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Free Speech and Content-Neutrality: Inconsistent Applications of an Increasingly Malleable Doctrine

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Contemporary free-speech jurisprudence divides laws that regulate expression into three categories—content-neutral, content-based, and viewpoint-based.[1] On their face, these labels provide clean, clear-cut distinctions between laws that raise or involve First Amendment[2] issues. In their application, however, the differences between the categories—in particular, the difference between content-neutral and content-based regulations—are not always obvious, let alone well defined.[3]

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1. Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 107 (1996); *see generally* Erwin Chemerinsky, *The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLEV. ST. L. REV. 199, 202-203 (1994) (explaining the principle and policy of content-neutrality and observing that content-neutrality "means that the government must be both viewpoint neutral and subject matter neutral"); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983) (analyzing both the practical workings and theoretical underpinnings of the content-neutral, content-based, and viewpoint-based distinctions in First Amendment jurisprudence).

Some types of speech—incitement to violence, fighting words, and obscenity, for instance—receive no constitutional protection and thus are not subject to analysis under the tripartite approach described in this Article. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (articulating the test for when speech amounts to an unlawful incitement to violence or lawless action and loses First Amendment protection); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (creating the so-called fighting words standard that places outside the ambit of First Amendment protection words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace"); Miller v. California, 413 U.S. 15, 24 (1973) (setting forth the current three-part legal standard for determining when speech is legally obscene and falls outside the scope of First Amendment protection).

2. The First Amendment to the United States Constitution provides in relevant part that Congress shall make no law abridging the freedom of speech, or of the press. U.S. CONST. amend. I. The Free Speech and Free Press Clauses are incorporated through the Fourteenth Amendment's Due Process Clause to apply to state and local governments. Gitlow v. New York, 268 U.S. 652, 666 (1925).

3. The first serious scholarly critique of the judicial distinction between content-neutral and content-based regulations occurred more than 15 years ago. Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981). Redish concludes that courts should abandon the content-neutral/content-based distinction. *Id.* at 114. He argues that "all government regulations of expression be subjected to a unified 'compelling interest' analysis." *Id.* at 150. The recent developments discussed in this Article heighten the problems analyzed by Redish and add fuel to his argument for the need for a unified standard.

This Article argues that a quartet of recent United States Supreme Court decisions—*Turner Broadcasting System, Inc. v. FCC*,[4] *Turner Broadcasting System, Inc. v. FCC*,[5] *Madsen v. Women's Health Center, Inc.*,[6] and *Schenck v. Pro-Choice Network of Western New York*[7]—undermines and erases rational distinctions between the content-neutral and content-based categories.[8] In particular, laws and court orders that appear content based, either on their face or by their operation, are held content-neutral by the Supreme Court. These cases exacerbate problems already created by the Court's adoption of the questionable and slippery secondary effects doctrine.[9] That doctrine too allows courts to transform seemingly content-based regulations into content-neutral ones.

Current problems in the application of the content-neutrality doctrine and the blurring of the lines between content-neutral and content-based regulations stem from two sources.[10] These are: (1) the inconsistent analysis and consideration of the legislative intent and purpose behind the laws or court orders considered by the Court; and (2) the failure to give proper weight to the disparate impact and operation of regulations on particular topics or ideas. Inconsistent consideration of both the *purpose and effect* of speech regulations, in the threshold decision about whether to classify them as content-neutral or content-based, causes serious problems today.

Ramifications of classifying a law as content-neutral or content-based are often profound.[11] Content-neutral laws and orders generally are subject to a more relaxed standard of review than content-based regulations.[12] Content-neutral laws thus are

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4. 512 U.S. 622 (1994) [hereinafter *Turner I*]. The case has been described by legal scholars as "the most important Supreme Court case in a generation concerning the regulation of the electronic media." Monroe E. Price & Donald W. Hawthorne, *Saving Public Television: The Remand of Turner Broadcasting and the Future of Cable Regulation*, 17 HASTINGS COMM. & ENT. L.J. 65, 66 (1994).

That the outcome of such an important case can—and did—hinge on the application of a court-created doctrine that is seriously plagued is particularly troublesome and should provide reason enough to re-examine the continued validity of the Court's formulaic content-neutral/content-based jurisprudence.

5. 117 S. Ct. 1174 (1997) [hereinafter *Turner II*].

6. 512 U.S. 753 (1994).

7. 117 S. Ct. 855 (1997).

8. *See infra* notes 62-230 and accompanying text.

9. *See* Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-49 (1986) (providing that zoning ordinances intended to counteract the secondary effects of so-called adult theaters must be reviewed under the standard applicable for content-neutral laws); *see also* Leon Harvey Lee, Jr., *Policing the Parlor and the First Amendment*, 22 WAKE FOREST L. REV. 673 (1987) (describing the United States Supreme Court's decision in *Renton*).

10. *See infra* notes 234-36 and accompanying text.

11. *See* Frisby v. Schultz, 487 U.S. 474, 481 (1988) (providing that "the appropriate level of [judicial] scrutiny is initially tied to whether the statute distinguishes between prohibited and permitted speech on the basis of content"). "[T]he chances of a law being found constitutional are almost a direct function of the level of judicial scrutiny the law receives." Roger Pilon, *A Modest Proposal on "Must Carry," the 1992 Cable Act, and Regulation Generally: Go Back to Basics*, 17 HASTINGS COMM. & ENT. L.J. 41, 46 (1994).

12. Stone, *supra* note 1, at 197. Content-neutral injunctions are subject to a "somewhat more stringent" standard of First Amendment scrutiny than content-neutral statutes and other generally applicable ordinances. Madsen v. Women's Health Center, Inc., 512 U.S. 753, 765 (1994). The *Madsen* Court stated that "when evaluating a content-neutral injunction, we think that our standard time, place, and manner analysis is not sufficiently rigorous. We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary

more likely to be upheld as constitutional, while content-based laws are more likely to be struck down as unconstitutional.

This Article does *not*, however, question the standards of scrutiny applicable to content-neutral, content-based, and viewpoint-based regulations and court orders. Rather, it analyzes and questions the *initial criteria and methodology* used by courts in the threshold decision to classify and place regulations and orders into those categories.

Even if the criteria are agreed on by the justices, a paradox inherent in the content-neutrality doctrine will always exist and plague it. The paradox? That a *rigid, formulaic, and categorical jurisprudence* like the dialectic between content-neutral and content-based laws ultimately depends for its vitality and validity on the *subjective, speculative endeavors* by individual justices into the often murky realm of legislative intent. Thus, the problems lie not only in establishing clear criteria that distinguish between the categories, but also in the application of those criteria by nine justices in the quest for identification of legislative intents and purposes.

Part I of this Article describes traditional, fundamental differences between the classifications of content-neutral, content-based, and viewpoint-based regulations.[13] It also introduces the policy behind these categories. Part II then analyzes the Supreme Court's decisions in *Turner I*, *Turner II*, *Madsen*, and *Schenck* on the question of content-neutrality.[14] It also describes the secondary effects doctrine that affects the decision to classify a regulation as content-neutral or content-based.

Part III argues that the cases analyzed here, when coupled with the secondary effects doctrine, illustrate the Court's inconsistent and variable consideration of legislative intent when it determines whether a regulation or court order is content-neutral or content-based.[15] Part III also argues that the Supreme Court fails to give sufficient consideration to the actual impact and effect of laws and court orders on specific types of speech when it decides whether they are content-neutral or content based.

Ultimately, the Article concludes that the seemingly nice and neat dialectical categories of content-neutral and content-based regulations that often provide an overarching structure for determining the applicable level of First Amendment scrutiny are anything but tidy. The original distinctions served an important purpose in limiting the ability of the government to distort the marketplace of ideas.[16]

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to serve a significant government interest." *Id.*

This standard, however, still is less rigorous than that faced by content-based statutes. The interest necessary to justify a content-based regulation must be "compelling," not merely significant. Sable Communications v. FCC, 492 U.S. 115, 126 (1989). The *Madsen* Court, in fact, specifically rejected the application of the strict scrutiny standard that generally applies to content-based regulations. *Madsen*, 512 U.S. at 766.

13. *See infra* notes 18-54 and accompanying text.

14. *See infra* notes 55-230 and accompanying text.

15. *See infra* notes 231-54 and accompanying text.

16. *See* Stone, *supra* note 1, at 217-27 (articulating the distortion-of-public-debate argument in support of the categorical approach of content-neutrality). *But see* Redish, *supra* note 3 (criticizing the original distinctions).

The marketplace of ideas metaphor embodies the free speech theory that "consistently dominates the Supreme

Whether that purpose is still served today in light of what amounts to judicial slight of hand that transforms seemingly content-based laws and orders into content-neutral ones is highly suspect. The standards and criteria used for determining whether a regulation on speech is content-neutral or content based are so malleable and amorphous as to jeopardize the functional validity of those categories. Justices and judges have far too much flexibility under the current approach, opening the door for the abuse of judicial discretion and unfettered bias in the categorization process.[17]

I. THE CATEGORICAL APPROACH TO LAWS & ORDERS AFFECTING SPEECH

The "most pervasively employed doctrine in the jurisprudence of free expression"[18] is the distinction between content-neutral, content-based, and viewpoint-based regulations. This Part introduces these three judicially created categories, including the legal tests and standards that traditionally are applied to the laws and court orders that fit the categories.

A. Content-Neutral Laws

Content-neutral regulations and court orders "may impinge on freedom of expression but are not aimed at regulating the content of the speaker's expression."[19] In a nutshell, laws and orders that fall into this category regulate speech but do not

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Court's discussions of freedom of speech." C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 7 (1989). For instance, in the Court's seminal analysis of broadcast regulations and the Fairness Doctrine, it adopted the metaphor, stating that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969). *See generally* W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 JOURNALISM Q. 40 (1996) (providing a comprehensive analysis of the United States Supreme Court's use of the marketplace metaphor).

The major premise of the marketplace theory is that "truth is discovered through its competition with falsehood." BAKER, *supra* at 6. The metaphor worked its way into First Amendment jurisprudence in Justice Oliver Wendell Holmes' dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919). Holmes wrote that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Id.*

For a brief discussion of flaws within the marketplace metaphor, see BAKER, *supra* at 12-17.

17. In *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2385 (1996), Justice Stephen Breyer suggested that the Supreme Court must not be bound to rigid formulae and categories in responding to free speech questions. He wrote that the Court's analysis of past cases "teaches that the First Amendment embodies an overarching commitment to protect speech from Government regulation through close judicial scrutiny, thereby enforcing the Constitution's constraints, but without imposing judicial formulae so rigid that they become a straightjacket that disables Government from responding to serious problems." *Id.* This language suggests, perhaps, a belief among some justices—including Justices Stevens, O'Connor, and Souter who joined with Breyer in this part of the *Denver Area* opinion—that the traditional content-neutral/content-based categories may not provide an appropriate framework for analyzing some free speech questions. Breyer specifically criticized what he called the "categorical analysis" of other justices in that case. *Id.* at 2387.

18. Stone, *supra* note 1, at 189.

19. KENT R. MIDDLETON ET AL., THE LAW OF PUBLIC COMMUNICATION 33 (4th ed. 1997).

target or single out a particular subject matter or topic for regulation.[20] They are neutral in their regulation as to both the subject matter of the speech restricted and the viewpoint of that speech.[21]

The justification or purpose for content-neutral regulations must be without regard to the content of the speech.[22] This may or may not be evident on the face of a regulation or court order.[23] In *Ward v. Rock Against Racism*,[24] the United States Supreme Court articulated the extent to which legislative purpose must be considered in the content-neutral/content-based determination:

> The principal inquiry in determining content-neutrality, in speech cases generally and in time, place, and manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys . . . . *The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral*, even if it has an incidental effect on some speakers or messages but not others.[25]

If a regulation or an order is determined to be content-neutral, it is subjected to review under a judicially created standard of scrutiny. The United States Supreme Court has stated variously that content-neutral laws are constitutional if they further "an important or substantial government interest; if the interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than essential to the furtherance of that interest,"[26] or if they are "narrowly tailored to serve a significant government interest, and leave open ample alternative avenues of communication"[27] or if "they are designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication."[28] In the context of content-neutral

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20. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (stating that the "principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys").

21. Chemerinsky, *supra* note 1, at 202-03.

22. Boos v. Barry, 485 U.S. 312, 320 (1988).

23. *Turner I*, 512 U.S. at 642. The Court observed in *Turner I* that "[o]ur cases have recognized that even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys." *Id.* at 645.

24. 491 U.S. 781 (1989). In *Ward*, a regulation controlling sound levels at concerts in a public park for the purpose of avoiding undue intrusion into neighboring residential areas and other areas of the park was held to be content-neutral. *Id.* at 792.

25. *Id.* at 791 (emphasis added) (citation omitted).

26. *Turner I*, 512 U.S. at 662-63 (quoting the standard articulated by the United States Supreme Court in the symbolic speech context of draft card burning in United States v. O'Brien, 391 U.S. 367, 377 (1968)).

27. Perry Ed. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983) (considering the standard in the context of a public forum case).

28. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986) (considering the standard in the context of zoning adult bookstores based on a secondary effects rationale for content-neutrality).

injunctions—as opposed to generally applicable laws that are content-neutral—the standard is "whether the challenged provisions of the injunction burden no more speech than is necessary to serve a significant government interest."[29] Under any of these standards, it is recognized by the Court that this is "an intermediate level of scrutiny"[30] less demanding than that applied to content-based regulations.[31]

Although content-neutral regulations reduce the total amount of speech that circulates in the metaphorical marketplace of ideas,[32] ostensibly they are less harmful than content-based regulations because they reduce speech equally across the full range of ideas and topics in the marketplace rather than entailing selective government regulation of particular messages.

The problem highlighted by the series of cases described later in this Article is that the task of deciding whether a particular regulation is content-neutral, as the Supreme Court itself recently acknowledged, "is not always a simple task."[33] As this article argues, those cases and the secondary effects doctrine have muddled this task to the point that the United States Supreme Court can state only that "laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are *in most instances* content-neutral."[34]

Determining what instances of speech fall within this category is growing increasingly difficult, as the Court selectively chooses to consider or ignore either or both the intent and impact of the laws in question. Despite the Court's language in *Ward* that "[t]he government's purpose is the controlling consideration,"[35] decisions such as *Turner I* and *Turner II* make the validity of this judicial admonition extremely questionable. Likewise, the *Ward* Court's statement that "an incidental effect on some speakers or messages but not others"[36] will not make a law content-based must be questioned in light of cases like *Madsen* and *Schenck*. In these cases,

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29. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994). This standard for content-neutral court orders is "somewhat more stringent" than that applied to content-neutral laws. *Id.* This new standard was openly mocked by Justice Scalia in his scathing opinion in *Madsen*. *Id.* at 791 (Scalia, J., concurring in part, dissenting in part). "The Court does not give this new standard a name, but perhaps we could call it intermediate-intermediate scrutiny. The difference between it and intermediate scrutiny (which the Court acknowledges is inappropriate for injunctive restrictions on speech) is frankly too subtle for me to describe." *Id.*

30. *Turner I*, 512 U.S. at 622, 642.

31. *See infra* notes 37-43 and accompanying text.

32. In his criticism of the content-neutral/content-based dichotomy, Professor Martin Redish observes:

> The most puzzling aspect of the distinction between content-based and content-neutral restrictions is that either restriction reduces the sum total of information or opinion disseminated. That governmental regulation impedes all forms of speech, rather than only selected viewpoints or subjects, does not alter the fact that the regulation impairs the free flow of information. Whatever rationale one adopts for the constitutional protection of speech, the goals behind that rationale are undermined by any limitation on expression, content-based or not.

Redish, *supra* note 3, at 128.

33. *Turner I*, 512 U.S. at 642.

34. *Id.* at 643 (emphasis added).

35. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

36. *Id.*

court orders that certainly had *much, much more than an incidental effect* on particular messages—messages protesting abortion—were nonetheless held to be content-neutral.

B. Content-Based Laws

The Supreme Court "has long held that regulations enacted for the purpose of restraining speech on the basis of content presumptively violate the First Amendment."[37] The Court applies "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."[38] It has held that "[t]he Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."[39]

This standard of review represents a means-ends approach in which "[i]t is not enough to show that the Government ends are compelling; the means must be carefully tailored to achieve those ends."[40] This test is often referred to as a strict scrutiny standard of review.[41]

Laws that single out some messages or topics for regulation, but not others, are reprehensible because the government, via the regulations, influences and limits which ideas may freely circulate in the marketplace of ideas and what messages may not.[42] They are paternalistic by their very nature, with the government telling citizens what ideas are of such low value—or perhaps are so dangerous[43]—that they are not worthy of reasoned consideration.

C. Viewpoint-Based Laws

Viewpoint regulations go beyond regulating speech on a particular topic or subject matter. They regulate *one side* of a debate or topic but not the other. In brief,

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37. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46-47 (1986).

38. *Turner I*, 512 U.S. 622, 642 (1994). *See* DONALD M. GILLMOR ET AL., FUNDAMENTALS OF MASS COMMUNICATION LAW 14 (1996) (stating that "content-based regulations of fully protected expression are subject to the severest kind of scrutiny by the courts").

39. Sable Communications v. FCC, 492 U.S. 115, 126 (1989).

40. *Id.* A compelling interest "is a justification of great magnitude, for example, directly protecting the nation's very existence, safeguarding life or limb, or shielding children from lasting emotional harm." JOHN D. ZELEZNY, COMMUNICATIONS LAW: LIBERTIES, RESTRAINTS, AND THE MODERN MEDIA 56 (2d ed. 1997). As Justice Sandra O'Connor recently observed, a compelling interest requires "some pressing public necessity, some essential value that has to be preserved." Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 680 (1994) (O'Connor, J., concurring in part, dissenting in part).

41. *See* GILLMOR, *supra* note 38, at 13.

42. *See* Stone, *supra* note 1, at 217.

43. The United States Supreme Court recently observed, in the context of regulations on commercial speech, that "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1508 (1996).

one viewpoint on a particular issue is treated more favorably under a law or court order than another on the same issue.

Rodney A. Smolla, a First Amendment legal scholar, advocates, "a per se rule making the punishment of speech flatly unconstitutional if the penalty is based on the offensiveness or the undesirability of the viewpoint expressed."[44] All ideas are created equal in the eyes of the First Amendment and the government may not pick and choose which ideas to privilege or denigrate.[45] Viewpoint-based statutes and court orders, free speech scholar Geoffrey Stone observes, distort public debate, reducing speech entirely on one side of the debate but not the other.[46]

In *American Booksellers Association, Inc. v. Hudnut*,[47] the United States Court of Appeals for the Seventh Circuit struck down as unconstitutional an Indianapolis statute regulating pornography on the ground that it was viewpoint based.[48] Observing that "[u]nder the First Amendment the government must leave to the people the evaluation of ideas,"[49] the Indianapolis statute established a government-approved "view of women, of how they may react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not."[50]

Erwin Chemerinsky illustrates the viewpoint-based category using an example of speech on the subject of abortion.[51] "[I]t would be clearly unconstitutional for the government to say that pro-choice demonstrations are allowed in the park but anti-abortion demonstrations are not allowed. . . . Such viewpoint regulation is not allowed."[52] Viewpoint regulations, Chemerinsky suggests, also allow the government to "advance its own interests by stopping speech that expresses criticism of government policy, while allowing praise."[53] The Court thus "reserves its closest scrutiny for laws distinguishing between the expression of particular viewpoints."[54]

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44. RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 46 (1992).

45. *Id.*

46. Stone, *supra* note 1, at 198.

47. 771 F.2d 323 (7th Cir. 1985).

48. *Id.* at 334 (suggesting that "Indianapolis might choose to have no ordinance if it cannot be limited to viewpoint-specific harms").

49. *Id.* at 327.

50. *Id.* at 328. Describing the statute, the appellate court stated:

> Under the ordinance, graphic sexually explicit speech is "pornography" or not depending on the perspective the author adopts. Speech that "subordinates" women and also, for example, presents women as enjoying pain, humiliation, or rape, or even simply presents women in "positions of servility or submission or display" is forbidden, no matter how great the literary or political value of the work taken as whole. Speech that portrays women in positions of equality is lawful, no matter how graphic the sexual content. This is thought control.

Id.

51. Chemerinsky, *supra* note 1, at 203.

52. *Id.*

53. *Id.*

54. Redish, *supra* note 3, at 118.

With these apparent distinctions among content-neutral, content-based, and viewpoint-based regulations in mind, the quartet of cases examined in Part II casts serious doubt on the continued validity of the distinctions between the categories of content-neutral and content-based distinctions.

II. THE ERODING DISTINCTIONS

This part initially examines the narrow 5-4 decisions of the United States Supreme Court in *Turner I* and *Turner II* to declare as content-neutral the so-called must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992.[55] Then, it analyzes the decisions of the Supreme Court in *Madsen* and *Schenck* to declare as content-neutral court orders restricting the speech rights of pro-life demonstrators outside abortion clinics. Finally, this part introduces the secondary effects doctrine, a judicial standard that further muddles the process of classifying regulations as content based or content-neutral.

A. Must-Carry Provisions: Content-Neutral or Content-Based?

In companion decisions in 1994 and 1997 affecting the regulation of cable television,[56] the United States Supreme Court was asked to consider the constitutionality of a federal law that requires cable television systems to devote a portion of their channels to the transmission of local, over-the-air broadcast television stations.[57] In deciding whether these so-called "must-carry obligations"[58] violated the First Amendment rights of cable operators and programmers,[59] the Court considered as a primary issue whether the regulations were content-neutral or content based.[60] The

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55. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.A.). *See generally* KENNETH C. CREECH, ELECTRONIC MEDIA LAW AND REGULATION 204-10 (providing a brief background on the Cable Television Consumer Protection and Competition Act of 1992).

56. *Turner I*, 512 U.S. 622 (1994) and *Turner II*, 117 S. Ct. 1174 (1997).

57. *Turner I*, 512 U.S. at 626.

58. *Id.* at 632. The must-carry provisions are codified at 47 U.S.C.A. §§ 534-35 (1992).

59. Less than one hour after the enactment of the Cable Television Consumer Protection and Competition Act on October 5, 1992, "cable giant Turner Broadcasting Systems was in federal court challenging the Act's 'must carry' and retransmission-consent provisions, with several other plaintiffs following suit over the next month." Pilon, *supra* note 11, at 42.

60. *Turner I*, 512 U.S. at 641-52. As law professor C. Edwin Baker writes, "the case turned on two issues." C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57, 58. In addition to consideration of whether the must-carry rules were content-neutral, the other pivotal issue "was determination of the constitutional standard to be applied to government regulation of cable." *Id.* A discussion of this second issue—whether cable should be treated like print, broadcasting, or as its own unique medium—is beyond the scope of this Article.

Court's analysis in *Turner I*, as other scholars have written, was "driven by its fixation on content-neutrality."[61]

1. Turner Broadcasting System, Inc. v. FCC (Turner I)[62]

The law at issue in *Turner I*, the Cable Television Consumer Protection and Competition Act of 1992,[63] requires cable systems with more than twelve active channels, and more than 300 subscribers, to set aside up to one-third of their channels for commercial broadcast stations that request carriage.[64] In addition, the regulations require cable systems with more than 300 subscribers but only twelve or fewer active channels to carry the signals of three commercial broadcast stations.[65] Under these must-carry obligations, cable operators must not—subject to a few exceptions —charge a fee for carrying over-the-air broadcast signals.[66] The law imposes similar obligations on cable operators regarding the carriage of local, non-commercial public broadcast television stations.[67]

The Court observed in *Turner I* that the must-carry regulations impact the First Amendment speech rights of cable operators "in two respects: The rules reduce the number of channels over which cable operators exercise unfettered control, and they render it more difficult for cable programmers to compete for carriage on the limited channels remaining."[68]

The Court analyzed the legislative history behind the must-carry provisions. It observed that the regulations were passed by Congress in light of "technological and economic conditions"[69] that threatened the survival of free, over-the-air television broadcasters.[70] It stated in *Turner I* in examining the legislative intent: In brief, Congress found that the "physical characteristics of cable transmission, compounded by the increasing concentration of economic power in the cable industry, are

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61. Price & Hawthorne, *supra* note 4, at 67. Price and Hawthorne criticize the Court's adherence to this "rigid doctrinal approach." *Id.*

62. 512 U.S. 622 (1994).

63. Cable Television Consumer Protection & Competition Act 1992, *supra* note 55.

64. *Turner I*, 512 U.S. at 630.

65. *Id.* at 630-31.

66. *Id.* at 631.

67. *Id.* at 631-32.

68. *Id.* at 636-37.

69. *Id.* at 634.

70. Eli Noam and Carolyn Cutler describe the power-play available to cable operators and programmers:

> [C]able's high penetration gave the cable industry increasing gatekeeper power over access to a viewer by a program provider. They had the power to pick and choose program channels and exclude those posing a threat to their own affiliated program channels . . . . With over-the-air broadcasting channels receiving increasingly over the cable wire and reception antennas dismantled, television broadcasters were worried about not being carried over cable or being placed on unfavorable spots on the dial.

Eli M. Noam & Carolyn Cutler, *Freedom of Expression and the 1992 Cable Act: An Introduction*, 17 HASTINGS COMM. & ENT. L.J. 1, 4 (1994). Baker adds that the must-carry provisions were passed "[i]n response to the virtual gatekeeper control that cable systems exercise over access to local broadcasting." Baker, *supra* note 60, at 57.

endangering the ability of over-the-air broadcast television stations to compete for a viewing audience and thus for necessary operating revenues. Congress determined that regulation of the market for video programming was necessary to correct this competitive imbalance."[71]

The Court noted in *Turner I* that Congress found that cable operators derived their power in part from control of over 60 percent of the television households in the United States that had replaced over-the-air broadcasting with cable subscriptions.[72] Coupling this fact with evidence that the overwhelming majority of cable operators exercise a monopoly over cable service, Congress observed that "this market position gives cable operators the power and the incentive to harm broadcast competitors."[73] As the Supreme Court stated, "[b]y refusing carriage of broadcasters' signals, cable operators, as a practical matter, can reduce the number of households that have access to the broadcasters' programming, and thereby capture advertising dollars that would otherwise go to broadcast stations."[74]

This marketplace failure directly impacts the *content* of messages carried on cable. In brief, problems in the economic marketplace create problems—imbalance in the distribution of ideas—in the metaphorical marketplace of ideas.

Some ideas—particularly those ideas uniquely and/or more effectively conveyed by local broadcasters—may be precluded from the marketplace of ideas presented on cable television. The Court, quoting in part from the legislative history of the Cable Act, observed that "broadcast television is 'an important source of local news[,] public affairs programming and other local broadcast services critical to an informed electorate' . . . and that non-commercial television 'provides educational and informational programming to the Nation's citizens."[75] Congress thus considered the value of preserving local broadcast content in the marketplace of ideas.

In sum, then, five justices agreed in *Turner I* that Congress envisioned the must-carry provisions as serving "three interrelated interests: (1) [p]reserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming."[76]

With both the terms of the law and its legislative history in mind, the Court addressed whether the must-carry regulations were content-neutral or content based. Clearly illustrating the problems with the criteria and methodology used to make this

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71. *Turner I*, 512 U.S. at 632-33. The Court noted as well that the must-carry provisions "are justified by special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television." *Id.* at 661.

72. *Id.* at 633. As of April, 1997, basic cable penetration had increased to 68.3% of television households. *By the Numbers*, BROADCASTING & CABLE, April 28, 1997, at 34.

73. *Turner I*, 512 U.S. at 633.

74. *Id.* at 633-34.

75. *Id.* at 648.

76. *Id.* at 662 (Part III-A of the opinion was authored by Justice Kennedy and joined by Chief Justice Rehnquist and Justices Blackmun, Stevens, and Souter).

determination, the Court fractured badly. Five justices considered the must-carry provisions content-neutral.[77] Four said they were content based.[78] The analysis and reasoning of each cluster of justices is set forth below.

a. The Must-Carry Provisions are Content-Neutral

To reach the conclusion that the must-carry provisions were content-neutral, Justice Anthony Kennedy considered three aspects of the regulations in *Turner I*: 1) The terms of the law on its face; 2) its legislative history; and 3) its actual operation and effect.[79] Each part is examined separately below.

i. Facial Content-Neutrality

Justice Kennedy and the four justices who joined him in Part II-C of the opinion in *Turner I* adopted a *burdens-and-benefits* approach in declaring the must-carry provisions facially content-neutral.[80] As Justice Kennedy initially observed, the rules "on their face, impose burdens and confer benefits without reference to the content of speech."[81] He then analyzed separately the burdens on cable operators and the benefits bestowed on over-the-air broadcasters by the must-carry regulations.

On the burden side of the equation, Justice Kennedy subscribed to the logic that it is constitutionally permissible to impose content burdens on cable operators, provided that the imposition of those content obligations is *not* triggered or activated by the cable operators' own content. This approach focuses on whether cable operators' specific messages trigger or activate the obligation to carry the content provided by local, over-the-air broadcasters. He found this was not the case. As Kennedy wrote, "[a]lthough the [must-carry] provisions interfere with cable operators' editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations, *the extent of the interference does not depend upon the content of the cable operators' programming.*"[82]

There are two separate, but related, ways to analyze and understand Kennedy's analysis of the burden side of the burden-and-benefits equation. One approach might be called a *triggering of the burden analysis.* The other may be thought of as a *content burden vs. content penalty analysis.*

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77. Justice Kennedy was joined by Chief Justice Rehnquist and Justices Blackmun, Stevens, and Souter in Part II-C of the opinion in *Turner I* concluding that the must-carry regulations were *not* content based. *Turner I*, 512 U.S. at 643-52.

78. Justice O'Connor, in a dissenting opinion joined in relevant part by Justices Scalia, Ginsburg, and Thomas, observed that "looking at the statute at issue, I cannot avoid the conclusion that its preference for broadcasters over cable programmers is justified with reference to content." *Id.* at 676 (O'Connor, J., dissenting).

79. *Id.* at 643-52.

80. *Id.*

81. *Id.* at 643.

82. *Id.* at 643-44 (emphasis added).

aa. Triggering-of-the-Burden Analysis

Kennedy's triggering-of-the-burden approach is fairly simple to understand as an "if-then" formula:

- If the content obligation imposed on an individual or entity is triggered by the specific content communicated by that individual or entity, then the regulation is content based.

- If the content obligation imposed on an individual or entity is *not* triggered by the specific content communicated by that individual or entity, then the regulation is content-neutral.

The latter formula, according to Justice Kennedy, described the situation in *Turner I.* The content obligations and burdens imposed on cable operators by the must-carry provisions, Kennedy observed, "are not activated by any particular message spoken by cable operators and thus exact no content-based penalty."[83] Phrased differently, the content burdens imposed on cable operators are generally applicable to all cable operators—they are not selectively applied to some cable operators who convey particular messages.

Kennedy explained this logic with reference to a previous Supreme Court decision. He distinguished the content obligations imposed under the must-carry provisions from the content burdens imposed on newspapers under so-called right-of-reply statutes like the one at issue in *Miami Herald Publishing Co. v. Tornillo.*[84] In *Tornillo*, the Supreme Court considered "whether a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper violates the guarantees of a free press."[85] Kennedy observed in *Turner I* that "[b]ecause the right of access at issue in *Tornillo* was triggered only when a newspaper elected to print matter critical of political candidates, it 'exact[ed] a penalty on the basis of . . . content.'"[86] A newspaper could avoid being forced to run a candidate's message if the newspaper itself avoided

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83. *Id.* at 655.

84. 418 U.S. 241 (1974).

85. *Id.* at 243. The Court added that under the law in question:

> [I]f a candidate, for nomination or election is assailed regarding his personal character or official record by any newspaper, the candidate has the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper's charges. The reply must appear in as conspicuous a place and in the same kind of type as the charges which prompted the reply, provided it does not take up more space than the charges. Failure to comply with the statute constitutes a first-degree misdemeanor.

Id. at 244.

86. *Turner I*, 512 U.S. at 653 (quoting Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974)).

printing material critical of that candidate.[87] In contrast to *Tornillo*, the must-carry provisions in *Turner I* imposed content burdens on cable operators regardless of the particular messages or ideas they conveyed.[88] Cable operators were not, under Kennedy's logic, penalized for conveying a particular idea or message. Neither could they avoid application of the must-carry law by self-censoring some messages and communicating others.

bb. The Content Burden v. Content Penalty Approach

Another useful way of examining Kennedy's analysis is to distinguish between *content burdens* and *content penalties.* When content requirements are imposed on cable operators as a whole, irrespective of the messages conveyed by those operators, they are seen as constitutionally acceptable content *burdens.* When those requirements, however, are imposed or triggered only *because of* the messages conveyed by cable operators, they are constitutionally invalid as content *penalties.* Contrasting *Tornillo* and *Turner I*, Kennedy specifically noted that because the must-carry regulations are neutral in application and not triggered by the message spoken by the cable operators they "exact no content-based *penalt[ies].*"[89]

Although the *burden/penalty dichotomy* is useful for understanding Kennedy's analysis, Kennedy himself was inconsistent in his use of terms when distinguishing between permissible burdens and impermissible penalties. For instance, Kennedy writes that "[n]othing in the Act imposes a restriction, *penalty, or burden* by reason of the views, programs, or stations the cable operator has selected or will select."[90] At another point, however, he states that the must-carry provisions "do not *penalize* cable operators or programmers because of the content of their programming."[91] Despite the Court's own failure to keep separate the difference between burdens and penalties, this dialectic between burdens and penalties provides a helpful heuristic for understanding the Court's decision.

After analyzing the burdens imposed on cable operators, Kennedy shifted gears and focused on the benefits bestowed on over-the-air broadcasters. As with the burdens, he found the benefits were content-neutral, observing that "the privileges conferred by the must-carry provisions are also unrelated to content."[92]

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87. *See Tornillo*, 418 U.S. at 257 (providing that when "[f]aced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy").

88. Kennedy observed that "in contrast to the statute at issue in *Tornillo*, no aspect of the must-carry provisions would cause a cable operator or cable programmer to conclude that 'the safe course is to avoid controversy,' *Tornillo*, 418 U.S. at 257, and by so doing diminish the free flow of information and ideas." *Turner I*, 512 U.S. at 656.

89. *Id.* at 655 (emphasis added).

90. *Id.* at 644 (emphasis added).

91. *Id.* at 647 (emphasis added).

92. *Id.* at 645.

In reaching this conclusion, Kennedy employed a *triggering of the benefit* analysis similar to the triggering of the burden analysis described above. The benefits to broadcasters were not triggered by the particular messages they conveyed, but applied generally to all broadcasters, and thus they were constitutionally permissible. Kennedy wrote:

> The rules benefit all full power broadcasters who request carriage—be they commercial or noncommercial, independent or network affiliated, English or Spanish language, religious or secular. The aggregate effect of the rules is thus to make every full power commercial and noncommercial broadcaster eligible for must-carry, provided only that the broadcaster operates within the same television market as a cable system.[93]

Kennedy concluded that the must-carry provisions, on their face, were content-neutral regulations that placed constitutionally permissible burdens on cable operators and conferred necessary benefits on broadcasters. His analysis, however, did not stop there. Going beyond the face of the statute, he examined its legislative intent. The next section describes this analysis.

ii. Content-Neutral Intent and Purpose

Kennedy began his analysis of the legislative intent in *Turner I* by stating a rule—"even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys."[94] This corresponds with the Court's earlier statement in *Ward v. Rock Against Racism*[95] that "the government's purpose is the controlling consideration"[96] on the content-neutrality issue.[97] Applying this rule, he ultimately concluded that the "overriding congressional purpose is unrelated to the content of expression disseminated by cable and broadcast speakers."[98]

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93. *Id.*

94. *Id.* Kennedy's analysis in *Turner I* reveals that he likely would support an obverse proposition to the maxim that a regulation that appears content-neutral may be content based if it regulates speech "because of the message it conveys." *Id.*

The must-carry provisions were mandated *not* because of the messages that cable operators conveyed, but because of the messages they potentially would *not* convey, specifically the messages of over-the-air broadcasters that might not be conveyed. Kennedy, as this section reveals, found that the purpose of compelling cable operators to convey these messages was *not* content based. Thus, it appears that Kennedy would support the proposition that a regulation that appears content-neutral may *not* be content based if it regulates speech because of the messages the speaker does *not* convey.

95. 491 U.S. 781 (1989).

96. *Id.* at 791.

97. *See supra* notes 24-25 and accompanying text.

98. *Turner I*, 512 U.S. at 647.

To reach this result, however, Kennedy craftily shifted his analysis away from the issue of speech to the issue of economics.[99] He viewed the controlling Congressional purpose as the preservation of free local broadcast television, not the guarantee that the specific content transmitted by those broadcasters would reach the public. As Kennedy stated, "[o]ur review of the Act and its various findings persuades us that Congress' overriding objective in enacting must-carry was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free television programming for the 40 percent of Americans without cable."[100]

Kennedy's statements reveal a fixation on the "overriding objective"[101] and "manifest purpose"[102] of a law as the touchstones for analysis of legislative intent. The fact that Congress made clear that *another purpose*—a purpose beyond economic considerations—of the must-carry provisions was to preserve "an important source of local news[,] public affairs programming and other local broadcast services critical to an informed electorate,"[103] was not determinative. According to Kennedy, this statement—a statement embodied in the official legislative history of the must-carry provisions that was codified with the law—"reflects nothing more than the recognition that the services provided by broadcast television have some intrinsic value and, thus, are worth preserving against the threats posed by cable."[104] Kennedy also described this as a mere "acknowledgment"[105] by Congress that "broadcast television stations make a valuable contribution to the Nation's communications system [that] does not render the must-carry scheme content based."[106] He therefore rejected the cable operators' and programmers' contention that the must-carry provisions are content based because they promote a favored type of content, namely local broadcast content.

Law professor C. Edwin Baker attacks Kennedy's logic on this point. He states that to "quarrel with the majority is more than possible. It is difficult to imagine that

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99. Pilon notes that the winners under the must-carry regulations—over-the-air broadcasters—"cast it [the regulations] as mere economic regulation, the better to render it immune from 'strict scrutiny.'" Pilon, *supra* note 11, at 62. Baker observes that the majority focused on the law's "admirable, anti-trust type purpose . . . [of] provid[ing] a fair playing field for television in order to prevent cable from using its control over the communication bottleneck to undermine the economic viability of (or to injure in somewhat less serious ways) local broadcasting." Baker, *supra* note 60, at 59-60.

100. *Turner I*, 512 U.S. at 646. Kennedy added in the same section of the opinion that:

> Congress designed the must-carry provisions not to promote speech of a particular content, but to prevent cable operators from exploiting their economic power to the detriment of broadcasters, and thereby to ensure that all Americans, especially those unable to subscribe to cable, have access to free television programming—whatever its content.

Id. at 649.

101. *Id.*

102. *Id.* at 645.

103. *Id.* at 648.

104. *Id.*

105. *Id.* at 649.

106. *Turner I*, 512 U.S. at 649.

Congress would justify the must-carry rules except *in part* on grounds that the content is expected characteristically to differ from that on cable and that this different content has value."[107] For Kennedy, however, the fact that the justification "in part" was content based was not determinative. Instead, he focused on what he considered to be the "overriding objective"[108] and "overriding congressional purpose"[109] of preserving free access to messages, apparently regardless of the content of those messages.[110]

The problem, of course, is the inherent subjectivity in determining when one congressional interest or purpose "overrides" another. In the must-carry cases, it seems difficult to remove or untangle the purpose of preserving unique local broadcast fare from the economic concerns about the survival of that fare on cable systems. Picking which purpose dominates often may amount to little more than a guessing game. Guessing games should not control decisions that ultimately affect the level of constitutional scrutiny—and therefore the likelihood of constitutionality—applied to laws that regulate speech.

Attorney and constitutional law scholar Roger Pilon illustrates this problem from the analysis in *Turner I*. He states:

> Winners under the Act cast it as mere economic regulation, the better to render it immune from "strict scrutiny." Losers cast it as the regulation of speech, the better to invoke the scrutiny that might render it void. The truth, of course, is that the Act regulates both property and speech, for to regulate property *is* to regulate speech. The Founders understood that, which is why they protected both, equally. To watch the modern Court try to determine which is dominant, whether the regulation of property or the regulation of speech, is to watch a morality play without direction . . . .[111]

Kennedy's own analysis reveals the conceptual difficulties of distinguishing the dominant or overriding purpose of a law from other lesser objectives. At one point, articulating the rules relating to content-based statutes, he states that "a content-based purpose may be sufficient in certain circumstances to show the regulation is content based."[112] He suggests with this language that *a* purpose—even if it is not *the* dominant purpose or overriding objective—is enough in some unspecified situations to declare an entire law content based. Why Kennedy chose to ignore this in *Turner I* is unclear but certainly problematic for the analysis of the content-neutral/

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107. Baker, *supra* note 60, at 60 (emphasis added).

108. *Turner I*, 512 U.S. at 646.

109. *Id.* at 647.

110. Kennedy, in fact, stated at one point in *Turner I* that what is important is that Americans "have access to free television programming—*whatever its content*." *Id.* at 649 (emphasis added).

111. Pilon, *supra* note 11, at 62-63.

112. *Turner I*, 512 U.S. at 642.

content-based dialectic. Perhaps the reason for Kennedy's rejection of this standard was that he did not even consider Congress' explicit language about the value of local programming *a* purpose. Along this line, he remarked that cable operators' and programmers' "ability to *hypothesize* a content-based purpose for these provisions rests upon little more than speculation and does not cast doubt on the content-neutral character of must-carry."[113]

iii. Content-Neutral in Operation and Effect

Justice Kennedy also considered briefly the actual operation of the must-carry provisions, concluding—in line with his analysis of both the terms of the regulations and their legislative history—that the provisions are content-neutral.[114] On this point, he again noted that the benefits were to all full power broadcasters, regardless of the content they convey.[115]

He added that in shouldering the burdens of the must-carry provisions, cable operators still controlled the cable stations that they could bump from their systems.[116] This means that there would *not* necessarily be an increase in local content, since the cable operator could *remove* a cable station that heavily carried local content, Kennedy observed.[117] "[I]f a cable system were required to bump a cable programmer to make room for a broadcast station, nothing would stop a cable operator from displacing a cable station that provides all local-or-education-oriented programming with a broadcaster that provides very little."[118]

After analyzing the terms of the must-carry provisions, their legislative history, and their operation and effect, Justice Kennedy concluded that they are content-neutral.[119] In finishing his analysis in Part II-C of the opinion in *Turner I*, Kennedy remarked that, "[i]n short, the must-carry provisions are not designed to favor or disadvantage speech of any particular content. Rather, they are meant to protect broadcast television from what Congress determined to be unfair competition by cable systems."[120] As the next section indicates, however, four justices disagreed with Kennedy's analysis.

b. The Must-Carry Provisions are Content-Based

Justice O'Connor, joined by Justices Scalia, Ginsburg and Thomas in Part I of her opinion dissenting from Justice Kennedy's analysis of the content-neutrality

113. *Id.* at 652 (emphasis added).
114. *Id.* at 648.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Turner I*, 512 U.S. at 648.
119. *Id.* at 652.
120. *Id.*

issue, disagreed with Kennedy *both* in terms of the applicable *legal standards* that apply to the content-neutrality analysis and with Kennedy's factual consideration of the *legislative intent.*[121]

i. Contrasting Legal Standards on Legislative Purpose

As noted above, Justice Kennedy hinged his analysis on the "overriding objective"[122] and "overriding congressional purpose"[123] of the must-carry provisions. This emphasis allowed him to elevate the economic questions of preserving free broadcast television to the status of the controlling purpose while treating the need to preserve local content as irrelevant. As argued above, divining or distinguishing which purposes of any law are dominant or overriding from other purposes is often little more than a guessing game.

Justice O'Connor applied a distinctly different legal standard to the question of legislative intent and purpose. She stated:

> It may well be that Congress also had other, content-neutral, purposes in mind when enacting the statute. But we have never held that the presence of a permissible justification lessens the impropriety of relying in part on an impermissible justification. In fact, we have often struck down statutes as being impermissibly content based even though their primary purpose was indubitably content-neutral.[124]

She added that "when a content-based justification appears on the statute's face, we cannot ignore it because another, content-neutral justification is present."[125] In O'Connor's view, then, analysis of content-neutrality does *not* pivot on the primacy of one purpose and the inconsequentiality of another. A supposedly primarily content-neutral purpose will not, for O'Connor, trump or override some other content-neutral purpose. This mitigates the dangers of the judicial guessing game of ranking congressional purposes as if they were some David Letterman *Late Show* Top 10 list.

In addition, O'Connor made it clear that an evil motive or ill will toward one speaker or set of speakers is *not* determinative in the analysis of whether a statute is content-neutral or content based. She observed that the must-carry provisions "may

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121. *Id.* at 675-82 (O'Connor, J., concurring in part and dissenting in part).

122. *Id.* at 646.

123. *Id.* at 647.

124. *Turner I*, 512 U.S. at 679 (O'Connor, J., concurring in part and dissenting in part).

125. *Id.* at 680. Justice Ginsburg, in a separate concurring opinion, agreed with Justice O'Connor's reasoning that the existence of content-neutral justification will not save a law from strict scrutiny if there are also content-based justifications. *Id.* at 686 (Ginsburg, J., concurring in part and dissenting in part). She wrote that "an intertwined or even discrete content-neutral justification does not render speculative, or reduce to harmless surplus, Congress' evident plan to advance local programming." *Id.*

not reflect hostility to particular points of view, or desire to suppress certain subjects because they are controversial or offensive. They may be quite benignly motivated. But benign motivation, we have consistently held, is not enough to avoid the need for strict scrutiny of content-based justifications."[126] This suggests that she rejects the Court engaging in a process of making distinctions between permissible content burdens and impermissible content penalties.[127] Although a law imposing content burdens may not be intended to penalize the speaker because of the speaker's messages, the law still may amount to an unconstitutional content-based burden.

Coupling O'Connor's points about the proper legal standards to apply in the content-neutrality analysis, it becomes clear that, for her, a law may be content based: 1) even if there is a content-neutral objective; and 2) even if that content-neutral objective is not malicious or intended to cause harm to a particular set of speakers like cable operators and programmers. A well-intended content-neutral objective simply will not save a law from strict scrutiny if there is a content-based objective that is clear from the legislative history. This is substantially different from Justice Kennedy's analysis.

ii. Contrasting Analysis of Legislative Intent and Purpose

While Justice Kennedy was giving short shrift to Congress' codified admonition about the importance of the local news and public affairs programming provided by over-the-air broadcasters,[128] Justice O'Connor was paying close attention.[129] She listed a litany of Congressional statements "enacted by Congress as §2 of the [Cable] Act"[130] that make it clear that Congress' "preference for broadcasters over cable programmers is justified with reference to content."[131] She cited the following statements by Congress to illustrate her point:

- "There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media."[132]

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126. *Id.* at 677.

127. *See supra* notes 89-91 and accompanying text (describing Justice Kennedy's apparent distinction between content burdens and content penalties).

Justice O'Connor's point is well taken, illustrating the judicial slight of hand that might arise in distinguishing penalties from burdens. If it is true, as the United States Supreme Court observed in Cohen v. California, 403 U.S. 15, 25 (1971), that "one man's vulgarity is another's lyric," then it is certainly possible that one person's penalty is another person's burden.

128. *Turner I*, 512 U.S. at 648.

129. *Id.* at 676-77 (O'Connor, J., concurring in part and dissenting in part).

130. *Id.* at 676.

131. *Id.* O'Connor's statement that the must-carry provisions privilege broadcasters over cable simply refers to the fact that the law gives benefits to broadcasters while interfering with the editorial discretion of cable operators and programmers. *Id.* at 675.

132. *Id.* at 676.

- "[P]ublic television provides educational and informational programming to the Nation's citizens, thereby advancing the Government's compelling interest in educating its citizens."[133]

- "A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation."[134]

- "Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate."[135]

Taking these and other statements together, O'Connor concluded that "[p]references for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make reference to content."[136]

It should be emphasized that O'Connor did *not* employ or consider Justice Kennedy's triggering-of-the-burden analysis in examining the question of content-neutrality. As described above, Kennedy distinguished the burden imposed on newspapers in *Tornillo* from the burden imposed on cable operators in *Turner I* in part on the ground that the burden in *Tornillo* was triggered *only* when newspapers printed a specific type of content.[137] Because the must-carry cable burdens were not triggered by the specific content provided by the cable operators, Kennedy deemed them less intrusive on the speech rights of the cable operators. For O'Connor, however, the fact that the content burden imposed on cable operators by the must-carry provisions was not triggered by any specific content they conveyed was *not* relevant. That the content burden applied equally to all cable operators and that it was not triggered by the specific messages the cable operators communicated would *not* save the must-carry provisions from review under the standard applicable for content-based regulations, under O'Connor's analysis.

In fact, Justice O'Connor actually cited *Tornillo* to *support* her argument that the must-carry provisions were content based.[138] She observed that "[f]or reasons related to the content of speech, the [must-carry] rules restrict the ability of cable operators to put on the programming they prefer, and require them to include programming they would rather avoid. This, it seems to me, puts this case squarely within the rule of . . . *Miami Herald Publishing Co. v. Tornillo*."[139]

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133. *Turner I*, 512 U.S. at 676.
134. *Id.*
135. *Id.* at 676-77.
136. *Id.* at 677.
137. *See supra* notes 84-87 and accompanying text.
138. *Turner I*, 512 U.S. at 682.
139. *Id.* at 681-82.

2. Turner Broadcasting System, Inc. v. FCC (Turner II)[140]

Less than three years after handing down its decision in *Turner I*, the Supreme Court revisited the question of the constitutionality of the must-carry provisions in *Turner II*. By a narrow 5-4 vote, the Court upheld the constitutionality of the must-carry provisions.[141] Although the principal opinion for the Court, authored by Justice Kennedy, did not formally revisit the question of content-neutrality it began "where the plurality ended in *Turner [I]*, applying the standards for intermediate scrutiny."[142] The analysis in *Turner II* raises further questions about the decision of five justices to consider the constitutionality of the must-carry provisions under the intermediate scrutiny standard applicable to content-neutral regulations. Furthermore, Justice O'Connor again questioned the decision to call the regulations content-neutral in a stinging dissenting opinion in *Turner II*.[143]

In reviewing the must-carry provisions a second time, Justice Kennedy again blinded himself from the possibility that a content-based purpose motivated the enactment of the law. As with the first decision, Kennedy reviewed "Congress' stated interests in enacting must-carry."[144] Observing that he was citing "explicit factual findings"[145] by Congress, Kennedy stated:

> Congress predicted that "absent the reimposition of [must-carry], additional local broadcast signals will be deleted, repositioned, or not carried" . . . with the end result that "the economic viability of free local broadcast television *and* its ability to originate quality local programming will be seriously jeopardized."[146]

This sentiment expressed by Congress and cited by Justice Kennedy reveals how inextricably intertwined are the content-neutral, economic interest in access and the content-based, local-programming objective behind the must-carry provisions. The must-carry provisions are necessary to prop up broadcasters economically only because they originate and convey a particular type of programming valued by Congress.

There must be something about the content conveyed by broadcasters that makes it valuable to preserve. If broadcast television stations conveyed only screen test

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140. 117 S. Ct. 1174 (1997).

141. *Turner II*, 117 S. Ct. at 1183. Justice Kennedy again wrote the opinion of the Court, except as to Part II-A-1, and was joined in the opinion in full by Chief Justice Rehnquist and Justices Stevens and Souter. *Id.* Justice Breyer joined the opinion except as to Part II-A-1, and filed an opinion concurring in part. *Id.* As in *Turner I*, Justice O'Connor authored a dissenting opinion that was joined by Justices Scalia, Thomas and Ginsburg. *Id.*

142. *Id.* at 1186.

143. *Id.* at 1205-19 (O'Connor, J., dissenting).

144. *Id.* at 1187.

145. *Id.*

146. *Id.* (citations omitted) (emphasis added).

patterns or perhaps blank screens, it is doubtful—highly doubtful—that Congress would have considered adopting must-carry provisions to preserve this type of content (or lack thereof). One cannot, therefore, take seriously Kennedy's statement in *Turner I* that it is important to preserve "access to free television programming—whatever its content."[147]

Kennedy himself acknowledged the importance of the content conveyed by broadcast television in *Turner II*:

> Broadcast television is an important *source of information* to many Americans. Though it is but one of many means for communication, by tradition and use for decades now it has been an essential part of the national discourse *on subjects across the whole broad spectrum of speech, thought, and expression.*[148]

Kennedy added that "Congress has an independent interest in preserving a multiplicity of broadcasters to ensure that all households have access to *information and entertainment* on an equal footing with those who subscribe to cable."[149] His own words reveal that Kennedy is concerned with allowing people to receive specific content—the information, the entertainment, the speech on the broad spectrum of subjects—provided by over-the-air broadcasters.

Despite the link between content-neutral and content-based objectives, Kennedy and four other justices analyzed the must-carry provisions in *Turner II* under the intermediate standard of scrutiny applicable to content-neutral regulations. Kennedy's ability to divine—and then hinge his analysis on—the "overriding congressional purpose"[150] in *Turner I* allowed him to trivialize the content-based objective of preserving local programming in *Turner II* by calling the interest in preserving free access the overriding objective.

Justice O'Connor argued—once again in dissent—in *Turner II* that the must-carry provisions are content based.[151] She observed that "the Court ignores the main justification of the statute urged by appellees and subjects restrictions on expressive activity to an inappropriately lenient level of scrutiny."[152] The main justification asserted by cable operators and programmers was that the must-carry provisions are content based because they focus on preserving diverse, quality local programming.[153] Because five members of the Court refused to accept that these

147. *Turner I*, 512 U.S. at 649.
148. *Turner II*, 117 S. Ct. at 1188 (emphasis added).
149. *Id.* at 1189 (emphasis added).
150. *Turner I*, 512 U.S. at 647.
151. *Turner II*, 117 S. Ct. at 1208 (O'Connor, J., dissenting).
152. *Id.* at 1219.
153. *Id.* at 1205.

interests made the must-carry provisions content based, O'Connor once again concluded that "the Court adopted the wrong analytical framework."[154]

3. *Trouble Spots From the Must-Carry Analyses in* Turner I *and* II

The mere fact that the Supreme Court fractured badly in both *Turner I* and *Turner II* on the question of content-neutrality suggests there are serious problems in the use of the rigid categorical doctrine of content-neutral/content-based analysis. The foregoing analysis suggests several sources of these problems.

First, justices can interpret legislative intent—even explicit, legislative intent codified as part of the law in question—in radically different ways. The must-carry cases thus embody the central paradox at the heart of the content-neutral/content-based dichotomy described: *A rigid, formulaic First Amendment jurisprudence that ultimately depends on a subjective, slippery, and speculative analysis of legislative intent.* This paradox will always plague the doctrine as long as legislative intent remains the touchstone concern of the Court, rather than consideration of the actual impact and operation of laws and regulation on speech.

Furthermore, when considering legislative intent, some justices apparently hinged their decisions on what they consider to be the *overriding* objective or purpose of a law. If the overriding or primary objective is content-neutral, the law will fall into this category. By contrast, other justices believe that any content-based objective—even if it is or is not overriding or the central objective—will place a law into the content-based category. These justices reject a hierarchical approach to legislative intent that elevates and prioritizes legislative purposes.

It may simply be that in those cases involving must-carry provisions that it is simply impossible to delineate content-neutral objectives from content-based objectives. In those cases, the Court either needs clearer standards—will it focus on one objective and denigrate another, or will it consider all reasons equally? will it distinguish between objectives that impose content *burdens* and objectives that impose content *penalties*?—or needs to rethink the very use of its categorical analysis.

In considering the burdens imposed by laws that regulate speech, will the Court employ a *triggering-of-the-burden* approach adopted by Justice Kennedy, *Tornillo* in *Turner I*, or will it ignore this test, as Justice O'Connor did in *Turner I*? Kennedy found it important that the content burdens imposed on cable operators were *not* triggered by any specific messages they communicated, but applied equally to all cable operators regardless of the messages they conveyed. The burdens imposed by

154. *Id.*

the must-carry provisions thus, at least for five justices, were different from the unconstitutional ones imposed on newspapers under the statute at issue in *Tornillo*.[155]

The next section explores two other recent cases in which the Court examined —and split—on the question of content-neutrality. These cases involve regulations of speech outside of abortion clinics.

B. Abortion Clinic Buffer Zones: Content-Neutral or Content Based?

Under the United States Supreme Court's decision in *Roe v. Wade*,[156] the unenumerated constitutional right to privacy was extended "to encompass a woman's decision whether or not to terminate her pregnancy."[157] Exercising that constitutional right, however, has not always been easy for women. This is especially true when anti-abortion protesters engage in vehement, vociferous demonstrations outside the offices of physicians who perform abortions.[158] The free speech rights of protesters run up against the physical safety and constitutional rights of women seeking abortions in these situations.

First, in *Madsen v. Women's Health Center, Inc.*,[159] and then less than three years later, in *Schenck v. Pro-Choice Network of Western New York*,[160] the United States Supreme Court considered the constitutionality of court-ordered buffer (or bubble) zones outside of abortion clinics. These zones are designed to facilitate patient access to clinics without unduly infringing on the free speech rights of the chanting, screaming, pushing pro-life supporters who harass those women.[161]

1. Madsen v. Women's Health Center, Inc.

The buffer zone in *Madsen* was a 36-foot bubble outside of a Melbourne, Florida abortion clinic.[162] It protected the entrances to the clinic to ensure unfettered entrance and exit from the premises.[163] Another portion of the court order prohibited

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155. *See supra* notes 84-88 and accompanying text (contrasting *Tornillo* and *Turner I* in a "triggering-of-the-burden" analysis).

156. 410 U.S. 113 (1973).

157. *Id.* at 153.

158. As Stanford University law professor Kathleen Sullivan states, "[t]he concern with terrorism in this context is a real one, as illustrated by the fatal shootings of health care workers at Florida and Massachusetts clinics." Kathleen M. Sullivan, *Discrimination, Distribution and Free Speech*, 37 ARIZ. L. REV. 439, 441 (1995).

159. 512 U.S. 753 (1994).

160. 117 S. Ct. 855 (1997).

161. *See* Ben A. Montenegro, Book Note, 25 SETON HALL L. REV. 1530, 1556 (describing the court's decision in *Madsen* and providing that the Court "balanced two competing rights: the fundamental right to decide whether to terminate a pregnancy, which is a significant part of a woman's right to privacy, and the freedom of speech central to the American concept of democracy" (citing Luke T. Cadigan, Note, *Balancing The Interests*, 32 B.C. L. REV. 835, 896 (1991)).

162. *Madsen*, 512 U.S. at 759-70.

163. *Id.* at 769.

picketing, demonstrating, and using sound amplification equipment within 300 feet of the residences of staff members of the abortion clinic.[164] The trial court's order imposing these restrictions was adopted after a prior injunction proved futile in protecting the health and safety rights of women seeking access to the clinic.[165]

In ruling on the constitutionality of the 36-foot buffer zone, the Supreme Court considered whether the court order was content-neutral or content based.[166] The majority began "by addressing [the] petitioners' contention that the state court's order, because it is an injunction that restricts only the speech of anti-abortion protesters, is necessarily content or viewpoint based. Accordingly, they argue, we should examine the entire injunction under the strictest standard of scrutiny."[167]

As was true in the Court's consideration of the must-carry provisions in *Turner I* and *Turner II*, the justices split on the issue of content-neutrality. Although six justices concluded the bubble zone was *not* content based,[168] a fiery Justice Antonin Scalia, joined by Justices Anthony Kennedy and Clarence Thomas, concluded that "the injunction in the present case was content based (indeed, viewpoint based) to boot."[169]

How did the justices reach these opposite conclusions? The following two sections describe the reasoning of the two camps on this issue.

a. The Buffer Zone is Content-Neutral

Writing the opinion of the Court, Chief Justice William Rehnquist squarely rejected the argument that the court order was content based because it restricted only the speech of anti-abortion protesters.[170] Rehnquist wrote:

> To accept petitioners' claim would be to classify virtually every injunction as content or viewpoint based. An injunction, by its very nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech of that group. It does so, however, because of the group's past actions in the context of a specific dispute between real parties.[171]

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164. *Id.* at 774.

165. *Id.* at 759. One clinic doctor told the lower court that the "noise produced by the protesters could be heard within the clinic, causing stress in the patients both during surgical procedures and while recuperating in the recovery rooms. And those patients who turned away because of the crowd to return at a later date . . . increased their health risks by reason of the delay." *Id.* at 758-59.

166. *Id.* at 762.

167. *Id.*

168. Chief Justice Rehnquist was joined by Justices Blackmun, O'Connor, Souter, Ginsburg and Stevens in Part II of the Opinion of the Court declaring the buffer zone content-neutral. *Id.* at 762-64.

169. *Id.* at 795 (Scalia, J., concurring in part, dissenting in part).

170. *Id.* at 762.

171. *Id.*

The Chief Justice observed that Florida law could equally restrain speech directed at a target "having nothing to do with abortion; none of the restrictions imposed by the court were directed at the contents of petitioner's message."[172] In other words, injunctions *could* be issued against any and all sides in the abortion debate if necessary to enforce rights in the context of a real dispute, but in this instance there was no injunction against pro-choice individuals simply because of "the lack of any similar demonstrations by those in favor of abortion."[173]

Articulating the principles for determining when a court order or law is content-neutral, Rehnquist stated the principal inquiry turns on "whether the government has adopted a regulation of speech *'without reference to the content of the regulated speech.'*"[174] The threshold consideration, Rehnquist said, was the government's purpose in imposing the restrictions.[175] The *government's purpose*, of course, in the case of an injunction amounts to the *trial judge's purpose* in granting the injunction.

Applying these rules, Rehnquist called the restrictions on the anti-abortion protesters' speech "*incidental* to their antiabortion message because they repeatedly violated the court's original order."[176] Rehnquist, in other words, drew on the speech/conduct distinction to avoid declaring the injunction content based.[177] He stated that the injunction was issued because of "the group *whose conduct* violated the court is order."[178] Therefore, "the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based."[179] By invoking the difference between speech and conduct, Justice Rehnquist was able marginalize as "incidental" the speech interests at stake in *Madsen*.[180]

Justice Rehnquist seemed on the verge of creating a per se rule that injunctions that restrict speech rights should never be considered content-based if the purpose of

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172. *Id.* at 762-63.

173. *Id.* at 762.

174. *Id.* at 763 (emphasis added) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

The italicized portion of that statement is extremely problematic if applied to the Court's analysis of the must-carry provisions in *Turner I* and *Turner II*. Those regulations were created precisely *because of* the content that cable operators carried and/or did not carry. Because cable operators might carry only speech provided by *non*-over-the-air broadcasters, Congress felt compelled to intervene and meddle with cable operators' content selection. In brief, the cable operators' speech was regulated precisely because of the content that it both carried and threatened to exclude. Under Rehnquist's standard articulated in *Madsen*, it is difficult to understand how the must-carry provisions could be considered content-neutral. This is discussed further in Part III of this Article.

175. *Id.*

176. *Id.* (emphasis added).

177. The speech/conduct distinction is a traditional part of First Amendment jurisprudence. *See* Kathleen M. Sullivan, *Resurrecting Free Speech*, 63 FORDHAM L. REV. 971, 976 (1995) (explaining the speech/conduct and mind/body dichotomies employed by the United States Supreme Court).

178. *Madsen*, 512 U.S. at 763.

179. *Id.* (citation and footnote omitted).

180. *See* Jennifer J. Seibring, Note, *If It's Not Too Much To Ask, Could You Please Shut Up?*, 20 S. ILL. U. L.J. 205, 206 (1995) (analyzing *Madsen* and stating that "the Court first established that the purpose of the injunction was to control the conduct of the protesters, rather than their message; the injunction, therefore, was content-neutral").

the injunction is to restrict conduct, not speech. He stated that "[a]n injunction, by its very nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech. It does so, however, because of the group's past actions in the context of a specific dispute between real parties."[181]

Furthermore, under the *Madsen* majority's analysis, the operation and effect of the court order on speech apparently is relevant to the content-neutrality determination. This contrasts, of course, with the analysis in *Turner I*. In that case Justice Kennedy specifically acknowledged consideration of the operation and effect of the must-carry provisions.[182] In *Turner I*, the Court went beyond legislative intent to consider the actual impact on speech of the must-carry regulations.[183] This inconsistency in the application of the operation and effect analysis is left unexplained by the majority in *Madsen*.

b. The Buffer Zone is Content Based

Justice Scalia, joined by Justices Kennedy and Thomas, argued on several grounds that the injunction should be subjected to the strict scrutiny standard applicable to content-based laws and regulations.[184] He observed that although "I believe speech-restricting injunctions are dangerous enough to warrant strict scrutiny even when they are not technically content based, I think the injunction in the present case was content based (indeed, viewpoint based) to boot."[185]

Justice Scalia attacked—and rejected—Chief Justice Rehnquist's use of the speech/conduct distinction that allowed the majority to conclude the injunction was content-neutral. Specifically, he cited a provision of the injunction that suggested it indeed only targeted certain individuals because of the viewpoints they held, not because of their conduct.[186] Scalia wrote:

> The Court claims that it [the injunction] was directed, not at those who *spoke* certain things (anti-abortion sentiments), but at those who *did* certain things (violated the earlier injunction). If that were true, then the injunction's residual coverage of "all persons acting in concert with or participation with

181. *Madsen*, 512 U.S. at 762.

182. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 647-49 (1994).

183. *Id.*

184. *Madsen*, 512 U.S. at 792-95 (Scalia, J., concurring in judgment in part and dissenting in part). Scalia identified two reasons why injunctions—as opposed to statutes and generally applicable laws—should be subjected to strict scrutiny, even if they are not considered content-based injunctions. *Id.* at 792-93. First, Scalia observed that:

> Although a speech-restricting injunction may not attack content as content in the present case, as I shall discuss, even that is not true, it lends itself just as readily to the targeted suppression of particular ideas. When a judge, on the motion of an employer, enjoins picketing at the site of a labor dispute, he enjoins (and he knows he is enjoining the expression of pro-union views).

Id. at 793.

185. *Id.* at 795.

186. *Id.*

> [the named individuals and organizations], or on their behalf," would not include those who merely entertained the same beliefs and wished to express the same views as the named defendants. But the construction given to the injunction by the issuing judge . . . is to the contrary: All those who wish to express the same views as the named defendants are deemed to be "acting in concert or participation."[187]

To buttress this argument, Scalia examined what might be considered the judicial equivalent of legislative intent—the transcripts of an in-court hearing before the trial judge who issued the disputed injunction.[188] In one exchange cited by Scalia, the defendant asked the trial judge, "When you issued the Injunction did you determine that it would apply only to—that it would apply only to people that were demonstrating that were pro-life?"[189] The judge responded, "In effect, yes."[190] These and other in-court exchanges allowed Scalia to conclude that there was "no doubt that the revised injunction here is tailored to restrain persons distinguished, not by proscribable *conduct*, but by proscribable *views*."[191] As if to demonstrate the relevance and importance of the in-court exchanges in determining the true purpose of injunctions that affect speech rights, Scalia appended to his opinion several pages containing portions of the transcript of the hearing in the case.[192] The majority, in contrast to Scalia's dissent, largely ignored the statements in the hearing transcripts in declaring the injunction content-neutral.

2. Schenck v. Pro-Choice Network

In *Schenck*, the Supreme Court revisited the question of buffer zones around abortion clinics, this time in the context of both "fixed bubble" and "floating bubble" zones around clinics and their patients in upstate New York.[193] The Court ultimately

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187. *Madsen*, 512 U.S. at 795.
188. *Id.* at 795-97.
189. *Id.* at 796.
190. *Id.*
191. *Id.* at 797.
192. *Id.* at 815-20.
193. 117 S. Ct. 855, 859 (1997). Three specific aspects of the injunction issued by the district court were at issue before the United States Supreme Court. *Id.* at 864. These were:

> (i) the floating 15-foot buffer zones around people and vehicles seeking access to the clinics; (ii) the fixed 15-foot buffer zones around the clinic doorways, driveways, and parking lot entrances; and (iii) the 'cease and desist' provision that forces sidewalk counselors who are inside the buffer zones to retreat 15 feet from the person being counseled once that person indicates a desire not to be counseled.

Id.

upheld provisions of the fixed zones while striking down the floating ones as violating the First Amendment rights of protesters.[194]

As in *Madsen*, six justices again joined in that part of the opinion holding that the buffer zones are content-neutral while three justices again thought otherwise.[195] This time, however, there was very little discussion of the issue of content-neutrality.

The majority simply stated that it was applying the rules from *Madsen* to consider the challenged provisions of the injunction.[196] It dropped a footnote stating that *Madsen* controlled and quoted that decision for the proposition that "the injunction was issued not because of the content of [the protesters'] expression, . . . but because of their unlawful conduct."[197] The government interests behind the injunctions in both *Madsen* and *Schenck*, the majority observed, were "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services."[198] The restrictions on speech were merely incidental to serving these interests. The *Schenck* majority observed that the so-called sidewalk counselors were still "free to espouse their message outside the 15-foot buffer zone, and the condition on their freedom to espouse it within the buffer zone is the result of their own previous harassment and intimidation of patients."[199] In other words, in line with the *Madsen* majority's invocation of the speech/conduct distinction, it is only the past *conduct* of the protesters which causes or leads to the restrictions on their *speech* rights. The majority thus had no difficulty finding the injunction content-neutral.

As with *Madsen*, Justice Scalia again dissented and again was joined by Justices Kennedy and Thomas.[200] This time, however, his dissent only indirectly discussed the question of content-neutrality. It arose in the context of the power of courts to

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194. *Id.* at 859. The majority held that the fixed buffer zones around doorways, driveways, and driveway entrances "are necessary to ensure that people and vehicles trying to enter or exit clinic property or clinic parking lots can do so." *Id.* at 868. In contrast, the so-called 15-foot floating buffer zones posed practical problems in terms of implementation and enforcement and "burden[ed] more speech than is necessary to serve the relevant government interests." *Id.* at 867. For instance, the majority observed:

> The sidewalk outside the clinic is 17-feet wide. This means that protesters who wish to walk alongside an individual entering or leaving the clinic are pushed onto the street, unless the individual walks a straight line on the outer edges of the sidewalk. Protesters could presumably walk 15 feet behind the individual, or 15 feet in front of the individual while walking backwards. But they are then faced with the problem of watching out for other individuals entering or leaving the clinic who are heading the opposite way from the individual they have targeted.

Id.

195. The question of content-neutrality was considered at Part II-D of the Opinion of the Court. *Id.* at 868-71. Chief Justice Rehnquist was joined in this part of the opinion by Justices Stevens, O'Connor, Souter, Ginsburg and Breyer. *Id.* at 859. The three justices who did not agree with the Court's analysis in Part II-D were Justices Scalia, Kennedy and Thomas, the same trio from *Madsen*. *Id.*

196. *Id.* at 865.

197. *Id.* at 865, n.6.

198. *Id.* at 866.

199. *Id.* at 870.

200. *Id.* at 871. (Scalia, J., concurring in part and dissenting in part).

articulate content-neutral rationales grounded in public safety concerns. "The Court's opinion . . . claims for the judiciary a prerogative I have never heard of: the power to render decrees that are in its view justified by concerns for public safety though not justified by the need to remedy the grievance that is the subject of the lawsuit."[201]

Scalia believed the majority exceeded the scope of its judicial powers and was acting, in his words, as a Committee of Public Safety.[202] As he stated, "[i]nstead of evaluating the injunction before us on the basis of the reasons for which it was issued, the Court today postulates other reason that *might* have justified it and pronounces those never-determined reasons adequate."[203]

If one accepts Scalia's argument, there are serious problems for application of the content-neutrality doctrine. When courts can go beyond the scope of express reasons for an injunction on speech and then create or "postulate" content-neutral ones, courts have the power to make any law content-neutral. This is especially true if one accepts the reasoning adopted in *Ward v. Rock Against Racism*[204] that a regulation "that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."[205] In other words, giving courts the power to create content-neutral rationales gives them, in turn, the power to transform an otherwise content-based law into a content-neutral one.

3. *Trouble Spots in Buffer Zone Analyses*

Madsen and *Schenck* illustrate, at the most basic level, that Supreme Court justices easily fracture on declaring injunctions—and not simply generally applicable laws and regulations, like those at issue in *Turner I* and *Turner II*—content-neutral or content based. That, however, is not the extent of the problem.

These cases raise serious questions about the proper role and weight that the actual *operation and effect* of an injunction has in the determination of content-neutrality. In each case, the impact of the law in question clearly was not only content-based, singling out speech on abortion, but also viewpoint based, restricting speech of anti-abortion activists. As noted in Part I of this article, regulations that are viewpoint based are presumptively unconstitutional.[206] The fact that the impact of the injunctions landed squarely on one particular viewpoint, however, was not relevant for the majority in the two cases.

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201. *Id.* at 871.
202. *Id.* at 875 n.4.
203. *Id.* at 871.
204. 491 U.S. 781 (1989).
205. *Id.* at 791.
206. *See supra* notes 44-54 and accompanying text (describing the category of viewpoint-based laws and the applicable standard of judicial scrutiny).

The Court has stated in previous decisions that a law can still be content-neutral "even if it has an incidental effect on some speakers or messages but not others."[207] Although it was injunctions—rather than laws—that were at issue in *Madsen* and *Schenck*, it is clear that the "effect on some speakers"[208] was much more than merely incidental. It was substantial, direct and immediate. It should also be noted that in *Turner I*, Justice Kennedy specifically *did* consider the operation and effect of the must-carry provisions.[209] The *operation and effect* of the injunctions were ignored by the Court in *Madsen* and *Schenck*, with the majority instead focusing on the *purpose* of the injunctions under consideration and rendering the actual impact on speech as merely incidental to that purpose. The question becomes: what weight, if any, *should* be given to the operation and effect—the real impact—of both laws and court orders in the resolution of the content-neutrality issue? If divining legislative (or judicial) intent is a speculative and subjective matter, then why not give more consideration to the actual impact and effect of statutes and court orders in the content-neutrality determination process?

Madsen and *Schenck* also raise questions about the use of the *conduct/speech dichotomy* in resolution of the content-neutrality question. Rehnquist's use of this dichotomy in *Madsen* allowed him, at least in part, to view the restrictions on speech of the protesters as merely incidental to the limitations on their conduct.

The use of this *conduct/speech dichotomy* parallels Justice Kennedy's invocation of the *economic/speech dichotomy* in *Turner I*.[210] As described above, Kennedy's focus on the economic interests as the "overriding objective"[211] of the must-carry regulations allowed him to devalue the speech-related objectives.[212]

In addition to these concerns, Justice Scalia's dissent in *Madsen* raises serious issues about the extent to which transcripts of hearings—transcripts that perhaps embody judicial intent—behind the decision to grant an injunction should be weighed in the content-neutrality issue. His emphasis on these transcripts leads him, in large part, to conclude that the injunction at issue was not just content based but viewpoint based.[213] The majority's decision, in contrast, did not consider the hearing transcripts and concluded that the injunction was content-neutral.[214]

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207. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).
208. *Id.*
209. *See supra* notes 114-18 and accompanying text.
210. *See supra* notes 99-106 and accompanying text.
211. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 646 (1994).
212. *See supra* notes 99-106 and accompanying text.
213. *See supra* note 184-92 and accompanying text.
214. *See supra* note 170-83 and accompanying text.

C. Secondary Effect Doctrine

So-called "adult" bookstores, theaters, and video arcades are a blight on the landscape of many communities today. Some cities have dealt with the problem by zoning these establishments to specific locations within a community.[215] One such city is Renton, Washington, located just south of Seattle.

In *Renton v. Playtime Theatres, Inc.*,[216] the United States Supreme Court considered the constitutionality of a zoning ordinance that prohibited adult motion picture theaters from locating within 1000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school.[217] Adult theater owners claimed the ordinance violated their First Amendment right of free speech.[218]

The Supreme Court initially considered whether the ordinance was content based or content-neutral.[219] It observed that although "the ordinance treats theaters that specialize in adult films differently from other kinds of theaters,"[220] the ordinance was aimed not at the content of the films shown but instead "at the *secondary effects* of such theaters on the surrounding community."[221] Specifically, the zoning law was designed to prevent crime, protect the city's retail trade, maintain property values, and generally preserve the quality of life.[222] Citing an earlier decision, *Young v. American Mini Theatres, Inc.*,[223] the Court in *Renton* concluded that zoning ordinances designed to combat secondary effects of adult businesses are subject to review under the intermediate standard of scrutiny applicable for content-neutral time, place, and manner regulations.[224]

Explaining the nature of content-neutral regulations, the Court stated that content-neutral regulations "are *justified* without reference to the content of the regulated speech."[225] The *Renton* Court also cited an earlier decision, *United States v. O'Brien*,[226] for the proposition that it "will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[227] This

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215. *Cf.* Schad v. Mount Ephraim, 452 U.S. 61, 68 (1981) (reviewing the constitutionality of a community's decision to ban nude dancing establishments, stating that "[t]he power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities," and providing that this power to zone is subject to constitutional limitations).

216. 475 U.S. 41 (1986).

217. *Id.* at 43.

218. *Id.* at 45.

219. *Id.* at 47.

220. *Id.*

221. *Id.* (emphasis added).

222. *Id.* at 48.

223. 427 U.S. 50 (1976).

224. *Renton*, 475 U.S. at 49.

225. *Id.* at 48 (quoting Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)).

226. 391 U.S. 367, 383 (1968).

227. *Renton*, 475 U.S. at 47-48.

statement, it should be noted, was cited by Justice Kennedy in *Turner I* to support his decision to declare the must-carry provisions content-neutral.[228]

There is a crucial difference, however, between *striking down* a law because of an alleged and speculative illicit motive and simply *classifying* a law as content-based because of an explicit content-based legislative purpose. Once a law is classified as content-based, *only then* is it subjected to judicial scrutiny, and, in turn, *only then* may it be upheld *or* struck down. In other words, the threshold decision that the Court must make is to classify a law as content-neutral or content based. The next step—the second decision—is whether that law will survive constitutional muster under the applicable standard of scrutiny. In citing the above quoted language from *O'Brien* in both *Renton* and *Turner I*, the Court confuses these two steps.

In summary, the secondary effects doctrine gives the legislative bodies that create laws—and the courts that interpret them—a method of transforming seemingly content-based laws into content-neutral ones. This is true despite the fact that, in operation and effect, the laws in question—like the zoning ordinances that target adult bookstores—clearly impact one particular type of content more than others.

Justice Brennan's dissent in *Renton* suggests some of the problems with the secondary effects doctrine.[229] "Because the [zoning] ordinance imposes special restrictions on certain kinds of speech on the basis of *content*, I cannot simply accept, as the Court does, Renton's claim that the ordinance was not designed to suppress the content of adult movies,"[230] wrote Brennan. He emphasized that Renton's ordinance singled out theaters specializing in "adult motion pictures" for regulation while other motion picture theaters exhibiting more mainstream fare escaped the strictures of the law.[231] The law, for Brennan, was thus content based both on its face *and* in its operation and effect on adult movie theaters.

It was only by looking at legislative intent—intent that, as Justice Brennan pointed out, was *not* included with the original law but was added by amendment only *after* the lawsuit was launched by owners of adult movie theaters[232]—that the zoning ordinance was magically transformed into a content-neutral regulation. In other words, post hoc legislative intent changed an otherwise content-based regulation into a content-neutral ordinance that was subject to the less demanding intermediate scrutiny standard. The secondary effects doctrine thus complicates the consistent and meaningful application of the content-neutral and content-based categories.

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228. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 652 (1994).
229. *Renton*, 475 U.S. at 55-65 (Brennan, J., dissenting).
230. *Id.* at 57.
231. *Id.*
232. *Id.* at 58-59.

III. THE FUTURE OF THE CONTENT-NEUTRALITY DOCTRINE

Where do these recent judicial forays and the secondary effects doctrine leave the content-neutrality doctrine today? Clearly the cases illustrate, at a minimum, that one justice's conception of a content-neutral law is often another justice's definition of a content based law.[233] The secondary effects doctrine, in turn, allows cities and communities to disguise—under cover of superficial legislative intent—content-based laws as content-neutral ones. The supposedly rigid and formulaic jurisprudence that centers around the deceptively clear categories of content-neutral, content-based, and viewpoint-based laws is, then, increasingly malleable and amorphous.

If the content-neutrality doctrine is to remain viable—and vital—in the next century, several issues need resolution. These involve clearer articulation of the legal standards and factors used in the threshold determination of into which category to place a regulation or court order. These issues are addressed in this part of the article.

Resolution of these questions alone, however, still will not end all of the problems with the content-neutrality doctrine. *Turner I* illustrates that justices can interpret legislative intent—codified legislative intent, no less—in substantially different ways. Thus, even if the legal "rules" are made clear and agreed on, justices will still find ways to interpret legislative intent on the question of content-neutrality in ways that best serve their personal tastes and whims. As previously noted, this part of the paradox plagues the seemingly simple and objective content-neutral/ content-based dichotomy in First Amendment jurisprudence. Although there are inevitable difficulties in interpreting legislative intent, *Turner I* reveals that these problems are not resolved even when the intent is explicitly included in the law. This throws into question the very use of a rigid, supposedly formulaic jurisprudence like the one embodied in the current content-neutral/ content-based categorical approach.

The four cases analyzed here simply add to law professor Martin H. Redish's seminal cry more than 15 years ago that the use of content distinctions "is both theoretically questionable and difficult to apply."[234] As Redish observed at the time, there is a fundamental misconception "that it is always possible to draw a conceptual distinction between content-based and content-neutral regulations."[235] *Turner I*, *Turner II*, *Madsen* and *Schenck* each bolster Redish's assertion that "the assumption that the courts can recognize and distinguish between these two kinds of regulations has proven incorrect in numerous instances."[236] Redish ultimately concluded back in 1981, long before the must-carry and abortion buffer zone cases, that the content-based/content-neutral distinction is "pragmatically untenable and should therefore be abandoned."[237] Although this article does not question the theoretical underpinnings

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233. *Cf.* Cohen v. California, 403 U.S. 15, 25 (1971) (providing that "one man's vulgarity is another's lyric").
234. Redish, *supra* note 3, at 113.
235. *Id.* at 114.
236. *Id.* at 140.
237. *Id.* at 142.

of the categorical approach, as Redish does, it certainly lends support to Redish's admonition of abandonment.

Before abandoning the approach altogether, however, this part examines the legal standards and tests that must be ironed out if the distinctions between content-neutral and content-based laws are to be both useful and valid.

A. *The Role of Legislative Intent in the Content-Neutrality Determination*

As described in Part I, the Supreme Court had said prior to the must-carry and buffer-zone decisions that "[t]he government's purpose is the controlling consideration"[238] on the question of whether a law is content-neutral or content based. If the government regulation is "*justified* without reference to the content of the regulated speech"[239] and not adopted because of "disagreement with the message"[240] conveyed by a speaker, then it is content-neutral.[241]

As *Turner I* and *Turner II* illustrate, there are times when there may be more than one government purpose. There may be an economic interest in preserving free access to a medium, and there may an interest in preserving unique or important content provided that medium that may be lost without government action.[242] The question becomes which interest or interests should control resolution of the content-neutrality determination question when there is more than one interest.

1. *What if there are several purposes?*

A central problem illustrated in the must-carry cases is that the justices apparently do not agree on what to do in the multi-purpose situation. Justice Kennedy, writing the principal decision, suggested at one point in *Turner I* that the existence of "a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based."[243] Although he failed to elaborate on what those "certain circumstances" are or might be, he seemed to employ what might be called a two-level (or n-level) approach for dealing with the multiple purpose situation. Under this approach, purposes are ranked in terms of apparent importance. The more important of two legislative purposes controls the decision as to whether the law is content-neutral or content based.

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238. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

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

240. *Id.*

241. In *Turner I*, both Justice Kennedy, who wrote the principal decision holding the must-carry provisions content-neutral, and Justice O'Connor, who wrote an opinion dissenting in part on the ground that the regulations were content based, cited similar language as providing the applicable standard. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 643, 676 (1994).

242. *See supra* Part II (discussing *Turner I* and *Turner II*).

243. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994).

Under this two-level approach, one purpose can be parceled out or identified as, in Kennedy's words, the "overriding objective"[244] or "overriding congressional purpose."[245] Any other lesser interest is denigrated and rendered secondary, in part by the use of disparaging rhetoric. Said Kennedy in *Turner I*, "[a]ppellants' ability to *hypothesize* a content-based purpose for these provisions rests on little more than speculation and does not cast doubt upon the content-neutral character of must-carry."[246] He observed, quoting a prior decision, that "an alleged illicit legislative motive"[247] will not strike down an otherwise constitutional statute.

As noted earlier in this article, this last statement provides somewhat specious support for a two-level theory of legislative intent. Why? The initial decision to classify a law as content-neutral or content based is *not* the same as the decision to strike down that law as unconstitutional. The law must first be classified as content-neutral or content based before it is subject to judicial scrutiny.

In contrast to employing a two-level approach to deal with the multi-purpose situation, Justice O'Connor observed that the Court has "often struck down statutes as being impermissibly content based even though their primary purpose was indubitably content-neutral."[248] In other words, classifying one purpose as overriding or primary should not be determinative. Given the speculative nature of divining and untangling congressional purposes and then evaluating whether one purpose was foremost in the minds of the legislators, Justice O'Connor's approach makes much more sense than any two-level theory.

2. *What if the purposes are ostensibly benign?*

Justice O'Connor stated in *Turner I* that "benign motivation . . . is not enough to avoid the need for strict scrutiny of content-based justifications."[249] This rule must be applied consistently by the Court. Preserving free access to television certainly seems benign, but it is a purpose that ultimately provides cover for interference with the content and editorial control of cable operators and programmers.

This admonition must apply as well to the zoning ordinance scenario in cases such as *Renton*. In that case, preserving quality of life and property values certainly seem like benign motivations. However, they mask motivations to suppress particular kinds of speech—in *Renton*, that speech was embodied in so-called adult movies.

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244. *Id.* at 646.
245. *Id.* at 647.
246. *Id.* at 652 (emphasis added).
247. *Id.* (quoting United States v. O'Brien, 391 U.S. 367, 383 (1968)).
248. *Id.* at 679 (O'Connor, J., concurring in part and dissenting in part).
249. *Id.* at 677.

3. *Can speech purposes rationally be separated from economic and/or conduct purposes?*

The must-carry, buffer zone, and zoning cases illustrate the difficulties in separating out non-speech-related purposes and motives from speech-related concerns. Each involved the use of a dialectic approach to intents and purposes.

In the must-carry cases, it will be recalled that Justice Kennedy shifted the focus from *speech* interests to *economic* interests to avoid calling the regulations content-based. In the bubble zone cases, the majority utilized the distinction between *conduct* and *speech* to avoid calling the court orders content-based. And finally, in *Renton*, under the secondary effects doctrine, the Court gets the power to separate *economic and lifestyle* interests from *speech* concerns.

Is it really possible for a court rationally to extricate one purpose from another, and, in so doing, discard the potentially damaging content-based purposes from the benign content-neutral ones? This certainly is a slippery and subjective task that poses problems for the future of the content-neutrality doctrine. In some cases there simply will be *both* content-based and content-neutral objectives that cannot be separated. In these cases, under Justice O'Connor's view described above, the law should be classified as content based.

4. *What does "without reference to content"[250] mean?*

In *Madsen*, the Supreme Court stated that the principal inquiry in determining content-neutrality concerns whether "the government has adopted a regulation of speech 'without reference to the content of the regulated speech.'"[251] Likewise, in *Turner I*, the Court stated that a content-neutral law is typically one justified "without reference to the ideas or views expressed."[252]

Just what, precisely, "without reference to the content of the regulated speech" really means is unclear in light of the must-carry decisions. The must-carry rules were adopted precisely *with reference* to the content of the speech that cable operators allegedly might not carry if allowed to control their content choices free of government intervention. The potential absence of free, over-the-air broadcast content is what prompted Congress to adopt those rules.

Part of the problem in interpreting the meaning of the without-reference-to-the-content rule is that the justices employ this term at two radically different *levels of analysis*. Those justices who perceived the must-carry rules as content-neutral employed the rule at the *micro* level of analysis. What does this mean? Simply that the focus of the legal analysis for these justices was on the level of the *individual*

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250. Madsen v. Women's Health Center, Inc., 512 U.S. 753, 763 (1994) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

251. *Id.*

252. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994).

cable operator. These justices observed that the rules applied to an individual cable operator regardless of—or, without reference to—the specific content conveyed by that cable operator. In other words, because the rules applied without reference to the messages conveyed by individual cable operators, they could be held content-neutral. No individual cable operator was singled out because of the messages he or she conveyed.

In contrast, at the *macro* level of analysis, the focus is not on the content provided by the individual cable operators but the content provided, in the *aggregate*, by cable operators. The must-carry rules are content-based at this level of analysis because of the concern that the cable industry as whole threatened the content provided by free, over-the-air broadcast industry. Although cable operators were not singled out individually under the must-carry provisions because of the content they did or did not provide, the cable industry as whole *was* singled for the content it did or did not provide. Thus the must-carry provisions clearly were imposed by Congress with reference to the content carried by cable operators collectively.

In future decisions, the justices must decide at which level of analysis—micro or macro—they will consider the constitutionality of a restriction on speech. Emphasis at the micro-level allowed the must-carry provisions to be declared content-neutral. Had the focus been at the macro-level, instead, the outcome might have been different.

B. What is the Role of Operation and Effect in the Content-Neutrality Determination?

Recall that, in *Turner I*, Justice Kennedy specifically considered the actual impact—the operation and effect—of the must-carry provisions in resolving the threshold question of content-neutrality.[253] The use of operation and effect in determination of the content-neutrality issue raises several questions, each of which is considered below.

1. How much weight should be given to the impact on speech?

The Court has repeatedly said that the primary inquiry in the determination of content-neutrality is on legislative intent and purpose, *not* on the actual impact of the regulations.[254] As described above, however, the search for legislative intent is often subjective and speculative. Justices are split on what the legislative intent truly was even in a case like *Turner I* in which the intent was actually codified within the law in question.

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253. *See supra* notes Part II.A. and accompanying text.

254. *See Madsen*, 512 U.S. at 753, 763 (stating that "we . . . look to the government's purpose as the threshold consideration").

Given this situation, courts should place more emphasis on the actual impact and effect of laws that regulate speech in the threshold determination of whether a law is content-neutral or content based. Clearly, in both the abortion buffer zone cases and the zoning/secondary effects scenarios, the burden of the laws or court orders in question falls squarely on the specific messages and content provided by specific speakers. With the buffer zone cases, it is the protesters of abortion whose speech pays the price. In the secondary effects scenario, it is the owners of adult movie theaters whose speech rights are sacrificed at the altar in the name of lower crime and higher quality of urban and suburban life.

When the actual impact of a law or court order falls squarely on the messages conveyed by one set of speakers—like abortion protesters or adult theater owners—the strict scrutiny standard applicable in the content-based law scenario must apply. There is a serious danger that superficial and phony legislative intent offering a content-neutral rationale for such laws hides content-based objectives.

2. *Is the triggering-of-the-content-burden approach useful?*

Justice Kennedy cited *Tornillo* in *Turner I* in adopting a triggering-of-the-burden approach for considering whether the impact of a law is content-based or content-neutral.[255] The problem with this approach, however, ties directly back to the difference between the micro-level and macro-level analysis of speech issues described above.

Specifically, the must-carry burden in *Turner I* was *not* triggered by the specific content provided by any individual cable operator. Thus, at the micro level of analysis, the must-carry provisions are content-neutral because the burden does not arise from—or depend on—the specific content conveyed by an individual cable operator.

At the macro level, however, the burden of the must-carry provisions certainly was triggered by the overall or aggregate content provided (or not provided) by cable operators as a whole. The threat of a lack of over-the-air broadcast content on cable television is what triggered the content burdens.

If this triggering of the burden approach is to be of any use, then, the Court must be consistent in terms of the levels of analysis it employs when applying this standard. Inconsistent application will only lead to further fractured decisions.

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255. *See supra* pp. 82-83 (discussing the triggering-of-the-burden analysis).

3. Is the penalty/burden dichotomy useful?

Justice Kennedy's apparent distinction between content-based penalties and content-based burdens in *Turner I* may provide a useful heuristic.[256] However, his own failure at times to properly distinguish between the categories of penalties and burdens suggests that this dialectic may be merely a matter of semantics. Unless the Court decides to clearly define and distinguish penalties and burdens, this distinction will provide little guidance for future decisions.

IV. CONCLUSION

Profound problems plague the current use of the judicially created categories of content-neutral and content-based speech regulations and orders. The cases examined in this article reveal that these problems have not been resolved in the fifteen years since Redish first lambasted these distinctions in a law journal article.[257]

If this rigid, formulaic approach to First Amendment jurisprudence is to serve a useful function in the future, the problems must be addressed and resolved by the Supreme Court. If the difficulties with the doctrine are not eliminated—or, at least, mitigated—the artificial categories will continue to be subject to manipulation and lead to fractured decisions.

If this remains the case, the categories will also fail to provide the type of predictability that lends itself to the establishment and maintenance of judicial legitimacy on which courts depend for their power and respect.[258] Thus, Redish's call for the abandonment of the categorical approach is heightened by the Court's failure to resolve the problems with the dialectic between content-neutral and content-based laws.

In contrast, if the justices address some of the issues discussed in this article, the categorical approach may be resuscitated as a useful procedure for evaluating the constitutionality of government intrusions on the speech rights of individuals and corporations. The longer the problems are not addressed, however, the more heroic measures will be needed to save the content-neutrality doctrine. The problems with the doctrine are not intractable. The Court, however, must take pause to reflect on and articulate clearer standards in the near future.

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256. *See supra* pp. 83-84 (elaborating on Justice Kennedy's content-based penalty and content-based burden analysis).

257. *See* Redish, *supra* note 3.

258. *See generally* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897) (observing that law is ultimately a body of "systematized prediction").