497 (1987), the Court indicated that in making such an assessment that "[t]he proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole." *Id.* at 500-501.

[129] In *Pope,* Justice Stevens questioned the appropriateness of using "the reasonable person" standard for ascertaining whether or not speech possesses serious social value. He observed that whether something does or does not have social worth is something over which reasonable people can differ:

> The problem with this formulation [using as the appropriate standard the "reasonable person"] is that it assumes that all reasonable persons would resolve the value inquiry in the same way. In fact, there are many case in which *some* reasonable people would find that specific sexually oriented materials have serious artistic, political, literary, or scientific value, while *other* reasonable people would conclude that they have no such value.

do so. Instead of saying that obscene speech lacks serious social value, the Court should have said that the regulation triggers only a middle level of scrutiny because it only restricts the mode of the speaker's expression, not the message. In *Miller,* the Court used a three-prong test to determine the exception, of which only one raised the improper "value" question. The other two prongs—namely, whether the expression "appeals to the prurient interest" and "depicts in a patently offensive way" prongs – can be used to determine whether the regulation of the mode of expression was actually impermissible censorship of a message or a constitutional regulation of a mode of expression for a non-censorial purpose. The Court could have reached the same result in the case, but with a clearer explanation of the nature of the regulation (mode, not message) and without having to judge the value of the speech itself, an assessment which itself runs afoul of the First Amendment.

2. Child Pornography

As with obscenity, in cases reviewing challenges to regulations of child pornography, the Court again suffered from its failure to recognize the distinction between regulations of speech mode and speech content.[130] A regulation that prohibits material depicting sexual activity involving children regulates a mode of expression, not the underlying message. The underlying message of the material could be that such sex is good, or that it is bad, or something else entirely. That is not the issue. The issue is that the speaker is trying to communicate his or her message, whatever it is, by depicting actual children having sex. The ban on child pornography has no restrictions on speakers saying anything they want about minors and sex or, for that matter, any other message.[131] It only restricts communicating any message by depicting actual children having sex. By failing to recognize the mode/message distinction, the majority made the unwise step of saying it was prepared to make an exception to the general First Amendment rule against con-

---

The Court's formulation does not tell the jury how to decide such cases (footnote omitted).

Id. at 511 (Stevens, J., dissenting).

Beyond the inherent subjectivity of such an assessment, having juries and judges making assessments about the social worth of what people say is precisely what the First Amendment prohibits.

[130] *See, e.g.*, New York v. Ferber, 458 U.S. 747 (1982).

[131] In her concurrence Justice O'Connor observed: "As drafted, New York's statute does not attempt to suppress the communication of particular ideas. The statute permits discussion of child sexuality, forbidding only attempts to render the "portrayal[s] somewhat more 'realistic' by utilizing or photographing children." *Id.* at 775 (O'Connor, J., concurring).

tent-based regulations by creating a new category of unprotected speech and to do so in part again because it had judged the speech in question as having low value.[132] But the basis for this exception to the general rule against content-based regulations, like the designation of obscene speech as unprotected speech, required the Justices to do precisely what the First Amendment forbids any government official from doing: judging the social worth of the speaker's underlying message.

The Justices could have avoided this predicament simply by ruling that the child pornography regulations were directed at the mode of the expression, not the underlying message, thus justifying only a middle level of scrutiny. Employing this middle level of scrutiny, the Court would have determined that the government was regulating the speech for a non-censorial reason, namely the protection of actual children ap-

---

[132] As one of its reasons for allowing the government to ban child pornography the majority stated that "the value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*. . . ." *Id.* at 762.

In her concurrence Justice O'Connor questioned whether it was appropriate or even made sense for the Court to indicate that whether it would allow the government to safeguard the physical and psychological well being of children by banning their use as live models engaged in sexually explicit acts should turn on the Court's assessment of the social worth of the overall work. As Justice O'Connor viewed the matter, if children are harmed by their participation as actors in sex scenes, why should it matter whether or not the overall work might be found to have social value:

> The compelling interests identified in today's opinion [i.e., protecting the physical and emotional well being of minors] suggest that the Constitution might in fact permit New York to ban knowing distribution of works depicting minors engaged in explicit sexual conduct, regardless of the social value of the depictions. For example, a 12-year-old child photographed while masturbating surely suffers the same psychological harm whether the community labels the photograph "edifying" or "tasteless." The audience's appreciation of the depiction is simply irrelevant to New York's asserted interest in protecting children from psychological, emotional, and mental harm.

Id. at 774-775 (O'Connor, J., concurring). In his majority opinion in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) Justice Kennedy similarly argued:

> Where the images are themselves the product of sexual abuse, *Ferber* recognized that the State had an interest in stamping it out without regard to any judgment about its content (citing *Ferber,* 458 U.S. at 761). . . The production of the work, not its content, was the target of the statute. The fact that a work contained serious literary, artistic, or other value did not excuse the harm it caused to its child participants.

Id. at 249.

Moreover, as a second reason for not allowing judges to assess the social worth of the work as a factor in their decisions whether or not to allow the government to ban children as live models in sexually explicit scenes, Justice O'Connor argued that were the Court to adopt what in effect would be "a serious social value exception" for what otherwise would constitute unlawful child pornography, that such an exception would increase the opportunities for the government to engage in content-based censorship: "An exception for depictions of serious social value, moreover, would actually increase opportunities for the content-based censorship disfavored by the First Amendment." *Ferber,* 458 U.S. at 775. (O'Connor, J., concurring).

pearing in the films from abuse, and thus the regulation did not violate the First Amendment prohibition on government censorship.

C. *Other Regulations of Mode that the Court Inappropriately Sees as Content-Based Regulations*

The failure to recognize the applicability of the middle "mode" doctrine also afflicted the Court in its approach to other categories of so-called "unprotected speech," such as government prohibitions of fighting words[133] and even incitement-to-riot speech.[134] Today, the Court views these regulations as content-based, but again, ones that are exceptions to the Court's general rule against content-based regulations. Once more I believe they are more properly characterized as mode-based, because they regulate *how* certain ideas and feelings are expressed, not the ideas or feelings themselves.[135] Likewise, other general conduct statutes such as the draft card protection law,[136] flag burn-

---

[133] *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[134] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

[135] That fighting words statutes are mode-based and are not content-based is evidenced by the fact that such statutes target certain *words* and not *ideas*. The statutes do not prohibit speakers from expressing, for example, a desire to start a fight. The Court has never held that the First Amendment does not protect speakers either from expressing a favorable opinion about fighting or from proposing a fight. Thus fighting words statutes do not prohibit speakers from making statements such as "I challenge you to a fight" or "If you were a real man you would fight me," even though in both cases the speakers' intent is to start a fight. Were fighting words statutes broadened to reach such statements, it is clear that the Court would strike down such statutes as overly broad. *See* Gooding v. Wilson, 405 U.S. 518 (1972). To survive a First Amendment challenge, a fighting words statute must be confined to only words that objectively constitute insults whose very utterance directed orally at another person in a face to face setting is likely to provoke the person at whom the insult is directed to retaliate physically. Such statutes therefore are mode-based since they are directed at one way by which a person either expresses his feelings about another person to the other person or seeks to provoke the other person into a fight — i.e., by using insulting language in a context where experience has shown that the use of such words will trigger a reflexive response.

Likewise, statutes that ban incitement to violent speech are mode-based and are not content-based. *See Brandenburg*, 395 U.S. 444 (1969), where the Court drew a clear distinction between speech expressing approval of the idea of violence and speech using language to trigger unlawful action. Under the test the Court formulated in *Brandenburg*, the government, consistent with the First Amendment, can only ban the latter speech. ("[C]onstitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"). *Id.* at 447.

[136] *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968). The federal statute in *O'Brien*, which made it a crime to destroy a draft card, on its face was neither mode-based nor content-based. It was only the government's enforcement of the statute against O'Brien that made the statute mode-based since the government when it enforced the statute against O'Brien was aware that he had burned his draft card for expressive purposes. On its face, the government's enforcement of the draft card destruction statutes against O'Brien was not

ing statutes,[137] anti-camping regulations[138] and anti-competitive boycott laws[139] were all cases involving the regulation of the mode of a speaker's expression, not the underlying message of the speaker.

Other "mode" cases similarly not recognized as such include laws giving speakers property interests in particular words (like the word "Olympic")[140] and laws giving entertainers the exclusive right to profit from their performances (like being shot out of a cannon).[141] All of these cases have one thing in common: when faced with a First Amendment challenge to the regulations, the Court failed to recognize the applicability of the "mode" doctrine proposed in this article, and was thus left with the imprecise and extreme categories of content-based or content-neutral.

V. CONCLUSION

If one of the roles of the U.S. Supreme Court is to formulate constitutional doctrine that can be applied effectively by lower courts, then the disarray of the opinions in these mode-of-expression cases is evidence of a serious analytical failure. A more generous observer might attribute the chaos to the challenging nature of the question itself. Instead, this article argues that the issue is much simpler than the Court makes it. In all of the cases, the fundamental issue raised is whether

---

content-based since the statute neither distinguished on the basis of what message those who burned their draft cards were seeking to convey, nor prohibited speakers from making anti-war statements by other means.

In later cases, the Court has characterized the draft card statute the Court reviewed in *O'Brien* as "content-neutral" and has done so by characterizing *O'Brien* as a "secondary effects" case. *See* Justice O'Connor's opinion for the Court in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (" [T]he Court recognized that the regulation against destroying one's draft card was justified by the Government's interest in preventing the harmful 'secondary effects' of that conduct"). *Id.* at 293. *O'Brien* was decided by the Court before it had begun distinguishing between content-based and content-neutral regulations and, accordingly, the Court did not employ the distinction in the case. Nor did the Court in *O'Brien* rely on the "secondary effects," a test the Court would not fashion until twenty years later. Under the secondary effects test, however, the draft card statute would be deemed to be content-neutral since the government's articulated purposes (i.e., preventing disruption to the Selective Service System) were not to combat what the Court defines as "primary effects." On its face the statute would also be seen as content-neutral under the traditional method the Court used prior to *City of Renton* to define laws as content-based or content-neutral since the law did not draw any distinction on the basis of any message.

[137] *See* Texas v. Johnson, 491 U.S. 397 (1989); United States v. Eichman, 496 U.S. 310 (1990).

[138] *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984). In *City of Erie v. Pap's*, 529 U.S. 277 (2000), Justice O'Connor inaccurately labels *Clark* (as she did *O'Brien)* as a "content-neutral secondary-effects" case. *Id.* at 294.

[139] NAACP v. Claiborne Hardware, 458 U.S. 886 (1982).

[140] S.F. Arts & Athletics v. U.S. Olympic Comm., 483 U.S. 522 (1987).

[141] Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977).

the government can regulate a speaker's mode of expression, while, ideally at least, leaving untouched the message imbedded in the expression. In most cases the answer will be yes. In some cases the answer will be no; for example, in those rare cases where either the message and mode are inextricably intertwined, or it is determined that the government's motive was to censor the message. In either case, the Court should begin its analysis by determining the appropriate standard of review. If the regulation addresses the mode of expression, rather than the message expressed or the method by which speakers have sought to distribute their speech, then the standard of review should be intermediate review. This is an analysis all nine Justices should adopt and the lower courts could understand and follow.