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Sharpening the Focus of Free Speech Law: The Crucial Role of Government Intent

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SHARPENING THE FOCUS OF FREE SPEECH LAW: THE CRUCIAL ROLE OF GOVERNMENT INTENT

*by: R. George Wright**

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I. INTRODUCTION

Contemporary free speech law is typically misfocused. This misfocus serves neither the purposes underlying the institution of free speech nor any broader social rights and interests in conflict with freedom of speech. As a general matter, the adjudication of free speech claims should properly focus, centrally, on the intent of the regulating government. More specifically, courts should focus crucially on whether the government has, in enacting or enforcing its speech regulation, intended to suppress or disadvantage a presumed or actual idea or its expression. This sharpened focus would allow the courts to responsibly address a surprisingly broad range of free speech cases with a substantially diminished need for attention to a number of artificial, if not unnecessary, judicial doctrines that have gradually been incorporated into the free speech case law.

This Article first briefly establishes the nature, and the typical costs, of official inhibition of speech in general.[1] The Article then more ex-

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1. *See infra* Part II. While our approach seeks to properly accommodate free speech values as well as other rights and interests, our approach to free speech law is neither distinctively individual-rights focused nor distinctively focused on policy ef-

tensively examines a range of the contemporary case law,[2] with attention, successively, to the recent student speech case of *Mahanoy Area School District v. B.L.*;[3] to cases involving various sorts of borderline and non-traditional forms of speech; and then to questions of content-based and content-neutral regulations of commercial and non-commercial speech, as raised by the case of *Reed v. Town of Gilbert, Arizona*[4] and the later case law.[5] The Article then addresses the problem of properly inferring, or otherwise ascertaining, any meaningful government intent to suppress or disadvantage a particular idea.[6] A brief conclusion then follows.[7]

Throughout, it will be useful to remember that in all sorts of free speech cases, the relevant government's intentions are likely to have been multiple; partly conflicting; or perhaps mutually linked, if not inseparable. Commonly, a government that is restricting speech may have an intent to suppress or disadvantage an idea where that intent is somehow linked to a more benign intent to discourage some perceived public harm that is thought by the government to result from the speech in question.[8] On our approach, if there is any causally significant government intent to suppress or disadvantage an idea, the speech restriction generally must fail. The result should follow even if the same restriction could have been adopted with no such invidious intent, and for worthy public purposes.[9]

Thankfully, not all substantial restrictions on speech involve any intent to suppress an idea. Thus some restrictions on, for example, polit-

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fects or consequentialist. *See generally* Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687, 687 (2018). A doctrinal focus on the consequences, or effects, of speech regulations is the currently dominant approach. *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 413–14 (1996). As we shall see throughout, the adverse consequences of a regulation on speakers and their ideas are often the best evidence of government intent. A speech-restrictive intent may be present from the beginning or may arise after the policy is implemented as evidenced in some such cases by an otherwise unexplained refusal to modify the policy in question.

2. *See infra* Part III.

3. *See infra* Section III.B.

4. *See infra* Section III.D.

5. *See infra* Section III.E. We note in particular that some content-based restrictions on speech involve no intent to suppress the relevant idea, while some content-neutral restrictions do indeed bespeak such an intent.

6. *See infra* Part IV. Unlike that of the approach adopted below, then-Professor Elena Kagan's emphasis focused on the motive-discovering potential of distinctions such as content-based, content-neutral, and subject-matter-based restrictions; low versus high value speech; and incidental versus targeted restrictions on speech. *See* Kagan, *supra note* 1, at 414–15.

7. *See infra* Part V.

8. *See infra* Section III.B.

9. This approach leaves open the possibility of later enacting the same or similar speech restriction but without an intent to suppress or disadvantage any relevant idea. *See* Kagan, *supra* note 1, at 431–32, 439 (showing one possible sense of causal significance in this context); *see also* Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 286–87 (1977).

ical speech, along with many instances of restrictions on libelous speech; fraudulent speech; politically favored speech that is irrelevant to the forum; noisy or distracting speech; perjury; or speech that would impair national security[10] can be enacted without any causally significant hostility to any idea that the speaker wishes to express. But again, regardless of the nature of the speech in question, if the restricting government harbors any causally relevant intention to suppress or disadvantage the idea in question, the speech restriction should generally be struck down. The social costs of such a judicial response to such a speech regulatory intent need not be substantial. Such a focus would, on the other hand, helpfully allow for reduced judicial attention to, if not a complete bypass of, a number of currently ubiquitous and largely distracting free speech tests and categories.[11]

II. Speech Inhibition in General & Its Costs

The Supreme Court's broad distrust of governmental inhibition of private actor speech is clear. Consider, merely for example, this language, repeated by the Court on several important occasions:

> The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[12]

In part, the Court's concern is for the availability of information.[13] Thus "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge."[14]

More fundamentally, the Court has recognized that official inhibition of speech inescapably conflicts with the underlying speech-pro-

10. For the sake of clarity, consider the case of an idea that the restricting government actually endorses and approves of, but which might complicate relations with, or embarrass, a foreign government, or that is expressed in the wrong public forum. *See also* Kagan, *supra* note 1, at 433–35.

11. Among the inevitable complications, consider a well-intended speech regulation that is nevertheless unnecessarily broad and innocently lacking in its tailoring to the government's benign purpose. We do not herein address entirely innocent and responsibly intended, and thus commonly less significant, speech regulations.

12. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) (quoting Leathers v. Medlock, 499 U.S. 439, 448–49 (1991)); *see also* Texas v. Johnson, 491 U.S. 397, 414 (1989) (discussing the censorship of "offensive or disagreeable" ideas on just that basis).

13. *Simon & Schuster, Inc.*, 502 U.S. at 116.

14. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 866 (1982) (plurality opinion) (quoting Griswold v. Connecticut, 381 U.S. 479, 482 (1965)).

tection values of discovering and disseminating important truths;[15] of deliberative democracy as distinct from arbitrary government;[16] and the development, realization, and flourishing of personal faculties and capabilities.[17] And each of these underlying speech values—roughly, the optimal pursuit of truth;[18] meaningful representative democratic government;[19] and the promotion of autonomous self-realization[20]—has been recognized by leading scholars.[21]

It is possible for a government to suppress or disadvantage the private-party expression of disfavored ideas, while itself publicizing its own formulation of those disfavored ideas, even along with some sort of a defense of those disfavored ideas. The basic problem with any such approach, however, was classically recognized by John Stuart Mill:

> That is not the way to do justice to the arguments . . . . [The public] must be able to hear them from persons who actually believe them, who defend them in earnest and do their very utmost for them. [The public] must know them in their most plausible and persuasive form.[22]

Otherwise put, suppression and disadvantaging of ideas impairs, to one degree or another, the process of optimally changing one's mind[23] and "prevents us from figuring out just what our minds are on some subject and what the reasons are for not changing them."[24]

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15. *See, e.g.*, Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled on other grounds by* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

16. *See id.*

17. *See id.*

18. *See generally* William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 1–2 (1995); Frederick Schauer, *Free Speech, the Search for Truth, and the Problem of Collective Knowledge*, 70 SMU L. REV. 231, 232–33 (2017); Steven D. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 S. CAL. L. REV. 649, 657 (1987).

19. *See generally* Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097, 1119–23 (2016) (recognizing that First Amendment rights, including speech, protect and foster active citizenship necessary for representative democracy); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482–83 (2011) (recognizing "public discourse" as an important aspect of a citizen's access to and participation in democratic self-governance).

20. *See generally* FLOYD ABRAMS, THE SOUL OF THE FIRST AMENDMENT 22 (2017) (emphasizing the value of "individual self-fulfillment"); C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 253, 259, 268–69 (2011); Brian C. Murchison, *Speech and the Self-Realization Value*, 33 HARV. C.R.-C.L. L. REV. 443, 502–03 (1998).

21. *See supra* notes 18–20 and accompanying text.

22. JOHN STUART MILL, ON LIBERTY 99 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859).

23. *See* Joshua Cohen, *Freedom of Expression*, 22 PHIL. & PUB. AFFS. 207, 235 (1993).

24. *Id.* Given these concerns, "suppression" and "disadvantaging" may either precede the speech—as a prior restraint—or else follow the speech—as some sort of criminal, civil, or administrative punishment, denial of benefit, arbitrary refusal to

Generally, official suppression of ideas tends to impair the capacity for meaningfully critical public reflection that is essential to a broadly liberal polity.[25] More dramatically, it might be held that "the government cannot suppress political ideas that pose challenges to it, because one aspect of a legitimate government is that criticism of those presently in power may be entertained."[26] Of course, governments might wish to suppress even some ideas that are not at all critical of the government in question,[27] even if thereby jeopardizing the legitimacy of the regime.[28] But in any event, there is some linkage between a government's refraining from idea suppression and the government's maintaining its own basic legitimacy.

Scholars of the First Amendment have been similarly unsympathetic to official restriction of the expression of ideas. Alexander Meiklejohn, for example, declared that "suppression of ideas about the common good, the First Amendment condemns with its absolute disapproval."[29] More elaborately, Professor Geoffrey Stone interprets the First Amendment to generally deny officials the authority "to suppress the advocacy of an idea because the majority believes the idea to be false or unwise or wrongheaded or dangerous and does not trust other citizens to make the 'right' decisions about such views."[30] Crucially, though, many government restrictions on speech again involve no objectionable intent.

The costs of speech inhibition imposed by often biased and inevitably fallible[31] government officials are thus clear. Recognizing these costs, though, need not imply any form of free speech absolutism. Alleged government suppression of ideas is commonly tested by, for ex-

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modify the rule, or other adverse response. *See* Taylor v. Roswell Indep. Sch. Dist., 713 F.3d 25, 42 (10th Cir. 2013). Thus, actionable suppression or disadvantaging need not successfully deter or prevent the speech.

25. *See* Brian Barry, *How Not to Defend Liberal Institutions*, 20 BRIT. J. POL. SCI. 1, 3 (1990).

26. Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 122 (1989).

27. We can imagine, for example, a government's attempt to suppress or disadvantage basic criticism of a favored constituency or client-group.

28. Beyond some point, the broad, sustained, and severe suppression of a sensible critique of a government-favored, major client group would call the regime's legitimacy into question.

29. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 27 (1948). Zechariah Chafee reviewed Meiklejohn's book. Zechariah Chafee, Jr., 62 HARV. L. REV. 891, 894 (1949) (reviewing ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 27 (1948)).

30. Geoffrey R. Stone, American Booksellers Association v. Hudnut*: "The Government Must Leave to the People the Evaluation of Ideas"*, 77 U. CHI. L. REV. 1219, 1227 (2010). The title reference is to Judge Easterbrook's opinion in the case of *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 327 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

31. *See* MILL, *supra* note 22, at 77–79.

ample, the elements of the *Brandenburg* subversive advocacy case.[32] Thus, as Professor Stone summarized the case law,

> the government cannot constitutionally punish the expression of particular ideas or viewpoints unless it can prove, at the very least, that the speech would cause imminent and grave harm that could not be prevented by means other than by suppressing free expression.[33]

> It is thus fair to say, before we begin to ask any of the hard analytical questions, that governmental restriction on free expression is generally disfavored. How and where this laudable general sentiment should be made operative in free speech cases is pursued below.

III. Official Restriction of Expression & Genuine Hostility to Ideas & Beliefs

A. *The Idea of Suppression*

Governments often seek to restrict private actor speech based on what is sometimes casually referred to as "dislike"[34] of the ideas, opinions, or viewpoints involved. Rarely, however, will mere "dislike," whether by the restricting government or by any interest group, exhaust the significant motivations underlying the restriction in question. At best, the notion of "dislike" must be taken as shorthand for further, underlying concerns. As Professor Stone observes, the idea in question may more broadly be considered "false or unwise or wrongheaded or dangerous."[35] There are, again, cases in which a government might suppress an idea that it actually approves on the merits, but which is embarrassing to some third party or otherwise inappropriate. A government might prefer to express the idea on its own initiative. Or a government might suppress even an approved idea in order to intimidate some group, or to demonstrate its power.

The crucial point, though, is that in a wide variety of what are referred to as content-based restrictions on speech,[36] there may be no

32. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

33. Stone, *supra* note 30, at 1229.

34. *See, e.g.*, Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 872 (1982) (plurality opinion) ("[L]ocal school boards may not remove books from school library shelves simply because they dislike the ideas contained in these books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'" (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)); *see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (referring to "proscribing speech . . . because of disapproval of the ideas expressed").

35. Stone, *supra* note 30, at 1227. Governments will of course not cite merely their own hostility to an idea, but also the supposed adverse consequences of that idea.

36. Very roughly, a restriction of speech that is based on the content of the speech focuses crucially on some small attempt by a speaker to convey some message, and some attempt by an audience to understand or interpret the message. In contrast,

evidence of a government's dislike, fear, distrust, hostility, opposition, disdain, or animus toward any idea that is sought to be expressed. In the absence of any such motive, it become unclear at best why rigorous judicial scrutiny as outlined above,[37] remains appropriate.[38] After all, there are costs not only of restricting speech,[39] but of overextending constitutional protection, and of excessively stringent constitutional protection, as well.[40]

B. *The* Mahanoy *School Speech Case*

Consider, to begin with, some of the Supreme Court's cases in which an intent to suppress or significantly disadvantage an idea might have been either present or absent. Let us focus initially on the recent public school cheerleader speech case of *Mahanoy Area School District v. B.L.*[41]

In *Mahanoy*, a public school sought to discipline B.L., a student and cheerleader, for an off-campus Snapchat post to a potential direct audience of 250 friends.[42] The post involved a conventionally impolite gesture[43] and a series of terse imprecations.[44] The particular objects of B.L.'s displeasure were, respectively, "school," "softball," "cheer," and more compendiously, "everything."[45]

Justice Breyer's opinion for the Court in *Mahanoy* referred, bracingly, to the broad background of free speech law and principle. Thus,

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many cases of restricting speech because of sheer sound volume or time of day may not be message-focused. *See generally* R. George Wright, *Content-Neutral and Content-Based Regulations of Speech: A Distinction That Is No Longer Worth the Fuss*, 67 FLA. L. REV. 2081, 2087 (2015) [hereinafter *No Longer Worth the Fuss*]; R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIA. L. REV. 333, 333 (2006) [hereinafter *The Limitations of a Common Distinction*].

37. *See supra* Part II; *see also* Reed v. Town of Gilbert, 576 U.S. 155, 179, 182–83 (2015) (Kagan, J., concurring) (holding content-based strict scrutiny as appropriate only when there is a "realistic possibility that official suppression of ideas is afoot" (quoting Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 189 (2007)).

38. As the Court has recognized, there are also textually content-neutral restrictions on speech that may indeed reflect hostility to particular ideas on the part of the drafters, or the administrators, of the speech restriction in question. *See Reed*, 576 U.S. at 164–67. *See generally* R. George Wright, *Time, Place, and Manner Restrictions on Speech*, 40 N. ILL. L. REV. 265, 265 (2020) [hereinafter *Time, Place, and Manner Restrictions*]. The common distinction between an absolute prohibition on speech in some context and a time, place, or manner restriction on the speech in question is an arbitrary distraction. Either form of speech restriction may be re-described as the other. *See id.* What matters, again, is intent to suppress an idea.

39. *See supra* Part II.

40. *See infra* note 140 and accompanying text.

41. Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2042–43 (2021).

42. *See id.* at 2043.

43. *See id.*

44. *See id.*

45. *See id.*

> America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the "marketplace of ideas." This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the people's will. That protection must include . . . unpopular ideas . . . . Thus, schools have a strong interest in ensuring that future generations understand the . . . aphorism, "I disapprove of what you say, but I will defend to the death your right to say it."[46]

Against this inspiring background, Justice Breyer then focused in particular on B.L.'s speech. In Justice Breyer's interpretation, B.L.'s post involved community rule-criticism.[47] In particular, "[p]utting aside the vulgar language, the listener would hear criticism, of the team, the team's coaches, and the school — in a word or two, criticism of the rules of a community of which B. L. forms a part."[48] And while "[i]t might be tempting to dismiss B.L.'s words as unworthy of the robust . . . protections . . . [,] sometimes it is necessary to protect the superfluous in order to preserve the necessary."[49]

On the sharply focused approach recommended herein, the most important issue in the *Mahanoy* case would be whether the school authorities intended to suppress or disadvantage any idea, opinion, or belief that B.L. sought to express. The *Mahanoy* case circumstances are laden with all sorts of intriguing complications.[50] But let us focus sharply on the implications of either the presence or the absence of any official intent to suppress or disadvantage any idea expressed by B.L.

If the school's attempted discipline of B.L., whether mild or severe, actually reflected an intent to suppress or disadvantage her expressed ideas, then the value of speech,[51] and the disvalues of its inhibition,[52] should largely dictate that the attempted speech restriction be judi-

46. *Id.* at 2046.

47. *Id.*

48. *Id.*

49. *Id.* at 2048 (citing Tyson & Bro.—United Theatre Ticket Offs., Inc. v. Banton, 273 U.S. 418, 447 (1927) (Holmes, J., dissenting)). In *Banton*, Justice Holmes interestingly observes that "to many people the superfluous is the necessary." *Tyson*, 273 U.S. at 447 (Holmes, J., dissenting). Justice Breyer, in turn, may have a sort of First Amendment overbreadth argument in mind. *Cf.* Gooding v. Wilson, 405 U.S. 518, 521 (1972).

50. *See, e.g.*, Michael C. Dorf, *A Modest Proposal to Protect Profanity in Public Schools (Warning: Contains Profanity)*, DORF ON LAW (June 25, 2021), http://www.dorfonlaw.org/2021/06/a-modest-proposal-to-protect-profanity.html [https://perma.cc/AM6M-DUYM]; Justin Driver, *Why We All Should Want the Suspended Cheerleader to Win Her Supreme Court Case* (Apr. 30, 2021, 10:24 AM), https://www.washingtonpost.com/opinions/2021/04/30/why-we-all-should-want-suspended-cheerleader-win-her-supreme-court-case/ [https://perma.cc/5AS2-YKNV].

51. *See supra* Part II.

52. *See supra* Part II.

cially nullified.[53] An intent to suppress an idea is crucially distinct from an intent to protect or promote some legitimate interest or purpose of the public schools.[54]

As used herein, an intention[55] to suppress or disadvantage an idea, or its expression, is a judicially familiar state of mind that is reasonably ascertainable through entirely familiar judicial inquiries. The law in general recognizes a range of meanings, in diverse contexts, of the idea of intent.[56] The precise meaning of intent in any legal context can always be contested.[57] The technically possible abstract complications are, inevitably, endless. All of this must be conceded.

For our purposes, though, all that is needed is a familiar, homespun, jury-friendly sense in which an official intent to suppress or disadvantage an idea, or its expression, reflects some sort of desire[58] for that speech-restrictive outcome, along with a sense of agency on the part of the government actor in giving effect to, or helping to give effect to, that speech-restrictive desire.

Crucially, not all of the effects of an official action, even if the effects are foreseen and inevitable, will count, by ordinary standards, as intended. Some important and clearly foreseen effects of policy decisions are unintended, and are perhaps deeply regretted. We might think of the desire of a conscientious military commander to minimize unintended civilian casualties, while knowing and regretting that the number of such civilian casualties is unlikely to turn out to be zero.[59]

More familiarly, we intend to accelerate an automobile by hitting the gas pedal. But ordinarily, we do not also thereby intend to hasten the time at which we must refuel. We intend to enjoy a delicious ice cream. Typically, though, we do not also intend to draw down our

53. We temporarily set aside the inevitable complications of mixed-motive cases and the appropriate burdens, tests, and standards of proof associated therewith. *See infra* notes 186–214 and accompanying text.

54. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (stating some basic pedagogical and cultural aims of the public schools).

55. We set aside the question of subconscious intentions of natural persons or of institutions, at least to the extent that such forms of intent cannot be meaningfully established in a court of law.

56. *See generally* Robert Audi, *Intending*, 70 J. PHIL. 387, 387 (1973); David Crump, *What Does Intent Mean?*, 38 HOFSTRA L. REV. 1059, 1061–62 (2010); R. A. Duff, *Intentions Legal and Philosophical*, 9 OX. J. LEGAL STUD. 76, 76 (1989); Anthony Kenny, *Intention and Purpose*, 63 J. PHIL. 642, 650 (1966); Raymond Lyons, *Intention and Foresight in Law*, 85 MIND 84, 84 (1976); Mark Thornton, *Intention in Criminal Law*, 5 CAN. J.L. & JURIS. 177, 177 (1992). Herein, we also set aside any possible difference between "intent" and "intention."

57. *See* sources cited *supra* note 56.

58. Of course, the desires that a person or institution holds may be equivocal or ambivalent. *See, e.g.*, Olivier's HAMLET (Two Cities Films Shakespeare's Hamlet (Int'l 1948)) ("This is the tragedy of a man who could not make up his mind").

59. *See generally* R. George Wright, *Noncombatant Immunity: A Case Study in the Relation Between International Law and Morality*, 67 NOTRE DAME L. REV. 335, 336 (1991) [hereinafter *Noncombatant Immunity*].

stock of ice cream, or to raise even slightly the chances of any disease resulting from ice cream consumption. Actors may, of course, misdescribe the scope of their intentions when challenged in a court of law. But the law has developed familiar techniques to work past such misdescriptions.[60] And the philosophers have refined our broader understanding of the distinction between intended and merely foreseen effects.[61]

The school authorities in *Mahanoy* were judged, as reported by Justice Breyer, to have interpreted B.L.'s communication as criticism of school personnel or school policies and practices.[62] On this assumption, we are left with two plausible views of the school officials' punitive response. The school officials may, indeed, have intended, at least in part, to suppress or disadvantage the expression of B.L.'s critical ideas. To the extent that the officials intended, specifically, to suppress or disadvantage the relevant ideas, their actions deserve the strictest and most rigorous judicial scrutiny.

On the other hand, if the intention of the school officials can be judged to have been independent and distinct from any such idea suppression, and to have proceeded instead from some circumstantially appropriate and legitimate broadly pedagogical interest,[63] their actions, however, objectionable in other respects, should not be held to violate B.L.'s free speech rights in particular.

Imagine, for example, that the ultimate decision-making authorities actually agreed with the merits of B.L.'s criticisms. But those authorities also determined, reasonably, under the specific circumstances, that the imposed discipline would somehow genuinely advance the basic educational, civic, and community goals of the school system. The authorities, on these assumptions, thus had no desire, in any ordinary sense, to suppress any idea expressed by B.L. In such a case, the various costs of official inhibition of speech[64] would be largely absent, at

60. *See infra* notes 191–214 and accompanying text.

61. *See generally* T.A. CAVANAUGH, DOUBLE EFFECT REASONING: DOING GOOD AND AVOIDING EVIL (Oxford Univ. Press 2006); THE DOCTRINE OF DOUBLE EFFECT (P.A. Woodward ed., 2001); Nancy Davis, *The Doctrine of Double Effect: Problems of Interpretation*, 65 PAC. PHIL. Q. 107, 108 (1984); Alison McIntyre, *Doctrine of Double Effect*, STAN. ENCYC. PHIL., https://plato.stanford.edu/entries/double-effect (Dec. 24, 2018) [https://perma.cc/7DZD-B674]; Dana Kay Nelkin & Samuel C. Rickless, *Three Cheers for Double Effect*, 89 PHIL. & PHENOMENOLOGICAL RES. 125, 125 (2014); Alexander R. Pruss, *The Accomplishment of Plans: A New Version of the Principle of Double Effect*, 165 PHIL. STUD. 49, 49 (2013); Suzanne M. Uniacke, *The Doctrine of Double Effect*, 48 THOMIST 188, 188 (1984).

62. Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021).

63. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (stating some basic pedagogical and cultural aims of the public schools).

64. *See supra* Part II.

least if the authorities publicly explained their benign motivations and intent.[65]

For our purposes, it does not particularly matter which of these two above scenarios most accurately describes the circumstances in *Mahanoy* in particular. Perhaps one could make at least a minimally plausible case for either scenario. The point, rather, is that the trier of fact in all appropriate cases should be required to focus crucially on the available evidence for, and against, any official intent to suppress or disadvantage the idea at issue. After all, the trier of fact, in a broad range of criminal[66] and civil[67] cases, is similarly left to determine parallel issues of intent without extraordinary judicial oversight.[68]

Often, we can test for the presence of an official intent to suppress an idea by considering whether the government would likely still regulate the same idea, expressed to the same audience, but in different, at least equally appropriate, speech channels.[69] If, for example, a government prohibits the publication of a book in one format, but permits the same book to be published as a readily available paperback, or electronically, or on acid free paper, it seems unlikely that the initial prohibition was driven, even in part, by a desire to suppress any idea.

But the *Mahanoy* case is particularly challenging and difficult in this respect. Suppose we assume that the school authorities would not have punished B.L.'s criticisms[70] had they been couched in equally vehement, but more decorous, language, in some medium clearly within the scope of the school's disciplinary jurisdiction. This is clearly a reasonable assumption. But given the distinctive character and context of B.L.'s actual speech, we can still not uncontroversially confidently conclude that the actual punishment of B.L.'s actual speech involved no intent to suppress an idea. The Supreme Court case law

65. Such an explanation, if plausible, would work against any unintended "chilling effect" or inhibition of the speech of third parties.

66. *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 10.01 (8th ed. 2018).

67. *See, e.g.*, City of Mobile v. Bolden, 446 U.S. 55, 55 (1980) (discussing intent to discriminate in a voting rights case); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 200 (1995) (discussing affirmative action in an employment case).

68. A bit further afield, the courts trust themselves to determine the presence, absence, and content of congressional intent across a broad range of administrative and other contexts. *See generally* Skidmore v. Swift & Co., 323 U.S. 134 (1944) (showing the methods and complications of ascertaining congressional intent); Chevron v. Nat'l Res. Def. Council, Inc., 467 U.S. 837 (1984) (showcasing the difficulties of ascertaining congressional intent).

69. *See generally* R. George Wright, *The Unnecessary Complexity of Free Speech Law and the Central Importance of Alternative Speech Channels*, 9 PACE L. REV. 57, 58 (1989) [hereinafter *The Unnecessary Complexity of Free Speech Law*].

70. Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 2038, 2046 (2021) ("Putting aside the vulgar language, the listener would hear criticism, of the team, the team's coaches, and the school—in a word or two, criticism of the rules of a community of which B. L. forms a part.").

on profane speech, as we shall now see below, will allow no such uncontroversial conclusion.

C. *Further Mainstream Case Law on Restriction & Intent in Mahanoy and Elsewhere*

The above uncertainty in the *Mahanoy* case reflects the Supreme Court's lack of clarity as to whether a profane expression should count as the same idea as an equally vehement, but non-profane, expression of the same general underlying concern. This lack of judicial clarity traces to the Court's near mirror-image discussions in, respectively, *Cohen v. California*[71] and *FCC v. Pacifica Foundation*.[72]

The *Cohen* case overturned a disorderly conduct conviction for the terse, profane, critique on a jacket of regarding the Vietnam War-era military draft.[73] The Court in *Cohen* assumed that the profanity in question, later echoed in *Mahanoy*, indicated the presence of an emotional, along with a cognitive, meaning.[74] More generally, the Court observed that much language "conveys not only ideas capable of relatively precise, detailed explication,[75] but otherwise inexpressible[76] emotion as well."[77] Crucially, the Court then went on to declare that it could not accept "the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for [the] emotive function [of the speech]."[78]

A Court plurality, however, later adopted an approach at remarkable variance from that in Cohen. In a case involving an FM radio broadcast of satirist George Carlin's seven "Filthy Words" monologue, the Court concluded that the administrative fine imposed in the case did not reflect any hostility or disagreement, by the FCC, with the content, message, or ideas conveyed by George Carlin's monologue.[79] Rather, the FCC's objection was, distinctively, merely to the specifically profane mode of expression, in context, of the ideas at

71. *See generally* Cohen v. California, 403 U.S. 15, 15–26 (1971).

72. *See generally* FCC v. Pacifica Found., 438 U.S. 726, 744–48 (1978) (plurality opinion).

73. *See Cohen*, 403 U.S. at 16–17.

74. *See id.* at 26. *See generally* R. George Wright, *An Emotion-Based Approach to Freedom of Speech*, 34 LOY. U. CHI. L.J. 429 (2003) [hereinafter *An Emotion-Based Approach*].

75. Or, presumably, vague, murky, or confused ideas as well. *See, e.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995).

76. Here, the "inexpressibility" by other means presumably refers to the capabilities of the particular speakers in context. There is no obvious reason why emotions conveyed through profanity of whatever intensity could not more generally be conveyed through art, music, or non-profane language just as faithfully.

77. This refers to "emotional" rather than "emotive" in a technical sense. *See generally* J. O. URMSON, THE EMOTIVE THEORY OF ETHICS (1968), for a discussion of the latter.

78. *Cohen*, 403 U.S. at 26.

79. *See* FCC v. Pacifica Found., 438 U.S. 726, 746–47 (1978).

stake.[80] The ideas conveyed by the monologue were thus constitutionally protected, but the specific language in the monologue judged to be "vulgar,"[81] "offensive,"[82] and "shocking,"[83] was not.[84]

Crucially for our purposes, and contrary to the general principle expressed in *Cohen*, the Court plurality in *Pacifica* declared that "a requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any thoughts that cannot be expressed by the use of less offensive language."[85]

As a result of this unresolved conflict between the respective approaches of *Cohen* and *Pacifica*, we cannot be sure whether the profane emotional meaning of B.L.'s speech in *Mahanoy* means that her speech conveys an idea that is different, for constitutional purposes, from otherwise similar criticism that lacks any such distinctively profane expression and emotional meaning.

If, pursuant to the Court's approach in Cohen, the distinctly profane character of B.L.'s speech means that the speech conveys an idea distinct from an otherwise similarly fervent, but non-profane, speech, then matters are indeed complicated. We could not then say that the school officials in *Mahanoy* would permit the same idea expressed in different emotional terms. The non-profane version of B.L.'s speech would instead convey a constitutionally different idea. And we would not then be able to conclude that the school officials did not intend to suppress B.L.'s idea, because a non-profane, permitted expression would then be of a different idea. The determination of whether those officials intended to suppress an idea would have to be made on other grounds.

A number of other recent, close, and intensely controversial Supreme Court cases also implicitly raise interesting questions of whether the speech regulation at issue involved an attempt to suppress or disadvantage the expression of an idea. The case of *Iancu v. Brunetti*, for example, involved an attempt to register a clothing trademark that was denied on statutory grounds.[86] The mark in question, pronounced as four consecutive letters, was F-U-C-T.[87] Registration of the mark was initially denied on the statutory grounds that the

80. *See id.* at 747–48.

81. *Id.* at 747.

82. *Id.*

83. *Id.*

84. *See id.* at 746–48.

85. *Id.* at 743 n.18. If this language was intended to suggest that non-serious ideas are entitled to lesser or no constitutional protection, that suggestion has not been uniformly endorsed. *See, e.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995); Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2042–43 (2021).

86. Iancu v. Brunetti, 139 S. Ct. 2294, 2297 (2019).

87. *Id.*

mark was immoral or scandalous, understood to mean that a substantial element of the public would find the mark shocking, offensive, vulgar, or disgraceful.[88]

In our approach, the central question would be whether such denial of registration would involve any intent to suppress or disadvantage an idea, or its expression. If the trademark in question fell short of being, or expressing, any sufficiently recognizable idea,[89] the mark would presumptively not qualify for protection on free speech grounds. But if some minimally sufficient ideas were indeed present, one could then easily attribute the denial of trademark registration at least in part to an intent to suppress or disadvantage that idea. The basic problem here is that of the continuing murkiness of the judicial distinction between speech and non-speech. Rather than focusing on how to draw this distinction, we would recommend bypassing the question by focusing instead on the government's clear disapproval of the presumed message of the assumedly offensive mark. And this is essentially the bottom-line conclusion eventually arrived at in *Brunetti*.[90]

The criminal indictment of the defendant's speech in the "Stolen Valor" case of *United States v. Alvarez*[91] raises other concerns. The statute in question prohibited, among other speech acts, a lying claim to have been awarded the Congressional Medal of Honor.[92] It would be more difficult to claim, as one might in *Brunetti*, that Alvarez expressed no cognizable idea, for free speech purposes, in claiming to have been thus recognized. It is unclear whether such a distinctively personalized claim by Alvarez raises, even implicitly, any broader social issue or concern.[93] But if a sufficient idea is present in the case of *Alvarez*,[94] the most important question should then be whether the statute, or the indictment, represents even in significant part an intent to suppress or disadvantage the clear idea[95] in question. The statutory

88. *See id.* at 2298.

89. For guidance on this general question, see *infra* notes 128–41 and accompanying text; R. George Wright, *What Counts as "Speech" in the First Place?: Determining the Scope of the Free Speech Clause*, 37 PEPP. L. REV. 1217, 1218 (2010) [herinafteer *What Counts as "Speech"*]; MARK V. TUSHNET, ALAN K. CHEN & JOSEPH BLOCHER, FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT 1–14 (2017).

90. *See Brunetti*, 139 S. Ct. at 2297 ("We hold that this provision . . . disfavors certain ideas.").

91. United States v. Alvarez, 567 U.S. 709, 713 (2012).

92. *Id.*

93. *See generally* R. George Wright, *The Constitutional Status of Speech About Oneself*, 59 CLEV. ST. L. REV. 489 (2011) [hereinafter *Speech About Oneself*].

94. *Alvarez*, 567 U.S. at 712.

95. Presumably, the clear idea is something like the idea that Alvarez received the Congressional Medal of Honor. One might argue that the dominant legislative intent was instead to ensure that legitimate claims to have received the medal would be taken seriously and proper credit would be extended to awardees. Any debate over ideas would be secondary on this view. *See generally* R. George Wright, "*What Is That*

intent was, instead, presumably one of promoting the legitimate, voluntary recognition of heroic valor, but not one of preventing or punishing any speech that denies or criticizes that goal or intent. If one instead thinks of the prosecution of Alvarez as an attempt to suppress some meaningful idea, the appropriate judicial test would then be one of strict scrutiny.[96] In ordinary perjury or fraud prosecutions though, the government intent is not generally to suppress some particular idea.

In *Brown v. Entertainment Merchants Association*,[97] the presumed ideas in question were less merely personalized in their focus than in *Alvarez*. *Entertainment Merchants* involved a state statutory prohibition of the sale or rental to minors of particular kinds of violent video games.[98] Specifically regulated were games

> "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted" in a manner that "[. . . [a] reasonable person, considering the game as a whole, would find [it] appeals to a deviant or morbid interest in minors," ; [that] is "patently offensive to prevailing standards in the community as to what is suitable to minors; [and that] causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors."[99]

It is possible that the idea sought to be conveyed was that of the artistic, or at least the entertainment, value of the depicted or participatory mayhem.[100] But the defendants could credibly assert that the speech restriction was intended, at least in part, to suppress or disadvantage precisely the idea that the games are worthy in that respect.[101] Such a

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Honor?": Re-Thinking Free Speech in the "Stolen Valor" Case, 60 CLEV. ST. L. REV. 847 (2013) [hereinafter *"What Is That Honor?"*].

96. Reed v. Town of Gilbert, 576 U.S. 155, 179, 182–83 (2015) (Kagan, J., concurring) (holding content-based strict scrutiny as appropriate only when there is a "realistic possibility that official suppression of ideas is afoot").

97. *Compare* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 789 (2011), *with* United States v. Alvarez, 567 U.S. 709, 713 (2012).

98. *See Brown*, 564 U.S. at 789.

99. *Id.* (quoting CAL. CIV. CODE § 1746(d)(1)(A) (West 2006)).

100. It is also possible that the sellers of the video games in question had neither conceived of nor intended to convey any cognizable idea at all. *Cf.* Morse v. Frederick, 551 U.S. 393, 401 (2007) (recognizing the "speaker" as confessedly not intending to convey any cognizable message); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 563 (1991) ("Miller wishes to dance nude because she believes she would make more money doing so."). Any similar question can be bypassed by asking whether the government regulation was nevertheless intended to be speech-suppressive and whether any "speech" in a constitutional sense was actually present or not. A governmental intent to suppress an idea does not logically ensure that an idea in the relevant sense is actually present.

101. And it is possible that this idea might qualify as a mixture of commercial and non-commercial speech if not as primarily non-commercial speech. *See generally* Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 481–82 (1989). For a more extreme case, see the so-called "crush video" case of *United States v. Stevens*, 559 U.S. 460, 464–66 (2010). If the sellers' idea was instead that video violence is harmless and

claim would then be explored judicially, as the straight-forward essence of the case.

Finally, consider the "Bong Hits 4 Jesus" student speech case of *Morse v. Frederick*.[102] In *Morse*, there is an interesting split between the arguable absence of any intended idea, and the apparent presence of an idea that might reasonably have been prompted in the minds of some audience members.[103] The plaintiff student, Frederick, testified, plausibly, that his displayed "Bong Hits 4 Jesus" banner was "just nonsense meant to attract television cameras."[104] Conceivably, "No Bong Hits 4 Jesus," or "[No] Bong Hits [or whatever else] 4 [Whomever]" might have sufficed, at least equally well, for Frederick's purposes. The school administrators might have chosen to recognize this absence of any desire to convey an idea. And, if so, there would in the *Morse* case presumably then be no intent to suppress or disadvantage the assumedly non-existent idea that Frederick wished to convey.

The complication, of course, is that the authorities could instead reasonably believe that some student viewers of the banner would interpret the banner as vaguely endorsing, or promoting, the use of then-illegal drugs.[105] The problem of determining a line between speech and non-speech would then arise. But in our approach, the key issue would instead be whether the discipline imposed in *Morse* reflected, in significant part, an intention to suppress, or disadvantage, any idea that was either thought by school officials to be expressed, or prompted in the minds of some viewers of the banner. If so, then on our approach, the speech restriction would be generally impermissible. Any official anti-drug message the school cared to impart could have easily been otherwise conveyed. Presumably, a public school can generally teach the harmfulness of recreational drugs through curricular and non-curricular means, and even subsidize student expression of agreement with the school's perspective. And, of course, punishing the expression of pro-, or anti-, drug speech in the middle of, say, an algebra class would not generally reflect an official intent to suppress the idea in question.

D. *Restrictions on Nontraditional Means of Speaking*

Further complications arise in the cases involving what we might call nontraditional means of communication.[106] In such cases, there may be an unclear relationship between the speaker's use of nontradi-

the government's intent was to suppress this idea, the proper government policy would instead be to promote their view that such violence is harmful through other means.

102. Morse v. Frederick, 551 U.S. 393, 393 (2007).

103. *Id.* at 401.

104. *Id.*

105. *Id.* at 401–02.

106. Roughly, "non-traditional means of communication" refers to means of communication apart from the standard means of books, news photographs, lyrics, docu-

tional means of communication and the officially claimed absence of any intent to suppress or disadvantage any relevant idea.

Along these lines, there is the recent Eleventh Circuit's split decision in *Burns v. Town of Palm Beach*.[107] In this case, Palm Beach's architectural review commission prevented Burn's demolishing his beachfront mansion and building a new, much larger replacement in a significantly different architectural style.[108] Burns raised a free speech challenge to the decision, which the agency claimed to have been based on familiar speech-neutral grounds, including ordinary zoning considerations such as general neighborhood compatibility and complementarity.[109]

Burns argued in particular that his new design would reflect "his evolved philosophy of simplicity in lifestyle and living with an emphasis on fewer personal possessions."[110] Burns "picked a design of international or midcentury modern architecture because it emphasized simple lines, minimal decorative elements and open spaces built of solid, quality materials."[111] As well, the design was intended to convey "Burns's message that he was unique and different from his neighbors."[112]

The Eleventh Circuit majority, however, rejected Burns's free speech claim on the merits.[113] Their distinctively narrow grounds for doing so emphasized that Burns's own proposed landscaping and construction plans would actually prevent neighbors and passers-by from viewing, receiving, or understanding Burns's message.[114] As well, the court observed that "Burns's mansion was not expressive because its predominant purpose, as shown by its location, design, and use, was to serve as a residence."[115] The court emphasized the narrowness of its holding by declaring,

> [W]e are not deciding whether residential architecture can ever be expressive conduct protected by the First Amendment. We have not

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mentaries, magazines and newspapers, television and radio media, the internet and social media, posters, banners, signs, and all similar such familiar media.

107. Burns v. Town of Palm Beach, 999 F.3d 1317, 1317 (11th Cir. 2021); *see also* Jim Saunders, *Florida Mansion Design Rejection Doesn't Violate First Amendment, Court Says*, TAMPA BAY TIMES, https://www.tampabay.com/news/florida-politics/2021/06/09/florida-mansion-design-rejection-doesnt-violate-first-amendment-court-says/ (June 9, 2021, 5:06 PM) [https://perma.cc/MP2R-VWT5].

108. *See Burns*, 999 F.3d at 1322.

109. *See id.*

110. *Id.* at 1325.

111. *Id.*

112. *Id.*

113. *See id.* at 1317, 1335.

114. *See id.* at 1338–39.

115. *Id.* at 1335 (applying a test adopted in Mastrovincenzo v. City of New York, 435 F.3d 78, 96 (2d Cir. 2006), which considered whether the "dominant" purpose of the clothing at issue in the case was expressive or communicative). Query whether the primary purpose of a shirt of a particular color indicating a specific political belief is to convey an idea or to serve as a shirt.

> decided . . . that Philip Johnson's Glass House isn't expressive conduct but tattooing is; we have not decided that Jefferson's Monticello isn't protected . . . but nude dancing is; and we have not decided that the Empire State Building doesn't meet the . . . test but elevator music does.[116]

On our approach, *Burns* should be a relatively easy case. There is apparently no evidence in the record that the agency in question had any improper intention in disapproving Burns's proposed construction. In particular, there seems to be no evidence that the agency harbored any intention to suppress or disadvantage any idea held by Burns. Nor is there any evidence that the agency had any even minimal disagreement with Burns's expressed aesthetic ideas.

Burns's intended message, after all, involved a broad and perhaps largely personal preference for lifestyle simplicity, quality, austerity, and uniqueness.[117] There is no indication that the agency, beyond its professed zoning concerns,[118] objected on the merits to any such message. And to the extent that Burns actually wished for a well-targeted, articulate, and extended expression of any or all of his views, he could presumably have chosen from among the many more traditional, alternative channels of communication.[119] Presumably the government would not have objected to, merely for example, an extended, articulate, permanently accessible presentation of Burns's ideas on a popular web site.

There are of course many other non-traditional means of expression and communication apart from architectural design. Among such previously litigated, non-traditional modes of expression are non-representational art;[120] decorated rectangular tiles;[121] instrumental music;[122] many instances of spectator sports;[123] the act of tattooing and the display of tattoos;[124] the blaring of a car horn, if not of an air

116. *Id.* at 1336.

117. *See id.* at 1325.

118. *See id.* at 1322.

119. *See generally The Unnecessary Complexity of Free Speech Law*, *supra* note 69.

120. *See* Mark Tushnet, *Art and the First Amendment*, 35 COLUM. J.L. & ARTS 169, 219 (2012) (noting that political art, if not art more broadly, is "sometimes the object of suppression").

121. People v. Chen Lee, 860 N.Y.S.2d 845, 850–51 (Crim. Ct. 2008).

122. *See* Alan K. Chen, *Instrumental Music and the First Amendment*, 66 HASTINGS L.J. 381, 387 (2015) (noting, in particular, the expressive nature and culture-shaping influence of instrumental music).

123. *See* Genevieve Lakier, *Sport as Speech*, 16 U. PA. J. CONST. L. 1109, 1112 (2014) ("[S]pectator sports are in fact dense symbolic performances . . . that communicate messages about, among other things, individual excellence and virtue, political identity, race, gender, sexuality, and even beauty.").

124. *See, e.g.*, Buehrle v. City of Key West, 813 F.3d 973, 976 (11th Cir. 2015); Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1055 (9th Cir. 2010); Coleman v. City of Mesa, 284 P.3d 863, 869 (Ariz. 2012). In the tattoo cases, the relevant idea might focus on the decision to have a (visible) tattoo or on the particular "text" or message of that specific tattoo. *E.g.*, *Buehrle*, 813 F.3d at 976–77.

horn;[125] nude dancing as a commercial performance;[126] and at least some instances of sheer nonsense.[127]

In cases in which the presence of "speech" within the scope and meaning of the First Amendment is unclear, the Court has adopted general guidelines. In the flag burning protest case of *Texas v. Johnson*, the Court adopted a general two part test in this respect.[128] The Court thus first asks whether the purported speech in question manifests an "intent to convey a particularized message,"[129] and then, second, whether "the likelihood was great that the message would be understood by those who viewed it."[130] The *Johnson* Court found both elements to be sufficiently present.[131] And because the restriction of Johnson's flag-burning speech was found to be content-based,[132] rather than content-neutral,[133] the Court applied strict scrutiny and struck down Johnson's conviction.[134]

The *Johnson* Court's test for the presence of "speech" in the constitutional sense was then effectively loosened in a case involving a Boston St. Patrick's Day parade.[135] In the *Hurley* case, the Court declared that "a narrow, succinctly articulable message is not a condition of constitutional protection."[136] This language is certainly consistent with the *Johnson* formulation.[137] But the Court in *Hurley* then disavowed the "particularized message"[138] requirement in *Johnson.* Requiring any such clarity in the form of a particularized message would deny free speech protection to "the unquestionably shielded painting of

125. *See, e.g.*, Porter v. Gore, 354 F. Supp. 3d 1162, 1169–79 (S.D. Cal. 2018).

126. *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000); Barnes v. Glen Theater, Inc., 501 U.S. 560, 565–66 (1991). But not, evidently, most ordinary social dancing. *See* City of Dallas v. Stanglin, 490 U.S. 19, 21 (1989) (allowing dance halls to limit dancers to a particular age group).

127. *See* Joseph Blocher, *Nonsense and the Freedom of Speech: What Meaning Means for the First Amendment*, 63 DUKE L.J. 1423, 1441 (2014) (suggesting "nonsense" as on some occasions serving "constitutional values such as the marketplace of ideas, individual autonomy, and democracy" (emphasis omitted)). The clearest cases might involve, perhaps, deliberate gibberish as a transgressive or otherwise critical response to government-mandated rote formalisms.

128. Texas v. Johnson, 491 U.S. 397, 404 (1989).

129. *Id.* (quoting Spence v. Washington, 418 U.S. 405, 410–11 (1974) (per curiam)).

130. *Id.* (quoting *Spence*, 418 U.S. at 410–11).

131. *Id.* at 405–06.

132. *Id.* at 411–12.

133. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968) (recognizing an assumed governmental concern for military draft readiness).

134. *Johnson*, 491 U.S. at 411–12, 420.

135. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995).

136. *Id.*

137. *Johnson*, 491 U.S. at 404.

138. *See Hurley*, 515 U.S. at 569 (quoting Spence v. Washington, 418 U.S. 405, 411 (1974) (per curium)).

Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll."[139]

We need take no issue with where the Court has chosen to draw the line between speech and non-speech for constitutional purposes.[140] Instead, our sharpened focus herein would allow the courts to bypass any inquiry into whether a given act or practice is sufficiently expressive to count as speech or not. The judicial focus should instead be on why the plaintiff's alleged speech in question was officially restricted. If the alleged speech was restricted even in part because of an official intent to suppress or disadvantage what the government imagined to be some purported idea, however vaguely or inarticulately expressed, that restriction should be, at the very least, strongly presumed to be unconstitutional. But if there is no evidence of any such regulatory intent, and the government has at least minimally reasonable grounds for the regulation in question, it should hardly matter whether the plaintiff's purported speech in question falls within the boundaries of speech in the first place.

Focusing on governmental intent would thus allow for bypassing this vexed and controversial preliminary inquiry. Even more importantly, though, our sharpened focus would dramatically simplify free speech law, at minimal cost, in a further respect. As it stands, free speech law crucially distinguishes between government regulation of speech that is based on the content of that speech, and regulation of speech that is not based on the speech's content, and is thus said to be content-neutral.[141] This difficult and nearly omnipresent distinction as well can, on our sharpened approach, generally be bypassed.

E. *Content-Based & Content-Neutral Restriction of Speech*

This currently central distinction in free speech law is discussed at length in the sign regulation case of *Reed v. Town of Gilbert*.[142] The

139. *Hurley*, 515 U.S. at 569. For discussion and application of the relaxed *Hurley* test for cognizable "speech," see, for example, Burns v. Town of Palm Beach, 999 F.3d 1317, 1336–37 (11th Cir. 2021); Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 901 F.3d 1235, 1240 (11th Cir. 2018); Robar v. Vill. of Potsdam Bd. of Trs., 490 F. Supp. 3d 546, 561–62 (N.D.N.Y. 2020) (emphasizing the Johnson formulation); Phillips v. City of Cincinnati, 479 F. Supp. 3d 611, 634–36 (S.D. Ohio 2020) (discussing urban homeless encampments as expressive conduct addressing affordable housing issues).

140. *See generally What Counts as "Speech"*, *supra* note 89. For some possible costs of overextending what counts as speech in the first place, see Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1633–34 (2015); Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318, 322, 330–31, 333–34 (2018). *See generally* Mark Tushnet, *The Coverage/Protection Distinction in the Law of Freedom of Speech—An Essay on Meta-Doctrine in Constitutional Law*, 25 WM. & MARY BILL RTS. J. 1073 (2017).

141. *See* sources cited *supra* note 36. *See generally* Reed v. Town of Gilbert, 576 U.S. 155, 163–171 (2015) (discussing the nature and role of the distinction between content-based and content-neutral restrictions of speech).

142. *Reed*, 576 U.S. at 163–171.

majority in *Reed* determined that regulations of speech that require examination of the communicative content of the speech are content-based regulations.[143] An entirely benign government purpose and intention in adopting and enforcing the speech regulation was thought, in *Reed*, to be irrelevant to whether such a regulation is content-based or not.[144] Quite apart from any intention, a regulation that requires inquiry into the communicative content, message, text, subject, or meaning of the speech counts as content-based.[145] And as a content-based regulation, even the most patently innocently intended regulation must be subjected to the rigorous judicial test of strict scrutiny.[146]

Thus, as *Reed* has it, "a law that is content- based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained in the regulated speech."[147] Improper intent is thus, according to *Reed*, "not the *sine qua non* of a violation of the First Amendment."[148] And "an innocuous justification cannot transform a facially content-based law into one that is content neutral."[149] In particular, "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter."[150]

It has indeed been judicially held elsewhere that government "has no power to restrict expression because of its message, its ideas, *its subject matter, or its content*."[151] This and similar formulations do seem to place government concern for speech messages, ideas, subjects, and content all on a par. But any such approach is, on our view, misfocused, unnecessary, distracting, and generally misconceived.

The occasional Supreme Court opinion this tends to support the supposed equivalence of idea or viewpoint suppression and regulation on the basis of subject matter in general, across context and circum-

143. *See id.* at 164–65

144. *See id.* at 165.

145. *See id.* at 163–64, 166. *But see* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48–49 (1986) (holding benign regulatory motives may downgrade the required level of judicial scrutiny to a limited degree).

146. *Reed*, 576 U.S. at 165. Strict judicial scrutiny then requires the showing of a compelling governmental interest underlying, and the narrow tailoring of, the regulation in question. *Id.* at 163.

147. *Id.* at 165 (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)). Presumably, the motive or intent involved would have to be benign at the administration, enforcement, and adoption stages.

148. *Id.* (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 117 (1991) (internal quotation marks omitted); *see also id.* at 167–68.

149. *Id.* at 166.

150. *Id.* at 169 (citing Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 537 (1980)).

151. Ashcroft v. ACLU, 535 U.S. 564, 573 (2002) (emphasis added) (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983)); *see also* People v. Ashley, 162 N.E.3d 200, 210 (Ill. 2020).

stance. But the Court has also occasionally recognized that the government's ability to impose content-based burdens on speech "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace."[152] That is, some content-based restrictions raise the possibility that, pursuant to our focus herein, some ideas may be intentionally suppressed.

Conversely, though, it remains true that some content-based restrictions on speech may simply not raise "any 'realistic possibility that official suppression of ideas is afoot.'"[153] This is true of many content-based regulations as defined by *Reed*;[154] of many narrowly applicable subject-matter based regulations;[155] and even, perhaps, of some broad prohibitions of any discussion, in any forum, of some designated subject.[156]

It is possible to imagine a government's broadly prohibiting the discussion of an entire subject, without being motivated by a desire to suppress the discussion of any particular idea. At least at the fringes of conceivability, perhaps, a government might seek to prohibit expression of all perspectives on some particular public issue primarily for the sake of preventing mass violence, civil rebellion, or other social disruption independent of any concern for maintaining regime legitimacy. The government might in such a case be uncertain about, or indifferent to, all of the various views on the prohibited subject in question.

A related kind of case would involve a contextually narrow and limited-scope regulation of speech where the desire to suppress a disfavored idea is not that of the regulating government itself, but of some third party to which the government merely wishes to cater. The regulating government in such a case might itself endorse the idea in question, but wish merely to curry favor with the third party would-be censor. The most sensible judicial approach in such a case, however,

152. R.A.V. v. City of St. Paul, 505 U.S. 377, 387 (1992) (quoting Simon & Schuster, Inc., 502 U.S. at 116 (citing the cable operator taxation case of Leathers v. Medlock, 499 U.S. 439–49 (1991), which discusses the risk that content-based regulations might "distort the market for ideas").

153. *Reed*, 576 U.S. at 182 (Kagan, J., concurring) (quoting Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 189 (2007)); *see also R.A.V.*, 505 U.S. at 390; Bruce & Tanya & Assocs., Inc. v. Bd. of Supervisors of Fairfax Cnty., 355 F. Supp. 3d 386, 408 (E.D. Va. 2018); State v. Boettger, 450 P.3d 805, 809 (Kan. 2019).

154. *See supra* notes 144–151 and accompanying text.

155. *See Reed*, 576 U.S. at 182 (Kagan, J., concurring). Consider, for example, that subject matter-based regulations of speech in what are referred to as limited purpose or non-public forums must be merely reasonable and must not target some particular viewpoint. *See, e.g.*, Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1885–86 (2018); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806–11 (1985); Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 46 (1983) (holding the subject matter regulation in such a forum must be "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view").

156. For some suggestive elements of such a case, see *Boos v. Barry*, 485 U.S. 312, 319 (1988) (discussing minimum distance of signs from foreign embassies).

might well impute the third party intent to suppress a crucial idea to the regulating government itself, at least where the third party's intentions, and the likely idea-suppressive effects, are known to the regulating government.[157]

What the *Reed* Court rightly appreciates is that the facial content-neutrality of a speech regulation should not invariably insulate that regulation from the most rigorous judicial review.[158] A facially content-neutral speech regulation may actually amount to a sophisticated, indirect attempt to suppress or disadvantage some disfavored idea.[159] Ideas can be suppressed through facially content-neutral regulations.[160] Merely for example, prohibiting all parading while wearing a military-style uniform arguably says nothing, in itself, about which ideas can be expressed while parading. But the underlying regulatory intent night be to disadvantage either pro-military ideas, or the expression of fascist ideas.[161] And facially content-neutral parade permit standards, if those standards are also sufficiently vague, delayed, indeterminate, or subjective, lend themselves especially to an administrative intent to disadvantage disfavored ideas.[162]

More crucially, though, *Reed*'s over-extension of strict scrutiny review to cases involving no meaningful intent, at any stage, to suppress or disadvantage any idea has already led to dubious lower court outcomes. Consider, for example, the on-site versus off-site billboard regulation case of *Reagan National Advertising of Austin, Inc. v. City of Austin*.[163] This case involved the city's denial of the company's application to digitize commercial and non-commercial signs in off-premises, as well as on-premises, sites.[164]

The Fifth Circuit first addressed whether allowing the digitization of on-premises signs, but not of off-premises signs, was a content-based regulation of off-premises speech.[165] The court held that this restriction of off-premises signs was indeed based on the content of the regu-

157. At a minimum, we can say that the law sometimes imputes criminal or civil intent to a state party where that state actor clearly had no hostile intent toward the person who is injured by the official conduct at issue. *See, e.g.*, Estate of Randolph v. City of Wichita, 459 P.3d 802, 824–25 (2020) (discussing the doctrine of transferred intent).

158. *See Reed*, 576 U.S. at 165–69.

159. *Id.* 165–66.

160. *Id.*

161. *See generally* Collin v. Smith, 578 F.2d 1197, 1200, 1211–12, 1215 (7th Cir. 1978).

162. *See, e.g.*, Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 133 (1992) (noting the existence of content-based elements of the permitting process); *see also* Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 802 (1988) ("[D]elay compels the speaker's silence.").

163. Reagan Nat'l Advert. of Austin, Inc. v. City of Austin, 972 F.3d 696 (5th Cir. 2020), *cert. granted*, 141 S. Ct. 2849 (2021).

164. *Id.* at 699.

165. *Id.* at 702.

lated speech.[166] The court cited *Reed* for the proposition that a regulation is content-based if it "applies to particular speech because of the topic discussed or the idea or message expressed."[167] This vague definition was said to be equivalent to the formulation that a regulation is content-based where it "target[s] speech based on its communicative content."[168]

Crucially, the *Reagan National* opinion then determined that whether a sign is on-premises or off-premises is "determined by its communicative content."[169] And because the communicative content must be examined to determine whether the sign qualifies as on-premises or off-premises, strict scrutiny of the regulation in question is required by *Reed*.[170] In effect, strict scrutiny is required because one must read the sign for at least the generally uncontroversial, politically unvalenced purpose of determining how, if at all, the sign relates to the property on which it is posted.[171]

Interpreting *Reed*, the court in *Reagan National* declared that the lack of any detectable animus, disapproval, or desire to in any way inhibit or disadvantage any idea, at any stage, did not preclude the application of strict judicial scrutiny.[172] Consider first, though, that *Reed*'s reference to "targeting" speech based on its "communicative content"[173] is, in itself, ambiguous and grossly overinclusive.

The idea of "targeting" some entity suggests first, and most vividly, something roughly like "shooting at with intent to destroy," as in targeting an enemy soldier or an entire city. Even the image of "target practice" often involves knocking over, or otherwise physically impacting, some object. But it is, secondary and more metaphorically, also possible to "target" some object in the looser sense of merely focusing on, addressing, or including that object within the scope of any regulatory enterprise. *Reed*'s reference to "targeting" speech may unfortunately suggest that "targeting" in only the latter, more benign sense somehow encompasses "targeting" in the former, more aggressive, less benign sense.

Reed's focus on targeting "communicative content" is thus ambiguous, over-inclusive, and misleading. When we think of targeting a government's "communicative content," the primary and entirely natural response is to think of something like censorship, the enforcement of orthodoxy, or the deterrence and punishment of disfavored ideas, messages, beliefs, attitudes, or views with some distinct content.

166. *Id.*
167. *Id.* (quoting Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015)).
168. *Id.* (quoting *Reed*, 576 U.S. at 163).
169. *Id.*
170. *See id.*
171. *See id.*
172. *Id.* (citing *Reed*, 576 U.S. at 165).
173. *Reed*, 576 U.S. at 165.

But in reality, and certainly in *Reagan National* and similar cases, a regulation targeting "communicative content" involves no such suppressive considerations. There is no sense that the City of Austin, whatever it thinks about commercial values, signs, digitization, or premises and their boundaries, is here pursuing any sort of idea-repressive agenda. Presumably, the inevitable balancing of aesthetic, traffic safety, and other considerations is instead thought to depend, to some degree, on whether a sign is on the speaker's own property, or instead on some remote location. Whether that sort of land-use judgment is justifiable or not is a subject on which reasonable minds may disagree, on non-speech-related grounds.

Pursuant to *Reagan National*, the zoning rules enforcers must indeed examine the content of a digitized sign, specifically in order to see whether its message refers to whatever takes place on the property on which it rests.[174] Typically, though, the rule's enforcers will not be looking at the sign's message in order to check for compliance with, or deviation from, any regime orthodoxy. Contrary to Václav Havel's classic scenario,[175] the regulation enforcer in *Reagan National* may read and interpret the green grocer's sign, or any other affected sign, merely to determine whether it is misplaced, with no discernable political aim or interest.[176] The enforcer in *Reagan National* thus does not examine the content of the sign in order to in any sense pass judgment on the merits of its substantive message.[177]

The interpretation of *Reed* adopted in *Reagan National* has been shared,[178] though not universally so,[179] in both related and unrelated regulatory contexts.[180] But for our purposes, a rule that requires an official to read and understand a sign's date, for example, merely to determine whether the sign refers to a past or future event,[181] is generally not a regulation that should be subjected to strict scrutiny. In any typical such case, there may well be no detectable intent to sup-

174. *Reagan Nat'l*, 972 F.3d at 701.

175. *See* Václav Havel, *The Power of the Powerless*, 32 E. EUR. POL. & SOC'YS & CULTURES 353, 359–60 (Paul Wilson trans., SAGE Publ'ns 2018) (1979).

176. *See Reagan Nat'l*, 972 F.3d at 701.

177. *See id.* Here, we of course set aside all issues of libel, fraud, intellectual property disputes, deceptive advertising, and such as well as the presumably rare cases in which a zoning regulation enforcer does indeed seek to use the rule in order to punish or deter expression of any disfavored idea.

178. *See generally* L.D. Mgmt. Co. v. Gray, 988 F.3d 836 (6th Cir. 2021); Thomas v. Bright, 937 F.3d 721 (6th Cir. 2019); Norton v. City of Springfield, 806 F.3d 411 (7th Cir. 2015) (panhandling regulation ordinance).

179. *See* Act Now to Stop War & End Racism Coal. v. District of Columbia, 846 F.3d 391, 404 (D.C. Cir. 2017) (citing a regulatory need to read and interpret a date on a sign merely in order to determine whether any referred-to event had already taken place).

180. *See generally* Note, *Free Speech Doctrine after* Reed v. Town of Gilbert, 129 HARV. L. REV. 1981 (2016) (discussing the respective opinions in *Reed*).

181. *Act Now to Stop War & End Racism Coal.*, 846 F.3d at 404.

press, disadvantage, or to drive from the marketplace any view or idea.[182]

On our approach, however, the proper judicial response to essentially benign restrictions on the basis of content, however defined, is not to merely relax the level of scrutiny from strict to any form of mid-level, but still non-deferential, scrutiny.[183] Where there is no indication of any suppressive intent, at any relevant stage, the courts should focus, in free speech challenge, on the mere legitimacy and minimum rationality of the regulation and its application.[184] And this should apply to commercial speech cases[185] as well as to non-commercial speech cases.[186] There is no role for anything like mid-level scrutiny in such cases.

IV. Reasonably Inferring the Relevant Restrictive Intent

Our sharpened focus on suppressive governmental intent, in any meaningful part, inevitably raises issues of ascertaining, and suffi-

182. *See Reagan Nat'l*, 972 F.3d at 707. Whether the logic of Reed in this respect would apply to a regulation only of commercial speech, as distinct from broadly political or non-commercial speech, is not yet clearly established. *See L.D. Mgmt. Co.*, 988 F.3d at 841.

183. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (free speech challenge in a commercial speech context). Presumably, most regulation of advertisements and other commercial speech involves an intent to prevent physical, medical, or financial harms to unwitting consumers rather than to suppress or disadvantage an idea. Such cases are not about official stifling or skewing debate. For free speech challenges in non-commercial contexts, see *Ward v. Rock Against Racism*, 491 U.S. 781, 784, 791, 798–99 (1989) (amplified concert sound volume); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 289, 294 (1984) (symbolic camping in national parks); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 43, 48–49 (1986) (zoning of adult movie theater locations). *But cf.* Reed v. Town of Gilbert, 576 U.S. 155, 183–84 (2015) (Breyer, J., concurring) (failing to overrule *Renton*). A similar analysis of government intent in cases involving national security, defamation, perjury, obscenity, government employee discipline, and other traditional areas of speech could be readily performed as well. *See* Brown v. Glines, 444 U.S. 348, 355–56 (1980) (halting distribution of materials by Air Force); Gertz v. Robert Welch, Inc., 418 U.S. 323, 348–50 (1974) (weighing a state's interest in passing an antidefamation law); United States v. Alvarez, 567 U.S. 709, 720–21, 747 (2012) (discussing how perjury harms legitimate government interests); United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 811–14 (2000) (restricting the viewing of adult TV channels); Lyman v. NYS OASAS, 928 F. Supp. 2d 509, 524–25 (N.D.N.Y. 2013) (rationalizing a state's interest in controlling what its employees say).

184. *See, e.g.*, Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 109 (1949) (borrowing such a judicial test formulation from the context of equal protection). Today, this case would likely be decided on commercial speech grounds. *Cf. Cent. Hudson Gas*, 447 U.S. at 566 (demonstrating a similar case decided on commercial speech grounds); *see also* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461–63 (1981); New Orleans v. Dukes, 427 U.S. 297, 303 (1976); McGowan v. Maryland, 366 U.S. 420, 425–26 (1961); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

185. *See Cent. Hudson Gas*, 447 U.S. at 566.

186. *See Ward*, 491 U.S. at 791, 798–99; *Clark*, 468 U.S. at 289, 294; *Renton*, 475 U.S. at 43, 48–49.

ciently proving, the relevant intent. Questions of intent of course pervade the law. Herein, we can be agnostic as between a standard of proof of intent by a mere preponderance of the evidence;[187] by clear and convincing evidence;[188] or even by a beyond a reasonable doubt standard, as in criminal cases.[189] Clearly, though, the regulating government is in the better position to provide most of the supporting evidence of its own intent, and should thus generally bear the burden of production and proof of intent in the relevant cases.[190]

Neither the regulating government nor the challenging party, though, need feel intimidated by the metaphysics or the alleged subjectivity of intent.[191] The long-established general rule at common law held, usefully, that one "is presumed to intend the foreseeable consequences of his own actions."[192] More narrowly, it was "a general principle that everyone must be presumed[193] to intend the necessary consequences of his acts."[194] Alternatively, an actor is presumed to have intended the natural consequences of his deeds.[195]

Crucially, the presumption that an actor intended the natural and probable consequences of their acts is most fully appropriate with respect to government actions, policies, and rules in general.[196] This presumption appreciates the complication that government actions are "frequently the product of compromise, of collective decisionmaking, and of mixed motivation."[197] And this sensible presumption applies

187. *See, e.g.*, Steadman v. SEC, 450 U.S. 91, 96–103 (1981) (applying a congressionally mandated preponderance of the evidence standard in an administrative disciplinary case).

188. *See, e.g.*, N.Y. Times v. Sullivan, 376 U.S. 254, 256, 285–86 (1964) (requiring proof of actual malice by a clear and convincing evidence standard in a libel case brought by a public official).

189. *See, e.g.*, Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 59 (1989) (requiring proof of each element beyond a reasonable doubt for RICO conviction in the case of an adult bookstore).

190. Medina v. California, 505 U.S. 437, 445–46, 450 (1992); *see also* Patterson v. New York, 432 U.S. 197, 205–06, 211 (1977) (discussing burden of proof placement issues).

191. *See generally* G.E.M. ANSCOMBE, INTENTION (Harvard Univ. Press, 2d ed. 1963) (1957).

192. Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 340 (1965) (Goldberg, J., concurring).

193. But this presumption need be neither irrebuttable nor an attempt to shift any otherwise appropriate burden of proof. *See* Sandstrom v. Montana, 442 U.S. 510, 516–17 (1979).

194. Toof v. Martin, 80 U.S. 40, 48 (1871). We may assume that "necessary," as in the Necessary and Proper Clause context, refers to something less rigorous than logical or physical necessity. *See* McCulloch v. Maryland, 17 U.S. 316, 324–25 (1819).

195. Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring).

196. *See id.*

197. *Id.*; *see also* City of Mobile v. Bolden, 446 U.S. 55, 138 (1980) (Marshall, J., dissenting) (quoting Justice Stevens' concurrence in Washington v. Davis, 426 U.S. 229, 253 (1976)).

not only to federal legislation,[198] but to state-level legislation as well.[199]

Thus on the one hand, evidence of intent to suppress or disadvantage an idea, or its expression, need not take the form of anything like a smoking-gun confession by a government actor. But it is also sensible, in cases of collective decisions by governments, to not impute to the collectivity some merely idiosyncratic, outlying intention, not necessary for the enactment, and that is held by one or more government actors.[200] To qualify as relevant for our purposes, the intention must have had some meaningful role, if perhaps as one motive among others,[201] in the enactment or enforcement of the restriction on speech.

Imagine, then, a restriction on speech, whether content-based or content-neutral on any definition, that is claimed by a regulated party to have been intended to suppress or disadvantage[202] a particular idea. Assume also, for purposes of clarity, that the burden on the regulated party's speech is substantial.[203] If, in such a case, the government asserts its innocent, non-suppressive intentions, a court might naturally inquire into whether the government has, now that the speech-restrictive impact has been legally challenged, explored the possibility of less speech-burdensome, alternative policies. Speech-suppressive intent

198. *See, e.g.*, N.Y. Cent. R.R. v. Winfield, 244 U.S. 147, 158 (1917) ("Congress must be presumed to have intended the necessary consequences of its action.").

199. *See, e.g.*, People v. Figueroa, 894 N.Y.S.2d 724, 739 (Sup. Ct. 2010) ("[A]s a matter of statutory construction, the Legislature is presumed to intend the natural and foreseeable results of its enactments.") (citing Dowling v. Church E. Gates & Co., 170 N.E. 511 (N.Y. 1930)).

200. *See Davis*, 426 U.S. at 253 (Stevens, J., concurring) (suggesting the burden of showing causal irrelevance would, again, generally be with the enacting government).

201. *See id.* Some courts reject, in some contexts, a substantial factor test of causation in favor of a more demanding requirement that the illicit intent have been causally decisive. *See, e.g.*, Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 871 (1982).

202. Whether or not an improper restriction on speech can ever qualify as merely de minimis or legally trivial, and therefore not subject to judicial redress, the nature or gravity of the harm must meet at least some minimal threshold in order to be legally cognizable, if only for showing standing to sue. But the courts are split on whether the principle of *de minimis non curat lex* applies in the area of constitutional rights. That it does is endorsed in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2504–05 (2019); *Ingraham v. Wright*, 430 U.S. 651, 674 (1977) (procedural due process liberty interest); *Swick v. City of Chicago*, 11 F.3d 85, 87 (7th Cir. 1993); *Bart v. Tedford*, 677 F.2d 622, 625 (7th Cir. 1982) (section 1983 freedom of speech case). *See also* JAMES MADISON, WRITINGS 787–88 (Jack N. Rakove ed., Libr. of Am. 1999) (1802) (discussion on religion). That de minimis requirements do not apply in constitutional right contexts is, in contrast, endorsed in *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curium) ("Applicants are . . . irreparably harmed by the loss of free exercise rights for even minimal periods of time.") (internal quotation marks deleted), and *Lorillard Tobacco Co. v Reilly*, 533 U.S. 525, 567 (2001) (commercial free speech case).

203. But see *supra* note 202 for discussion on the division in the authorities on the status of alleged merely de minimis restrictions on the availability of judicial redress.

may in some cases crystalize post-enactment, and post-initial enforcement. Has the government considered the legal and practical feasibility of granting exemptions, or of somehow amending the rule, in light of its professed intentions and purposes? A lack of interest in adopting plainly viable, but less speech-suppressive and equally effective policies may suggest the presence of an intent to suppress the idea.

Of course, the government might have foreseen, and indeed regretted, the speech-restrictive effects of its regulation without also intending them.[204] Perhaps the unintended speech-restrictive effects are inseparable from the otherwise unobtainable desired consequences of the rule. But if it is apparent that providing the necessary exemptions,[205] or a tailored re-drafting, of the policy would not impair the government's cited purposes, and would come at reasonable cost, then the government's refusal to pursue such possibilities would normally impeach its claim to the innocence of its intentions.

Circumstantial evidence of a significant intent to suppress or disadvantage an idea can also be shown by adapting any of the considerations discussed in the classic equal protection case of *Village of Arlington Heights v. Metropolitan Housing Authority*.[206] One might thus infer suppressive intent from the fact that a speech regulation "bears more heavily" on one viewpoint than another.[207] Otherwise unexplainable systematic patterns of adverse impact on particular ideas may also suggest an invidious government intent.[208] The history of actions, including prior suppressive policies, by the government in question may also be relevant.[209] The sequence of events leading up to the speech-restrictive decision may be relevant in showing intent as well.[210] Unexplained departures by the enacting government from its usual procedures,[211] or from its usual substantive priorities,[212] may be probative of suppressive intent as well. Of course, official statements in any legislative history may also be relevant to inferring an invidious

204. See the double effect doctrine discussion *supra* note 61 and accompanying text.

205. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881–82 (2021) (discussing the realistic and required scope of exemptions and accommodations in the free exercise context); *see also* Mast v. Fillmore Cnty., 141 S. Ct. 2430, 2432 (2021) (Gorsuch, J., concurring). As well, intentional suppression or disadvantaging of speech may also raise a separate substantial question of a denial of constitutional equal protection.

206. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977).

207. *Id.* at 266.

208. *See id.*

209. *See id.* at 267.

210. *See id.* (citing Reitman v. Mulkey, 387 U.S. 369, 373–76, 387 (1967)). As in, for example, the contemporaneous rise of an overwhelming populist movement in favor of repressing the idea in question.

211. *See id.* As in the case, perhaps, an unusual off-the-record or unrecorded discussion followed by a vote.

212. *See id.*

intent as well.[213] Nor do these considerations exhaust the ways in which an intent to suppress or disadvantage the expression of an idea might be inferred.[214] In this context, as in other familiar legal contexts in which questions of intent may be dispositive, mind-reading is unnecessary.

V. Conclusion

We have addressed herein a broad range of problems. A government's intent to suppress or disadvantage an idea or its expression can take many forms. The focus herein has been on central problems of restrictions of the speech of individuals and groups. But a similar repressive intent may also be manifested in official restrictions on freedom of association[215] as a sort of preliminary to, or preparation for, engaging in speech. This only adds to the significance of our subject.

As we have seen throughout, a focus on government intent is well-directed as a matter of First Amendment theory and practice. This sharpened focus allows for the full appropriate promotion of all of the basic free speech values and purposes, in all contexts. And this focus also recognizes the need for the regulation of speech, for appropriate reasons, in many cases of, for example, commercial fraud, defamation, some forms of obscenity, perjury, land use, government employee discipline, breaches of national security, the integrity of the voting booth, and other contexts.

Thus, the costs of this sharpened focus on invidious government intent, in terms either of free speech values or the promotion of various legitimate government interests, are minimal. The advantage of the sharpened focus herein is, on the other hand, a matter of minimizing, if not entirely avoiding, a series of currently prominent but largely distracting and misleading free speech tests and categories.

As well, all judges who address free speech matters, who engage in the maintenance and enhancement of the constitutional legal regime, and who must account for the interests of all those persons affected by that regime, would benefit from a sharpened focus on what really matters in free speech law. The law of freedom of speech is, as discussed above, currently a dense thicket of dichotomies, trichotomies, multi-step tests, almost indefinitely malleable levels and sub-levels of judicial scrutiny, and any number of context-specific rules and principles. Much of this baroque structuring is unnecessary, where it is not otherwise costly and harmful.

213. *See id.* at 268.

214. *See id.*

215. *See generally* Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984); Ams. for Prosperity Found. v. Becerra, 919 F.3d 1177, 1182 (9th Cir. 2019) (Ikuta, J., dissenting); Perry v. Schwarzenegger, 591 F.3d 1147, 1159 (9th Cir. 2010); Tabbaa v. Chertoff, 509 F.3d 89, 105 (2d Cir. 2007).

In particular, courts must currently focus, in some cases, on whether a party's activities should count, to begin with, as speech for free speech purposes. This step can be largely bypassed. Courts must then often focus on whether the speech at issue is, say, commercial or non-commercial. This inquiry, too, can often be bypassed. Then there will often be an inquiry into whether the speech restriction is content-based, content-neutral, viewpoint-based, or focused on the subject matter of the speech in question. Courts then often fret, needlessly, over whether to call the speech restriction an absolute prohibition, or else a regulation of the time, place, or manner of the speech. This vast area of free speech law is, on our approach, largely just a distraction.

As it turns out, whether there is any meaningful government intent to suppress or disadvantage an idea, or its expression, cuts across and outweighs the significance of all of these categories. Such an invidious intent may, or may not, be found in all of the above, and in other speech contexts. And it is the presence or absence of that intent that crucially matters for the promotion of the basic values underlying the constitutional protection of speech.

In practice, a suppressive government intent can often, though certainly not infallibly, be shown by whatever standard of evidence is appropriate, through one or more familiar forms of circumstantial evidence. Government intent is already standardly in at issue in various sorts of civil rights, anti-discrimination, and equal protection cases. Assessing the character of government intent is often central to, and not typically unmanageable in, all such cases.

A restrictive government speech policy may involve no causally meaningful wish to suppress or disadvantage any particular idea. The government may be indifferent to, or even sympathize with, an expression that turns out be libelous or a traffic hazard; or geographically misplaced; or disturbingly loud; or a commercial idea that a seller wishes to assert; or that is perjurious; or that is approved of but inappropriate to the forum in question; or of a policy idea that was expressed by a now terminated government employee; or of a preferred idea whose expression would impair electoral or national security. In such cases, the courts should centrally focus on the absence of significant government intent to suppress or disadvantage the expressed idea, as distinct from any more legitimate government intent. And in such cases, the absence of any such intent should mean that any constitutional challenge to the government practice or policy should be brought on other, non-speech grounds.

In the core political speech cases in particular, a meaningful government intent to suppress or disadvantage an idea, or even a broader ideology, will more often be present. However, that suppressive government intent might be self-servingly re-described, or mixed with other intentions. Some causally meaningful intent to suppress an idea, whatever other motives may also have been present as well, may ap-

pear in the classic litany of the crucial subversive political advocacy cases historically running from *Shaffer*,[216] to *Masses*,[217] to *Schenck*,[218] to *Frohwerk*,[219] to *Debs*,[220] to *Abrams*,[221] to *Gitlow*,[222] to *Whitney*,[223] to *Dennis*,[224] to *Brandenburg*.[225] Determining government intent in the core political speech cases is, for practical reasons, especially important. A focus on causally meaningful idea-suppressive intent is the simplest, most theoretically sound, and most civically educational grounds for condemning, in appropriate cases, the speech restriction in question.

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216. *See generally* Shaffer v. United States, 255 F. 886 (9th Cir. 1919).
217. *See generally* Masses Publ'g Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917).
218. *See generally* Schenck v. United States, 249 U.S. 47 (1919).
219. *See generally* Frohwerk v. United States, 249 U.S. 204 (1919).
220. *See generally* Debs v. United States, 249 U.S. 211 (1919).
221. *See generally* Abrams v. United States, 250 U.S. 616 (1919).
222. *See generally* Gitlow v. New York, 268 U.S. 652 (1925).
223. *See generally* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled on other grounds by* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).
224. *See generally* Dennis v. United States, 341 U.S. 494 (1951).
225. *See generally Brandenburg*, 395 U.S. 444.