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FLOWCHARTING THE FIRST AMENDMENT

Fred C. Zacharias†

When may the government restrict political dissent? The Supreme Court last confronted that question in 1984. In Wayte v. United States¹ a group of eighteen-year-old draft protestors claimed that the government had singled them out for prosecution because of their vocal refusal to register for the draft. In National Gay Task Force v. Board of Education² (NGTF) a gay rights organization challenged an Oklahoma law forbidding public school teachers to “advocate” homosexuality. The two cases presented the same broad, overriding first amendment issue: to what extent may the government identify citizens on the basis of their political expression and subject them to regulation?³

Neither case produced a satisfactory response. With one cavalier sentence in Wayte, Justice Powell dismissed the conflict between the government’s law enforcement needs and the draft protestors’ right to express themselves: “prosecuting visible nonregistrants was [legitimately] thought to be an effective way to promote general deterrence, especially since failing to proceed against publicly known offenders would encourage others to violate the law.”⁴ Justice Powell enabled the Court to avoid deciding the NGTF issues altogether by declining, on grounds of ill health, to participate in the decision. The resulting four-to-four division among the remaining Justices produced a per curiam affirmance of the lower court’s decision.⁵

† Associate Professor, Cornell Law School. I gratefully acknowledge the assistance of colleagues at Cornell and elsewhere who took the time to comment upon earlier drafts of this manuscript. They include Professors Sheri Johnson, Michael Perry, Stewart Schwab, Gary Simson, and Geoffrey Stone. My secretary, Carol Kautz, and research assistants, Beth Anderson and Glenn Gordon, also provided yeoman—and much appreciated—support services. Finally, but not least, a special thanks must go to my wife, Sharon Soroko, for her technical, substantive and psychological assistance in creating the flow charts included in the Article.

² 470 U.S. 903 (1985), aff'g per curiam by an equally divided Court 729 F.2d 1270 (10th Cir. 1984).
³ Of course, the government will ordinarily justify such regulation on the basis of independent, allegedly legitimate goals; in Wayte and NGTF, for example, preserving the integrity of the draft and protecting the morals of school-aged children.
⁴ 470 U.S. at 613.
⁵ One hesitates to criticize the Supreme Court’s failure to provide a rationale in such a per curiam affirmance. Justice Powell’s unavoidable absence at oral argument on January 14, 1985, due to surgery left the participating members of the Court evenly split. Nevertheless, the Supreme Court did order reargument for three other cases ar-
This Article focuses on political speech cases and addresses the broad question the Supreme Court ducked. One can easily hypothesize a spectrum of situations in which federal or state authorities pursue legitimate or allegedly legitimate activities in a way designed to stifle protest. If the government concedes a desire to limit dissent or its influence on listeners, the strict "clear and present danger" or traditional "compelling state interest" test controls. But where the government has asserted independent justifications for regulation of political protest, courts have responded inconsistently. This Article proposes a model for analyzing all cases in which the government selects and regulates individuals as a result of their political speech.

The Supreme Court has decided most first amendment issues, including political protest cases, with some form of value balancing. Rather than discuss yet again the propriety of judicial balancing, this Article addresses more practical and concrete questions: (1) Has the Court ever adopted a full, all-encompassing balancing approach? (2) If not, why not? (3) If comprehensive balancing would be a reasonable approach, what factors should courts consider in implementing the balance? and (4) How would courts weigh these factors? The Article's practical framework represents an appendix to the general theoretical debate over first amendment balancing. Its model should enable courts to resolve the spectrum of protest cases in a more coherent way.
II
The Problem

A. Wayte and NGTF

Cases like Wayte and NGTF are difficult because they involve conflicts between important societal values. In Wayte the government had a legitimate interest in ensuring that young men register for the draft. Deterrence considerations seemed to require prosecutors to pursue publicized offenses. Wayte’s vocal refusal to register encouraged other eighteen-year-olds to break the registration law. Wayte in effect challenged the government to act. Had the government failed to prosecute, others subject to the registration law might well have determined that the law was a farce. Thus the case that most threatened the integrity of the Selective Service specifically involved public protest.

On the other hand, Wayte’s speech was a but-for cause of his selection for punishment. Only his exercise of first amendment freedoms distinguished Wayte from nonvocal nonregistrants who were not prosecuted. As a practical matter, the government’s passive enforcement program taught two related lessons: first, that it pays not to express one’s political views, for the government pursues public speakers for crimes it otherwise ignores; second, that nonregistrants who remain silent are immune from prosecution. These axioms contradict the ordinary teachings of the first amendment. Congress may not, for example, pass a law forbidding “vocal nonregistration” while immunizing silent noncompliance with the system. Yet the Wayte Court ultimately allowed the executive to accomplish the same end through selective prosecution.

NGTF presented a similar conflict of interests. From one perspective, the anti-advocacy law forced politically active teachers to

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11 The government disputed this characterization, arguing that it prosecuted all nonregistrants who came to its attention. Id. at 609-10. As a practical matter, however, the government’s failure to look actively for nonregistrants combined with its willingness to allow identified violators to register meant that only principled, vocal nonregistrants would face trial.
12 As the Justice Department official responsible for the registration law’s enforcement stated in a letter: “[W]ith the present universe of hundreds of thousands of non-registrants, the chances that a quiet non-registrant will be prosecuted is probably about the same as the chances that he will be struck by lightning.” Id. at 627-28 (Marshall, J., dissenting) (emphasis by Justice Marshall).
13 Indeed, the Supreme Court has taken pains to point out that diversity of views is healthy for society and that open disagreement and debate should be encouraged. See, e.g., First Nat’l Bank v. Bellotti, 435 U.S. 765, 783 (1978); United States v. United States Dist. Court, 407 U.S. 297, 314 (1972); Teminiello v. Chicago, 337 U.S. 1, 4 (1949).
14 Wayte, 470 U.S. at 610. Congress may enact a law punishing the speech aspect of such conduct only if the speech is “directed to inciting... lawless action and likely to... produce [it].” Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).
risk their jobs. It chilled their exercise of free expression. In contrast to *Wayte,* the statute explicitly conditioned regulation upon particular types of expression. Since a state may not, in the abstract, constitutionally select one political viewpoint and ostracize it, the *NGTF* statute seemed less justifiable than the governmental actions in *Wayte.*

Nevertheless, *NGTF* does parallel *Wayte* because the state officials, like the Selective Service in *Wayte,* had a valid regulatory rationale independent of any distaste for the teachers’ political views. Teachers serve as role models for children. Their status in the classroom gives them significant influence over the views of students. To the extent the teachers approved illegal acts, the state had reason to single them out and to prevent their advocacy from reaching students’ ears. Even where the teachers’ speech fell short of encouraging illegality, society’s interest in allowing parents to guide children’s moral development served as a counterweight against the notion that teachers’ speech should never be abridged.

*Wayte* and *NGTF* are two examples of situations in which indi-

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15 In *Wayte,* the government could reasonably argue that the decision to prosecute had nothing to do with the content of the defendant’s expression; it prosecuted only because *Wayte* had broken the law by failing to register. *Wayte,* 470 U.S. at 600-01.
18 These differences in the focus of the two regulations at issue in the two cases may indeed affect the way courts should assess their constitutionality. See infra notes 187-90 and accompanying text.
19 See *Ambach* v. *Norwick,* 441 U.S. 68, 78-79 (1979) (“a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values”); *East Hartford Educ. Ass’n v. Board of Educ.***, 562 F.2d 838, 359 (2d Cir. 1977) (en banc) (approving dress code for teachers because it promotes respect for authority and traditional values as well as discipline).
21 Twenty-three states have passed sodomy statutes that criminalize sexual acts by homosexuals. See *Note,* Bowers v. Hardwick: *The Extension of the Right to Privacy to Private Consensual Homosexual Conduct,* 10 Nova L.J. 175, 176 n.6 (1985). In *Bowers v. Hardwick,* 106 S. Ct. 2841 (1986), the Supreme Court upheld the constitutionality of such laws.
22 Cf., e.g., *Wisconsin v. Yoder,* 406 U.S. 205, 233 (1972) (recognizing importance of parents’ interest in guiding child’s religious and moral development); *Ginsberg v.*
individual government regulators\textsuperscript{23} may not personally disagree with the views of the targeted speakers, but nonetheless feel compelled to restrict the speech. In each case the regulation is content-based. It deters protest by others similarly situated. But because the regulators may have legitimate independent goals in mind, one cannot necessarily ascribe to them the specific motive to stifle the substance of the political beliefs.\textsuperscript{24} The problem for the courts is whether and how the government may implement its interests by singling out particular speakers. That determination necessarily requires some assessment of whether the governmental interests are important enough to justify the chill on free expression.

B. Some Examples

It is important to place \textit{Wayte} and \textit{NGTF} into broader context. In the classic example of state regulation of political dissent, the government attempts to punish "dangerous" political advocacy directly. The Supreme Court has adopted the \textit{Brandenburg} test to resolve such situations: The government may not punish political advocacy unless "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."\textsuperscript{25}

\textit{Wayte} and \textit{NGTF} suggest, however, that courts must evaluate regulation prompted by speech content in a broad range of other contexts.\textsuperscript{26} Consider the following examples:\textsuperscript{27}

\textsuperscript{23} Throughout this Article, I use the terms "regulator" and "government regulator" in the broadest sense. They encompass all governmental actors who may make or enforce rules that potentially infringe on first amendment freedoms.

\textsuperscript{24} In cases arising under the Smith Act, 18 U.S.C. § 2385 (1982), for example, the government's political distaste for communism may well have motivated the regulation. Yet during the early periods of labor unrest and the subsequent "cold war," well-meaning legislators did, in fact, fear a communist rebellion. The threat of violence rather than political disagreement may thus have fueled anticommunist regulation. Cf. \textit{Scales v. United States}, 367 U.S. 203, 228-30 (1961) (Congress may forbid attempts to accomplish communist goals through violent means); \textit{Yates v. United States}, 354 U.S. 298, 319 (1957) (Smith Act prohibits specific actions aimed at overthrowing government, not mere abstract ideas); \textit{Dennis v. United States}, 341 U.S. 494, 502 (1951) (Smith Act is "directed at advocacy not discussion").


\textsuperscript{26} The term "regulation" refers broadly to all governmental rules or actions that affect free expression. See \textit{supra} note 23.

\textsuperscript{27} This Article focuses exclusively on political protest situations. A virtually endless variety exists, ranging from "dangerous advocacy," see \textit{Brandenburg}, 395 U.S. 444, to student protests, see \textit{Tinker v. Des Moines Indep. Community School Dist.}, 393 U.S. 503 (1969), to simpler, milder expressions of viewpoint. See \textit{Cohen v. California}, 403 U.S. 15 (1971) (wearing jacket with vulgar antidraft slogan). Under any view of the first amendment, political protest deserves the highest order of protection. See \textit{infra} note 240. This
1. **Discharges of Public Employee Whistleblowers—Connick**

   A dissatisfied assistant district attorney distributes a questionnaire critical of the District Attorney's supervision of both internal and "public" aspects of the office. The questionnaire affects office routine and morale. The District Attorney orders the assistant District Attorney fired.\(^\text{28}\)

2. **Public Benefits Conditioned on Loyalty Oaths**

   As a requirement for public employment, admission to the bar, or receipt of other public benefits, a state requires recipients to pledge to uphold the U.S. Constitution and to deny membership in any organization that seeks the overthrow of the state and federal governments.\(^\text{29}\)

3. **Prosecutions of Tax Protestors**

   A protestor against the federal income tax program refuses to file an income tax return. In deciding when to criminally prosecute those who fail to file returns, the Internal Revenue Service considers the flagrance of the violation and the potential deterrent effect of prosecution on other taxpayers. The I.R.S. has a policy of selectively prosecuting tax protestors.\(^\text{30}\)

4. **Prosecutions of Draft Protestors—O'Brien**

   Protestors against U.S. involvement in a war burn draft cards as a means of highlighting their views. Their actions automatically violate laws requiring full-time "possession" of the cards. Nevertheless, in response to a rash of card burnings, Congress passes a supplemental statute punishing draft card mutilation. The government prosecutes O'Brien, a war protestor, for violating both the nonpossession and mutilation statutes.\(^\text{31}\)

5. **Reclassification of War Protestors**

   The Selective Service adopts a policy of withdrawing draft deferments and accelerating induction of protestors who participate in demonstrations that illegally interfere with draft recruitment.\(^\text{32}\)

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\(^\text{32}\) Gutknecht v. United States, 396 U.S. 295 (1970); see also National Student Ass'n v. Hershey, 412 F.2d 1103 (D.C. Cir. 1969) (government deferment policy). See generally
6. Criminal Surveillance of Political Activists

Law enforcement authorities adopt a policy of identifying, photographing, and gathering information on participants in political demonstrations. In each of these situations, the targets can claim that the government has singled them out because it disapproves of their political views and expression. In addition, others who share the protestors' opinions may well feel threatened in the exercise of their own first amendment freedoms.

As Figure A shows, the government has several possible responses. First, it can argue that it did not consider the content of the target's speech, but rather that it merely exercised a legitimate, independent legislative or executive function in a nondiscriminatory way. Second, the government may admit that the speech was a but-for cause of the regulation, yet assert that the effect rather than the content of the expression was the key. In other words, the government had the right to consider the speech's interference with society's independent interests. Third, the government may concede that the expression—even its content—was a but-for cause of the regulation because it alerted the government to the target's transgression. Once alerted, however, the government did not consider the expression further. Finally, in a few of the contexts, the government may be willing to admit that it did indeed intend to regulate speech content and claim an overriding right to do so.

These "defenses" overlap. In some cases, the government may use one or more to disguise the true justification for its regulation.


34 For descriptions of the categories portrayed in Figure A, see supra text accompanying notes 28-33. For citations to cases fitting within the categories, see infra notes 57-61.

35 In O'Brien and Wayte, for example, the defendants claimed that the government's primary purpose was to stifle antidraft sentiment. See Brief for the Petitioner at 22, Wayte v. United States, 470 U.S. 598 (1985) (No. 83-1292); Brief for David Paul O'Brien at 14-22, United States v. O'Brien, 391 U.S. 367 (1968) (Nos. 232, 233); see also Shane, Equal Protection, Free Speech, and the Selective Prosecution of Draft Nonregistrants, 72 Iowa L. Rev. 359, 362-71 (1987) (discussing Wayte's arguments). The government denied such motive, claimed an independent interest in prosecution, and asserted that it pursued all violations that came to its attention. See Brief for the Respondent at 26, 30, Wayte v. United States, 470 U.S. 598 (1985) (No. 81-1292); Brief for Petitioner at 22-31, United States v. O'Brien, 391 U.S. 367 (1968) (Nos. 232, 233). Similarly, the government routinely contends that it has fired whistleblowers not for their public disclosures, but rather for other, independent reasons relating to their competence. See, e.g., Connick v.
FIGURE A

<table>
<thead>
<tr>
<th>SITUATION</th>
<th>FACTUAL CONTEXT</th>
<th>POSSIBLE GOVERNMENT DEFENSES</th>
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<tr>
<td></td>
<td>GOV'T REGULATORS ARGUALLY DO NOT APPROVE OF CONTENT OF SPEECH</td>
<td>EXPRESSION OF TARGET AND OTHERS IS CHILLED</td>
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<td>HAYTE</td>
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<td>SURVEILLANCE OF ACTIVISTS</td>
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<td>X</td>
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Only rarely\textsuperscript{36} is the speech-inhibiting purpose of a regulation obvious or undisputed.

C. Factors Relevant to the Legitimacy of Regulation of Protest

1. The Factors

In order to assess the conflicting justifications in the protest cases, one would expect the courts to be flexible. Several factors seem appropriate for judicial consideration.

\textit{Motive for Regulation.} Courts should be able to evaluate the government's claim that it has no intent or desire to suppress the content of expression. If independent objectives rather than a distaste for a protestor's message in fact prompt a rule, a court can more easily accept the need to regulate. Conversely, proof of an intent to "stop" or "get at" protest activity should logically color a court's assessment of a regulation's importance.\textsuperscript{37}

A court can attempt to determine motive objectively. It can, in other words, look to (1) whether a regulation abridges speech expressly and (2) how substantial the abridgment is.\textsuperscript{38} Reference to subjective evidence would, however, enable courts both to evaluate the motives underlying a broader range of regulation and to do so more realistically and accurately.

\textit{Effect on Speech and Speech Values.} The first amendment mandates

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\textsuperscript{36} The few examples include the draft reclassification cases, see supra note 32 and accompanying text, and cases involving McCarthy-period legislation directed against membership in communist organization. See, e.g., Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961). More frequently, however, the government's obvious distaste for the speaker's message is interwoven with a fear of its dangerous effects. See, e.g., Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853 (1982) (plurality opinion) (distasteful books pulled from shelves because of potential effect on students); National Gay Task Force v. Board of Educ., 729 F.2d 1270 (10th Cir. 1984), \textit{aff'd per curiam} by an equally divided Court, 470 U.S. 903 (1985) (teacher advocacy of homosexuality banned, in part, because of impact on students). See generally Barnes, \textit{Regulations of Speech Intended to Affect Behavior}, 63 DEN. U.L. REV. 37 (1985).

\textsuperscript{37} The more a court defers to administrative or legislative regulatory decisions, the more critical it becomes for the court to inquire into the regulators' motivation. If a court is willing to assess the relative importance of the governmental and private interests, it has independent tools with which to strike down speech-repressive laws. When the Court relies primarily on a regulator's discretion, however, the Court gives up those tools. Only by reserving the right to examine the regulator's motive can the Court justify trusting the judgment of the coordinate branch. It is the Supreme Court's failure to acknowledge the role of motive analysis that caused the Court to abdicate its function as guardian of free expression in \textit{O'Brien}, 391 U.S. 369.

\textsuperscript{38} I define the terms "objective" and "subjective" motive \textit{infra} notes 164-71 and accompanying text.
concern for protestors’ rights. It thus requires at least some evaluation of the effect of a regulation on free expression. A court might first ask whether the regulation influences free expression at all. Does the regulation restrict the speech of the targets and persons similarly situated? Does it deter others from expressing their views? A careful court would pursue the analysis further by determining how much free expression the regulation deters, whether equally effective means of protest exist, and whether citizens who share the target’s views will be willing and able to use the alternatives.  

Effect on Governmental Interests. A comprehensive approach would include a similar evaluation of the government’s countervailing interests. First, does the government have independent reasons for regulating the protest? Second, even assuming a “legitimate” governmental interest, is it important enough to justify the effect on free expression?

The Method Used to Accommodate the Conflicting Interests. When litigants demonstrate that state and first amendment interests conflict, one would expect a court to assess the government’s accommodation of the competing interests. The alternatives for protecting the protestors’ freedoms and for accomplishing the governmental goals appear to be highly relevant considerations.

Other Factors. Scholars have identified other possible considerations, including a regulation’s “distortive effect” on public debate, the “nature” of the government interest, “equality” of treatment among speakers, and the “right-privilege” distinction. Courts

39 Justice Harlan suggested this line of analysis in O’Brien, 391 U.S. at 388 (Harlan, J., concurring), but few courts have pursued it.


41 The Supreme Court, for example, seems to disfavor certain types of governmental justifications for regulation. See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 769-70 (1976) (rejecting justification that citizens will misunderstand commercial advertising); First Nat’l Bank v. Bellotti, 435 U.S. 765, 789-92 (1978) (rejecting view that voters will be unable to evaluate commercially supported public speech). Professors Scanlon, Wellington, and Stone suggest that courts will hesitate to accept any government claim that is based on “paternalism.” Scanlon, A Theory of Freedom of Expression, 1 PHIL. & PUB. AFF. 204, 209 (1972); Stone, supra note 40, at 212-216, 229-30; Wellington, On Freedom of Expression, 88 YALE L.J. 1105, 1135 (1979). To the extent paternalism notions are relevant, courts can take them into account in assessing the government’s motive and the importance of the governmental interests.

42 See Karst, supra note 17, at 28. The degree to which a regulation discriminates among speakers and viewpoints is, of course, one factor contributing to the regulation’s impact on expression.

43 The right-privilege distinction seems to have lost its viability. L. Tribe, AMERICAN CONSTITUTIONAL LAW 705 (1978); Van Alstyne, The Demise of the Right-Privilege Distinc-
might, in theory, treat these as distinct and relevant criteria to be included in any balance. Nevertheless, the broad factors outlined above seem to encompass the additional considerations. This Article, therefore, will not address them separately.

2. Use of the Factors by the Courts

The Supreme Court has often discussed the way it must "balance" values in first amendment cases. Interestingly, though, courts have rarely considered and assigned weights to all the criteria discussed above. In each category of political protest, the courts have adopted legal tests that focus on one or several of the factors, but downplay or ignore the others.

Judicial use of the motive factor, for example, has been inconsistent. In United States v. O'Brien the Supreme Court disavowed any reliance on motive. It refused even to inquire into an alleged congressional intent to single out "hippies" and draft protestors for punishment. In contrast, in the draft reclassification cases, courts have considered legislative motive to be the controlling element in their decisions. The whistleblower context reveals a third approach: the courts place some, but only a limited emphasis on motive.

Similar cacophony appears with respect to the "impact on free expression" factor. Particular confusion exists regarding "chilling effects." In the examples that involve criminal prosecutions—the
tax protestor, *O'Brien*, and *Wayte* situations—judges have acted singularly unconcerned with the effect of prosecution on societal free speech values.\(^{50}\) The existence of a chill, however, seems to be the prime consideration in the loyalty oath context.\(^{51}\) But even the loyalty oath cases place little emphasis on the *significance* of the chilling effect; that is, the degree to which the regulation deters speech.\(^{52}\)

Courts that have reached the point of assessing the government's accommodation of state interests have also failed to balance fully. They have focused exclusively on either the degree to which a regulation furthers the governmental interest\(^{53}\) or the degree to which it affects first amendment rights.\(^{54}\) Rarely have the courts considered the factors in combination.\(^{55}\)

Figure B depicts graphically the courts' inconsistent theoretical focus.\(^{56}\) On one axis, Figure B categorizes a variety of protest cases.\(^{57}\) On the other, it lists the factors a comprehensive decision


\(^{52}\) See, *e.g.*, *Baird* v. State Bar, 401 U.S. 1, 2-4 (1971); *Speiser* v. Randall, 357 U.S. 513, 528-29 (1958).

\(^{53}\) See, *e.g.*, *O'Brien*, 391 U.S. at 376-82; *Anderson* v. Sills, 56 N.J. 210, 227, 265 A.2d 678, 687 (1970) (*"If a properly drawn measure is within the power of government, it is no objection that the exercise of speech or association is thereby 'chilled.'"*).

\(^{54}\) *Keyishian*, 385 U.S. at 602-03; United States v. Robel, 389 U.S. 258, 268 (1967); *Elbbrandt*, 384 U.S. at 18-19; *Aptheker*, 378 U.S. at 514.

\(^{55}\) On rare occasions, courts have attempted a refined analysis of the conflicting interests. See, *e.g.*, *Cohen* v. California, 403 U.S. 15, 22-26 (1971) (recognizing governmental interest, individual interest, and society's interest); American Communications Ass'n v. Douds, 339 U.S. 382, 399-400 (1950) (same).

\(^{56}\) I do not mean to suggest that it is impossible to reconcile any of the seemingly inconsistent cases. Comity or proof considerations explain some of the motive illustrations. In addition, courts may treat chilling effect considerations differently depending on the "direct" or "incidental" nature of a regulation's impact on speech. Nevertheless, it is fair to conclude that the erratic pattern of the decisions does not stem from any principled, overall theory.

\(^{57}\) For the sake of convenience, cases cited in Figure B are not footnoted individually. Instead, a list of citations follows (in the order of appearance on Figure B):


The cases selected for the loyalty oath category reflect the most typical judicial approaches. Individual courts have, on occasion, attempted other methods of disposition.
<table>
<thead>
<tr>
<th>SITUATIONS</th>
<th>DIRECT OR INDIRECT NATURE OF REGULATION</th>
<th>OBJECTIVE MOTIVE</th>
<th>SUBJECTIVE MOTIVE</th>
<th>EXISTENCE OF IMMEDIATE IMPACT</th>
<th>DEGREE OF IMPACT</th>
<th>EXISTENCE OF SPEECH DETERRENCE</th>
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<th>IMPORTANCE OF GOV'T. INTEREST</th>
<th>ACCOMMODATION OF FIRST AMENDMENT RIGHTS</th>
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The resulting overview illustrates a startling contrast in the courts' approaches to the different contexts. Figure B demonstrates that comprehensive balancing of all factors has not been the norm. The following section of this Article explains why the confusion in the law has occurred.

III

THE MEANING OF BALANCING IN FIRST AMENDMENT CASES

A. Do Courts Balance?\(^{59}\)

Constitutional law teachers traditionally expose students to Justice Black's view that first amendment rights are "absolute":\(^{60}\)

My belief is that we must have freedom of speech, press and religion for all or we may eventually have it for none. I further believe that the First Amendment grants an absolute right to believe in any governmental system, discuss all governmental affairs, and argue for desired changes in the existing order. This freedom is too dangerous for bad, tyrannical governments to permit. But those who wrote and adopted our First Amendment weighed those dangers against the dangers of censorship and deliberately

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\(^{58}\) In Speiser v. Randall, 357 U.S. 513 (1958), for example, the Court considered four of the listed factors: the direct/indirect nature of the regulation, \textit{id.} at 523-24, 527, subjective motivation, \textit{id.} at 519, 527, the impact on general first amendment values, \textit{id.} at 528, and the importance of the governmental interest. \textit{Id.} In its aberrational decision in American Communications Ass'n v. Douds, 339 U.S. 382 (1950), the Court touched on even more factors. See infra note 138. It explicitly balanced the existence of a chilling effect, its degree, the importance of the governmental interests, and the accommodation of first amendment rights. 339 U.S. at 400. In addition, the Court mentioned, but did not rely upon, the direct/indirect nature of the expression. \textit{Id.}


\(^{59}\) For an excellent general discussion of balancing, a definition of the term, and a description of the various forms balancing has taken, see Aleinikoff, \textit{Constitutional Law in the Age of Balancing}, 96 YALE L.J. 943, 945-48 (1987).

\(^{60}\) That is, immune from any regulation.
chose the First Amendment’s unequivocal command that freedom of assembly, petition, speech and press shall not be abridged.\textsuperscript{61}

Gradually, students learn that even Justice Black limited his extreme position.\textsuperscript{62} By the time students come to contrast Justice Black’s “absolutist” stance with Justice Harlan’s countervailing view in \textit{Ko

\textsuperscript{nigsberg v. State Bar},\textsuperscript{63} they recognize that courts have little choice but to “balance values” in deciding first amendment claims.\textsuperscript{64}

It is one thing, however, to recognize a need for some form of balancing, another to implement the need. The Supreme Court has adopted many different rules. In \textit{O’Brien}, for example, the Court held that a regulation is valid

if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.\textsuperscript{65}

The \textit{O’Brien} test focuses upon the governmental interest at stake. Its refusal to assess the interest in terms of the regulation’s actual impact on free expression represents a formula that the modern Court has used in many contexts.\textsuperscript{66}


\textsuperscript{63} 366 U.S. 36, 49-51 (1961). Harlan wrote, “Whenever . . . [first amendment] protections are asserted against the exercise of valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved.” \textit{Id.} at 51.

\textsuperscript{64} This conclusion holds true both within and without the political protest context. \textit{Cf.} M. Redish, \textit{Freedom of Expression: A Critical Analysis} 7-8 (1984) (“[absolute] approaches are either practically unworkable or effectively amount to little more than disguised forms of balancing”).

In a recent article about balancing throughout constitutional law, Professor Aleinikoff disputes that balancing is unavoidable. Aleinikoff, \textit{supra note 59}, at 977-1002. He posits that “balancing is uncontroversial today because of its resonance with current conceptions of law and notions of rational decisionmaking.” \textit{Id.} at 914; see also \textit{id.} at 952-63 (describing changes in courts’ and commentators’ jurisprudential orientations).


\textsuperscript{66} Justice Powell, for example, has implemented this analysis in such divergent con-
Other balancing "tests," however, compare governmental and first amendment interests more directly. In *American Communications Association v. Douds*, for example, the Court held:

When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented.

The traditional strict first amendment test recasts the focus in more speech-protective terms:

Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest.

On rare occasions, as in *Brandenburg v. Ohio*, the Court has adopted formulas that encompass some balancing but are so speech-protective that they verge on Justice Black's initial refusal to balance at all.

The bottom line is this: Among the Court's varying tests, some resemble the absolutist model, others clearly weigh countervailing state and first amendment interests, and yet others focus primarily on the governmental interest. But they all "balance" to one degree or another. Nevertheless, the Court has steadfastly refused to admit that it balances or to recognize a comprehensive approach which would weigh all the relevant factors.


68 395 U.S. 444, 447 (1969) (per curiam) (state may not forbid advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action).

71 The Court has, for example, been highly protective of speech in libel cases. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (adopting "actual malice" standard for libel actions involving public officials); *see also Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514 (1984) (requiring appellate judges to review evidence of malice); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967) (plurality opinion) ("public figures" who are not public officials must meet libel standard established in *Sullivan*).

72 *See Shiffrin, Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. Rev. 915, 946 (1978) ("If the Court should ever attempt to put [the] cases side by side, it would have to admit that it employs an elaborate general balancing technique to determine whether speech shall enjoy first amendment protection.") (footnote omitted); *see also id.* at 955-58.

73 Arguably, courts balance whenever they choose to use one test rather than an-
B. Attempts to Explain the Schizophrenic Decisionmaking on the Basis of Rules

Judges and commentators have offered numerous theoretical frameworks in an attempt to rationalize the Court's inconsistent approaches. They have tried to show that the Court has not just balanced _ad hoc_. In the end, however, none of the "rule-oriented" approaches succeeds in explaining the outcomes of the first amendment cases. Inevitably, each of the theories runs up against the reality that a judicial desire to weigh conflicting interests has fueled the decisions.

Perhaps the most persuasive of the analyses is Professor Tribe's attempt to sort regulations into two groups. "Track one," encompassing "government actions aimed at [the] communicative impact" of speech, is subject to the absolute approach of cases like _Brandenburg_. In contrast, balancing rules may justify "track two" actions, those "aimed at the non-communicative impact" of speech or conduct. As Professor Tribe himself suggested, however, the cases do not uniformly follow his categorizations. Moreover, the two-track

other. Often, the more significant an infringement on first amendment interests, the stricter the test a court will choose. See Stone, _supra_ note 40, at 197-98.

Yet the possibility that courts balance "implicitly" does not eliminate the need to develop a comprehensive method for explicit balancing. Failure of judges to express their true reasons has costs. See _supra_ note 45; cf. Zacharias, _The Politics of Torts_, 95 _Yale L.J._ 698, 752 (1985) (courts should express factors they consider). This Article's model provides a framework that enables judges to decide cases honestly and reveal their true rationales for appellate and scholarly critique.

Theories here discussed are the ones that have attracted the most attention. There are, of course, others. See generally T. Emerson, _Toward a General Theory of the First Amendment_ (1966); Schlag, _An Attack on Categorical Approaches to Freedom of Speech_, 30 _UCLA L. Rev._ 671 (1983); sources cited in _id._ at 671-72 n.1.

L. Tribe, _supra_ note 43, at 580-84. Dean Ely suggests a similar approach in J. Ely, _Democracy and Distrust_ 111-14 (1980) (issue is whether evil state is seeking to avert is one that is independent of message being regulated).


_id._ at 582.

_id._ at 591-94. By refusing to consider motive in United States _v._ O'Brien, 391 U.S. 367 (1968), for example, the Supreme Court avoided determining the actual "aim" of the draft-card statute. _Id._ at 383. The Court's decision to balance away the target's choice of expression therefore does not fit neatly into Professor Tribe's two-track analysis. Similarly, where the government conditions benefits, such as employment, upon the taking of a loyalty oath, the regulation clearly aims at "communicative" aspects of the target's behavior; absent proof of disloyal actions, the statute punishes the target solely for his political beliefs and associations. See, e.g., _Law Students Civil Rights Research Council, Inc. v. Wadmond_, 401 U.S. 154 (1971) (loyalty oath for admission to New York bar); Adler _v._ Board of Educ., 342 U.S. 485 (1952) (membership in a subversive organization renders individual ineligible for public school employment). On the whole, however, the Court has adopted a balancing, rather than an absolutist, approach to such oaths. United States _v._ Robel, 389 U.S. 258 (1967); American Communications Ass'n _v._ Douds, 339 U.S. 382 (1950).
theory does not take into account a vast array of regulations clearly aimed at communicative aspects of speech—such as perjury and extortion statutes—which the courts would not even consider striking down. Professor Tribe’s analysis, although useful in providing a general theory for how the First Amendment might operate in the future, thus provides neither a justification nor a full explanation for the prior decisions.

Justice Powell implemented a similar approach in Wayte. In the past, Justice Powell had firmly supported a compelling state interest test in cases involving a “direct” regulation of speech. But in Wayte, he adopted the weaker balancing approach of O’Brien because, like Professor Tribe, he viewed the prosecution as affecting speech values only “indirectly.”

Logically, however, Justice Powell should not have been able to determine whether the Wayte regulation affected speech “directly” or only “incidentally” without first evaluating why the government chose to prosecute primarily vocal nonregistrants. If by “indirect” regulation Justice Powell meant to permit judicial balancing whenever the government can hypothesize a nonspeech-related justification for a regulation post hoc—regardless of the government's actual motive—then the decision is inconsistent with his own prior First Amendment opinions.

Justice Powell’s approach, in short, also

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81 See M. Redish, supra note 64, at 90-116; Emerson, First Amendment Doctrine and the Burger Court, 68 Calif. L. Rev. 422, 472-74 (1980) (listing six criticisms of Professor Tribe’s approach); Farber, Content Regulation and the First Amendment: A Revisionist View, 68 Geo. L.J. 727, 743-47 (1980) (criticizing Professor Tribe’s approach in O’Brien context). Professor Tribe himself has recently suggested that the Court may have simultaneously used its “speech/conduct” distinction, see infra notes 91-93 and accompanying text, as a surrogate for Tribe’s two-track analysis and “a mask for discrimination against the methods of communications favored by the relatively powerless groups in society.” L. Tribe, Constitutional Choices 199-200 (1985).
84 Id.; see L. Tribe, supra note 43, at 685-86 (discussing O’Brien).
85 470 U.S. at 611 (quoting United States v. O’Brien, 391 U.S. 367, 376 (1968)).
86 In Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (plurality opinion), for example, Justice Powell joined Justice Stevens in balancing the government’s zoning interests against the First Amendment rights of exhibitors of erotic movies, on the sole basis that the net effect on speech values was minimal.

The inquiry for First Amendment purposes ... looks only to the effect of this ordinance upon freedom of expression. This prompts essentially two inquiries: (i) Does the ordinance impose any content limitation on the creators of adult movies or their ability to make them available to whom they desire, and (ii) does it restrict in any significant way the viewing of these movies by those who desire to see them? On the record in this case, these inquiries must be answered in the negative.
fails to explain the case law.

An alternative interpretation of Justice Powell's opinion is that he was merely following the now common distinction between "content-based" and "content-neutral" speech restrictions. Like Professor Tribe's "two track" theory, the content distinction makes sense in many contexts. It underscores a valid fear that the government may regulate expression on the basis of speakers' views. Yet content analysis often honors form over substance. And in practice, courts have subjected even content-based restrictions to a

Under the content distinction, regulations that do not explicitly mention speech content are subject to "balancing" standards, while rules that identify targets by their message are strictly scrutinized. See, e.g., Carey v. Brown, 447 U.S. 455 (1980) (striking down statute that permitted peaceful residential picketing based on nature of message conveyed); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (striking down drive-in movie theater ordinance based solely on content of movies shown). See generally Stephan, The First Amendment and Content Discrimination, 68 VA. L. REV. 203 (1982). Proponents of the distinction can read Justice Powell's Wayte opinion as applying a balancing approach because the regulation did not specifically mention speech content.

The content distinction is closely akin to Professor Tribe's two-track analysis. Tribe would, however, take a less formalistic approach and look somewhat beyond the mere terms of a regulation. See L. Tribe, supra note 43, at 592-98. Other scholars have attempted to bridge the gap between the two theories by proposing (or assuming) greater flexibility in the use of content analysis. See Farber, supra note 81.

Professor Stone has distilled and analyzed the content doctrine's concerns. See Stone, supra note 40; see also infra note 285. He rightly concludes that the concerns are not always significant even in situations where the doctrine treats the content-based or content-neutral nature of a regulation as controlling. The theory of this Article's model shares the sentiment underlying content analysis. But the model tries to avoid the problems that a singular emphasis on content creates. In cases where a prejudice against content-based regulations is justified, the model takes the relevant concerns into account. By acknowledging other equally important factors, however, the model avoids many of the bizarre results occasioned by strict reliance on the content distinction.

Content analysis may, as in O'Brien, legitimate regulations that seem invidiously motivated and that substantially restrict expression. Conversely, it may also operate to invalidate perfectly viewpoint-neutral rules that have no effect on freedom of expression. See generally Stone, supra note 40; Stone, Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions, 46 U. CHI. L. REV. 81 (1978).
range of first amendment balancing tests. The overall content doctrine is thus too narrow in focus to justify the outcome of prior decisions or to provide a unitary framework for the vast variety of first amendment conflicts.

The final attempt to offer an overall theoretical framework is Justice Black's. In reconciling his absolutist position with regulations of disruptive symbolic expression that became prevalent in the protest movements of the 1960's, Justice Black drew a strict, clear line between speech and conduct. Black concluded that the state could not regulate "pure speech," but that the Court should enforce countervailing state interests in regulating conduct, or "speech plus." In the end, however, Black's speech/conduct distinction, too, proved unworkable.

All communication . . . involves conduct. . . . [I]f the expression involves talk, it may be noisy; if written, it may become litter. So too, much conduct is expressive, a fact the Court has had no

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90 See Stone, supra note 40, at 194-97.


93 See, e.g., Street v. New York, 394 U.S. 576, 609-10 (1969) (Black, J., dissenting) (state can prohibit burning of American flag but not mere act of making derogatory statements); Cox v. Louisiana, 379 U.S. 559, 576-79 (1965) (Black, J., dissenting) (state's interests may be sufficient to regulate conduct but not pure speech). See also Cox, 379 U.S. at 563 (Goldberg, J.) (implementing speech/conduct distinction); NAACP v. Button, 371 U.S. 415, 464-65 (1963) (Harlan, J., dissenting) (same): Cameron v. Superior Court, 339 U.S. 460, 465 (1950) (Frankfurter, J.) (same). One could, in fact, cite Justice Black's opinions for the proposition that government may not regulate speech but may regulate "speech plus" without regard to first amendment values. See, e.g., Cox, 379 U.S. at 581 (Black, J., dissenting) ("I have no doubt about the general power of Louisiana to bar all picketing on its streets"). Other Justices have, however, tempered that approach. They have adopted the position that a balancing standard is appropriate for regulation that covers conduct together with speech, but that a more "absolute" standard applies where only speech is involved. See id. at 564 (Goldberg, J.) (rejecting an absolute test because "[w]e deal in this case not with free speech alone, but with expression mixed with particular conduct").

trouble recognizing in a wide variety of circumstances. Expression and conduct, message and medium, are thus inextricably tied together in all communicative behavior. . . .95

As Professor Tribe has concluded, the distinction "may be taken at most as shorthand for an inquiry into the aim of the government's regulation."96

A strict rule-oriented approach for deciding when, if ever, courts can weigh governmental interests against free expression may yet win the day. This Article does not take a position on whether the Supreme Court should, for example, adopt Professor Tribe's view. The Court has, however, clearly not yet done so. Instead, a variety of often unidentified ingredients have crept into the overwhelming majority of its first amendment decisions. The total picture is confused and unclear.

In response, much of the recent literature has shifted in focus from "may the court balance" to the more practical issue of how balancing is to occur.97 The Supreme Court has not fully adopted any one balancing theory, though it has leaned toward a categorization approach.98 The Court has never articulated a meaningful ex-

95 L. Tribe, supra note 43, at 599 (footnotes omitted); see also L. Tribe, supra note 81, at 199 ("It is impossible to imagine speech unaccompanied by a 'verbal act.'"). Nevertheless, some courts continue to rely on the speech/conduct distinction. See, e.g., City of Los Angeles v. Preferred Communications, Inc., 106 S. Ct. 2034 (1986).

96 L. Tribe, supra note 43, at 601. Professor Emerson redefines Justice Black's "speech/conduct" distinction into an "action/expression" distinction in a valiant attempt to prove that the distinction is capable of being applied. See T. Emerson, supra note 74, at 479. But see L. Tribe, supra note 43, at 599-600 ("expressive behavior is 100% action and 100% expression.") (quoting Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1495-96 (1975)); Baker, Scope of the First Amendment Freedom of Speech, 25 UCLA L. Rev. 964, 1009-12 (1978) (discussing the "Inadequate Expression-Action Dichotomy"); Shiffrin, supra note 72, at 959-60 (Emerson rule-oriented approach is balancing in fact).

97 Some courts and commentators argue that courts should balance ad hoc; that is, weigh first amendment interests against governmental interests on a case-by-case basis. See, e.g., Cohen v. California, 403 U.S. 15 (1971); Spence v. Washington, 418 U.S. 405 (1974); see also Farber, supra note 81, at 747; Shiffrin, supra note 72, at 916-17. The "categorization" approach also allows courts to compare conflicting interests, but first attempts to define categories of speech. A few categories may not be abridged, while others may be regulated to a greater or lesser extent. See generally Ely, supra note 96, at 1496-1502 (1975); Scanlon, Freedom of Expression and Categories of Expression, 40 U. Pa. J. of L. 519 (1979); Schauer, supra note 80; Note, Politics and the Non-Civil Service Public Employer: A Categorical Approach to First Amendment Protection, 85 Colum. L. Rev. 558 (1985).

98 Professor Schlag defines categorization as "an approach which (1) defines a class or classes of speech protected by the first amendment and (2) accords or denies protection (to whatever degree) to the class or the classes of speech in a categorical manner, i.e. by operation of an unconditional rule." Schlag, supra note 74, at 672 n.3. The Court has excluded speech from first amendment protection in such areas as obscenity, see Miller v. California, 413 U.S. 15 (1973), and "fighting words," see Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The Court has accorded lesser protection to other categories such as commercial speech. See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).
planation for why it uses different balancing tests for different categories of speech. Nor has the Court ever been willing to adopt an across-the-board approach to first amendment cases that would weigh all the relevant factors. Figure B illustrates this hesitation and the overall judicial inconsistency in cases in which the government threatens political protest.

C. Reasons for the Hesitation to Balance Comprehensively

This Section focuses on political protest examples and outlines the reasons why the Court historically may have avoided balancing. It concludes that practical fears account for both the traditional hesitation to balance comprehensively and the current judicial preference for a categorical approach. Subsequent sections consider whether means exist to eliminate or lessen these practical concerns.

The theoretical key to the antibalancing view is the notion that balancing degrades first amendment values. Balancing treats free expression as an ordinary interest to be weighed like any other. It tends to focus exclusively on the value of free speech to private individuals. Balancing ignores society's interest in safeguarding a political system where protest serves as a valuable outlet for peace-

99 See supra notes 36-43 and accompanying text. Indeed, Professor Tribe suggests that recent cases "represent a dangerous trend [in which] the Court cuts off its constitutional analysis before assessing the particular interests involved." L. Tribe, supra note 89, at 209.

100 See the discussion of Figure B at text accompanying notes 56-58 supra.

101 Courts and commentators have long debated the propriety of balancing in the first amendment context. The debate has been fueled by the diverging opinions of such justices as Black, see supra notes 61-62, Harlan, see supra note 63, and Frankfurter, see, e.g., Dennis v. United States, 341 U.S. 494, 517, 525 (1951) (Frankfurter, J., concurring). See generally Tushnet, Anti-Formalism in Recent Constitutional Theory, 83 Mich. L. Rev. 1502, 1508-1519 (1985); authorities cited id. at 1508 n.17.

102 See Frantz, Balance, supra note 101, at 1441 ("There is a fundamental logical and legal objection to 'weighing' a governmental objective . . . against a constitutional statement that the government may not employ a certain means for the attainment of any of its objectives.").

103 See id. at 1438 ("[I]t will not do to treat freedom of speech as though it were a
ful dissent and a catalyst for change. The Justices who have opposed first amendment balancing most vociferously have argued that it contradicts the preferred position the framers accorded free speech.

A related objection focuses on the judicial role. In *United States v. Robel,* for example, the Court rejected a balancing approach, deeming it "inappropriate for this Court to label one [interest] as being more important or more substantial than the other." In Chief Justice Warren's majority view, only Congress had the power to evaluate policies and weigh countervailing interests. The Court would have exceeded its adjudicatory "function" by balancing on its own.

Although the *Robel* Court renounced the balancing label, it nonetheless used an interest-weighing formula: "[W]hen legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms." The Court's hesitation to confess the true nature of its actions ob-

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105 See, e.g., *Gilbert v. Minnesota*, 254 U.S. 325, 337-38 (1920) (Brandeis, J., dissenting) ("harmony in national life [results from] the struggle between contending forces"); see also P. Kauper, *supra* note 101, at 120 (first amendment freedoms assume a "paramount importance" for peaceful change).


107 The Constitution's terms, of course, strictly emphasize the importance of first amendment values: "Congress shall make no law ... abridging the freedom of speech." U.S. Const. amend. 1. On the other hand, supporters of balancing justify the position that expression can be limited by interpreting the phrases "freedom of speech" and "abridging." See, e.g., Mendelson, *Meaning*, *supra* note 101, at 821.


109 Id. at 268 n.20. In *Robel,* the Court considered several provisions of the Subversive Activities Control Act of 1950, Pub. L. No. 81-831, 64 Stat. 987 (1950), which, in effect, prohibited Communist Party members from working in defense facilities. The Court struck down the statute on overbreadth grounds, holding that less drastic means were available to meet the government's ends. 389 U.S. at 265-66.

110 Id.

111 Id. at 267; see also P. Kauper, *supra* note 101, at 124 ("It is understandable, however, that a majority of the Court, mindful of the ultimate responsibility of Congress for determining national policy and enacting appropriate measures for the national security, should be reluctant to engage in a head-on collision with Congress ... ").

112 389 U.S. at 268 (emphasis added). The Court's formula was vague and provided little guidance for its future implementation. See Gunther, *Reflections on Robel: It's Not What the Court Did But the Way That It Did It*, 20 Stan. L. Rev. 1140, 1147 (1968).

113 Numerous commentators have criticized Chief Justice Warren's reasoning in *Robel.* See, e.g., Gunther, *supra* note 112.
secured the reality that the first amendment could neither be deemed "absolute" in fact\textsuperscript{114} nor relegated to a category of unenforceable ideals.\textsuperscript{115}

Professor Black explained the Court's hesitation to admit to balancing on the basis of the symbolic, hortatory effect of a statement of absolutes.\textsuperscript{116}

[If] the judges tell themselves and the world that the constitutional language . . . does define absolutes, even if not 'in imagined chemical purity' but in the practical sense in which chemicals labelled 'chemically pure' are 'pure', the tendency of their judgments and those of their posterity will be affected thereby. There will be a tendency, for example, to let more speech be heard more freely in more circumstances if the First Amendment is thought of as a literal absolute than if it is conceded that the amendment is merely an invitation to contemporary judgment.\textsuperscript{117}

Professor Black argued that the practical dangers inherent in balancing far outweigh any theoretical drawbacks to absolutism. A review of those dangers highlights the reasons why the Court has, in the end, always shied from an all-encompassing balancing approach.

At one extreme, some scholars regard it as "nearly inevitable that a court which clings to [a] balancing test will sooner or later adopt a corollary that the balance struck by [a legislature] is not only presumed correct, but is to be accorded extreme, almost total, judicial deference."\textsuperscript{118} The fear is not idle. The first vocal proponent of balancing, Justice Frankfurter, openly espoused the principle that:

Free-speech cases are not an exception to the principle that we are not legislators, that direct policy-making is not our province. How best to reconcile competing interests is the business of legislatures, and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment.\textsuperscript{119}

Several of the balancing tests that the Court has adopted over the years do, indeed, incorporate a significantly deferential attitude.\textsuperscript{120}

\begin{enumerate}
\item \textsuperscript{114} See supra notes 59-64 and accompanying text.
\item \textsuperscript{115} Professor Karst believes that Chief Justice Warren in \textit{Robel}, like "the latter-day absolutists risk[ed] the independence of the judiciary by denying [the Court's] basic judicial responsibility, which is to exercise judgment." Karst, supra note 9, at 80.
\item \textsuperscript{116} Black, \textit{Mr. Justice Black, the Supreme Court and the Bill of Rights}, HARPER'S, Feb. 1961, at 63, reprinted in \textit{C. Black, The Occasions of Justice} (1963).
\item \textsuperscript{117} A. BICKEL, supra note 101, at 93 (discussing Professor Black's view).
\item \textsuperscript{118} Frantz, \textit{Balance, supra} note 101, at 1444.
\item \textsuperscript{119} Dennis v. United States, 341 U.S. 494, 539-40 (1951) (Frankfurter, J., concurring).
\item \textsuperscript{120} In an early loyalty oath case, for example, the Court purported to "weigh" state interests against "the probable effects of the statute upon the free exercise of the right of speech and assembly." American Communications Ass'n v. Douds, 339 U.S. 382, 400
\end{enumerate}
The theoretical objections to balancing assume added significance when a court combines its willingness to balance with a willingness to defer. A policy of judicial deference encourages judges to decide cases as if the First Amendment requires no special consideration. In any particular case, a legislature or executive may decide that administrative, political, or other practical concerns outweigh constitutionally guaranteed speech freedoms. If courts routinely accept these judgments, they minimize the First Amendment's protective role.

At the other extreme lies the concern that judges can tailor balancing to produce pre-determined results. The danger that a judge will "convert balancing into something that... merely give[s] him back whatever answer he feeds into it" is omnipresent. Be-

(1950). The Court upheld the statute in deference to "the congressional determination that political strikes are evils of conduct which cause substantial harm to interstate commerce and that Communists and others identified by [the statute] pose continuing threats to that public interest when in positions of union leadership." \textit{Id.}; accord \textit{Dennis v. United States}, 341 U.S. 494, 501 (1951) (plurality opinion) (Vinson, C.J.) (political advocacy context).

Similarly, in \textit{United States v. O'Brien}, 391 U.S. 367 (1968), the Court adopted a balancing approach that expressly avoided any inquiry into the importance of a superficially "substantial" government purpose. The Court of Appeals in \textit{O'Brien} had found the draft card mutilation statute to be redundant and wholly unnecessary to accomplish any legitimate governmental objective. \textit{O'Brien v. United States}, 376 F.2d 538, 540-41 (1st Cir. 1967), rev'd, 391 U.S. 367 (1968). The Supreme Court reversed, deferring not only to Congress's assertion of the reasons for the law, but also to its assessment of the need for it. \textit{See supra} notes 65-66 and accompanying text. In applying \textit{O'Brien} to the selective prosecution context in \textit{Wayte}, 470 U.S. 598 (1985), the Court again deferred to the government's assessment that deterrence was an adequate justification for punishing only vocal nonregistrants. \textit{Id.} at 611-14.

In the tax protestor cases, the federal courts of appeals have not even questioned the government's conclusion that prosecution served a deterrence function and therefore justified the selection of defendants for punishment. See, e.g., United States v. Tibehts, 646 F.2d 193, 195 (5th Cir. 1981); United States v. Catlett, 584 F.2d 864, 868 (8th Cir. 1978); United States v. Gillings, 568 F.2d 1307, 1309 (9th Cir.), cert. denied, 436 U.S. 919 (1978).

121 \textit{See supra} notes 101-11 and accompanying text.

122 \textit{See Clark, Legislative Motivation and Fundamental Rights in Constitutional Law}, 15 \textit{San Diego L. Rev.} 953, 979-80 (1978) (When courts defer to legislative judgment in \textit{ad hoc} balancing, the "test gives no real meaning to constitutional provisions but states only that legislatures may restrict protected rights whenever it is reasonable for them to do so."); \textit{see also supra} note 37.

123 \textit{See Frantz, Balance, supra} note 101, at 1443 (deference to Congress that inevitably follows use of balancing tests nullifies first amendment protection of speech).


125 \textit{Frantz, A Reply, supra} note 101, at 748. Several scholars have examined the results of cases involving compelled disclosures from organizations when such disclosures
cause any comparison of conflicting values is, by definition, subjective, judges can easily define relevant interests to favor one result over another. A balancing process might thus eliminate all constraints on a court’s discretion to whittle away or overemphasize first amendment rights.

threaten the expressional and associational rights of members. The commentators have concluded that, as a rule, courts have used balancing tests to require disclosures from communist-related organizations but not from civil rights groups. See, e.g., P. KAUPER, supra note 101, at 108; Frantz, Balance, supra note 101, at 1429; see also H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 65-121 (1965).


Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a “substantial factor”—or, to put it in other words, that it was a ‘motivating factor’ in the Board’s decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent’s reemployment even in the absence of the protected conduct.

Doyle, 429 U.S. at 287 (footnote omitted). In Connick v. Myers, 461 U.S. 138 (1983), however, the Court’s test lost its clarity: “Whether an employee’s speech addresses a matter of public concern must be determined by the content, form, and context of a given statement . . . .” Id. at 147-48. “[T]he State’s burden in justifying a particular discharge varies depending upon the nature of the employee’s expression.” Id. at 150. The Court once again invited individual Justices to implement their personal views of the importance of first amendment interests in any given case:

[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action. We caution that a stronger showing may be necessary if the employee’s speech more substantially involved matters of public concern.

Id. at 152 (footnote omitted). In a final break with precedent, the Court announced that it, not the lower federal courts, would make factual determinations relating to first amendment discharge decisions. Id. at 150 n.10.

As one commentator has noted, first amendment and governmental interests “can no more be compared quantitatively than sheep can be subtracted from goats.” Frantz, A Reply, supra note 101, at 749.

See, e.g., P. KAUPER, supra note 101, at 116-17; Frantz, A Reply, supra note 101, at 747-49; see also infra note 129 and accompanying text.

The early political advocacy cases illustrate this danger. In 1919, the Supreme Court enunciated a clear and present danger test which on the surface appeared speech-protective but in fact upheld limits on expression wherever speech “tended” to produce an undesirable end. Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919). The following half-century produced a series of cases that implemented and developed the balancing test haphazardly, particularly in cases involving the Communist Party. For the most part, conservative Justices approved governmental restrictions on communist advocacy on the basis that the governmental interests outweighed the private interests. E.g.,
Balancing is thus "a slippery and ambiguous enterprise for the judiciary." The danger of abuse breeds a fear, on the one hand, that the Court will act as a super-legislature in first amendment cases or, on the other, that it will use balancing to legitimate governmental limits on free expression. Either result breeds disrespect for the judiciary.

Finally, balancing itself discourages expression. By referring to the absolute nature or the preferred position of first amendment values, the Court signals that society must tolerate political dissidence. If, on the other hand, the Court adopts a case-by-case balancing approach, it cautions protestors to beware. Failure to provide rules and guidelines for the lower courts and potential litigants chills free speech.


It is fair to conclude that, until Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam), tightened the reins, balancing served as a cover for the expression of individual Justices' political leanings.

This fear may account for the Court's insistence that it was not balancing in United States v. Robel, 389 U.S. 258 (1967), when it clearly was. See supra notes 112-15 and accompanying text.

See, e.g., M. Shapiro, Freedom of Speech: The Supreme Court and Judicial Review 89 (1966) ("Since the legislature is the primary balancer, any balance they achieve, so long as it is not totally unjustifiable, is constitutional."); Frantz, Balance, supra note 101, at 1441-42, 1449 (balancing becomes a "mechanism for rationalizing and validating the kinds of governmental action intended to be prohibited [by the first amendment]"). But see Gunther, In Search of Judicial Quality on a Changing Court: The Case of Justice Powell, 24 Stan. L. Rev. 1001, 1006 (1972) (Justice Harlan's balancing "typically entailed a fair and careful evaluation of the asserted state justifications for impinging upon first amendment interests").

See, e.g., Frantz, Balance, supra note 101, at 1442 ("It is difficult to see how the impartiality of ... judgments can be assured ... unless the Justices abandon ad hoc balancing and undertake to state a rule ... by which the rights of all can be measured.").

See supra notes 101-07 and accompanying text; see also A. Bickel, supra note 101, at 94 (discussing first amendment's symbolic importance).

See, e.g., Frantz, Balance, supra note 101, at 1443 (ad hoc balancing fails to assure that there is no danger in speaking out).

Id.

See Gunther, supra note 132, at 1026 (case-by-case balancing fails to "provide the maximum possible guidance for lower courts and litigants").

American Communications Ass'n v. Douds, 339 U.S. 382 (1950) provides a prime example. A union challenged a statute that withheld National Labor Relations Board
In sum, fear of the consequences may well be the reason for the Court's refusal to balance fully and honestly. It may also explain and to some extent justify "categorization." By excluding certain categories of speech from first amendment protection and by attempting to define rules to govern different types of speech, the Court ties its own hands; it sets artificial limits on its discretion to balance.

(1987) services from unions whose officers were affiliated with the Communist Party. The Court decided the first amendment issues using perhaps the most all-encompassing balancing test it has ever employed:

When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented.

Id. at 399. The Court upheld the statute, finding that it substantially furthered the government's interest in preventing political strikes that interfere with commerce, that only a few union leaders fit within the regulated category, and that free speech rights were affected only minimally. Id. at 400-06.

Douds illustrates why the Court generally has hesitated to balance. Assuming that the Court's factual findings were correct, the decision seems unobjectionable. The Court simply held that the minimally affected rights of the few had to give way to the interests of the nation. But consider the effect of the Court's approach on the union and on the few union leaders within the regulated category. Congress enacted the statute in question in 1947 as an amendment to the National Labor Relations Act. Labor Management Relations Act, 1947, Pub. L. No. 80-101, 61 Stat. 136 (1947). The Court issued its decision on May 8, 1950. In the interim, the union was faced with a Hobson's choice: lose all rights to pursue claims through the NLRB or demote a portion of its leadership.

Had the union anticipated that the Court would balance, how should the union have proceeded? It was not in a position to know how many union leaders the regulation affected nationwide. Nor could the union have assessed, with any degree of certainty, the importance the Court would attribute to the governmental interest at stake. Absent a rule of law or fixed criteria establishing a presumption in first amendment cases, the union had no realistic method for evaluating how the Court would strike the balance. All the pressures on the union would have encouraged it to decide based solely on practical factors: could it best do without a segment of its leadership or without the NLRB's facilities? The apparent guarantees of the first amendment would thus have lost all force.

Even if initially implemented to protect first amendment values, balancing may ultimately legitimate governmental restrictions and discourage free expression. Spence v. Washington, 418 U.S. 405 (1974), provides an interesting example of this phenomenon. In Spence, the Court struck down the conviction of a symbolic protestors under a flag desecration statute. The majority relied on the balancing approach Justice Harlan adopted in Cohen v. California, 403 U.S. 15 (1971), and Street v. New York, 394 U.S. 576 (1969). 418 U.S. at 412. The dissenters used essentially the same approach to justify the conviction. Id. at 416 (Rehnquist, J., dissenting).


See id. at 139-142 (discussing gradations of protection for gradations of speech); Farber, supra note 89, at 749-62 (discussing class of first amendment cases involving “offensive speech”).

See Schauer, supra note 80, at 298-99 (discussing relationship between choice of balancing approach and degree of judicial "flexibility"); see also Schauer, Codifying the
Balancing and categorization both encompass risks. This Article does not try to prove the superiority of either approach. Its goal is simply to illustrate that means exist to alleviate some of the balancing concerns.

Before courts can even begin to resolve the categorization/case-by-case balancing debate, they must view each approach in its best light. Although many scholars have written in support of categorization, no one has yet shown how courts can balance comprehensively in a systematic and principled way. The following pages attempt to fill that void.

In the abstract, comprehensive balancing is a plausible and reasonable procedure for courts to pursue. Although the words of the precedents disavow it, elements of balancing have made their way into most of the significant first amendment cases. Moreover, comprehensive balancing is principled; unlike categorization, it neither totally excludes any variety of speech from first amendment protection nor requires courts to constantly redefine the words of the amendment itself. In theory, if courts could learn to balance comprehensively without falling into the inherent traps, that approach would probably be the fairest way of deciding first amendment claims. Parts IV and V thus take a close look at the factors upon which an all-encompassing balancing approach might rely. Drawing on the lessons taught by all the various schools of thought, including the categorization school, these sections consider whether a structured balancing process can minimize the courts' practical concerns.


I have therefore neither catalogued nor described the many criticisms of categorization that scholars have expressed. See, e.g., M. REDISH, supra note 64, at 173-255; Schlag, supra note 74, at 731-39.

See supra note 97.

Professor Shiffrin and others have alluded to such an approach. See, e.g., Shiffrin, supra note 72, at 955.

Professor Schlag points out two respects in which categorization fails to achieve principled results. First, drawing lines for classes of speech that are to receive differing protection necessarily becomes arbitrary in cases at the margins. Schlag, supra note 74, at 694-96, 732. Second, classifying groups of speech fails to accord individual expression the dignity it (and the speaker) deserve and which the first amendment is designed to protect. Id. at 676, 697-98, 737.

See generally Van Alstyne, supra note 140, at 113-28 (discussing meaning of "the freedom of speech"); Schauer, supra note 80, at 268-70, 273 (discussing possible ways to define "speech"); Schauer, Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language, 67 Geo. L.J. 899 (1979) (discussing obscenity as nonspeech).

See supra notes 101-38 and accompanying text.
IV
THE COMPREHENSIVE BALANCING MODEL

The factors courts might consider in a comprehensive balancing approach are not themselves dangerous. Figure B shows that courts have, at one time or another, relied on them all. The risk of unsatisfactory first amendment reasoning occurs only when the courts apply the factors without rules, criteria, or standards to guide them.149 Balancing then becomes an ad hoc, subjective assessment easily employed to further the political philosophy of individual judges.

This section outlines a form of analysis through which courts could consider all the relevant first amendment criteria150 while still avoiding the current helter-skelter reasoning of the federal courts.151 The Article's model isolates and prescribes the use of common denominators relevant to all protest cases. For clarity's sake, it displays the proposed analysis in pictorial form. Figures C through F contain four flow charts that illustrate the possible paths, or mental processes, courts should follow.152 Figure G summarizes all four stages of the decisionmaking framework; it illustrates graphically how the model attempts to point the bevy of current first amendment tests in a single, consistent direction.

As Professor Schauer has noted, some categorization is unaviodable.153 In focusing only on political protest cases, for example, the model adopts a limited categorical approach. Similarly, the model does delineate different ways of looking at different sets of cases and of "predetermin[ing] the outcome that flows from easily determinable facts."154 By instructing courts on how to weigh the various factors, the model implicitly creates "tests" that will apply to different categories of speech.

Yet the model diverges from categorization in several significant respects. First, within the political protest context, the model

149 See M. REDISH, supra note 64, at 3 (arguing that courts "must seek general guidelines of interpretation" rather than rigid distinctions or "total, unguided chaos").

150 There will be instances where one factor so clearly favors one of the parties that the court will be able to resolve the case without lengthy consideration of the countervailing interests. If, for example, the governmental interest in regulating is minimal, the court need not fully evaluate the importance of the individual's speech. Some assessment may, however, be in order, if only to establish that some first amendment interest exists.

151 See supra notes 44-58 and accompanying text. As Figures A and B illustrate, the various first amendment "tests" currently in effect do not address uniform considerations.

152 Full explanations of Figures C through G appear infra in the text as the charts are introduced.

153 Schauer, supra note 80, at 282.

154 Id. at 300; see also id. at 271, 276.
maintains as a premise that courts should subject all cases to the same analytic approach; it neither subcategorizes the field nor establishes an absolutist rule. Second, rather than justifying regulation by excluding entire categories of speech from first amendment protection, the model allows courts to uphold regulation by specifically gauging the importance of the speech and the countervailing governmental interests. Third, the model directly addresses the issue of how judges should balance and decide particular cases. It does not avoid that topic by refocusing on whether judges should balance at all.

In the end, the goal of the model is similar to that of the categorization approach. It attempts to guide judicial discretion. Under the model, courts must continue to make some subjective quantitative judgments: Are the governmental interests important? Does the regulation chill expression? This model, however, confines the subjective assessments. Each factual determination triggers predetermined rules that define the next step in a court’s analysis. Only in limited circumstances does the model put a court in the position of balancing ad hoc; that is, deciding which values—governmental concerns or private first amendment interests—deserve more protection. The model, although not avoiding all possibility of judicial manipulation, thus limits the fears that motivate both the anti-balancing and categorization schools.

A. Stage I—The Motive Analysis

1. Principles of Motive Analysis

Existing first amendment standards implicitly recognize that

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155 See Schauer, Codifying, supra note 142, at 314-15 ("Although it requires a bit of an act of faith, it is possible to create new categories within the First Amendment without entirely eating away the principles of free speech"); see also L. Tribe, supra note 81, at 218 ("This sort of pigeonholing endangers the pigeon. If one parses First Amendment doctrine too fine, one may soon discover that little protection for expression remains") (footnote omitted).

156 Cf. Schlag, supra note 74, at 673 ("Not all categorical theories . . . are absolute; some define subcategories of protected speech but attach different levels of protection to each.").

157 See Schauer, supra note 80, at 296.

158 See id. at 300 (categorization advocates "leaving little if any discretion to the judge in the particular case.").

159 No legal principle, theory, or model always prevents judicial manipulation. Even rules specifically designed to limit judicial discretion are often circumvented. Cf. e.g., Dennis v. United States, 341 U.S. 494, 509-10 (1951) (Vinson, C.J.) ("We . . . reject the contention that . . . probability of success is the criterion" for the "present danger" prong of the clear and present danger test. Yet the more a model limits the contexts in which judges have room to maneuver, and the more it makes clear that those contexts are prone to improper manipulation, the more effectively it will produce principled and well-reasoned results.

160 This Article considers the advantages and disadvantages of motive analysis. But
motive is relevant in evaluating governmental action. If a regulation's effects alone counted, it would make no sense to encourage regulators to ban whole categories of speech rather than smaller, more specific subcategories. Yet that is the mandate of the current legal tests.161 Only the fear of improper discrimination among types of speakers and expression explains the cases.162 Ordinarily, however, judges have been unwilling to admit the connection between motive and first amendment decisionmaking.163

Judges who have considered the reasons for particular regulations have treated motive as a threshold issue. As a rule, the Supreme Court has considered only "objective motive";164 that is, whether the terms of a regulation, its accompanying documentation,165 and its undisputable effects166 show that the regulation is

For example, time, place, and manner analysis permits "reasonable" regulation of speech provided the government does not select or discriminate among potential speakers. See, e.g., Cox v. Louisiana, 379 U.S. 536, 554 (1965) (a regulation "designed to promote the public convenience . . . and not susceptible to abuses of discriminatory application, cannot be disregarded"); Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (legitimate time, place, and manner regulation "must be exercised with 'uniformity . . . free from improper or inappropriate considerations and from unfair discrimination'"); see also Arcara v. Cloud Books, Inc., 106 S. Ct. 3172, 3177 (1986) (court tests neutral legislation directed at public health nuisances generally by looser standards than it would test legislation directed at bookstores presenting a public health nuisance).

Clark, supra note 122, at 992. See generally Karst, supra note 17.

See infra note 169. As discussed below, practical proof problems probably account for the judicial hesitance to consider motivation. See Clark, supra note 122, at 954; Eisenberg, supra note 160, at 144 and authorities cited therein.

Judges have often treated all the different aspects of motive as one. See Clark, supra note 122, at 955-63 (discussing use of the terms "purpose" and "motivation"); Eisenberg, supra note 160, at 106-07 n.321 (there exists little distinction between "motive" and "purpose"). To avoid similar confusion, this Article coins two distinguishing terms: "objective motive" and "subjective motive."

"Documentation" refers to legislative or administrative materials that can be considered part of the law. These may include statutory preambles and, on occasion, undisputed committee reports that define the statutory scope. See Dworkin, How to Read the Civil Rights Act, N.Y. REV. OF BOOKS, Dec. 20, 1979, at 37-39.

The line distinguishing between objective and subjective motive, like all lines, is sometimes blurred. Ordinarily, the effects of a law are relevant only to subjective motive. Occasionally, however, the effect of a regulation may be so dramatic that the underlying intent is unambiguous. See, e.g., Comissioner v. Lightfoot, 364 U.S. 339, 340-41 (1960) (redistricting of Tuskegee's borders into an "uncouth twenty-eight-sided figure" with virtually no remaining black residents explicable only on the basis of racial
patently designed to restrict speech content. An affirmative answer has led the Court to evaluate the regulation according to a strict test of constitutionality that is usually fatal in practice. In the absence of an initial finding of an "objective" intention to stifle particular speech, however, the Court has ordinarily declined to inquire further into the actual "subjective" motives of the relevant governmental actors. It has instead applied constitutional standards that deemphasize the importance of first amendment interests.

Where the Court has considered "subjective" motive—the true purposes underlying a regulation—it has also done so on a threshold basis. The first issue addressed in whistleblower cases, for example, is whether the exercise of free expression was "a substantial factor" in the government's decision to act against the whistleblower. An affirmative answer does not mean the whistleblower automatically wins. It merely creates a presump-
tion of unconstitutionality, shifting the burden to the government to show "by a preponderance of the evidence that it would have reached the same decision as to respondent's [re]employment even in the absence of the protected conduct." If the government carries its burden, the motive analysis ends.

Treating motive as a threshold issue makes good sense. Motive is relevant primarily because it bears on the good faith of the government's independent justifications for restricting free speech. Yet regulations may stem from a desire to restrict free expression, while at the same time may serve important state functions. An initially improperly motivated regulation may, in hindsight, be so necessary as to render malicious motivation of secondary concern.

Although a court may fairly assume that a statute intended to suppress particular views will be "successful"—that is, will have a substantial impact on those who wish to express the targeted views—the court cannot foreclose the possibility that the regulation should ultimately be sustained. Proof of a constitutionally forbidden goal thus justifies courts in shifting the burden of persuasion while still retaining the option of upholding the law.

These considerations highlight two defects in the logic of the

Adamian v. Lombardi, 608 F.2d 1224 (9th Cir. 1979), cert. denied, 446 U.S. 938 (1980) (protestor properly dismissed because his action interfered with employer's functions).

*Mt. Healthy,* 429 U.S. at 287; *see also* Mazaleski v. Treusdell, 562 F.2d 701 (D.C. Cir. 1977) (government may show by preponderance of the evidence that it would have reached the same decision had the protected conduct never occurred).


In Brandenburg v. Ohio, 395 U.S. 444 (1969), for example, Ohio law enforcement officials undoubtedly had mixed motives. On the one hand, the Ku Klux Klan speaker probably expressed views distasteful to the officials. On the other hand, the speaker's call for "revenge" may truly have made them fear that violence would result from the speech. It would not be appropriate for a court to foreclose all options to prevent such violence solely because the speaker can introduce evidence of personal animosity.

*See Ely,* supra note 160, at 1339.

Three interrelated intuitive assumptions underlie this conclusion. First, a government regulator is unlikely to adopt an ineffective regulation. Second, the government will rarely crank up its legislative or administrative machinery for the purpose of silencing a single protestor. Third, protestors who share the target's views will inevitably perceive that a government that has acted once against protest activity may act again. The model thus concludes as a general matter that overt, official sanctions against protest activity will have a speech-deterrent effect.

*See Eisenberg,* supra note 160, at 150-51. Professor Brest, in contrast, argues that courts should treat improper motivation alone as a conclusive reason to invalidate a law. Brest, *supra* note 164, at 116-18, 191; *see also* Clark, *supra* note 122, at 954; Simon, *supra* note 160, at 1047.
existing "objective motive" cases. In one sense, the courts have attributed too much significance to a finding of an objective intent to regulate speech "directly." The distinction between direct and indirect regulation of speech content is subtle, often bordering on the meaningless. Yet courts have applied an exceedingly strict constitutional test in cases that fall on one side of the "direct regulation" line while upholding almost any type of so-called indirect regulation. This artificial approach fails to accommodate governmental and first amendment interests in a realistic or practical fashion.

At the same time, courts that refuse to consider the subjective reasons for a regulation underestimate the significance of motive. If improper purpose is relevant at all, it is illogical for a court to suspect a regulation where the government openly expresses its goal to regulate speech content, yet decline even to consider the government's hidden agenda in other cases.

To define the appropriate degree of judicial deference to the regulators, judges must examine both the overt and secret motives for which a law is adopted. A court that learns that illicit considerations came into play should hesitate to rely on the interest that the government asserts. On the other hand, pure motives may call for

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179 See supra notes 84-86 and accompanying text.

180 In Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980), for example, the Court applied a strict first amendment test because the regulation was, in a technical sense, content-based. The Court used a strict test even though the regulation did not aim at any particular view and numerous alternative means of expression were available.


182 See, e.g., Clark, supra note 122, at 978-83 (summarizing beneficial effects of motivational analysis in all cases involving "fundamental rights"); Eisenberg, supra note 160, at 101 (arguing that "rights of equality," including first amendment rights, "often cannot be protected unless a court is willing to examine motive or purpose").

183 The Court's hypertechinical approach to motive may lead to peculiar judicial reasoning. In United States v. O'Brien, 391 U.S. 367 (1968), for example, the "no-motivation" approach enabled the Supreme Court to ignore the court of appeals' compelling conclusion that the only possible purpose of the draft-card mutilation statute was to stifle protest. In the opposite direction, the Supreme Court has frequently found itself unable to justify regulations on the basis that the government's intent is benign. In Consolidated Edison, the Court was forced to strike down a totally viewpoint neutral statute. In Young v. American Mini Theatres, Inc., 427 U.S. 50, 73-84 (1976), Justice Powell concurred in applying a weak first amendment standard to a zoning ordinance because it had no effect on speech. Id. at 73-84. However, Justice Powell found himself in the anomalous position of supporting a strict, nearly absolutist test for parallel situations in which any impact on speech is evident, even if the purposes underlying the statute and the governmental interests at stake remain the same.
greater deference to the lawmakers' exercise of discretion.\textsuperscript{184} Using motive analysis to set presumptions, or parameters, to guide the balancing process thus responds logically to the legitimate fears of the absolutist school.\textsuperscript{185}

From this discussion, three principles emerge for the balancing model:

1. Any inquiry into motive should occur at the threshold. A finding of improper motive warrants only a change in the parties' burdens. It may justify a more jaundiced view of the regulation and an assumption that the regulation substantially affects the targets' expression. Proof of improper motive alone, however, cannot determine a regulation's constitutionality.

2. Objective motive, distilled from the terms of the regulation, should not be the sole inquiry. While a court should scrutinize all express restrictions of speech, it should not allow the government to immunize improperly motivated and equally dangerous restrictions by framing them in indirect terms.

3. A court should apply the same presumptions to cases in which improper motive has been proven objectively or subjectively.\textsuperscript{186}

2. \textit{The Model}

Figure C illustrates the first stage of the comprehensive balancing approach.\textsuperscript{187} Motive analysis is the threshold inquiry. First, does the regulation, by its terms, restrict particular expression (i.e., speech content)? If so, then the target has established an objective motive to restrict first amendment rights and is entitled to a pre-

\textsuperscript{184} See Clark, \textit{supra} note 122, at 983 ("explicit discussion of the existence of animus or prejudice properly forces the Court to consider when the social contract has been broken and consequently when judicial intervention is warranted under the Constitution"); \textit{see also id.} at 988.

\textsuperscript{185} \textit{Cf. supra} notes 108-11 & 121-24 and accompanying text.

\textsuperscript{186} This Article recommends close scrutiny of regulation born out of improper subjective motive. Arguably, proof of an illicit hidden intent might give rise to an even stronger presumption of unconstitutionality. If the government refuses even to reveal its true intentions and weigh openly the pros and cons of regulation, a court might logically conclude that the secret reasons are unlikely to be legitimate or sufficient to support the regulation.

\textsuperscript{187} Figures C through G contain large and small rectangles, diamonds, circles, and ovals. Each geometric figure has a meaning. The rectangles tell the reader where the court is in its analysis. The large rectangle describes the general "stage," or type of analysis to be pursued. The smaller rectangles specify the precise analysis the court must pursue next. Diamonds summarize the question the court has to answer. Circles represent a roadmap of sorts; they tell the reader where the results of the previous analysis direct the court. Finally, ovals represent end results; that is, how the court should decide.
The burden shifts to the government to carry the burden of proving its independent reasons for a regulation. If the government can nonetheless substantiate those independent justifications, the individual regulator's motive should not bar implementation of a legitimate law.

188 In theory, the model could consider motive as one factor for a court to weigh in the balance of a regulation's constitutionality. Such an approach, however, gives too much substantive weight to a finding of improper motive. Improper motive is relevant only insofar as it casts suspicion on the government's independent reasons for a regulation. If the government can nonetheless substantiate those independent justifications, the individual regulator's motive should not bar implementation of a legitimate law.
ernment to establish either that it would have taken the same action in the absence of the target's expression, or that it can justify the regulation even if the court finds a significant speech-deterrent effect.\footnote{189}

If the target cannot establish an objective motive, the target may then attempt to prove subjective intent to restrict the expression. The practical proof impediments will necessarily be substantial.\footnote{190} But, if successful, the litigant should benefit from the same presumption of unconstitutionality as in the "objective motive" scenario; again, the burden will shift to the government to justify its action. If, on the other hand, the target fails to establish motive either objectively or subjectively, the court will not set guidelines for the ultimate decision at this stage. The court instead proceeds to Stage II of the balancing process: there, it assesses the impact of the regulation, in anticipation of weighing the private against the governmental interests.

An example best demonstrates the novelty of the model's approach. Consider regulations of demonstrations in a public place, like those that confronted the Nazi demonstrators in Skokie, Illinois, in the late 1970's.\footnote{191} Assume that a particular regulation is content-neutral on its face, uniformly applied (at least in the short run), and serves some marginally legitimate governmental interest. Under current case law, a court would apply a time, place, and manner analysis. It would sustain the regulation as long as it does not foreclose all reasonable alternative means for the demonstrators to express their views.\footnote{192} Time, place, and manner analysis does not take into account such variables as (1) whether the regulation is aimed

Rather than accord motive substantive weight, courts should thus treat it as a threshold factor that establishes a rebuttable presumption. See supra notes 175-78 and accompanying text.\footnote{189} In such a case, proof of objective or subjective motive would require a court to proceed to Stage III(C) of the balancing process.\footnote{190} See infra notes 195-98 and accompanying text. Courts, for example, will allow whistleblower plaintiffs to engage in discovery provided they can establish a \textit{prima facie} case. See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287. Litigants who cannot carry that initial burden lose, regardless of whether their claims in fact have merit. This result, although harsh, is consistent both with the general presumption that statutes and government actions are constitutional, see, e.g., Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 341, 348 (1936) (Brandeis, J., concurring), and with the overall principles of discovery in civil litigation. See, e.g., Hickman v. Taylor, 329 U.S. 495 (1947).\footnote{191}

particularly at Nazis; (2) whether it chills free expression; (3) how important the regulation is; and (4) whether alternatives exist for the government to accomplish its ostensibly legitimate aim.

The model's approach is more flexible. Where the predicates for time, place, and manner analysis are not met, the current legal standards coincide with the model's guidelines.193 The model may, however, treat a superficially content-neutral statute more strictly if the target can prove subjective motive. The Nazi demonstrators, for example, would benefit from a presumption of unconstitutionality by establishing that a newly promulgated regulation is directed specifically at their activities.

Even if no proof of improper motive exists, a uniform, content-neutral time, place, and manner regulation does not automatically pass muster under the model. Instead, a court must engage in a careful analysis of various relevant factors. It must weigh in the balance the types of people and expression the antidemonstration regulation affects, the relative importance of the governmental interest in the regulation, and the degree to which the municipality has accommodated potential demonstrators' first amendment interests.194

views); Cox v. New Hampshire, 312 U.S. 569, 575 (1941) (Jehovah's Witnesses' ability to communicate orally or in writing not suppressed by parade license law).

193 For example, a finding that the regulation is content-based is approximately equivalent to a finding of objective or subjective motive. Tradition would have us analyze the regulation under the strict "compelling state interest test." The model would assume a substantial chilling effect, which would in turn lead to a similar presumption of unconstitutionality. If the governmental interest justifying the regulation is not "very important," a court will strike it down. Even a "very important" interest will not save a regulation that fails to accommodate the countervailing speech interests nearly perfectly. Where the governmental interest is very important and the accommodation perfect, the court must determine if the interest is sufficiently compelling to outweigh the target's interest in free expression.

194 Under current law, courts often use the O'Brien "indirect speech" analysis as an alternative to the time, place, and manner approach. The model's differences from "indirect speech" analysis parallel its differences from the time, place, and manner approach.

In O'Brien itself, for example, the Court upheld the draft card mutilation statute on the basis that it was the least restrictive means—or at a minimum the least restrictive of the equally cost-effective means—for accomplishing an important state interest. United States v. O'Brien, 391 U.S. 367, 381 (1968). The Court did not consider (1) whether Congress had a specific intent to punish draft protestors or, more generally, "hippies": (2) whether the protest was important; or (3) whether the regulation chilled free expression.

The model's approach is, again, more flexible. Even though the regulation may on the surface appear to affect speech only "indirectly," the protestors have an opportunity to establish that the regulation is in design and effect a means of restricting expression. Moreover, if no proof of improper motivation exists, a court need not validate the regulation merely because it serves some governmental purpose. Instead, the court must balance such considerations as the effect of the regulation on the free speech values and the relative importance of the governmental interests.
3. **Problems of Proving Motive**

Proving motive can be difficult. Several governmental actors with potentially differing goals may have participated in adopting a particular regulation. Furthermore, regulators may hide their motive. They may have sole possession of documentary and testimonial proof. Even where evidence is available, the ultimate answer to the question “why did they regulate” may remain ambiguous.

The extent of potential proof problems necessarily depends on how courts assign the burden of showing improper motive. The nature of the burden in turn depends on the significance courts attach to a finding that the government intended to suppress the target’s speech.

**The Standard of Proof.** A court prepared to strike down an improperly motivated regulation as *per se* unconstitutional is justified in imposing strict proof requirements on the target. In the Nazi demonstration example, the ordinance addresses a potentially dangerous situation which the government has a real interest in diffusing. A court thus would properly hesitate to strike down the regulation merely because the regulators initially acted due to dislike of the Nazi position.

On the other hand, if a finding of improper motive merely shifts

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195 Practical considerations played a role in the O'Brien Court’s decision to avoid the issue of subjective motivation. 391 U.S. at 383-84. See generally Schwemm, From Washington to Arlington Heights and Beyond: Discriminatory Purpose in Equal Protection Litigation, 1977 U. ILL. L.F. 961 (discussing difficulty of proving discriminatory intent in race cases); Note, Proving Intentional Discrimination in Equal Protection Cases: The Growing Burden of Proof in the Supreme Court, 10 N.Y.U. REV. L. & SOC. CHANGE 435, 435-36 (1980-81) (“[T]he Court has placed an extraordinary burden on plaintiffs by focusing on purpose rather than effect.”); Note, Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law, 92 YALE L.J. 328, 351 (1982) (“[T]he intent standard comes close to establishing a right for which there can be no remedy.”).

196 See Palmer v. Thompson, 403 U.S. 217, 224 (1971) (“[I]t is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment.”); see also Clark, supra note 122, at 974 (executive signing act into law and individual legislators may have different motives for enacting legislation).

197 See Binion, “Intent” and Equal Protection: A Reconsideration, 1983 SUP. CT. REV. 397, 441-42 (“Plaintiffs may succeed only by demonstrating the persuasiveness of a ‘secret’ agenda. Because it must be shown that the decisionmakers were motivated by that which they deny, the plaintiffs must prove them to be liars.”); Brest, supra note 160, at 123 n.137.


199 See Palmer, 403 U.S. at 224-25 (evidence supports finding of both proper and improper motive); see also Ely, supra note 160, at 1213-14 (discussing possibility of motives “intertwined in the minds of most legislators”).

200 A more sympathetic illustration is the tax protestor hypothetical. See supra note 30 and accompanying text. From society’s point of view, it would be counterproductive
the burden to the government to justify its regulation, a court can more readily accept evidence short of proof of bad faith. A determination that suppression of the target's message played a "substantial" role may not be enough to invalidate a regulation, but it certainly seems sufficient to require the government to explain.

Under the balancing model outlined above, the government can overcome objective or subjective proof of improper motive by showing it would have acted similarly regardless of the target's prohibited speech. Even where the government fails to lift the presumption of unconstitutionality, the presumption's sole effect is to relieve the target of establishing the regulation's impact on free expression. A limited standard of proof that shifts the burden to the government is thus appropriate.

**Difficulty of Proof.** Still, one cannot overlook the difficulty of proving motive. Individual administrators invariably offer every available innocent explanation for implementing a regulation. Courts may find it hard even to determine which administrator is responsible for a particular decision to regulate. In the case of a statute, different legislators with potentially differing intentions for a court to prevent future bona fide tax evasion prosecutions merely because the Internal Revenue Service has targeted a protest group for investigation.

Thus, in the Nazi demonstration and tax protestor examples, see supra note 200 and accompanying text, the government could still justify its regulation or prosecutions by carrying its burdens under Stages III(C) and IV(D) of the model. The government would have to establish both that its method of proceeding served a very important governmental interest and that it fully accommodated the protestors' first amendment interests. In general, however, proof of the government's intent to restrict expression supports an assumption that the regulation will have a restrictive effect. See supra note 177 and accompanying text.

See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (applying substantial factor test in whistleblower context); cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 403 (1983) (in the labor context, an employer who has acted in violation of the National Labor Relations Act, 29 U.S.C. §§ 151-69 (1982), is "a wrongdoer . . . . It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing"); see also Ely, supra note 160, at 1208 (arguing that proof of motive should shift to the government the burden of "justifying the [law] under attack by relating it to a permissible governmental goal").

Because evidence of motive often lies exclusively in the hands of government employees, first amendment claimants will inevitably demand discovery on the issue. Equally predictable is the government's defense to discovery that answering interrogatories and providing documents and depositions are burdensome and disruptive of government operations.

The Supreme Court's opinion in Wayte v. United States, 470 U.S. 598 (1985), for example, identifies numerous officials who participated in the prosecution decision. Initially, the Selective Service adopted a passive enforcement approach. The Department of Justice then became involved at several levels, including the central bureau in Washington, the Federal Bureau of Investigation, and local United States Attorneys. Various members of the Department's Criminal Division then attempted to set prosecution policy, but individual United States Attorneys and local assistants ultimately carried
voted for the legislation.\textsuperscript{205} Individual representatives may also have had more than one goal in mind.\textsuperscript{206}

Courts have coped with problems of determining the motives of government administrators in contexts beyond the first amendment.\textsuperscript{207} It is the task of judges to infer intent from extrinsic circumstances, corroborating documentary evidence, and the demeanor of the witnesses.\textsuperscript{208} Particularly in cases involving impor-

\textsuperscript{205} See United States v. O'Brien, 391 U.S. 367, 384 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it."); see also Eisenberg, supra note 160, at 115 (courts must enforce law despite difficulties of ascertaining a collective body's motive). As Professor Simon suggests, whether to place legislators' motives on trial should logically depend on a calculus including such factors as the evidentiary value of having legislators testify, the added time and expense of trials, and the negative institutional ramifications of requiring testimony. It should not turn "on any mysticisms concerning the difference between institutional and individual motivation." Simon, supra note 160, at 1106.

\textsuperscript{206} See Palmer v. Thompson, 403 U.S. 217, 224-25 (1971) (addressing difficulty of ascertaining the "dominant" motivation behind the statute); Brest, supra note 160, at 119 (when several motives influenced decisionmaker, complainant must prove illicit motive affected result). See generally Dworkin, supra note 165. at 39-40 (discussing problems of identifying collective motivation).

\textsuperscript{207} See, e.g., Eisenberg, supra note 160, at 115, 117 (discussing various situations in which courts inquire into the motives of corporations, unions, or other government branches); Raveson, Unmasking the Motives of Government Decisionmakers: A Subpoena for Your Thoughts?, 62 N.C.L. Rev. 879, 965-67 (1985) (describing methods courts use to prove institutional motives); cf. Schnapper, Perpetuation of Past Discrimination, 96 Harv. L. Rev. 828, 858-61 (1983) (arguing that difficult questions concerning past racial discrimination and its motivation and effects are not "inherently unanswerable" as an evidentiary matter).

Parties routinely seek discovery relating to motivation in discrimination litigation, selective prosecution motions in criminal cases, and many other contexts. See, e.g., \textit{Wayte}, 470 U.S. at 604-05 n.5 (selective prosecution); Village of Arlington Heights v. Metropolitan Hou. Dev. Corp., 429 U.S. 252, 270 n.20 (1977) (housing discrimination). Courts ordinarily require the party with the burden to make a \textit{prima facie} showing of improper motivation before allowing discovery. See United States v. Catlett, 584 F.2d 864, 867 (8th Cir. 1978) (mere allegation of government's selective prosecution without some evidence of elements of improper motive does not support discovery request); United States v. Berrios, 501 F.2d 1207, 1211 (2nd Cir. 1974) (party must present evidence "tending to show the existence of the essential elements of [improper motivation] ... and that the documents in the government's possession would indeed be probative of these elements."). The disruption resulting from discovery has, however, not been so burdensome as to prompt courts to establish an across-the-board, process-based rule eliminating claimants' opportunity to prove their allegations. The administrative burden of discovery in the first amendment context would be no greater. See supra note 190.

\textsuperscript{208} Numerous courts and commentators have discussed the types of evidence that might serve to prove or disprove motivation. See, e.g., Arlington Heights, 429 U.S. at 266-70 (listing types of evidence); Washington v. Davis, 426 U.S. 229, 242 (1976) (discriminatory purpose "may often be inferred from the totality of the relevant facts" including disproportionate impact evidence); see also Simon, supra note 160, at 1098 (discussing types of institutional behavior that can serve as circumstantial evidence of motivation); Note, The Role of Circumstantial Evidence in Proving Discriminatory Intent: Developments Since Washington v. Davis, 19 B.C.L. Rev. 795, 797-800 (1978); Note, Proof of Racially Discrimi-
tant constitutional rights, courts abdicate their adjudicatory function if they avoid the inquiry simply because of its complexity.\textsuperscript{209}

The legislative context, however, presents a more difficult problem.\textsuperscript{210} For reasons of comity, courts justifiably hesitate to require legislators to testify as to their motive\textsuperscript{211} even when the relevant leg-


In both first and fourteenth amendment litigation, comity considerations and fear of disrupting executive operations cause courts to hesitate to allow "targets" to subpoena high level government officials. \textit{See} L. TRIBE, \textit{supra} note 43, at 593 n.9 ("[I]mpugning the integrity of a coordinate branch . . . is to be avoided if possible."). Courts have, however, on occasion required and relied on official testimony. \textit{See}, e.g., \textit{Arlington Heights}, 429 U.S. at 268-70 (questioning village board members during discovery and at trial.); Jefferson v. Hackney, 406 U.S. 535, 547 (1972) (questioning welfare officials); \textit{see also} Simon, \textit{supra} note 160, at 1105-06 (mistake to infer broad testimonial privilege for government officials). Only experience can determine whether courts can develop workable rules and rationales for distinguishing this type of discovery.

\textsuperscript{209} \textit{See} Karst, \textit{supra} note 9, at 95-98 (constitutional litigation demands adequate information about the facts of the challenged action; \textit{see also} Eisenberg, \textit{supra} note 160, at 104-05, 114 (problems of ascertainability, futility, disutility, and impropriety justify judicial caution, but not abstention from examining motive). Making such determinations is the function of trial courts. \textit{See}, e.g., United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973) ("[T]he inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts."); Chastleton Corp. v. Sinclair, 264 U.S. 543, 549 (1924) (facts are best ascertained and weighed at the local level); \textit{see also} H. HART & A. SACKS, \small THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 164, 396-97 (tent. ed. 1958) (discussing fact-finding capabilities of trial courts); Chayes, \small The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281, 1307-09 (1976) (discussing suitability of trial courts for making fact-sensitive decisions in public law litigation).

\textsuperscript{210} \textit{See} L. TRIBE, \textit{supra} note 43, at 592-93 ("the Court has been more reluctant to find legislative purposes illicit than to criticize administrative purposes"). The Court's decisions on whether to investigate the motives of legislators for the purpose of evaluating the constitutionality of statutes have been inconsistent. The Court has engaged in motivational analysis where race discrimination is at issue. \textit{See} Rogers v. Lodge, 458 U.S. 613 (1982); \textit{Arlington Heights}, 429 U.S. at 265; Washington v. Davis, 426 U.S. 229, 242-44 (1976). The Court has also relied upon motive in establishment clause cases. \textit{See}, e.g., Wallace v. Jaffree, 472 U.S. 38, 56 (1985) ("[A] statute must be invalidated if it is entirely motivated by a purpose to advance religion."). In the first amendment context, some Justices have been willing to inquire into the motives of legislative committee members who conduct congressional hearings and investigations that threaten to chill free political associations. \textit{See}, e.g., Barenblatt v. United States, 360 U.S. 109, 153-62 (1959) (Black, J., dissenting); \textit{see also} Ely, \textit{supra} note 160, at 1310-12 (the Court should determine if Committee members intend to expose a witness's beliefs and associations merely for the sake of exposure). \textit{But see} Watkins v. United States, 354 U.S. 178, 200 (1957) ("[A] solution . . . is not to be found in testing the motives of committee members . . . ").

\textsuperscript{211} \textit{See}, e.g., Palmer v. Thompson, 403 U.S. 217, 224-26 (1971) (illustrating difficulty and futility of judicial attempt to strike down legislation solely because of supporters' bad motives); United States v. O'Brien, 391 U.S. 367, 383 (1968) (the judiciary cannot restrain otherwise lawful use of legislative power merely because a wrongful motive might have prompted the legislation); \textit{see also} Brest, \textit{supra} note 160, at 129 (legislators should not be subject to subpoena to explain their motives).

The term "comity" refers to the notion of judicial respect for the legislature's sover-
islators are available as witnesses. Nevertheless, courts do evaluate legislative intent for the purpose of construing statutes without the benefit of direct testimony. Judicial hesitation to test the constitutionality of statutes by similar means appears to stem not from the difficulties of assessing the legislative goals, but rather from a reluctance to blame individual legislators for conduct requiring nullification of a statute.

This Article’s balancing model disavows the peculiar distinction between constitutional and statutory cases. A first amendment

eighty that may cause a court to defer to the legislative action. Separation-of-powers concerns may also contribute to judicial hesitation to inquire into actual legislative motivation. It is, in a sense, unseemly for courts to call members of a coordinate and coequal branch of government as witnesses, evaluate their credibility, and ultimately decide whether they have acted improperly. Courts therefore are willing to do so only in exceptional cases. See Arlington Heights, 429 U.S. at 268 & n.18 (legislative or executive decisionmakers called to stand to testify only in “extraordinary instances”); cf. City of Memphis v. Greene, 451 U.S. 100, 114-17 nn.22-27 (1981) (relying on extra-judicial statements by officials and in court testimony of witness who had spoken with an official); Jefferson v. Hackney, 406 U.S. 535, 547 (1972) (relying on depositions of state officials).

Practical impediments may, of course, prevent courts from selecting or subpoenaing the “relevant” legislators. It would be cumbersome to call all 535 federal Senators and Representatives to the stand in any one case. But without such a procedure it may be impossible to identify the “key” legislators. Even if identification were simple, the relevant legislators may be unavailable to participate in court proceedings due to death, location outside the court’s jurisdiction, or other valid reasons.

Where the evidence of intent is ambiguous, courts have simply declined to rely on motive as a controlling factor and have relied on more general rules of statutory construction. See 2A N. Singer, Statutes and Statutory Construction § 48.01, at 278 n.12 (4th ed. 1972) (“where legislative history is ambiguous a court must look to intrinsic aids”); Eisenberg, supra note 164, at 115 (“When courts are not sure that they know a legislature’s motives, they can simply decline to invalidate on the basis of motive.”); see also United States v. Moore, 423 U.S. 122, 145 (1975) (“The canon in favor of strict construction ... is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.”) (citing United States v. Brown, 333 U.S. 18, 25-26 (1948)); Callanan v. United States, 364 U.S. 587, 591-93 (1961) (rejecting defendant’s congressional intent argument because the legislative history was ambiguous).

It may, for purposes of this model, be significant to compare the first and fourteenth amendment contexts. Initially, courts refused to inquire into legislative motive in both areas. See Palmer, 403 U.S. 217 (fourteenth amendment); O’Brien, 391 U.S. 367 (first amendment). The first amendment rule has remained constant. See City of Renton v. Playtime Theatres, Inc., 106 S. Ct. 925, 929 (1986) (relying on O’Brien’s rejection of a motivation analysis). But in racial discrimination cases, the Court has found it necessary to open the door to all available evidence of the intent underlying an allegedly discriminatory act or rule. See Arlington Heights, 429 U.S. at 265-68. The shift I propose in this Article is thus neither radical nor unrealistic. But see Perry, supra note 160, at 555-56 (arguing that first amendment is source of affirmative obligations and negative restrictions upon government, while equal protection is only a negative restriction).

See L. Tribe, supra note 43, at 593 n.9 (Supreme Court will avoid ascribing illicit motives to coordinate branches of government if possible).
claimant deserves the same judicial protection as one who argues that a statute does not apply to him. Considerations of comity ordinarily have less force in the first amendment context, not more.\textsuperscript{217}

Moreover, the role motive analysis plays under the model should, to some extent, minimize the comity concerns.\textsuperscript{218} Proof of intent to restrict speech merely requires a court to take a closer look at alternative justifications for the law.\textsuperscript{219} A court that finds improper motive thus need not hold individual legislators who voted for the law directly accountable for its invalidation. Because the model does not require the court to determine the sole or predominant legislative motive,\textsuperscript{220} its finding does not cast as much of an aspersion on the legislators in question. The finding simply reflects the court’s conclusion that some legislators were influenced by the statute’s potential effect on speech. The court can leave open the possibility that even those legislators were ultimately persuaded to vote for the statute because of other, more fitting considerations.

Employing a "substantial factor" rather than "predominant motive" standard also minimizes other practical problems in assessing legislative intent. Under a "substantial factor" test, ambiguities in the legislative record no longer preclude a court from relying on

\textsuperscript{217} See Dombrowski v. Pfister, 380 U.S. 479 (1965) (federal injunction of a state prosecution justified when prosecution impairs defendant's freedom of expression); see also Bailey, Enjoining State Criminal Prosecutions Which Abridge First Amendment Freedoms, 3 HARV. C.R.-C.L. L. REV. 67, 68-69 (1967) (arguing that Dombrowski did not go far enough).

\textsuperscript{218} That is not to say the model eliminates comity concerns, or even reduces the comity conflicts that are evident under prevailing standards. Whenever a court begins to evaluate a politician's goals, the danger increases that the court will overstep its own bounds, enter the political arena, or show disrespect for the workings of the coordinate branch.

Nevertheless, these concerns pale in comparison to the alternative: a balancing approach in which courts wholly defer to the legislature’s assertions of what it is doing and why. See supra notes 118-24 and accompanying text; see also Brest, supra note 160, at 130 (the Court should invalidate a governmental act when claimant has proved illicit motivation). Moreover, it is difficult to understand why theoretical comity concerns should be less significant when a court decides cases with reference to hypothetical "legislative purposes" it conjures up. See J. Ely, supra note 75, at 125-26. Allowing courts to investigate true legislative motives may, in addition, produce side benefits, such as increased legislative and administrative accountability. Id. at 125-34. The Court has implicitly recognized as much by agreeing to consider legislative motive in the fourteenth amendment context. Arlington Heights, 429 U.S. at 266-68; see also Eisenberg, Reflections on a Unified Theory of Motive, 15 SAN DIEGO L. REV. 1147, 1148-49 (1978) ("important classes of cases [exist] in which analysis of motive yields important dividends" that may outweigh comity concerns).

\textsuperscript{219} See supra text accompanying note 193; see also Bice, Motivational Analysis as a Complete Explanation of the Justification Process, 15 SAN DIEGO L. REV. 1131, 1139 (1978) (court might logically use motive analysis to identify covert suppression of speech); Simon, supra note 160, at 1108, 1127 (evidence of racial purpose should lead court to "demand of the government a more credible, non-prejudiced explanation").

\textsuperscript{220} The model only requires a finding that motive to restrict speech was a "substantial factor." See supra notes 187-94 and accompanying text.
motive.\textsuperscript{221} The court need not determine whether all or most of the legislators who voted for the bill shared in the improper motive. It must find only that a substantial number considered the speech element as a valid rationale.\textsuperscript{222} Nor must the court select among mixed legislative motives, except to identify which goals were significant factors in the vote.\textsuperscript{223} The limited effect that a finding of improper motive has under the balancing model and the concomitant limited burden of the target thus render the otherwise enormous problems of proving actual intent somewhat more manageable.\textsuperscript{224}

\textbf{Motive as an Unimportant Factor.} Of course, motive may not be an important element of every case. The reasons for a regulation are often clear. Alternatively, motive may be insignificant when compared with other concerns.\textsuperscript{225} It may thus seem counterproductive

\begin{itemize}
\item \textsuperscript{221} See Ely, supra note 160, at 1267, 1278-79.
\item \textsuperscript{222} See id. at 1267; cf. Bennett, Reflections on the Role of Motivation Under the Equal Protection Clause, 79 NW. U.L. Rev. 1009 (1985) (suggesting that in the equal protection area Court no longer sees any “problem of ‘summing’ individual motivations to come up with a unitary motivation”).
\item \textsuperscript{223} See J. ELY, supra note 75, at 138 (question of motive should be “whether an unconstitutional motivation appears materially to have influenced the choice”).
\item \textsuperscript{224} The O'Brien court noted two additional justifications for its decision not to consider legislative intent. First, the Court believed motive analysis might be counterproductive because it could lead the Court to strike down “good” laws on the basis of extraneous and essentially irrelevant considerations. Second, the Court suggested that invalidating a statute for improper motivation would be “futile” because the legislature could merely reenact the statute without referring to the expression they wish to suppress. United States v. O'Brien, 391 U.S. 367, 383-84 (1968); see also Brest, supra note 160, at 125-28 (acknowledging these problems but justifying the analysis nonetheless).
\item The balancing model takes both of these considerations into account. It leaves a court room to uphold a statute so “good” that a legislature would have passed it anyway. But see Ely, supra note 160, at 1215-16 (O'Brien Court may have been misguided in attempting to characterize some laws as "good" and deserving of enactment). The burden of convincing a court that it should not strike a statute down, however, appropriately lies with the regulators whose motivation a claimant has shown to be suspect.
\item In theory, if a court holds a statute unconstitutional the legislature can simply reenact it. That possibility does not, however, render the court's decision futile or meaningless. The judicial opinion will educate the legislators on the statute's implications for free expression. It may change the minds of some legislators who previously voted in favor of the bill. See, e.g., Bickel & Wellington, Legislative Purpose and the Judicial Process: The Lincoln Mills Case, 71 Harv. L. Rev. 1 (1957) (arguing that it is proper for courts to "remand" legislation to Congress to reconsider delegation of power to federal courts). Some legislators may, after all, be willing to support a law that restricts free expression so long as they believe the government has the right to limit that speech content. Once advised that such regulation oversteps first amendment bounds, the legislators may be unwilling to use a subterfuge to accomplish the same end. See Eisenberg, supra note 160, at 116 (“it is absurd to assume that all legislators would completely ignore a court holding that the legislature used constitutionally impermissible criteria in initially passing a statute”).
\item For example, the impact of a regulation on speech interests may be so great and
to ask courts to undertake the difficult motive determination at the initial stage.

Under the model, courts retain the option of deferring their consideration of intent.226 Yet in the vast majority of cases, reasons exist for treating motive on a threshold basis, even where it does not appear to be a controlling concern. In particular, a court’s motive analysis may well bring other issues into focus and orient the court’s overall approach.

The reason for this phenomenon is that motive and “governmental interests” are interconnected concepts.227 In focusing on the motives underlying a regulation, a court cannot help but identify the governmental purposes or “interests” against which it will subsequently measure the laws constitutionality. Even if the court finds no “illicit” motive, it may still conclude that the true interest supporting the regulation is a weak one.228 That determination, in turn, will influence the court’s treatment of the remaining issues.229

Wayte provides a good example. Assume for purposes of analysis that only two possible reasons could support the selective prosecution of vocal nonregistrants for the draft:230 first, that selective prosecution is the most efficient method of prosecuting nonregistrants; and second, that the government wishes to reduce public dissatisfaction with the draft. If a court finds that the second, protest-muting interest prompted the prosecutions, it may be able to strike the countervailing governmental interests so weak that a court would be foolish to waste its efforts evaluating the motive issue.

226 See supra note 150; see also Eisenberg, supra note 160, at 100-01 (existence of nonmotive-based doctrines may “relax the pressure to inquire into actual government motives”); Eisenberg, supra note 218, at 1148, 1152 (relevance of motivational analysis may vary).

227 See Clark, supra note 122, at 990 (“By considering legislative motivation, the Court can begin to define both the impermissible and permissible goals [particular legislation] may serve.”).

228 Eliminating all consideration of motive makes it difficult for courts to test and weigh the governmental interests at stake. If courts do not consider motive, they must either hypothesize every conceivable justification for a law or eliminate some possible rationales based on speculation that they do not reflect the law’s true thrust. Compare O’Brien, 391 U.S. at 378-79 (hypothesizing that draft cards may further interests of verifying classification of delinquents, facilitating communication between registrants and draft boards, demonstrating availability for induction in case of emergency, and reminding registrants to notify local boards of changes in status) with Erznoznik v. City of Jacksonville, 422 U.S. 205, 214-15 (1975) (rejecting traffic-related justification for ordinance on grounds that record failed to indicate law was in fact “aimed at traffic regulation”). As in the equal protection sphere, either decisional mode can lead to a strained evaluation of the facts. See Bennett, supra note 222, at 1017-18 (discussing equal protection cases).

229 See infra notes 314-20 and accompanying text.

230 In fact, several possible reasons exist. See infra notes 381-84 and accompanying text.
them down as inconsistent with first amendment principles. On the other hand, it is not altogether clear that the government is forbidden to seek a reduction in public dissatisfaction with the draft. The Constitution clearly permits the government to recruit, to forbid interference with the draft, and to engage in some public relations activities designed to enhance citizens’ opinions of registration. Ultimately, a court might conclude that a governmental motive to reduce dissatisfaction is not illicit, in and of itself.

Under Stage I of the model, that conclusion would lead a court to deny the challenging party the benefits of a favorable presumption. Nevertheless, the process of engaging in the threshold motive analysis produces a useful by-product. For in the course of testing motive, the court will have identified the true justification for the law. This renders its task at Stage III of the model far easier. When the court later evaluates the governmental interests at Stage III, it no longer must consider all interests that hypothetically might have supported the prosecutions. The “reducing dissatisfaction” interest, while conceivably legitimate, is very weak; only under extraordinary circumstances would any serious balancing procedure allow it to justify selective regulation of nonregistrants. This example thus illustrates that treating motive as a threshold issue can

231 See, e.g., Gutknecht v. United States, 396 U.S. 295, 307-08 (1970) ("[R]egulations, when written, would be subject to the customary inquiries as to infirmities on their face or in their application, including the question whether they were used to penalize or punish the free exercise of constitutional rights.").
233 See Bice, supra note 219, at 1139 ("Of course, a finding that the desire to suppress speech caused the government’s action would not necessarily lead to invalidation . . . ."); Eisenberg, supra note 218, at 1152 (arguing that relevance of motive may change in different categories of cases); cf. Clark, supra note 122, at 963-73 (discussing when and why motives may be "invidious").
234 See Clark, supra note 122, at 985 ("A balancing approach not considering legislative purpose thus involves several difficulties. First, it is difficult to know what interests to weigh on each side of the balance."); Eisenberg, supra note 160, at 152-53 (motivational analysis may help the court choose from a "wide range of plausible purposes" in order to test a law).
235 Motive analysis provides a middle ground for the current judicial dilemma over how to assess governmental interests. See supra note 230. When the analysis uncovers the true purpose of a law, courts can avoid speculating about other justifications. Where the underlying reasons remain unclear, courts are no worse off than before. They must then choose among the options of giving the government the benefit of all possible justifications, selecting only reasonably likely justifications, or attempting to guess the true single justification for a rule.
236 Such circumstances might arise under aspects of Stages IV(B) and IV(D) of the model. See infra notes 336-37 & 340-47 and accompanying text.
prove efficient even where motive does not appear to be the most significant issue in the case.

B. Stage II—Assessment of the Effect on Speech

Stage II considers the degree to which a regulation restricts, deters, or chills free expression. This "impact" in turn determines the manner in which a court analyzes the remaining factors in Stages III and IV of the balancing process. Stage II focuses on first amendment values in general, rather than on a target’s particular words.

237 Upon completing a threshold motive analysis, a court might address the other factors in any order. For example, it might first consider the importance of the governmental interest and the accommodation of first amendment rights, and only then undertake an analysis of the regulation’s impact.

238 I.e., the governmental interests and the government’s accommodation of first amendment rights.

239 On the surface, the model seems to allow a court to skip consideration of impact when the target establishes improper motive. See supra note 189 and accompanying text. In fact, the court still weighs impact in the balance. It merely takes as a given that the impact is great and enters the Stage III process as if it had reached that determination independently.

240 At the outset it is important to note one inquiry not required by the model: how important is the content of the expression? Some current Supreme Court Justices have expressed the view that courts should accord varying degrees of protection depending upon the importance of the types of expression at issue. See, e.g., F.C.C. v. Pacifica Found., 438 U.S. 726, 746-48 (1978) (plurality opinion) (Stevens, J.). These Justices have, however, not yet convinced a majority of the Court to adopt such a dramatic change in traditional first amendment principles. Justice Powell, frequently a swing vote in the cases, has steadfastly maintained a refusal to subscribe to the theory that the Justices of [the] Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most “valuable” and hence deserving of the most protection, and which is less ‘valuable’ and hence deserving of less protection. Pacifica Found., 438 U.S. at 761 (Powell, J., concurring). But see Clarke, Freedom of Speech and the Problem of the Lawful Harmful Public Reaction: Adult Use Cases of Renton and Mini Theatres, 20 Akron L. Rev. 187, 195 (1986) (asserting that five justices "would assign nonobscene erotic speech a low status for the purpose of constitutional protection.").

Under any general theory of the first amendment espoused to date, the political expression the balancing model addresses is of the highest order of importance. See, e.g., Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 20-35 (1971) (“Constitutional protection should be accorded only to speech that is explicitly political.” Id. at 20.); Meiklejohn, The First Amendment is an Absolute, 1961 Sup. Ct. Rev. 245. The model thus need not take a position on the "two tier" theory of the modern Justices. See G. GUNTHER, CONSTITUTIONAL LAW 1109-1128 (11th ed. 1985) (discussing Justice Stevens’s approach); L. TRIBE, supra note 43, at 672-74 (same).

Of course, a court could in theory draw distinctions within the category of political expression. Some commentators suggest that on occasion the Supreme Court has in practice disfavored “communist speech” where in the same circumstances it would have protected “civil rights speech.” See, e.g., P. KAPER, supra note 101. at 108; FRANTZ, BALANCER, supra note 101, at 1429, 1441-42. The Court has, however, expressly rejected any
The impact on free expression consists of both "immediate" and "secondary" effects. A regulation challenged on first amendment grounds usually restricts speech by the targets and similarly situated persons. But its enforcement can also have a ripple effect. Persons only technically subject to prosecution and other, wholly unrelated persons may become unwilling to make their views public. Stage II considers a regulation’s full effect on expression in society as a whole.

1. The Immediate Impact on Free Expression

A regulation’s terms together with its first applications ordinarily define the target pool and, concomitantly, the set of persons who will bear the regulation’s immediate impact. Ordinarily, the Supreme Court has expressed little interest in "how much" speech a regulation eliminates or restricts. Yet on occasion, the Court has looked at a regulation’s impact on the free expression of the target pool. The Court has upheld a few regulations because of their *de minimis* effect. Recently, the Court has seemed ready to undertake a more in-depth evaluation of a regulation’s immediate consequences.

Such an inquiry, of course, is not a simple matter of determining how many targets exist. An easily satisfied permit requirement may, for example, apply to many persons without noticeably affecting their ability to express their views. Factors such as the availability of alternative channels of communication and of substitute political speech and the differential treatment from within similar categories of political speech on the grounds that a free society must, where possible, tolerate a variety of views. See, e.g., Cohen v. California, 403 U.S. 15, 24 (1971); Whitney v. California, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring).

Any first amendment regulation by definition restricts the individual target’s speech. Beyond this, a regulation’s impact will vary, and cannot be measured simply by labeling the regulation. For example, content-neutral restrictions may not deter the expression of other persons with the target’s views. But a content-based regulation that clearly focuses on only one type of illegal expression may also have little chilling effect. A regulation specifying that "no one may use the word ‘communist’ in public" would not necessarily deter legal speech that society wishes to foster. Speakers can use all other words and methods of expression to propound their views. Under these facts, a court should have to address the direct first amendment issue: does the government have a sufficient interest in banning public use of the word "communist" to justify the regulation? Stages III and IV of the balancing process would pose that question.

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243 See, e.g., Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 n.35 (1976) (plurality opinion) (Stevens, J.) (city zoning ordinances regulating only location of adult theaters held constitutional); id. at 73, 78 (Powell, J., concurring).

ity of alternative means of communication and the degree of inconvenience imposed on the targets can mitigate or enhance a regulation's immediate impact.

A regulation's effect is also determined by more than the number of times it actually prevents expression. Government intervention may change the nature and value of expression even if it does not ban it outright. For example, a content- and target-neutral rule that restricts the location of demonstrations may reduce or change a speaker's audience. A superficially reasonable curfew may, by limiting the speaker's time, affect the content of the speech. A regulation that causes a speaker to shift his medium of expression may also alter his message, his audience, and the relative ability of other citizens to express themselves. Courts must measure a regulation's full impact not only by its effect on the targets' right to speak, but also by its influence on what the targets say.

2. The Secondary Impact on Free Expression

Regulations often have "secondary" effects on nontargets. Persons potentially subject to the regulation may avoid speaking out to avoid its application to them. Others technically not subject to the regulation may infer from its existence that they should refrain from expressing their views. Similarly, a regulation may intimidate into

245 Professor Stone explains many recent first amendment cases by looking at the "distortion of public debate" caused by the regulation. See Stone, supra note 40, at 217-27.


247 Restrictions on the timing of speech may vary dramatically in their "distortive" effect on expression. See Stone, supra note 40, at 224-25.


250 See L. Tribe, supra note 43, at 683; see also Martin, 319 U.S. at 146 (1943) ("Door to door distribution of circulars is essential to the poorly financed causes of little people."); Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 29-30 (discussing equal protection and censorship). Professor Karst has suggested that courts should determine a regulation's constitutionality in light of the degree to which it discriminates among different speakers and messages. See generally Karst, supra note 17.
silence subsets of existing and potential target pools in contexts beyond those the regulation contemplates.

In common usage, all of these groups consist of citizens whose free expression has been "chilled." The case law, however, reserves the term "chilling effect" for persons whom the government is likely to regulate directly under the regulation's terms.251 This Article therefore labels the impact on the remaining persons' freedom of expression as "societal speech deterrence." A regulation's "chilling effect" and "societal speech deterrence" together compose its "secondary impact."

The Chilling Effect Concept. A regulation may have a chilling effect in two different ways. First, by defining imprecisely what speakers may say, it deters speakers from risking potentially punishable expression.252 Second, by identifying a particular type of expression or category of speaker appropriate for regulation, it brings governmental and sometimes societal opprobrium to bear upon those who might share the speaker's views.253 It thus chills their tendency to speak out.254

Despite the obvious relationship between chilling effect and first amendment values,255 the Supreme Court has not always recognized chill as a factor relevant to substantive first amendment decisionmaking.256 Rather, it has tended to subsume the chilling effect

251 The Supreme Court first referred to the notion of a "chilling effect" in Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (loyalty oath as condition of employment "has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice").

252 See, e.g., Gooding v. Wilson, 405 U.S. 518, 521 (1972) (prohibition of "obscene words or abusive language" invalid because vague and overbroad); Baggett v. Bultitt, 377 U.S. 360, 367-68 (1964) (loyalty oath held invalid because vague, overbroad and therefore likely to deter lawful activities).

253 See, e.g., United States v. Robel, 389 U.S. 258, 265 (1967) (Subversive Activities Control Act, Pub. L. No. 81-831, 64 Stat. 987 (1950), directed at communists held unconstitutional in part because it establishes "guilt by association"); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 546 (1963) (legislative investigation of allegedly subversive branch of NAACP enjoined because of intrusion on right of political association); see also Ely, supra note 160, at 1310-11 ("If. . . a committee is engaging in exposure 'for the sake of exposure' . . . there is nothing on the 'benefit to society' side which can conceivably outweigh [the speech and associational interests].").

254 See, e.g., Brown v. Socialist Workers '74 Campaign Comm. (Ohio), 459 U.S. 87, 91-101 (1982) ("The First Amendment prohibits a state from compelling disclosures by a minor party that will subject those persons identified to the reasonable probability of threats, harassment, or reprisals."); American Communications Ass'n v. Douds, 339 U.S. 382, 392-93 (1950) (upholding NLRA requirement that labor organization officials file "non-communist" affidavits upheld although it "undeniably discourages the right to elect[ ] communists to office").

255 See supra note 39 and accompanying text.

notion within procedural doctrines such as standing,257 ripeness,258 and abstention.259

The Court's few substantive references to chilling effect notions appear most frequently in cases involving overbroad or vague legislation.260 The Court has struck down laws that "sweep unnecessa-

257 When a party can demonstrate a chill, the Court is more likely to hear the case. See Walker v. City of Birmingham, 388 U.S. 307, 344-45 (1967) (Brennan, J., dissenting) (To give first amendment "freedoms the necessary 'breathing space to survive,' . . . the Court has modified traditional rules of standing and prematurity."). In Dombrowski v. Pfister, 380 U.S. 479, 487-89 (1965), for example, the Court used chilling effect notions to grant a litigant standing even though his own activity was not necessarily constitutionally protected. See also id. at 501 (Harlan, J., dissenting). The Court has frequently allowed organizations to assert the rights of their members because failure to do so would have threatened the associational rights of the entire class. See, e.g. NAACP v. Alabama, 357 U.S. 449, 458-60 (1958) (NAACP); Allee v. Medrano, 416 U.S. 802 (1974) (union); cf. Note, The Chilling Effect in Constitutional Law, 69 COLUM. L. REV. 808, 820 (1969) ("The door-opening effect of chilling has worked to relax normal standing requirements and to give first amendment freedoms 'breathing space'.").

258 Courts have relaxed the requirement that a threatened injury be "clear and imminent" for injunctive relief to issue where the litigant can establish potential injury and present chill. See, e.g., Dombrowski, 380 U.S. at 487-89.

259 When a regulation creates a chilling effect, the Court has proven more ready to interfere with ongoing state proceedings. See generally Bailey, supra note 217. It has created exceptions not only to abstention, but also to exhaustion of state remedies principles. See, e.g., Steffel v. Thompson, 415 U.S. 452, 459, 475 (1974) (declaratory relief proper because potential prosecution "deters the [target's] exercise of his constitutional rights"); Dombrowski, 380 U.S. at 486, 489-90 (abstention is inappropriate where "statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities").

Recent decisions, however, have limited the circumstances in which the courts deem chill even procedurally relevant. The Court has limited Dombrowski's approval of federal court interference in state criminal proceedings to situations where the prosecution was undertaken in "bad faith" or the underlying statute is patently unconstitutional. See Younger v. Harris, 401 U.S. 37, 53 (1971); Samuels v. Mackell, 401 U.S. 66 (1971); see also Fiss, Dombrowski, 86 YALE L.J. 1103, 1120 n.48 (1977) (discussing narrowness of bad faith exception). The Court has similarly limited the chilling effect exception to the exhaustion of state remedies doctrine, see, e.g., O'Shea v. Littleton, 414 U.S. 488, 502-03 (1974), and curtailed litigants' ability to use chill to establish "ripeness." Laird v. Tatum, 408 U.S. 1, 11 (1972) (chilling effect is relevant to ripeness only where the "exercise of governmental power is regulatory, proscriptive, or compulsory in nature"). The Court has also cut back the right of organizations to assert the rights of their members. See, e.g., Rizzo v. Goode, 423 U.S. 362, 373 (1976).

Even where litigants have succeeded in circumventing threshold procedural bars by demonstrating a chilling effect, courts have found other ways to disregard the chill. Under current doctrine, litigants must still prove the merits of their first amendment claims by relying on factors other than speech deterrence. See, e.g., Socialist Workers Party v. Attorney Gen., 419 U.S. 1314, 1319 (1974) (chilling effect established standing and ripeness, but injunction denied on the merits); Laird v. Tatum, 408 U.S. 1, 10-14 (1979) (chilling effect may establish ripeness, but case nonjusticiable on the merits).

The Court has placed substantive reliance on a regulation's chilling effect in a few contexts other than overbreadth. For example, if a state institutes criminal prosecutions in bad faith, to harass the defendant or others who share his views, the Court may entertain a first amendment claim and may consider the degree of chill in balancing the countervailing interests. See, e.g., Younger v. Harris, 401 U.S. 37, 47-48 (1971); Mitchum v. Foster, 407 U.S. 225 (1972); Dombrowski v. Pfister, 380 U.S. 479 (1965). But

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rily broadly and thereby invade the area of protected [first amendment] freedoms" or that are "so vague that men of common intelligence must necessarily guess at [their] meaning. Overall, however, the Justices have treated the chilling effect factor haphazardly, even sloppily.

At one level, the Court has merely identified a chill and labelled it relevant without illustrating how to consider it: "In essence, the problem is one of weighing the probable effects . . . upon the free exercise of the right of speech and assembly against the . . . [identified] harm." On occasion, the Court has purported to consider a regulation's impact, yet has adopted legal standards that have not included chill as a factor.

At another level, the Court has advanced beyond the threshold inquiry of whether a chilling effect exists to an evaluation of the substantiality of the chill. Recent overbreadth cases require a finding of degree. The Court will not strike down a regulation unless it is "substantially overbroad"; that is, unless it has a significant chilling effect. Yet the relatively in-depth evaluation of chill in the


American Communications Ass'n v. Douds, 339 U.S. 382, 400 (1950); see also Brown v. Hartlage, 456 U.S. 45, 61 (1982); cf. Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 91 (1961) (finding a chilling effect "is to establish the condition for, not to arrive at the conclusion of, constitutional decision").


See, e.g., Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (overturning statute seriously limiting political activity of state employees as substantially overbroad and unconstitutional on its face); Arnett v. Kennedy, 416 U.S. 134, 159 (1974) (refusing to strike down statute as unconstitutional on its face when longstanding principles of interpretation limit its application).

It remains unclear whether the Court's evaluation of the chill's significance turns on the number of people affected, the amount of speech deterred, or the importance of the expression chilled. See, e.g., New York v. Ferber, 458 U.S. 747, 773 (1982) (obscenity
recent overbreadth cases is also unfocused. The Court's only inquiry is whether the chill is substantial. Under current law, a negative conclusion requires a court to reject the target's first amendment claim. Courts are not authorized to balance a real but lesser chill against the governmental interest at all.

One can, again, distill several principles from this experience:

1. Courts should acknowledge the substantive importance of the degree to which a regulation deters free expression.
2. In considering a regulation's chilling effect, a court should be willing to assess the effect.
3. Courts should not hesitate to find that some chilling effect exists. They should treat the factor as simply one element in the first amendment balancing process.

Societal Speech Deterrence. Although societal speech deterrence is akin to a chilling effect, judges have not recognized it. The concept contrasts sharply with the limited view of speech deterrence that the courts apply in the overbreadth context.

Under the overbreadth doctrine, a chilling effect may enable a litigant whose own speech is regulable to attack a law that deters unregulable speech of others. A court will not rely on such a "chill" unless it can identify particular potential targets of the regulation who could themselves successfully challenge the law on constitutional grounds.

A court prepared to balance speech against governmental inter-
ests directly ordinarily cannot, at the outset, assess the likelihood that a third-party claim will succeed. In Professor Schauer's terms, the court cannot at that point tell if a regulation has a "benign" or "invidious" impact on free expression. That is because the degree of deterrence itself contributes to the decision of whether the regulation can stand.

If one considers modern reactions to the McCarthy era one can identify a broad concern over speech deterrence which the overbreadth doctrine's limited chilling effect concept fails to acknowledge. McCarthy's investigations and accusations frightened citizens into hiding communist affiliations. Modern society disavows that period, but not because the targets' practice of communism should have been considered a constitutionally protected activity under prevailing legal standards. Rather, in historical retrospect, one can perceive secondary consequences of regulating communism. The process of stifling speech adversely affected expression in society as a whole, not only the targets' expression. The perception of these regulatory side effects has taught modern society to encourage speech, even where particular expression does not serve its current tastes. For these reasons courts seem to have struck down modern McCarthy-type investigations because of their secondary speech-deterrent effect throughout society, without ascertaining whether their effect on individual targets is invidious or benign.

This Article's model explicitly considers the entire secondary impact of regulations. It looks not only to potentially "unconstitutional" applications of a rule, as in the overbreadth context, but also to the number of persons and types of expression that enforcement,
and the accompanying fear of penalty, deter. 278 In the ordinary case, the immediate targets 279 will present the strongest claim for relief. 280 A court charged with balancing first amendment and governmental interests, however, should be able at least to consider the effects of a law on individuals not directly implicated in the case. 281 The regulation’s aggregate impact on their speech may be sufficient to tip the overall balance.

Thus, under the model:

1. A court may take into account the effect of a regulation on free expression in society as a whole.
2. Governmental interests that would justify a regulation if balanced only against the target pool’s speech interests may be insufficient when weighed against the aggregate first amendment interests of all speakers the regulation deters. 282

3. The Model

The balancing model both incorporates and goes beyond the case law. It rejects the current haphazard approach to chilling effect notions and requires courts to consider the total restrictive and deterrent impact on free expression. In so doing, the model incorporates the best aspects of the traditional distinction between content-based and content-neutral regulations. 283 The model, however, avoids content theory’s two major flaws: its exclusive focus on a regulation’s phrasing and its failure to recognize other, equally relevant, factors. 284

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278 See Schauer, supra note 270, at 694-701 (discussing the first amendment implications of speech regulation that engenders “fear, risk, and uncertainty”).
279 The term “immediate targets” encompasses persons similarly situated to those involved in the litigation. In the example of the congressional committee investigating communism, this would include individuals the commission subpoenaed or would be likely to subpoena in the future.
280 As under current standards, courts would limit the repercussions of regulation on societal speech by giving the target’s speech a high degree of protection.
281 For example, persons who did forego communist affiliations in the 1950’s because of the obvious governmental opprobrium signalled by the Senate investigations.
282 The mere existence of some speech deterrence will, of course, not automatically invalidate a law. See infra text accompanying notes 290-91. All regulation of speech deters to some extent. See Schauer, supra note 270, at 700 (“there will always be a chilling effect”) (emphasis in original).
283 See generally Stephan, supra note 87. Content theory stems from the fear that the government may use its influence to structure opinions and public debate in society. Professor Stone suggests that, even within the “content-based” and “content-neutral” categories, the Court’s analyses have varied with the different impacts that the regulations have on free expression. Stone, supra note 40, at 217-27. By allowing courts to take full account of all types of impact, including the “distortion of public debate,” id. 217-27, and the discriminatory effects, id. 201-07, the model addresses content theory’s central concerns.
284 Criticism of the content distinction abounds in the literature and will not be repeated here. E.g., Redish, The Content Distinction in First Amendment Analysis, 34 Stan. L.
Where the impact on a target pool is either *de minimis* or substantial, the model's results comport with current standards. If the targets can prove no significant interference with their expression, they lose.\(^{2885}\) On the other hand, courts must apply strict scrutiny when a regulation substantially restricts the targets' expression.\(^{2886}\)

The model's novelty comes in the middle ground, where the regulation affects the target pool's freedom of expression, but not substantially.\(^{2887}\) Unlike under current standards, the model allows a court to consider not only the regulation's impact on the targets' speech, but also the impact on free expression in society as a whole. The model requires that the court factor into the balance all immediate and secondary effects.

The flow chart in Figure D illustrates how a court can react to the five possible conclusions regarding "impact" which the model allows; that is, that the regulation in question has (1) a minimal immediate impact; (2) a substantial immediate impact on the targets; (3) a total impact that includes a real, but not substantial, immediate impact and no secondary impact; (4) a total impact that includes both immediate and secondary impacts, but does not rise to the substantial level; and (5) a substantial total impact.

Categories (1) and (2) correspond to the threshold impact inquiry. A court first looks at the immediate impact on the targets. A finding of a *de minimis* effect allows the court to terminate the lawsuit.\(^{2888}\) The existence of a substantial immediate impact also obviates the need to evaluate the secondary impact; the immediate impact alone is enough to create a presumption that the regulation

Rev. 113 (1981); Stephan, supra note 87; cf. Farber, supra note 81 (positing change in traditional content doctrine). In short, the distinction's singular focus is in many ways too inflexible and its willingness to uphold content-neutral regulation may be misguided. *See supra* notes 89-90 and accompanying text.

\(^{2885}\) *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 n.35 (1976) (ordinance constitutional because it does not have "the effect of suppressing, or greatly restricting access to lawful speech").


\(^{2888}\) This result is appropriate even if the regulation has a secondary impact. Under any view of standing requirements, a target who suffers no real injury is not a suitable representative of the affected class. The doctrines allowing one party to litigate the claims of other "chilled" persons only overlook the general requirement that a statute in question apply *unconstitutionally* to the litigant. *See supra* notes 270-71. The cases do not authorize unaffected litigants to rely upon the rights of others.

Where it appears likely at the outset that the regulation has an insignificant immediate impact, a court may wish to evaluate impact before considering motive. *See supra* note 226 and accompanying text. Judicial economy suggests that a court should undertake any inquiry that may terminate the litigation at its earliest opportunity.
FIGURE D
Stage II: Assessment of Impact

Assessment:
Reg.'s Impact
On Free
Expression

Threshold
Assessment:
Immediate
Impact

Is Immed.
Impact
De Minimis
?

NO

Is Immed.
Impact
Substantial
?

Assessment:
Total
Impact

NO

Is There
Secondary
Impact
?

YES

Is Total
Impact
Substantial
?

YES

NO

Note:
De Minimis
Impact

Note:
Limited
Immed. Impact

Note:
Limited
Immed. Impact
& Sec. Impact

Note:
Substantial
Impact

Regulation
Constat

Go To
Stage
III (A)

Go To
Stage
III (B)

Go To
Stage
III (C)
is unconstitutional. This presumption moves the court's analysis to Stage III(C), where the court must weigh all the relevant factors with a speech-protective bent.289

The situations in categories (3) through (5) are more difficult to resolve. If a court finds some immediate impact, but not enough to justify a strong presumption of unconstitutionality, it must look to the regulation's secondary impact for further guidance. The court initially decides whether any "chill" or "societal-deterrent effect" exists at all. A negative answer does not automatically validate the regulation because, even without deterring other potential speakers, the regulation still restricts the targets' right to express themselves freely. The absence of a substantial immediate impact or any regulatory side effect, however, offers the court more leeway to emphasize the societal interests in the regulation. The model directs the court to a Stage III(A) balance that allows the court to sustain the regulation on much the same basis as traditional time, place, and manner analysis of content-neutral statutes.

A court concluding that a regulation does indeed deter freedom of expression in society must consider the extent of the regulation's total impact. The burden on the government to justify the regulation shifts, in varying degrees, depending on the court's findings. Where the immediate impact, the chill, and the societal-deterrent effect together result in a substantial impact on expression, the court must enter the balancing process with a special view to vindicating the first amendment rights.290 On the other hand, if the regulation, despite its immediate and secondary effects, does not substantially limit expression in society, the model directs courts to be more receptive to countervailing values upon which the government relies.291

The example of the ordinance that prohibits public demonstrations in a town park illustrates the distinctions courts must make in the category (3) through (5) cases. In the abstract, the ordinance appears to fit within category (3). It has some immediate effect on targets because it restricts the ability of some persons to demonstrate. But it should have few, if any, secondary effects. The ordinance is clear, unthreatening, does not choose among speakers, and is content-neutral.

Suppose, however, that the town adopts the ordinance shortly after the Nazi party announces plans for a demonstration. Whether or not the Nazis can prove improper motive, the ordinance in this

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289 At Stages III(C) and IV, a court will assess the justifications for the regulation and the government's method of accommodating free expression.
290 This occurs at Stage III(C). See infra notes 325-29 and accompanying text.
291 This occurs at Stage III(B). See infra notes 320-24 and accompanying text.
scenario may send a signal that the town disapproves of Nazi speech. It thus encompasses some secondary deterrent effect on persons (whether or not within the target pool) who might identify themselves with the demonstrators. Yet because the statute is limited in scope, the total impact is not substantial. In the final analysis, the regulation imposes no restrictions on anyone who wishes to join with the party in a non-demonstration setting. The ordinance’s impact fits within category (4).

If the hypothetical ordinance is changed from a flat prohibition against demonstrations in the park to a somewhat more vague rule forbidding “unruly demonstrations,” the impact will change as well. On the one hand, the restrictive effect on targets may decrease, because the demonstrators’ alternatives expand. The immediate impact, however, remains more than de minimis. In addition, the nature of the statute, its vagueness, and the timing of its enactment all enhance its secondary effect. A significant number of potential demonstrators and sympathetic onlookers may reasonably expect police to single out Nazi demonstrators as “unruly.” Depending on the evidence, the total impact may, in this scenario, rise to the “substantial” category (5) level.

4. Problems of Proving Impact

Because ascertaining the degree of a regulation’s impact necessarily involves an imprecise inquiry, a court must make certain predictions. Specifically, the court must estimate how many third parties the regulation affects, how they have reacted and will react to the speech-restrictive rules, and what kinds of expression or association the regulation deters.

The model accounts for the practical problems of evaluating a regulation’s chill. It does not require a court to determine precisely how much speech the regulation deters, but only whether the impact is minimal, substantial, or somewhere between.\(^ {292} \) The model assumes that the constitutional preference for speech\(^ {293} \) requires courts to exercise a maximum tolerance for free expression when-

\(^ {292} \) In this respect, the model adopts the Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977), “substantiality” inquiry. \textit{Mt. Healthy} represents a middle-of-the-road approach. On one hand, it avoids placing an impossible burden of establishing first amendment violations on plaintiffs, while on the other it attempts to prevent putting plaintiffs “in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing.” \textit{Id.} at 285.

\(^ {293} \) See West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (state may only restrict freedom of speech to “prevent grave and immediate danger”); Palko v. Connecticut, 302 U.S. 319, 326 (1937) (freedom of speech is one of those rights absorbed in fourteenth amendment without which “neither liberty nor justice would exist”).
ever a regulation seriously threatens political dissent.294

This standard places a manageable factfinding burden on the judiciary. To identify whether a substantial immediate or secondary impact exists, a court may need to conduct hearings or examine documentary evidence on the following issues:295 (1) does the regulation aim at a viewpoint held by a significant number of people;296 (2) does the regulation penalize the viewpoint or merely the manner of expressing it;297 (3) do alternative, effective means exist, at no added costs, to express the viewpoint;298 (4) does the regulation encourage any societal299 or peer300 opprobrium toward persons sharing the viewpoint; and (5) will the regulation's restriction or its penalty have any collateral effects upon the targets?301 Although

See, e.g., United States v. United States Dist. Court, 407 U.S. 297, 314 (1972) ("private dissent, no less than open public discourse, is essential to our free society"); id. at 324, 332 (Douglas, J., concurring) (discussing role of speech in a free society); Cohen v. California, 403 U.S. 15, 25 (1971) ("one man's vulgarity is another's lyric").

See generally Karst, supra note 9, at 99-109 (discussing manner in which courts can make a record establishing the facts necessary to reach constitutional decisions).

Where a regulation aims at the membership of an existing public organization, as in the Smith Act cases, a court can easily obtain data about the target pool. In other circumstances, such as whistleblower cases in which other employees may share a whistleblower's criticism of his employer, the potential targets are more difficult to identify. The Court must then evaluate objective indicators, such as the truth of the whistleblowers accusations, in order to predict whether others are likely to share his views.

The Supreme Court ordinarily has not required speakers to choose among different means of expression. See Schneider v. State (Town of Irvington), 308 U.S. 147, 163 (1939) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place"). See also Schad v. Borough of Mount Ephraim, 452 U.S. 61, 75 n.17 (1981) (rejecting argument that substitutes for prohibited conduct exist). This consideration is, however, logically relevant to an assessment of a regulation's speech-deterrent impact.

In United States v. O'Brien, 391 U.S. 367 (1968), the statute would have permitted O'Brien to burn a xerox copy of his draft card rather than the original. In this way, O'Brien could have made his point equally effectively, while still allowing the government to pursue the legitimate objective the statute served. Id. at 389 (Harlan, J., concurring); see L. Tribe, supra note 43, at 686 (Court might reasonably have considered the alternatives in accommodating the speech and governmental interests).

See, e.g., O'Brien, 391 U.S. at 388-89 (Harlan, J., concurring) (validity of draft card mutilation statute depends, in part, on alternative available means of communication). A neutrally applied permit requirement, for example, would not necessarily suggest to potential speakers that they should keep silent. When, however, such requirements are clearly directed at a particular group, such as the Nazi demonstrators in Skokie, Illinois, the deterrent impact may increase.

For example, when a legislative committee investigates with the intent to "expose" a group of targets as dangerous. See supra note 253 and accompanying text.

An employer that disciplines an employee who speaks out sends a signal to other employees that the whistleblower is harming the organization which provides their livelihoods. This may in turn cause them to ostracize or criticize the whistleblower.

A person denied a demonstration permit will, for example, suffer little or no adverse collateral consequences. But, when a protestor is convicted of even a minor crime, he may lose his employment or be disqualified from receiving governmental benefits. In the McCarthy period, those identified as communist sympathizers were ostra-
the impact of a regulation may be difficult to predict mathematically, a court can ordinarily answer these questions in general "substantiality" terms.

Concern over the difficulty of proof also lessens because of the effect Stage I's motive inquiry may have on the impact inquiry. Where the objective or subjective motive underlying a regulation is to suppress particular expression, the need to quantify the regulation's impact disappears. Upon proof of an improper motive, the model presumes a substantial effect and automatically skips to a strict, Stage III(C) scrutiny. Judges will thus ordinarily have to engage in the complex impact inquiry only with respect to content- and target-neutral regulations.

C. Stage III—Assessment of the Governmental Interest

I. Background

Before undertaking any serious first amendment inquiry, a court must conclude that the governmental interest in a regulation is legitimate. In traditional analysis, a court would strike down a regulation based on illegitimate concerns as a matter of due process. This Article's model would also invalidate such a regulation through the model's motive analysis.

Judges have characterized the strength of governmental interests with a variety of labels; for example, "substantial," "important," and "compelling." Implementation of the labels has occasionally, but rarely, provided guidance on which interests fall cized by many portions of society. Thus, the scope of the regulation's deterrent effect depends on the type of regulation and the context in which it applies.

Other questions may be relevant. For example, do other pressures exist in society which endanger the particular type of expression in question? Are numerous, equally respected citizens currently expressing similar viewpoints without threat of punishment?

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302 See supra note 189 and accompanying text.
303 See, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 448 (1985) (negative attitudes toward and fear of mentally retarded in neighborhood is not legitimate concern for zoning ordinance against group home); United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest") (emphasis in original).
304 See supra notes 187-94 and accompanying text.
within each category. A few judges have attempted to analyze and explain why particular values rise to a certain level.\textsuperscript{309} For the most part, however, the selection and categorization have been subjective, \textit{ad hoc}, and poorly defined.\textsuperscript{310}

The courts’ analyses have often fallen short in another way as well. Proper evaluation of the importance of an interest necessarily entails a two-fold assessment. First, a court must decide whether an interest is, as a general matter, substantial. Second, the court must evaluate whether society has a significant stake in how a particular regulation addresses the interest.\textsuperscript{311} Courts have, however, often ignored the second step of the analysis and relied instead on broad-brush characterizations of society’s stake in the regulation at issue.\textsuperscript{312}

These, then, are the principles that emerge for the model:

1. Initially, at least, courts should attempt to avoid \textit{having} to place governmental interests in narrow, hard-to-differentiate categories.
2. Any analysis of governmental interest must focus on the particular context in which the regulation appears.

2. \textit{The Model}

Consistent with these principles, Stage III of the model adjusts the traditional evaluation of governmental interests\textsuperscript{313} in two significant respects. First, the model only requires a court to determine whether an interest is “very important.”\textsuperscript{314} Second, based on a

\textsuperscript{309} See generally Gunther, supra note 132.

\textsuperscript{310} See Erznoznik v. City of Jacksonville, 422 U.S. 205, 220 (1975) (Burger, C.J., dissenting) (noting majority’s analysis of governmental interests takes “rigidly simplistic approach”).

\textsuperscript{311} Courts should, in other words, assess the general societal interest in the specific case. The government’s interest in national security may, for example, be great. New York Times Co. v. United States, 403 U.S. 713, 727-29 (1971) (Stewart, J., concurring). Its interest in a domestic wiretapping law that allegedly enhances national security may, however, not be equally compelling. United States v. United States Dist. Court, 407 U.S. 297, 314-18, 322 (1972); \textit{id.} at 324, 329-32 (Douglas, J., concurring); \textit{see also New York Times Co.}, 403 U.S. at 724 (Brennan, J., concurring) (comparing instances when prior restraint may be justified because of specific threat to national security). A proper balancing process requires a fair evaluation of both aspects of the governmental interest. \textit{Compare} Dennis v. United States, 341 U.S. 494, 511 (1951) (plurality opinion) (Vinson, C.J.) (relying on general, future danger of communism to national security) \textit{with id.} at 524-25 (Frankfurter, J., concurring) (discussing current danger of Communist Party to United States) and \textit{id.} at 581, 582 (Douglas, J., dissenting) (arguing lack of evidence that defendants present any specific threat).

\textsuperscript{312} See Fried, supra note 101, at 763-65; Tushnet, supra note 101, at 1512-16.

\textsuperscript{313} By governmental interest, I refer to a combination of the general and specific societal stake in the regulation. \textit{See supra} note 311 and accompanying text.

\textsuperscript{314} To avoid confusion, I use the term “very important” rather than the standard current terminology. I intend “very important” to cover the many levels of “impor-
combination of the Stage II and Stage III conclusions, the model directs the court to employ a variable approach in assessing the government's accommodation of private and state interests. As the flow chart in Figure E illustrates, the model establishes presumptions or

"preconceptions" for a court to use in accommodating the conflicting interests; the greater the governmental interest and the less the impact on expression, the easier it becomes for the court to uphold a regulation. The model's "preconceptions," in turn, alleviate the need for refined distinctions among governmental interests which principled courts are ill-suited to make.315

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315 One of the general criticisms of balancing approaches focuses upon notions of...
The model's "preconceptions" start from the proposition that the Constitution mandates judicial protection of free speech. However, the reasons to uphold a regulation increase where the immediate restriction of the targets' expression is limited, no secondary impact exists, and the government has a strong interest in regulating. Under those circumstances, Stage III(A) thus directs a court to evaluate the government's accommodation of the targets' first amendment rights with a view to protecting the government's ability to operate efficiently. On the other hand, Stage III(B) of the model illustrates that if additional speech deterrent impact exists and the government interest is not "very important," a court should emphasize first amendment values. Stages III(A) and (B) require courts to keep a more open mind in assessing the government's accommodation of the targets' interests in the intermediate situations where there is either (1) no secondary impact combined with no very important (though still legitimate) governmental interest; or (2) some (but not substantial) immediate and secondary impact combined with a very important governmental interest.

The model effects a subtle realignment of traditional first amendment analysis. Aspects of the new direction may trouble civil libertarians. Other aspects will offend those who believe courts already go too far in protecting first amendment rights.

For example, truly fringe minorities may, in limited circumstances, receive reduced protection under the model. If only a

separation of powers and federalism. The more the courts assess and weigh competing policy considerations, the more they act like a legislature. See supra notes 108-11 and accompanying text. Stage III of the model to some extent tempers existing first amendment rules that give rise to these concerns. When courts draw fine distinctions among governmental interests, they must engage in inquiries, such as an assessment of public opinion, that are generally within the province and expertise of legislators and legislative committees. See Karst, supra note 9, at 80-81. At Stage III of the model, however, courts evaluate the governmental interests only at one level. The model abrogates the current standards that require judges to distinguish among legitimate, substantial, important, very important, and compelling values.

316 U.S. CONST. amend. I; see P. KAUPER, supra note 101, at 119 ("If the balance-of-interest technique is to be used, however, it must be done in a way that does justice to constitutional values."); see also supra note 293 and cases cited therein.

317 This occurs at Stage IV(A) of the balancing process. See infra note 335 and accompanying text.

318 Here, the model refers to a secondary impact that is insufficient to render the total impact on expression "substantial."

319 The model thus directs the court to enter Stage IV(D) of the balancing process.

320 As discussed below, the balancing process differs slightly in these two examples. In the first, the model directs a court to proceed according to Stage IV(B). The second example calls for a Stage IV(C) evaluation.

321 It is important not to confuse the "fringe minority" discussed here with so-called "marginal"—perhaps disenfranchised—persons. "Fringe minorities" are identified solely on the basis of their unusual viewpoints. "Marginal persons" are simply unpopular or distasteful to the larger portion of the population and may need enhanced judicial
very few people share the fringe minority's views and the regulation affects only a small variety of speech, a court will be unable to find a secondary impact. As a result, a strong governmental interest may justify even a content-based regulation of their speech. In this scenario, then, the model provides a weaker standard than the existing compelling state interest test; the model's balancing theory admits the possibility that society's interests may at times outweigh a fringe speaker's right to express himself as he wishes, where he wishes.  

It is important, however, not to exaggerate either the number of cases that fit within this category or the apparent contradiction with traditional first amendment theory. Courts have always been willing to balance societal interests against speakers' interests in a variety of situations. The model merely changes the contexts and method of balancing, and makes explicit the interest-weighing process. Under no circumstance does the model permit the government to avoid accommodating first amendment rights.  

Moreover, rarely will minorities have so little support that restrictions on their speech can truly be said to have no secondary impact. Ordinarily, regulation of even the most unpopular groups—like the Nazis in Skokie—will fall at least within the intermediate "some secondary impact" category. Consequently, Stages III(B) and (C) of the model may well provide more protection than existing standards. The extent of that protection will depend upon the nature of the governmental interest.

Stage III(C) of the model represents those situations in which a protection to assure common civil rights. See M. Perry, The Constitution, The Courts, and Human Rights 146-62 (1982); cf. Clark, supra note 122, at 992 ("the first amendment is needed primarily to protect against invidiously motivated suppression of unpopular points of view").

322 In the example of the Nazi demonstration in Skokie, Illinois, the Court's evaluation of the speech regulations should have turned on two factors: the impact on free speech and the reasons for the regulation. A reasonable fear of violence on the municipality's part should, perhaps, have carried greater weight than the mere desire of residents not to hear the Nazis' views. See Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 542 (1980) (recipients of objectionable mailings can throw them away); Cohen v. California, 403 U.S. 15, 21 (1971) (offended targets of speech are free to walk away). As a practical matter, a municipality should not have to risk danger to its citizens in order to protect the speech of an unsupported individual—for example, a lunatic who claims to be Satan. On the other hand, as an historical matter important political movements have grown out of the persistence of a small minority. Therefore, when a regulation impacts upon a significant quantity or type of free expression, the first amendment requires protection. The model's de minimis impact threshold attempts to distinguish between these two types of cases.

323 See supra notes 60-73 and accompanying text.

324 At Stage IV, the government must at a minimum show that its accommodation of speech interests is "reasonable." This standard affords no less protection than does the traditional time, place, and manner analysis.
court finds a substantial total impact on free speech. Here, the model’s presumption of unconstitutionality is at its greatest. If a regulation substantially influences free expression and is not justified by a “very important” societal value, a court can safely invalidate the regulation without considering the government’s accommodation of first amendment interests. In that circumstance, the harm to free expression so outweighs the possible societal benefit in the regulation that it should not matter how well or how carefully the government implements the regulation. Alternatively, if a very important governmental interest does support the regulation, it behooves a court to consider whether that interest justifies the adverse effect on speech values. The balancing process thus continues at Stage IV(D). The substantiability of the impact, however, requires a court to complete that process with a view to safeguarding first amendment rights.

Stage III(C) both mirrors and diverges from current standards. Initially, it treats a “substantiality” finding quite differently. The prevailing cases do not clearly define whether or how courts should weigh even substantial chilling effects. The model, in contrast, relies expressly on the presence of secondary impacts. Moreover, in those instances where courts currently do rely substantially on chilling effect notions, the courts are unwilling to invalidate regulations based solely on the existence of a substantial chill. Narrowly drawn regulations survive so long as they further legitimate state interests. The model gives free expression more protection if the secondary impact is strong.

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325 Stage III(C) also includes those cases in which the target has established improper motivation for the regulation. See supra note 189 and accompanying text.
326 The Court has, for example, inconsistently evaluated the constitutionality of legislative investigations that chill associational and speech rights of potential witnesses. In Barenblatt v. United States, 360 U.S. 109, 130-32 (1959), the Court disregarded the existence of a chilling effect and held that Congress’s investigatory power was sufficient to foreclose any first amendment claim. In comparison, in Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963), the Court pursued an analysis similar to the model’s. The existence of a substantial chill and the lack of a “substantial” or “subordinating” state interest led the Court to strike down the legislative action. See Parker v. Levy, 417 U.S. 733, 758-60 (1974) (court martial regulation upheld despite obvious deterrence of protected activity).
327 In this respect, the model reflects Justice Harlan’s concurring opinion in United States v. O’Brien, 391 U.S. 367 (1968). Justice Harlan joined in the majority’s general approach of upholding narrowly drawn statutes supported by important government interests. He acknowledged, however, that at times even narrow regulation is invalid: I wish to make explicit my understanding that this [approach] does not foreclose consideration of First Amendment claims in those rare instances when an “incidental” restriction upon expression, imposed by a regulation which furthers an “important or substantial” governmental interest and satisfies the Court’s other criteria, in practice has the effect of entirely preventing a “speaker” from reaching a significant audience with whom he could not otherwise lawfully communicate.
In other categories of cases, however, the model coincides with the traditional approach. Where, for example, the Supreme Court has found both a relevant, substantial chill and a substantial governmental interest in a regulation, its analysis has been equivalent to the balancing process that Stage III(C) requires (i.e., in Stage IV(D)).

D. Stage IV—The Government’s Accommodation of First Amendment Rights

1. Introduction to the Final Balancing Process

By this stage in the balancing process, a court has completed the motive inquiry, ascertained the impact, and assessed the government’s interests. Starting with the abstract proposition that the Constitution requires society to tolerate free expression, a court must next compare the conflicting values. Under the model, judges are required to weigh these values, in most cases, by gauging how well the government has accommodated speech values and by applying presumptions dictated by the already-made assessment of the competing factors.

Thus far the model has allowed judges to avoid drawing fine distinctions which are prone to manipulation. With respect to immediate, secondary, and total impacts, a court need only assess whether they (1) exist, (2) are more than \textit{de minimis}, or (3) are substantial. Similarly, only “very important” governmental interests have had to be isolated. These manageable distinctions are enough to enable courts to decide most first amendment protest cases.

As Figure F illustrates, however, there are a few categories of cases in which these assessments are insufficient. A quandary develops, for example, where the impact is substantial but the governmental interest is very important and the government has made every effort to accommodate free expression. Which must give way, the right to speak or the government’s need to achieve important societal objectives? These cases may draw courts into further analysis of the degree of impact and the importance of the governmental interests. Courts that opt for a general balancing approach can-
not altogether avoid such an analysis manipulable though it may be.\textsuperscript{334} The advantage of the model is that it confines the categories of cases in which \textit{ad hoc} balancing must occur.

\textsuperscript{334} Under current law, courts might focus on the governmental interests and uphold the regulation. \textit{See}, e.g., \textit{Buckley v. \textit{Valeo}}, \textit{424 U.S. 1}, 29 (1976) (upholding statutory limits on campaign contributions because of the "weighty [governmental] interests served"). In doing so, a court would not consider further how much the regulation affects speech values. This process-oriented approach provides a bright-line rule, but
2. The Model

Stage IV(A). Upon reaching Stage IV(A), a court has determined that the challenged regulation has only limited immediate impact, that a very important governmental interest supports it, and that no improper motive can be proven. All of these factors favor upholding the regulation.

The regulation, however, has a real effect on the target’s constitutional rights. Rather than create a per se rule upholding the regulation, the model thus requires the government to consider the target’s interests. As under current first amendment standards, a court should uphold the regulation only if it reasonably accommodates the target’s first amendment freedoms. If the government has failed to take reasonable steps to preserve the target’s rights, the court is warranted in striking the statute down.

Stage IV(B). The balance of interests is closer at Stage IV(B). Here, a court has determined that a regulation has little impact on speech, but that it also serves no particularly strong governmental interest. The situation is thus in low-level equipoise. The legitimate but limited governmental value counters the isolated effect on the target’s first amendment interests.

The constitutional mandate for free expression requires courts to scrutinize the government’s accommodation of the right. If the fit is poor—that is, if a regulation either does not serve the legitimate governmental interest or fails to accommodate speech rights adequately—a court should presume the law unconstitutional. If, however, the government accommodates the private interests well, there is no easy resolution. The court finds itself in the gray area of balancing, where the speech and governmental interests carry roughly the same weight. Fair balancing requires the court to analyze the countervailing values further in order to decide which interest should control.

...essentially disregards the constitutional mandate that “Congress shall make no law . . . abridging the freedom of speech . . . .” U.S. Const. amend. I (emphasis added).


336 In addition, the target has failed to establish that the regulation is improperly motivated.

337 See infra notes 351-55 and accompanying text. Courts currently only rarely analyze the government’s accommodation with care. In the Nazi protestor example, a court should confront the difficult balancing problem which presents itself. A pre-existing, content-neutral demonstration restriction may have no substantial chilling effect. At the
Stage IV(C). Stage IV(C) represents another situation in which the balance of interests is fairly even. Under current standards, a real, but less than substantial, secondary impact is insignificant; a court will pursue overbreadth analysis only where a substantial chill exists.\textsuperscript{338} Under the model, however, a significant deterrence of free expression militates against upholding a regulation supported by a very important societal interest.

As in existing overbreadth analysis, the model focuses upon the government's accommodation of the rights of the targets and those whose free exercise of expression is threatened. If the regulation is narrowly tailored to achieve a very important end and the government has made a substantial effort to minimize the effect on speech values, the societal interest in the regulation outweighs its limited impact. If, in contrast, the government has failed to recognize that its regulation deters speech and has not taken steps to dampen that effect, the government has disobeyed the first amendment's mandate. A court is then justified in striking down the regulation. Such a ruling in effect requires the government to rethink its means of accomplishing its objectives.\textsuperscript{339}

Stage IV(D). Stage IV(D) focuses on two broad categories of cases. In the first category, a confined total impact competes against a legitimate but not "very important" governmental objective. In the second, a very important societal interest supports the regulation,\textsuperscript{340} but the regulation either substantially deters free expression or is based on a motive\textsuperscript{341} to suppress particular types of speech content. In both categories, courts must adopt a speech-protective attitude. In the first, only limited justifications exist for upholding a noticeable restriction on constitutional rights. In the second, free speech values are at their peak.

Again, the model directs the court to assess the government's accommodation of free expression. Here, however, the model re-
quires a tighter fit. Unless the court can determine that the accommodation is nearly perfect—that is, the least restrictive regulation of free expression that still enables the government to accomplish its ends effectively—the court should invalidate the regulation.

On the other hand, if the government has adopted the least restrictive regulation possible, a court once more finds itself in the gray area. The private and state interests are equally limited or vital. The conflict is square and unavoidable. Either individuals' rights or the interests of society as a whole must give way.342 The balancing process here requires more refined distinctions and, perhaps, a more subjective, ad hoc analysis of the importance of each factor.

The best example of such an equipoise case is the "limited impact/not very important governmental interest" whistleblower situation evident in Connick v. Myers.343 In Connick, the government suppressed speech of so little "public" interest344 that few people were likely to be restricted or deterred from bona fide whistleblowing. On the other hand, the government's rationale for Connick's discharge was maintenance of office morale,345 hardly a compelling justification. The Supreme Court adopted a balancing approach that provided no guidance for future courts faced with whistleblower cases.346 Under the model, the analysis is substantially clearer: the government has no hope of sustaining its speech regulation unless it employs means that least restrict free expression. Only where no accommodation of the conflicting public and private interests is possible may a court decide which interest to prefer.347

342 See supra note 159 and accompanying text.
344 Id. at 154.
345 Id. at 150-51.
346 See Parker, Free Expression and the Function of the Jury, 65 B.U.L. REV. 483, 536 (1985) (discussing aftermath of Connick). The Connick Court held that "the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression." 461 U.S. at 150. The Court provided only very general criteria for determining the nature of the expression: "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." Id. at 147-48.
347 Courts adopting a "least restrictive alternative" approach must define their terms. For instance, if cost is no object, there is almost always some less intrusive way for the government to accomplish its aim. In United States v. O'Brien, 391 U.S. 367 (1968), for example, the Selective Service could have maintained up-to-date registration records by telephoning registrants on a regular basis. In holding that draft cards were the "least restrictive alternative" for accomplishing the goal, the Court implicitly defined "least restrictive alternative" as either the "least restrictive, equally cost-effective alternative" or the "least restrictive alternative at a reasonable cost." This Article's model anticipates that courts will adopt something similar to the latter definition.
E. The Final Balance—Square Conflicts

In Stages I through IV, the model reduces the categories of cases in which courts can engage in the practices questioned by the critics of balancing. Judges with pre-existing philosophical preferences have less leeway to manipulate the model’s rough conclusions than the fine distinctions required by ad hoc balancing. Judicial protection of individual rights interferes with legislative activities no more than necessary. State interests receive full and equal consideration. Courts need not reach more difficult factual or policy conclusions than in any other constitutional context.

If the model has no other advantage, it serves an important

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348 See supra notes 101-42 and accompanying text. I suspect that critics of my model will argue that I have erected a “straw man”; that is, that the model disposes only of cases easily resolved under the traditional helter-skelter or categorization approaches, while leaving the vast majority of cases—the more difficult ones—up in the air. The criticism is misguided for several reasons.

First, as an empirical matter, I do not believe its factual premise is correct. I cannot hope, in this Article, to prove mathematically that the model will resolve a large number of cases. Only time will tell. However, if the reader applies the model to a series of political protest cases, as I apply it to Wayte and NGTF below, see infra notes 356-417 and accompanying text, the reader should quickly agree that the model often helps. Only a limited number of cases will, in fact, reach the “square conflict” stage.

Second, it is important to recall that this Article does not purport to favor comprehensive balancing over, say, categorization. See supra note 143 and accompanying text. It merely acknowledges that balancing is a plausible approach that many courts have chosen and attempts to assist those courts in improving the way they balance. Any criticism that challenges balancing as a methodology thus misses my point.

Third, and more to the substantive argument, there are valid reasons to prefer balancing under the model to categorization. This Article’s focus is, by definition, already on a “category” of cases; namely, those that involve political speech. Within this category, the current legal standards provide little guidance for resolving any cases. Courts have attempted to subcategorize the category and provide a series of inconsistent rules for different fact patterns; for example, the O’Brien rules, see supra notes 65-66 and accompanying text, the whistleblower ad hoc approach, see supra note 126, and the selective prosecution standards, see infra note 365 and accompanying text. As the leading proponent of categorization himself concedes, such continual subcategorization can and often does lead to bizarre and inconsistent results. See Schauer, supra note 80, at 288-89, 307. The model’s method does not.

Finally, and perhaps most important, the model provides a principled framework for deciding political speech cases. Even if it were to resolve only the same number of situations as categorization, its methodology would reflect an improvement. For the model addresses the true factors of concern to the courts and resolves the litigants’ claims on the merits of the expression, rather than by pigeonholing and attempting to exclude claims. The model thus accords the first amendment, and persons exercising first amendment privileges, the judicial respect they deserve.

349 Some judges may continue to rely on labels, see supra notes 306-10 and accompanying text, or on generalized characterizations of the importance of first amendment freedoms. See, e.g., Konigsberg v. State Bar, 366 U.S. 36, 60-62 (1961) (Black, J., dissenting); see also Gunther, supra note 132, at 1005 (noting that Justice Harlan’s balancing came under attack from those who preferred more rigid analyses of the first amendment). For these judges, the balancing model’s only impact will be to limit the number of cases in which judges can do so.
function in isolating those few categories of cases where true, *ad hoc* balancing is unavoidable. The model eliminates sloppy decision-making in the other categories. More important, it informs courts when they are truly within the critical "danger zone." This warning in turn cautions judges to beware of rationalizing personal preferences as principles of law.\(^{350}\)

These conclusions, of course, do not help courts decide the remaining "clear conflict" cases.\(^{351}\) As in any decisional process, marginal cases may be difficult. If the problem areas are properly identified, however, courts can develop rules to guide future decisions. As cases arise, careful courts\(^{352}\) will identify the legally significant elements of particular regulations and speech.\(^{353}\) Over time, the assessments of the importance of particular governmental interests and the expression they deter will become more refined. These developments, in turn, may ease future courts’ assessments and further reduce the instances in which judges can make subjective judgments.\(^{354}\)

Implementing the balancing model can only improve courts’ current decisional processes. The model allows courts to consider important and relevant factors they now ignore. It adds principle to balancing except in those few cases in which a final conflict develops. To the extent the model condones *ad hoc* balancing within the remaining gray areas, it merely acknowledges the reality that in limited circumstances balancing is unavoidable. An honest judicial ap-

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\(^{350}\) Cf. Fried, *supra* note 101, at 763 ("The Court should never cast the controversy in a form which conceals the conflict to be resolved . . . ").

\(^{351}\) Clear conflicts occur when: (1) a very well tailored regulation neither deters speech nor is supported by a very important governmental interest; (2) a nearly perfectly tailored statute substantially deters speech, but not substantially, and furthers a less than very important objective; or (3) a nearly perfectly tailored statute is supported by a very important governmental interest but substantially affects first amendment freedoms.

\(^{352}\) See Gunther, *supra* note 132, at 1005-06 (Harlan approach of "systematic, critical scrutiny of asserted governmental interests" and generous perception of first amendment values proved intellectually satisfying and protective of speech).

\(^{353}\) See, e.g., Quadres, *supra* note 240, at 454-63 (Supreme Court has defined various aesthetic interests upon which state may rely). I do not attempt to identify criteria or considerations by which courts should decide the relative importance of private and governmental interests. That endeavor is beyond this Article’s scope and is a task that may be best addressed by courts over time. Over a period of implementing the balancing model, courts will rely on factors such as precedent, history, and the practical effects of various rulings. By enunciating their decisions clearly, each court should provide guidance for the future. But see Schauer, *Precedent*, 39 STAN. L. REV. 571, 576-90 (1987) (pointing out pitfalls of relying on precedent to constrain future judges).

proach to this balancing better prepares courts to cope with their difficult adjudicatory task.\textsuperscript{355}

V

\textit{Wayte and NGTF Under the Balancing Model}

This Article began by describing the Supreme Court's treatment of \textit{Wayte} and \textit{NGTF} as cavalier. The Article concludes by considering how the Court might have decided the cases under the comprehensive balancing model.\textsuperscript{356}

A. \textit{Wayte}\textsuperscript{357}

1. \textit{The Facts}

The record in \textit{Wayte} reveals that roughly 674,000 youths (7.5\% of those eligible) failed to register for the draft.\textsuperscript{358} The Selective Service System pursued a passive enforcement system. It made no active effort to identify nonregistrants. The names of approximately 286 nonregistrants came to its attention fortuitously, either through

\begin{footnotesize}
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\item \textsuperscript{355} See M. Redish, \textit{supra} note 64, at 262 ("If the judiciary is to be able to develop workable and effective principles of free speech protection, its balancing of competing interests must be done openly and candidly, rather than indirectly or surreptitiously."); Gunther, \textit{supra} note 113, at 1148-49 (Supreme Court's refusal to acknowledge balancing when dealing with a clear conflict between governmental and individual interests is flawed). As Professor Schlag has noted, in proposing a somewhat similar, although far less defined analytic process for first amendment decisionmaking:

[The] four parameters approach will produce a mode of first amendment analysis that is richer than categorical approaches, one that allows courts to speak a language that is more reflective of the culture, a language that allows the court to gain and disseminate more information about the facts and how these might be related to values.

By injecting greater clarity in the language of the courts, decisions that are unnecessary to the values sought to be realized might be avoided to a greater extent. Furthermore, we have an interest in having courts make clear what they contribute . . . to the culture.

Schlag, \textit{supra} note 74, at 738.

\item \textsuperscript{356} The balancing model focuses on four factors: motive, effect on first amendment rights, importance of the governmental interests, and the government's accommodation of first amendment interests. At various places in \textit{Wayte v. United States}, 470 U.S. 598 (1985), Justice Powell mentioned three of the four factors: important governmental interests, \textit{id.} at 611-12; accommodation of first amendment interests, \textit{id.} at 613; and motive, \textit{id.} at 610. Because Justice Powell adopted the \textit{O'Brien} test, he nowhere discussed the effect of the government's selective prosecution policy on speech values. To the extent the Court considered motive, it did so only in the context of \textit{Wayte}'s equal protection claim, not the general first amendment issue. It is thus fair to say that the Court never balanced all the factors that warranted attention.

\item \textsuperscript{357} For an excellent, in-depth analysis of the facts and arguments in \textit{Wayte}, see Shane, \textit{supra} note 35 (Addressing \textit{Wayte}'s separate first amendment claims, \textit{id.} at 577-89, noting the difficulty in deciding protest cases solely on the basis of the "objective" phrasing of the regulation, \textit{id.} at 381, and concluding that the court should accord some measure of protection to "civil disobedience." \textit{Id.} at 388.)

\item \textsuperscript{358} \textit{Wayte}, 470 U.S. at 604.
\end{itemize}
\end{footnotesize}
reports of third parties or self-reporting by vocal draft protestors who, like Wayte, informed their draft boards that they would not register.\footnote{359 Id. at 602.}

The government gave the 286 targets several opportunities to avoid prosecution. First, in what the Supreme Court termed "the beg policy,"\footnote{360 Id. at 602.} the government wrote the nonregistrants and sent an FBI agent personally to convince them to register under a grant of amnesty. Second, after the registration deadline expired, the President announced an additional grace period.\footnote{361 Id. at 603.} As a result, 270 of the 286 immunized themselves from prosecution by registering, fleeing, or demonstrating their immunity from registration requirements.\footnote{362 Id. at 604 n.3.} The remaining sixteen were vocal nonregistrants who either protested the draft publicly or wrote the government, setting forth their philosophical rationale for refusing to obey the law.\footnote{363 Id. at 605 n.6.} The government prosecuted this group.

2. Application of the Balancing Model

Motive. The Court applied "ordinary equal protection standards" to decide Wayte's selective prosecution claim.\footnote{364 Id. at 608.} It placed the burden on Wayte "to show both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose."\footnote{365 Id. at 604 n.3.} The Court ultimately rejected Wayte's selective prosecution argument because he could not, in light of the beg policy, prove that "the government prosecuted him because of his protest activities."\footnote{366 Id. at 610 (emphasis in original).} It made no further inquiry into motive in considering Wayte's direct first amendment arguments.\footnote{367 Id. at 614.}

Under the proposed balancing model, the Court could not have rejected Wayte's motive argument so blithely. The model demands a different order of proof. Wayte would not have had to show that stifling dissent was the predominant or sole reason for his prosecution, only that it played a substantial role.\footnote{368 See supra note 221 and accompanying text. Wayte suggested that it may be sufficient for a defendant to show his prosecution was "in part 'because of' " his exercise of
On the one hand, the Court was correct that the government's willingness to dismiss charges against public protesters who ultimately registered suggested a lack of improper subjective motive.\textsuperscript{369} On the other hand, Wayte was able to prove his protest activities were a but-for cause of his prosecution. Under the balancing model, that showing would have entitled Wayte to obtain discovery\textsuperscript{370} as to whether Selective Service officials intended to embarrass or punish protesters, a motive that has been the Service's hallmark in the past.\textsuperscript{371} In contrast, the Wayte Court decided the factual motive issue without considering whether the district court should have allowed more discovery.\textsuperscript{372}

Full discovery and judicial consideration of motive might have resulted in several different conclusions under the model. Wayte might have been able to establish that his protest activities or the Service's general desire to stifle antiregistration sentiment played a substantial role in the prosecution decision. If so, the model would have shifted the burden to the government to prove it would have prosecuted Wayte even in the absence of his protected conduct. On the record before the Supreme Court, the government could not have carried that burden, for the Selective Service made no effort whatsoever to prosecute nonregistrants who remained silent. The

\textsuperscript{369} \textit{Id.} at 609.

\textsuperscript{370} The district court in \textit{Wayte}, indeed, decided the case on discovery grounds. After an \textit{in camera} examination of documents, the court concluded that a nonfrivolous basis existed for believing Wayte's prosecution was improperly motivated. It therefore ordered the government to make additional disclosures and provide depositions. In order to obtain appellate review of the district court's interlocutory discovery decree, the government refused to obey. The district court then dismissed the indictment against Wayte. United States v. Wayte, 549 F. Supp. 1376, 1378-79, 1391 (C.D. Cal. 1982). The government appealed the dismissal order and obtained a reversal. United States v. Wayte, 710 F.2d 1385 (9th Cir. 1983), \textit{aff'd}, 470 U.S. 598 (1985).


\textsuperscript{372} Justice Powell concluded, over strong dissent by Justices Marshall and Brennan, that the discovery issue "was neither raised in the petition for certiorari, briefed on the merits, nor raised at oral argument." \textit{Wayte}, 470 U.S. at 605 n.5. Justice Powell's ruling led to an anomalous result. In effect, the Court approved the court of appeals's decision to cut off discovery as to motivation, while at the same time relying upon the government's factual assertions that its intent was pure.
Court would thus have had to proceed to Stage III(C) and evaluate with suspicion the government's decision to prosecute.

Alternatively, discovery might not have uncovered subjective evidence of improper prosecutorial motive. Under such circumstances, the model would have required the Court to commence its first amendment analysis without predisposition for or against the government. In *Wayte*, a Stage II analysis of the effect of the prosecution on first amendment values would have then determined the parties' burdens of persuasion.

**Impact on First Amendment Rights.** The *Wayte* Court, in passing, noted its "doubt that petitioner has demonstrated injury to his First Amendment rights." Because it applied the *O'Brien* test, focusing exclusively on the governmental interest in the regulation, the Court attempted no further assessment of the impact of the prosecution of vocal nonregistrants on the exercise of free speech. Nor did it consider remanding for further factfinding.

The balancing model approaches the issue differently. If a subjective motive to punish or deter speech can be proven, the model requires the trial court to presume substantial impact. If not, the court must assess the regulation's immediate and secondary effects.

Despite the *Wayte* Court's "doubts," a trial court would have had difficulty concluding as a matter of law that prosecution of only vocal nonregistrants has no immediate, chilling or societal speech-deterrent effect. Prosecution may deter illegal nonregistration, but it also tends to keep nonregistrants from protesting the registration system in a lawful manner. Potential critics of government policy who have not violated the registration law may also perceive selective prosecution as a sign that the government will penalize protest.

Ascertaining the actual extent of impact in *Wayte* is more difficult. In 1982, the target group of nonregistrants potentially de-

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373 *Id.* at 611 n.12. The Court believed that "[t]he government's 'beg' policy removed most, if not all, of any burden passive enforcement placed on free expression. Because of this policy, nonregistrants could protest registration and still avoid any danger of prosecution." *Id.*

374 *Id.* at 611; see also *supra* notes 65-66 and accompanying text.

375 As Justice Harlan's concurring opinion in *United States v. O'Brien*, 391 U.S. 367 (1968), makes clear, the *O'Brien* Court did not foreclose reliance on other factors in other cases. *Id.* at 388-89. However, subsequent judges, such as those in the *Wayte* majority, have interpreted *O'Brien* to achieve precisely that result.

376 See *supra* note 189 and accompanying text.


378 This proposition, though, is questionable. See *infra* notes 385-86 and accompanying text.
terminated from making public statements numbered 674,000. The immediate impact of the prosecution was, however, more limited, for not all nonregistrants had a philosophical basis for failing to register or an interest in speaking publicly about their views. It is fair to conclude that the immediate impact, though more than de minimis, did not rise to the "substantial" level.

The government's beg policy also minimized the secondary impact. It limited the number of potential protestors likely to perceive a government purpose to deter speech. Because the government's policy was to prosecute only lawbreakers, not simply protestors, potential protestors had less reason to fear.

The latter conclusion, however, holds true only to the extent that the Selective Service publicized the beg policy. Until Wayte uncovered the policy during litigation, protestors had no knowledge of its existence. Even thereafter, the government maintained throughout the litigation that it intended to change its prosecution policies, including the beg policy, to more active enforcement of the registration laws. Persons who feared government reaction to protest thus had no reason to presume the government would continue to focus on lawbreaking rather than protest activities.

Assessing total impact in the Wayte context is therefore not simple. The model would require an evidentiary inquiry into the number of persons whose legitimate speech was deterred, the degree to which the government committed itself not to act except when protestors had broken the law, and the publicity that surrounded the commitment. Under the model, the Wayte courts would not have had to resolve the inquiry with mathematical precision; they merely would have had to decide whether the total impact was substantial. This result in turn would have determined whether to proceed to Stage III(B) or III(C).

The Government Interest. Justice Powell asserted that the government's general interest in the registration statute was to ensure national security. He did not, however, attempt to show that national security justified the government's specific interest in selectively prosecuting vocal nonregistrants. Justice Powell instead identified three "important or substantial" governmental interests in the passive enforcement system: (1) passive enforcement enhances prosecutorial efficiency by avoiding the need to actively investigate

379 Wayte, 470 U.S. at 604 n.4. Presumably, absent a change in prosecution policies, the 7.5% nonregistration figure would remain fairly constant. The numbers within each year's registration pool may vary.
380 Id. at 603-613.
381 Id. at 611-12.
382 Id. at 611 (citing O'Brien, 391 U.S. at 377).
violations of the registration law; (2) passive enforcement takes full advantage of the nonregistrants’ vocal refusal to register because it eliminates the need to prove independently that they intended to violate the law; and (3) prosecution of vocal nonregistrants promotes deterrence of others considering nonregistration.383

Justice Powell’s limited assessment of these purported interests probably stemmed from the low standard to which he held the government. He merely asked prosecutors to show that their interest in passive enforcement was substantial. The balancing model requires courts to make the alternative determination of whether any asserted interest is "very important."384

Serious weaknesses undermine each of the government’s justifications in Wayte. For example, prosecution of only vocal nonregistrants, particularly when coupled with a beg policy, fails to deter nonregistration.385 To the contrary, it signals that the government will not punish silent nonregistrants. From a deterrence perspective, the effective response to Wayte’s flouting of the registration system would have been to prosecute all or a random sample of violators, perhaps together with the groups identified by passive means.386

The prosecutorial efficiency rationale is also vulnerable. In essence, it reduces to a financial argument; in other words, passive enforcement helps prosecutors expend fewer resources in investigating crime. The Court has often rejected fiscal and administrative convenience as excuses for undercutting constitutional values.387

Nevertheless, the model leaves open some possibility that a court could rely on the prosecutorial efficiency rationale. Administrative convenience has always been rejected on the basis that it is not a “compelling” interest.388 Under Stage III of the model, a court deciding Wayte would have to confront the issue of whether

383 Id. at 613.
384 I.e., at Stages III(B) or III(C).
385 See Note, supra note 377, at 412 (“A much greater deterrent effect could have been achieved by drawing media attention to the prosecution of a quiet nonregistrant.”).
386 In fairness, the government’s justification arguably was the opposite of deterrence. Rather than seeking to prevent nonregistration affirmatively, the government may simply have been trying to stave off a drastic reduction in registration that would have occurred upon failure to prosecute vocal nonregistrants. Even this justification, however, appears convoluted. Publication of the prosecution policy—inevitable once prosecutions began—served as a virtual guarantee that silent nonregistrants would escape punishment. In the long run, the policy thus assured the disastrous result it purported to prevent.
388 See L. Tribe, supra note 81, at 209 (discussing role of “administrative efficiency” considerations in the first amendment context).
the government may justify a restriction of constitutional rights on less-than-compelling money-saving grounds.

The final government interest offered by the Wayte opinion is, perhaps, closest to a "very important" interest. Vocal nonregistration does alleviate the government's burden of proving specific intent to avoid the draft. Yet it is the nonregistrant's response to a "beg" rather than his protest which is probative of his state of mind. The policy would be equally effective in resolving proof difficulties at trial under an active enforcement system. A court deciding Wayte under the model could thus not treat the alleged evidentiary benefits as a "very important" interest justifying passive selection of defendants.

A determination that the government's interests are less than "very important" would invalidate Wayte's prosecution instantly under two of the model's three possible scenarios; that is, if the deciding court previously found the prosecution improperly motivated or the impact on expression substantial. The third, Stage III(B), scenario would require the court to proceed to a Stage IV(D) analysis of whether the government's method of prosecution accommodated first amendment values in nearly perfect fashion. A finding that one of the governmental interests is very important and that the chilling effect was substantial would, in contrast, result in a Stage IV(C) assessment of the accommodation more favorable to the government.

Accommodation. In Wayte, Justice Powell concluded that the passive enforcement policy "placed no more limitation on speech than was necessary to ensure registration for the national defense." Had Justice Powell considered the policy's chilling effect he could not have reached that conclusion. Random or active enforcement would have had at least as much deterrent effect, with no adverse impact on first amendment freedoms. Thus, even under Justice Powell's analysis, passive enforcement was logically supportable only by reference to the three subsidiary objectives he identified in evaluating the government's interests.

Justice Powell seemed to recognize as much, for he repeatedly stated that the Selective Service was not yet capable of carrying out a comprehensive active enforcement program. The opinion asserts that "[p]assive enforcement was the only effective interim solution

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389 See supra note 325 and accompanying text.
390 I.e., when the court finds no improper motive and no substantial impact.
391 470 U.S. at 613.
392 See supra note 385 and accompanying text.
393 470 U.S. at 613.
available to carry out the government’s compelling interest.”  

Yet in making this assertion, Justice Powell failed to consider any of the obvious enforcement alternatives.

As discussed above, application of the comprehensive balancing model to the *Wayte* facts might lead to several different types of Stage IV analysis. If a court were to apply the strict Stage IV(D) test, it would find the passive enforcement policy’s accommodation of first amendment rights inadequate. The government would have to show nearly perfect accommodation of first amendment interests. Since active prosecution would have served the government’s deterrence interest as well as the passive enforcement policy and would have had a lesser effect on free expression, deterrence considerations would not justify the policy.  

Nor could the specific intent rationale; applying a beg policy to nonregistrants identified by active enforcement would have served the same interest without the first amendment impact.

In the end, it is the cost-saving justification that best supports the passive enforcement system. Avoiding the need to investigate and identify violators does preserve prosecutorial resources. A Court willing to conclude that administrative convenience qualifies as a very important governmental interest could fairly rule that the *Wayte* passive enforcement policy directly served that interest. By combining passive enforcement with the beg policy, the government limited the number of persons whose rights were restricted and minimized the effect on their right of free expression. Under Stage IV(C) of the model, the government’s solid attempt to accommodate first amendment freedoms might save the prosecutorial scheme.

On the other hand, if a court applying the model in the *Wayte* context were to require a nearly perfect accommodation of first amendment rights, as in Stage IV(D), the passive enforcement pol-

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394 *Id.* (emphasis added).

395 Despite Justice Powell’s insistence that no active enforcement was possible, some alternatives were obviously available. For example, federal agents could easily have compared high school or local birth records against local registrations. Although such a system would have overlooked many nonregistrants, it would have caught far more than passive enforcement did.

396 Moreover, the government routinely proves specific intent in criminal cases without the assistance of the prophylactic type of enforcement system used in *Wayte*. Given the unambiguous registration law and widespread publicity of its requirements, proving specific intent on a case-by-case basis would not be an overwhelming task, even in the absence of a beg policy. Nondiscriminatory prosecution of nonregistrants would, however, restrict first amendment rights to a far less extent than passive enforcement did.

397 The government thus enabled protestors to keep protesting legally after complying with the registration law.

398 In Justice Powell’s mind, the accommodation was excellent. *Wayte*, 470 U.S. at 609-10.
icy would fall. The selective prosecutions unnecessarily deterred the expression of silent nonregistrants. A small-scale active enforcement system designed to uncover a similar number of random nonregistrants (i.e., thirteen) would not have imposed substantially on prosecutorial resources and would have avoided the impact on free expression. The key to *Wayte* under the comprehensive balancing model is thus the determination of whether Stage IV(C) or IV(D) analysis should apply.

**Summary.** The balancing model does not provide an easy solution for the decisionmaker in *Wayte*. But it does focus and narrow the issues and enable the decisionmaker to consider all the relevant factors.

The above analysis suggests that the Supreme Court's decision in *Wayte* was probably wrong. The Court should have required further evidentiary proceedings. If, as a result, the record revealed a governmental motive to deter protest activity or a substantial first amendment impact, the Court should have applied a very strict Stage IV(D) analysis to the passive enforcement/selective prosecution policy. The availability of less restrictive alternatives would then have invalidated the prosecutions. In short, the model suggests that, if preventing nonregistration was important to the government, the government should have been willing to prosecute widely enough so as to avoid deterring speech.

The model does, however, envision a scenario under which the Court might have upheld the passive enforcement policy. The government did take significant steps to accommodate free speech. That opens the door to a Stage IV(C) rather than Stage IV(D) inquiry. Under Stage IV(C), if the Court had supplemented the record and determined that the enforcement policy was properly motivated, did not have a substantial total impact, and served a very important cost-saving function, the convictions might properly have stood.

Justice Powell may have secretly reached precisely that conclusion in his *Wayte* opinion. His use of the limited *O'Brien* test, however, enabled him to avoid identifying the values he preferred and to hide the fact that he gave financial considerations primacy. The proposed balancing model would take this shield from the courts. It requires judges facing difficult first amendment issues, like Justice Powell in *Wayte*, to state their findings explicitly and expose their true rationales to critical analysis. That exposure and scrutiny, in the end, gives first amendment freedoms their greatest protection.
B. NGTF

1. The Facts

The Oklahoma statute at issue in NGTF permitted dismissal of school teachers for engaging in public homosexual conduct. The statute defined such conduct as "advocating, soliciting, imposing, encouraging, or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees." The Court of Appeals for the Tenth Circuit invalidated the statute on overbreadth grounds. It incorporated the Brandenburg test, holding that a state could ban "advocacy" of homosexuality only where such advocacy is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." The court concluded that the Oklahoma law improperly prohibited speech that did not fall within this category.

It is impossible to predict how the Supreme Court would have ruled had it reached the merits of the case. Some of the Justices may well have voted to grant certiorari in order to change the overbreadth doctrine or abrogate it altogether. Had the Supreme Court continued to apply overbreadth analysis, however, the Court probably would not have followed the court of appeals in incorporating the Brandenburg test. As a teacher discharge case, NGTF should have been considered under the less stringent

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400 Id.
402 NGTF v. Board of Educ., 729 F.2d at 1274 (citing Brandenburg, 395 U.S. at 447).
403 Id. at 1275.
405 Strangely, Judge Barrett's dissent in NGTF fails to point out the error in the majority's reasoning. The judges all seem to have been convinced that the statute's use of the term "advocacy" automatically required application of the Brandenburg standard. Brandenburg, however, quite clearly applies to a different type of situation; that is, where the government forbids a private person from advocating others to engage in illegal activity. Brandenburg, 395 U.S. at 449. The Supreme Court has applied a different rule when action is initiated against government employees because their speech may affect either their ability to perform their jobs or the employing agency's ability to carry out its operations. See supra note 126.
nich/Pickering standards. 406

Plaintiffs could have satisfied their threshold burden under Connick/Pickering. Speech clearly played a substantial role in discharge decisions, since the statute authorized the discharge of teachers specifically because of their expression. The outcome would thus have turned on the Court's ad hoc judgment of the importance of the governmental interests in preventing the speech. 407

2. Application of the Balancing Model

For reasons somewhat similar to the Tenth Circuit's overbreadth analysis, NGTF is not a difficult case to decide under the comprehensive balancing model. Plaintiffs proved Stage I motive objectively by showing that the relevant portion of the Oklahoma statute disciplined teachers directly and exclusively for speaking. The model would thus direct a court to begin the balancing process at Stage III(C). 408

The court of appeals declined to consider the importance of the governmental interests in restricting teachers' speech on the basis that the school board had failed to show actual "disruption of official functions" or "unfitness" of teachers who advocate homosexuality. 409 The court gave short shrift to the serious implications of allowing teachers to influence students on the morality or propriety of a homosexual lifestyle. Federal courts have often upheld the right of school boards to shape the moral perceptions of students. 410

406 Connick v. Myers, 461 U.S. 138 (1983), requires a court first to determine the degree to which the speech addresses a matter of public concern and thus deserves first amendment protection. Id. at 146. The court must then adjust the government's burden of justifying the discharge, depending upon its assessment of the nature of the expression. Id. at 149-50. Since NGTF was a declaratory suit, the court of appeals would have had difficulty evaluating these semi-factual issues. If the court assumed that the statute's implementation would forbid a substantial amount of expression of "public concern," it would then have had to decide whether the government's interest in preventing teachers from influencing children on the issue of homosexuality outweighed the teacher's first amendment rights. Id. at 150-51.

407 The Court in Connick recognized the essentially ad hoc nature of such an evaluation. Id. at 154.

408 Even if an improper motive could not have been established, the court of appeals held, as a factual matter, that the statute had a real and substantial chilling effect. Stage III(C) analysis of the governmental interests would thus have been necessary in any event.

409 NGTF v. Board of Educ., 729 F.2d at 1274 (citing Childers v. Independent School Dist. No. 1, 676 F.2d 1338, 1341 (10th Cir. 1982)).

410 Id. at 1275-76.

411 See, e.g., Ambach v. Norwich, 441 U.S. 68, 76 (1979) ("The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, has long been recognized."); see also Board of Educ., Island Trees Free School Dist. No. 26 v. Pico, 457 U.S. 853, 871 (1982) (school board can remove books from school library if decision based on "educational suitability," or pervasive vulgarity); Epperson v. Arkansas 393 U.S. 97, 104 (1968) ("By
or to leave that process to parents. In addition, many typical homosexual activities are illegal in Oklahoma, so the state had a particular interest in preventing publicly paid and certified role models from advocating such activity to students. Under the balancing model, a court could legitimately conclude that Oklahoma's interest in the NGTF statute was "very important."

The statute nonetheless would fall upon reaching Stage IV(D). The model requires a nearly perfect accommodation of first amendment freedoms. Even if the statute's broad purpose was legitimate, the statute made no effort whatsoever to protect expression that would not influence students' moral perceptions. The statute did not provide exceptions to allow teachers to participate in debate on the subject of homosexuality, even in controlled situations. It offered teachers no method to gain approval to make factual or neutral statements they otherwise had to avoid for fear of "encouraging" some students. The model therefore would require the statute's invalidation.

3. Summary

Analysis of the NGTF statute under the model is similar to the traditional overbreadth analysis used by the NGTF court of appeals. But had the Supreme Court closely reviewed and analyzed the case, it might well have had difficulty resolving the issues on overbreadth grounds. The Supreme Court could not so easily have discarded the state's interest in the statute. Nor could it have concluded that most of the speech prohibited under the statute was immune from regulation. The outcome of NGTF under ordinary overbreadth

and large, public education in our Nation is committed to the control of state and local authorities.


OKLA. STAT. ANN. tit. 21, §§ 886-87 (West 1983).

To date, the Supreme Court has declined to strike down state statutes banning homosexual conduct. See Bowers v. Hardwick, 106 S. Ct. 2841 (1986) (refusing to invalidate Georgia's sodomy law); Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), aff'd mem. 403 F. Supp. 1199 (E.D. Va. 1975) (summarily affirming lower court's refusal to invalidate state sodomy law). But see Bowers v. Hardwick, 106 S. Ct. at 2847-48 (Powell, J., concurring) (leaving open the possibility of invalidating criminal enforcement of an antisodomy law on eighth amendment grounds). See generally Note, supra note 21. Should the Court ever hold that sexual preference or conduct is constitutionally protected, the analysis in the NGTF context would necessarily change as well.

For example, in a school-approved educational discussion, in a public debate that is unlikely to come to the attention of children, or in a context where the teacher's statements are counterbalanced by the contrary position of an equally influential role model.

In finding overbreadth, the court of appeals pointed to the example of the "teacher who went before the Oklahoma legislature or appeared on television to urge
analysis, properly conducted, is thus far from certain.\textsuperscript{417}

The \textit{NGTF} example underscores why adoption of the model would make a significant contribution to the prevailing law. In contexts like \textit{NGTF}, the model's approach, unlike the overbreadth doctrine, allows courts to admit the conflict of interests freely. The model provides a means by which courts can analyze the conflict without having to express a preference for the private or governmental interest. It not only eases the task of the courts, but makes for more honest decisionmaking as well.

\textbf{Conclusion}

This Article has addressed the question of when courts can restrict political dissent. It has proposed a comprehensive balancing model through which courts can resolve protest cases. The model does not provide easy or mathematically precise answers for all situations. It does, however, reduce the number of cases that require \textit{ad hoc} balancing and it refines the issues presented in those cases where balancing cannot be avoided. Perhaps most important, the model provides a framework under which courts must conduct balancing through open and honest identification of all relevant factors.

\textsuperscript{417} See \textit{supra} note 405 and accompanying text.