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## The Incidental Regulation of Free Speech

David S. Day

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# The Incidental Regulation of Free Speech\*

DAVID S. DAY\*\*

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## I. INTRODUCTION

One of the basic constitutional standards that the Supreme Court of the United States has employed in evaluating the constitutionality

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of governmental regulations of protected speech is the "incidental regulation" test.<sup>1</sup> Along with the use of the strict scrutiny test for "content" restrictions of protected speech,<sup>2</sup> and the "time, place, and manner" test for regulations of the physical form of protected speech,<sup>3</sup> the incidental regulation standard forms one of the three pillars of the modern free speech doctrine. This article will explore the historical development of the incidental regulation standard and delineate the current status of the doctrine.

A commonly accepted starting point in free speech analysis is the observation that the Court has adopted a "two-track" system: "content-based" and "content-neutral."<sup>4</sup> In any given case, the determination of the appropriate track depends on whether the challenged regulation is based on the content of protected speech. Regulations on the content-based track receive a higher level of judicial scrutiny

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1. *Arcara v. Cloud Books, Inc.*, 106 S. Ct. 3172, 3177-78 (1986); *United States v. Albertini*, 472 U.S. 675, 687-89 (1985); *United States v. O'Brien*, 391 U.S. 367, 376 (1968); see Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1483-84 (1975); Schauer, *Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communication*, 26 WM. & MARY L. REV. 779, 783 (1985).

The text of the free speech clause of the Constitution of the United States provides: "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I. The free speech guarantee applies to the states through the fourteenth amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Hereinafter, the terms "protected speech" and "protected expression" are used interchangeably. They both refer to communicative activity that, under the free speech clause, receives some form of heightened judicial protection against governmental regulation greater than the rational basis test. For a discussion of the rational basis test, see *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986).

In addition, the terms "test" and "standard" are synonyms when referring to the expressed criteria employed by the Court in determining the constitutionality of a governmental regulation. Finally, the terms "regulation" and "restriction" are used interchangeably to refer to the type of abridgments of free speech interests that governmental authorities employ in various contexts. The term "regulation" is used in a broad sense to include any of "the various other formulae for the repression of expression." *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

2. *Widmar v. Vincent*, 454 U.S. 263, 270 (1981); see Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 48 (1987).

3. *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1981); see Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757, 758 (1986).

4. See M. NIMMER, *NIMMER ON FREEDOM OF SPEECH* § 2.04 (1984); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 789-92 (2d ed. 1988); Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U.L. REV. 1137, 1185 (1983); Stone, *supra* note 2, at 54. Content restrictions are "regulations enacted for the purpose of restraining speech on the basis of its content." *City of Renton v. Playtime Theatres*, 475 U.S. 41, 46-47 (1986). On the content-based track, governmental regulations are subject to intensive scrutiny. On the content-neutral track, courts employ a lower level of judicial review. See *id.* at 48, 54.

than those on the content-neutral track.<sup>5</sup> The Court traditionally has implemented the incidental regulation test on the content-neutral track.<sup>6</sup>

The significance of the incidental regulation doctrine can be determined only by reference to the other standards the Court has employed in free speech cases.<sup>7</sup> Because the incidental regulation standard must be viewed in relation to both the other lower track tests and the heightened scrutiny of the higher track, a brief overview of these standards is appropriate. In addition, because the Court has utilized overlapping concepts, the development of various tests on the content-based track may provide insights into the status of the incidental regulation standard.

### A. *The Higher Track: Content Regulation*

On the content-based track, the Court has established that cer-

5. See *Playtime Theatres*, 475 U.S. at 46-47; *L. TRIBE*, *supra* note 4, at 791-92; *Stone*, *supra* note 2, at 48, 54.

6. Although commentators and Justices of the Supreme Court have criticized this two-tier form of analysis, a full critique of the conventional wisdom of the two-track model is beyond the scope of this article. For a range of commentary, see *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 313 (1984) (Marshall, J., dissenting); and Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 142 (1981).

An implicit criticism of the two-track system is found in the Court's recent use of the public forum doctrine to decide, in whole or in part, first amendment cases. See *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 805-06 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). For purposes of this article, the public forum doctrine is merely an exception to a generally applicable regulation. *Schauer*, *supra* note 1, at 789; see *L. TRIBE*, *supra* note 4, at 981-82. Given this view, which is admittedly inconsistent with a broad reading of *Cornelius* and *Perry*, the public forum doctrine will not be discussed in this article. See generally Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 110 (1986) (Recent decisions have converted the original public forum concept into a "device for denying open and equal access."); Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1265 (1984) (The public forum doctrine "fails to illuminate the true problem at hand."); *Perry*, *supra* note 4, at 1205 (The Court's use of the public forum doctrine "simply makes no sense,").

Although an extended discussion of the criticism of the two-track system would not be appropriate here, it should be noted that the standards of the two-track model should be aligned so that content regulations and time, place, and manner (TPM) regulations are grouped together and receive appropriate heightened scrutiny. In contrast to incidental regulations, both content and time, place, and manner regulations share the common factor that they are purposeful governmental regulations. See Day, *The Hybridization of the Content-Neutral Standards for the Free Speech Clause*, 19 ARIZ. ST. L.J. 195, 195-211, 211 n.94 (1987).

7. See *Stone*, *supra* note 2, at 52. The use of standards is a significant, if often unarticulated, aspect of constitutional analysis. In contrast to ad hoc balancing, the use of standards permits some level of predictability and accountability regarding judicial decisionmaking. Cf. Note, *Political Boycott Activity and the First Amendment*, 91 HARV. L. REV. 659, 662 (1978) (offering a "systematic analysis" of political boycotts, as opposed to the traditional ad hoc balancing test).

tain categories of expression are not protected with any heightened level of judicial review.<sup>8</sup> For example, the government may restrict speech that the trier of fact categorizes as "obscenity"<sup>9</sup> or "child pornography,"<sup>10</sup> as long as there is a rational basis for the restriction.

Yet these definitional exclusions are not static. Even though the Court previously excluded commercial speech and defamatory speech from protected status on the basis of content, it later afforded these forms of speech a measure of protection greater than the rational basis test.<sup>11</sup> In essence, the Court has employed an ad hoc balancing test rather than any of the standards utilized on one of the tracks.

Even if a category of expression is not definitionally excluded from protection, the government may attempt to regulate speech based on its content. Under traditional free speech standards, the government has a heavy burden of justification in such instances, both substantively and procedurally.<sup>12</sup> In fact, governmental regulation of the content of protected speech must normally satisfy the strict scrutiny test.<sup>13</sup> Under this test, the conventional presumption of constitutionality is suspended, and the government has the burden of showing that both the content regulation serves a compelling state interest, and

8. See *L. TRIBE*, *supra* note 4, at 832; Schauer, *supra* note 1, at 785 n.24; Stone, *supra* note 2, at 47. The test applicable to a regulation of speech that falls within one of the categorical exclusions is usually the familiar rational basis test. See *L. TRIBE*, *supra* note 4, at 832.

9. *Miller v. California*, 413 U.S. 15, 24 (1973).

10. *New York v. Ferber*, 458 U.S. 747, 773 (1982); see also *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (Fighting words, among other things, are not protected by the federal Constitution.).

11. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (commercial speech receives limited constitutional protection); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976) (same); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) ("[L]ibel can claim no talismanic immunity from constitutional limitations."); see *L. TRIBE*, *supra* note 4, at 890-904.

12. *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986); *Widmar v. Vincent*, 454 U.S. 263, 270 & n.7 (1981) (subject matter restriction); *Freedman v. Maryland*, 380 U.S. 51, 58 (1965) (procedural protection); see Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 217 (1984). For purposes of this article, content regulations include both viewpoint and subject matter restrictions. I have adopted what Professor Baker has called the "broader version of the content neutrality requirement." Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 NW. U.L. REV. 937, 959 (1983); see *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that Government has no power to restrict expression because of . . . its subject matter, or its content.").

Governmental efforts to punish advocacy constitute one type of content regulation. The Court subjects such regulations to the very highest level of judicial scrutiny currently employed under the free speech clause: the modern "clear and present danger" test. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

13. *Widmar*, 454 U.S. at 270; see *Mosley*, 408 U.S. at 95-96; see also Stone, *supra* note 2, at 73 (discussing the rationale for the use of strict scrutiny).

the regulatory means chosen are the least restrictive ones available to further that interest.<sup>14</sup>

### B. *The Lower Track: Content-Neutral Regulation*

Outside of the area of content regulation, however, the Court has routinely applied lower levels of judicial protection.<sup>15</sup> On the content-neutral track, the Court has employed two judicially created standards: The time, place, and manner (TPM) test, and the incidental regulation test. A preliminary review of the content-neutral track is appropriate as background for an analysis of the incidental regulation standard.

#### 1. LOWER JUDICIAL SCRUTINY

Both types of content-neutral regulations are tested by judicial standards that are less rigorous than the strict scrutiny test applicable to content regulations.<sup>16</sup> Even though the Court has recently implied that the two standards have merged into a single, hybrid test,<sup>17</sup> the TPM test and the incidental regulation test have traditionally been separate and distinct from one another.<sup>18</sup>

At least in part, different constitutional policy considerations underlie the separate tests. The dominant policy consideration reflected in the TPM test is the need to determine whether regulations that supposedly are limited to only the physical form of protected speech actually are directed towards the content of the speech.<sup>19</sup> In

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14. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 583 n.6 (1983); *Widmar*, 454 U.S. at 270; *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978).

15. *See United States v. Albertini*, 472 U.S. 675, 688-89 (1985) (incidental regulation test); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 517 n.23 (1981) (opinion of White, J.) (time, place, and manner test); Stone, *supra* note 2, at 48, 54. Dean Stone argues that the Court has utilized "three distinct standards" on the content-neutral track, rather than the two presented herein. *Id.* at 50. There can be no doubt that the Court's analysis of content-neutral restrictions is inconsistent and confusing. Moreover, the Court's analysis is hardly static. The important point is that the level of protection for free speech interests has deteriorated. *See Schauer*, *supra* note 1, at 787.

16. *See Albertini*, 472 U.S. at 688-89 (incidental regulation test); *Metromedia*, 453 U.S. at 517 n.23 (opinion of White, J.) (TPM test).

This article proceeds on the assumption that the Court will apply the incidental regulation test when the government chooses to defend a challenged regulation by asserting that it is merely an incidental regulation. Similarly, the Court's use of the TPM test will be determined primarily by the government's asserted defense.

17. *See City of Renton v. Playtime Theatres*, 475 U.S. 41, 50 (1986); *Posadas De Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 106 S. Ct. 2968, 2979 n.9 (1986).

18. *See Day*, *supra* note 6, at 197; *Schauer*, *supra* note 1, at 785; Stone, *supra* note 2, at 99.

19. *See Carey v. Brown*, 447 U.S. 455, 462 (1980); *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 94 (1977); Day, *supra* note 6, at 200.

contrast, the primary policy consideration underlying the incidental regulation test is the concern for the overreaching effect of governmental restrictions that have an adverse impact on protected expression, even though the intent of the regulations was to regulate noncommunicative conduct only.<sup>20</sup> Although the tests may embody overlapping policy concerns, the significant distinction between the tests originally developed from the judicial perception that, of the two standards, only the government's use of a TPM regulation involved a deliberate effort to restrict expression.<sup>21</sup> In other words, although a TPM regulation is established for the purpose of abridging protected expression, an incidental regulation is a nonpurposeful abridgment.

## 2. THE TIME, PLACE, AND MANNER DOCTRINE: NEUTRAL BUT PURPOSEFUL ABRIDGMENTS OF THE FORM OF EXPRESSION

The TPM doctrine originated in a series of cases decided in the late 1930's and early 1940's.<sup>22</sup> The developing doctrine reached the point of independent status in the so-called "loud speaker" cases of the late 1940's.<sup>23</sup> In *Kovacs v. Cooper*,<sup>24</sup> for example, although the Court did not fully delineate the doctrine, it upheld the application of a facially neutral ordinance regulating the broadcasting of political messages by sound trucks.<sup>25</sup>

Over thirty years later, in *Heffron v. International Society for Krishna Consciousness*,<sup>26</sup> the Court announced the modern TPM doctrine. In *Heffron*, the International Society for Krishna Consciousness (ISKCON) brought an action against the Minnesota Agricultural Society, the operator of the annual Minnesota state fair.<sup>27</sup> The Minnesota Agricultural Society had promulgated a regulation that confined sales, distribution, and solicitation activities to certain "fixed" booths.<sup>28</sup> ISKCON challenged this regulation under the first amendment because the Krishna religion required its followers to sell literature and solicit donations from passers-by on a peripatetic, face-to-

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20. See *United States v. O'Brien*, 391 U.S. 367, 376 (1968); Comment, G. & A. Books, Inc. v. Stern: *Relevance of Improper Motive to First Amendment Incidental Infringement Claims*, 61 NOTRE DAME L. REV. 272, 280 (1986).

21. See Day, *supra* note 6, at 211; Stone, *supra* note 2, at 99.

22. See *Martin v. Struthers*, 319 U.S. 141, 144 (1943); *Cox v. New Hampshire*, 312 U.S. 569, 575-76 (1941); Goldberger, *Judicial Scrutiny in Public Forum Cases: Misplaced Trust in the Judgment of Public Officials*, 32 BUFFALO L. REV. 175, 205 (1983).

23. See *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949); *Saia v. New York*, 334 U.S. 558, 562 (1948).

24. 336 U.S. 77 (1949).

25. *Id.* at 87.

26. 452 U.S. 640 (1981).

27. *Id.* at 643-44.

28. *Id.* at 644.

face basis.<sup>29</sup> The state responded by arguing that the regulation was a content-neutral place restriction.<sup>30</sup> The Court upheld the regulation<sup>31</sup> and identified the three prongs of the modern TPM test: First, whether the regulation was content-neutral; second, whether the regulation was justified by a "significant governmental interest;" and third, whether the regulation preserved "ample alternative channels" for the expression of the interest.<sup>32</sup>

Two years after the *Heffron* decision, the Court moved from fair-grounds to sidewalks. In *United States v. Grace*,<sup>33</sup> a protester sought to distribute leaflets that advocated the removal of unfit judges, and another protester displayed a sign on which she had placed "the verbatim text of the First Amendment."<sup>34</sup> Although these actions involved clearly protected speech, they occurred on the sidewalk in front of the Supreme Court, and therefore were prohibited under a federal statute regulating activity on the grounds of the Supreme Court building.<sup>35</sup> After law enforcement authorities prevented the protesters from demonstrating, the protesters challenged the statute.<sup>36</sup> Although the government defended the statute as a place regulation,<sup>37</sup> the Court, recognizing that the sidewalks outside the Supreme Court building were traditionally open to the public, held that the government failed to justify the significant governmental interest prong of the TPM test, and overturned the federal statute.<sup>38</sup>

This brief history of the TPM doctrine demonstrates that the modern TPM test generally provides a lower level of judicial scrutiny of content-neutral regulations prohibiting protected speech than the high level of scrutiny of content regulations.<sup>39</sup> The Court has recognized, however, that the government, through so-called TPM regula-

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29. *Id.* at 644-45. The practice is called "Sankirtan." *Id.* at 645.

30. *Id.* at 646, 648.

31. *Id.* at 655.

32. *Id.* at 647-48 (quoting *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976)); see Note, *Time, Place, and Manner Regulations of Expressive Activities in the Public Forum*, 61 NEB. L. REV. 167, 181-82 (1982). In subsequent decisions, the Court has delineated a fourth prong, an explicit means test. See *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984); Day, *supra* note 6, at 202.

33. 461 U.S. 171 (1983).

34. *Id.* at 173-74.

35. *Id.*

36. *Id.* at 174.

37. *Id.* at 180.

38. *Id.* at 182-83.

39. See *City of Watseka v. Illinois Pub. Action Council*, 107 S. Ct. 919, 920 (1987) (White, J., dissenting) (quoting *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 517 n.23 (1981) (opinion of White, J.)); *Regan v. Time, Inc.*, 468 U.S. 641, 657 (1984); Goldberger, *supra* note 22, at 205.



tions, is deliberately attempting to restrain protected speech.<sup>40</sup> It appears that, because of a recognition that governmental regulators may not proceed in a completely neutral manner with respect to the suppression of free expression, the Court has maintained the relatively vigorous TPM test.<sup>41</sup> The Court's modern TPM doctrine contemplates, therefore, that judicial review of such governmental conduct must guard against the prospect that the purportedly neutral regulations are merely pretexts for content regulations.<sup>42</sup>

The Court demonstrated its concern for, and awareness of, such pretense in *Tinker v. Des Moines Independent Community School District*.<sup>43</sup> Three public school students wore black armbands to their schools as a protest against the Vietnam War. By wearing the armbands, they violated the school board's prohibition on armbands, which the board had adopted upon learning of the students' plan of protest.<sup>44</sup> Pursuant to its new policy, the board suspended the students.<sup>45</sup> The district court upheld the constitutionality of the prohibition on the ground that it was merely a place regulation.<sup>46</sup>

In analyzing the place justification, the *Tinker* Court recognized that the school board previously had permitted students to wear various political and ideological insignia, including swastikas.<sup>47</sup> Under these circumstances, the Court determined that the actual purpose

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40. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981); *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 94 (1977). See generally *Perry*, *supra* note 4, at 1185 (censorial versus noncensorial restrictions); *Schauer*, *supra* note 1, at 785 (intended versus unintended restrictions); *Stone*, *supra* note 2, at 99 (communicative versus noncommunicative restrictions).

41. Cf. *Grayned v. City of Rockford*, 408 U.S. 104, 116-17 (1972); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 511 (1969); *Goldberger*, *supra* note 22, at 208.

42. See *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 649 (1981); *Schad*, 452 U.S. at 65, 72; see also *Metromedia*, 453 U.S. at 515 (opinion of White, J.); *Linmark*, 431 U.S. at 93 (The city was "not genuinely concerned with the place of the speech."). The term "pretext" connotes, at a minimum, a lack of sincerity. See *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 813-14 (1985) (Blackmun & Brennan, JJ., dissenting). A pretextual justification arises when the government attempts to justify a regulation as content-neutral "under the guise of preserving" some important governmental interest. See *Carey v. Brown*, 447 U.S. 455, 462 (1980); see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) (dictum discussing congressional action "under the pretext of executing its powers"). The concern for pretense makes the TPM doctrine analytically similar to the doctrine employed for content regulation.

43. 393 U.S. 503 (1969).

44. *Id.* at 504. Because of the armbands, this was clearly symbolic speech. Yet the Court did not use the *O'Brien* standard. *Tinker*, consequently, refutes the conventional wisdom that all symbolic speech cases are resolved under the incidental regulation test. See *Schad*, 452 U.S. at 65, 72 (nude dancing protected as symbolic speech under the TPM standard).

45. *Tinker*, 393 U.S. at 504.

46. *Id.* at 504-05; see L. TRIBE, *supra* note 4, at 794 n.4.

47. *Tinker*, 393 U.S. at 510.

behind the board's armband prohibition was to regulate protected speech on the basis of the students' antiwar position.<sup>48</sup> The Court properly concluded, therefore, that the alleged place regulation was a pretext for content regulation.<sup>49</sup>

Under a traditional analysis, the purposeful nature of TPM regulations distinguishes them from incidental regulations.<sup>50</sup> Before examining the history of the incidental regulation standard, however, a brief overview of its policy basis provides an appropriate context.

### 3. THE INCIDENTAL REGULATION OF FREE SPEECH

The Court has applied the incidental regulation standard to governmental regulations that are directed towards nonspeech behavior, but that have an adverse impact on protected speech.<sup>51</sup> The incidental regulation doctrine protects "expressive conduct," as opposed to "ordinary noncommunicative conduct."<sup>52</sup> The Court developed the doctrine in order to evaluate alleged abridgments of protected expression that arise from the effect of a generally applicable regulation of nonexpressive conduct.<sup>53</sup> Even if the effect on protected speech is severe, the adverse impact for such regulations is considered incidental because it is nonpurposeful.<sup>54</sup>

With respect to such incidental regulations, the Court has tradi-

48. *Id.* at 510-11.

49. *Id.*; see Ely, *supra* note 1, at 1498 n.62; see also *Bethel School Dist. No. 403 v. Fraser*, 106 S. Ct. 3159, 3163 (1986) (suggesting that *Tinker* was a more narrow, viewpoint discrimination decision). The *Fraser* Court appears to have ignored Professor Ely's observation that reading *Tinker* as merely a viewpoint discrimination decision "is as irrelevant as it is unintelligible." Ely, *supra* note 1, at 1498.

50. See L. BOLLINGER, *THE TOLERANT SOCIETY* 201 (1986); Day, *supra* note 6, at 207. Professor Quadres has argued that the TPM standard is more protective of speech than the *O'Brien* standard. See Quadres, *Content-Neutral Public Forum Regulations: The Rise of the Aesthetic State Interest, the Fall of Judicial Scrutiny*, 37 *HASTINGS L.J.* 439, 449 n.51 (1986). In contrast, a student commentator has argued that the *O'Brien* standard provides greater protection for free speech interests than the TPM test. See Note, *The Two-Track Model of First Amendment Adjudication After Consolidated Edison Co. v. Public Service Commission*, 62 *B.U.L. REV.* 215, 233 (1982). It is important, nevertheless, to recognize that the standards are distinct.

The incidental regulation test reflects a judicial concern for sham justifications. See *United States v. O'Brien*, 391 U.S. 367, 388-89 (1968) (Harlan, J., concurring). To that extent, the incidental regulation test shares a policy concern with the TPM standard. Although the incidental regulation test obviously embodies several policy concerns, its primary focus is on good faith governmental regulations that affect protected speech. See *id.* at 376.

51. See *O'Brien*, 391 U.S. at 376; Wright, *Politics and the Constitution: Is Money Speech?*, 85 *YALE L.J.* 1001, 1008 n.36 (1976); P. Baum & M. Stern, *An Analysis of Legislation Directed at the Closing of P.L.O. Offices in the United States* 9 (June 1987).

52. See L. BOLLINGER, *supra* note 50, at 287 n.40.

53. *United States v. Albertini*, 472 U.S. 675, 681-82 (1985); *O'Brien*, 391 U.S. at 376.

54. See Day, *supra* note 6, at 209-10.

tionally identified two primary issues. The first issue is whether the conduct in question is actually protected.<sup>55</sup> Historically, various types of "symbolic speech," such as walking, marching, sitting, sitting-in, and even sleeping, have received protection.<sup>56</sup> Assuming that it is protected, the Court would then address the second issue: What level of protection is appropriate?<sup>57</sup> This article examines the latter issue.

Because the Court has applied the incidental regulation test outside of the context of symbolic speech, the symbolic speech issue has lost much of its jurisprudential significance.<sup>58</sup> The application of the incidental regulation test outside of the context of symbolic speech indicates that the operational rationale for the doctrine focuses on the type of regulation, as opposed to the type of speech-related conduct.<sup>59</sup> In a nation whose history can be traced to such symbolic conduct as a "tea party," it is appropriate for the focus of the doctrine to be on the type and purpose of the governmental action. The question, therefore, is not whether the particular speech is worth protecting, but whether the government has a sufficient justification for its attempts to restrict the expressive interests.<sup>60</sup>

Indeed, the incidental regulation doctrine focuses on restraining governmental conduct, rather than on enhancing the quality or quantity of the speech involved.<sup>61</sup> Thus, the doctrine plays an important role in free speech jurisprudence. As the following historical discussion demonstrates, this role has been, at times, controversial and colorful.

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55. See Note, *First Amendment Protection of Ambiguous Conduct*, 84 COLUM. L. REV. 467, 468 (1984). The Court has almost completely abandoned the analytically unworkable "speech versus conduct" distinction. See Stone, *supra* note 2, at 80 n.141. Yet the first issue—whether the conduct is actually protected—has proven to be problematic for courts. See Note, *supra* at 468. Indeed, the Court's analysis often ended with this issue.

56. See Note, *supra* note 55, at 468.

57. *Id.*

58. Schauer, *supra* note 1, at 785 & n.22.

59. See *id.* at 782-83; Note, *supra* note 7, at 671.

60. See Schauer, *supra* note 1, at 786. Commentators recently have emphasized that focusing on the "nature of government regulation" rather than the "values that are served by speech" may influence free speech analysis. *E.g., id.* at 783; accord L. BOLLINGER, *supra* note 50, at 77-92. Dean Bollinger certainly provides a helpful insight when he asserts that citizens, as opposed to "officialdom alone," provide a real threat to freedom of speech. L. BOLLINGER, *supra* note 50, at 80. The Court, however, should impose appropriate protection for free speech interests without regard to the source of the threat.

61. See L. BOLLINGER, *supra* note 50, at 205-08; Schauer, *supra* note 1, at 786.

## II. THE HISTORICAL DEVELOPMENT OF THE INCIDENTAL REGULATION STANDARD

Although the incidental regulation standard originated with the seminal decision of *United States v. O'Brien*,<sup>62</sup> several pre-*O'Brien* decisions had some bearing on the development of the standard.<sup>63</sup>

### A. *The Pre-O'Brien Cases*

The pre-*O'Brien* case law provided, at best, an uncertain level of protection for free speech interests. Although the Court did not articulate a test, it identified the appropriate perspective on the question of what is to be the level of protection afforded free speech interests.<sup>64</sup> Because the cases of *Stromberg v. California*<sup>65</sup> and *Thomas v. Collins*<sup>66</sup> illustrate the uncertain level of protection, as well as the development of the "preferred position" of free speech interests,<sup>67</sup> this discussion will be limited to these decisions.

The *Stromberg* Court was faced with an early sample of what would later be called "symbolic speech." The defendant was a member of, and summer camp counselor for, the Young Communist League. Her responsibility as a counselor included raising a red flag as part of a daily ceremony for children attending camp.<sup>68</sup> She was convicted of violating a California criminal statute that prohibited the displaying of a "red flag, banner or badge . . . in any public place."<sup>69</sup> Although the lower court overruled the defendant's demurrer,<sup>70</sup> the Supreme Court of the United States reversed.<sup>71</sup>

The Court did not carefully apply particularized free speech standards in its analysis. Rather, it relied upon a sweeping generalization: "The maintenance of the opportunity for free political discussion . . . is a fundamental principle of our constitutional system."<sup>72</sup> Ultimately relying on the void for vagueness doctrine, the Court held

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62. 391 U.S. 367 (1968).

63. These decisions are important for their illustrative value. They are also important to the doctrine because the *O'Brien* Court cited them as purported authority for the announcement of the incidental regulation standard. *Id.* at 377, 382.

64. See *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945).

65. 283 U.S. 359 (1931).

66. 323 U.S. 516 (1945).

67. For a discussion of the Burger Court's treatment of the preferred position doctrine, see Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 441-43 (1980).

68. *Stromberg*, 283 U.S. at 362.

69. *Id.* at 361.

70. *Id.* The appellate court affirmed. *Id.*

71. *Id.* at 370.

72. *Id.* at 369.

that the California statute was "so vague and indefinite" that it violated the fourteenth amendment.<sup>73</sup>

In its own context, the *Stromberg* decision was actually a remarkable development in which the Court used judicial review to protect highly unpopular points of view.<sup>74</sup> It is important to note, however, that the Court's use of the vagueness doctrine provided an amorphous level of protection. After *Stromberg*, it would be extremely difficult to predict with any certainty how another incidental regulation case might be decided.

Perhaps the uncertainty left by *Stromberg* is best evidenced by *Thomas v. Collins*.<sup>75</sup> The *Thomas* Court, in a 5-4 decision, reversed the contempt citation of a union organizer.<sup>76</sup> The defendant was the president of the United Auto Workers Union, and planned to give a speech at a union rally in Texas. He did not have an "organizer's card," however, which was required of all union organizers by a Texas statute.<sup>77</sup> When the Texas state authorities learned that Collins was going to be in Texas, they successfully sought an ex parte temporary restraining order against the defendant's speech.<sup>78</sup> Although the defendant had received notice of the order six hours before his appearance at the rally, he gave the speech.<sup>79</sup> A Texas court subsequently held him in contempt.<sup>80</sup>

The state argued before the Supreme Court of the United States that, because "the statute [was] directed at business practices, like selling insurance,"<sup>81</sup> the applicable constitutional standard is the "'rational basis' test."<sup>82</sup> Rejecting this argument, the Court held that the applicable standard is stricter than a rational basis test.<sup>83</sup> Using this higher standard, the Court determined that the temporary

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73. *Id.* Judge Wright, in his otherwise insightful and persuasive article, argues that *Stromberg* represents an instance of viewpoint discrimination. See Wright, *supra* note 51, at 1008 n.36. Even if this interpretation were correct, however, it is significant that the Court employed the void for vagueness doctrine. Thus, *Stromberg* does not provide much support for Judge Wright's assertion that the incidental regulation standard is limited to regulations that discriminate on the basis of a particular viewpoint. See *id.* Indeed, the Court has applied the incidental regulation standard to regulations that adversely affect the subject matter of protected expression, as well as viewpoints. See *Procunier v. Martinez*, 416 U.S. 396, 413 (1974).

74. See Foster, *The 1931 Personal Liberties Cases*, 9 N.Y.U. L. REV. 64, 65-66 (1931).

75. 323 U.S. 546 (1945).

76. *Id.* at 543.

77. *Id.* at 518.

78. *Id.* at 518, 521.

79. *Id.* at 521.

80. *Id.* at 518.

81. *Id.* at 526.

82. *Id.* at 527.

83. *Id.* at 530.

restraining order issued under the Texas statute violated the first amendment.<sup>84</sup>

As in *Stromberg*, the *Thomas* Court's analysis is not completely discernible. The Court appeared to engage in ad hoc balancing.<sup>85</sup> Perhaps for the first time, however, the balancing in the context of a free speech case was explicitly governed by a different presumption than that which would attach under the rational basis standard.<sup>86</sup> The *Thomas* Court determined that "the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the . . . indispensable democratic freedoms secured by the First Amendment."<sup>87</sup> Given the preferred place of such first amendment freedoms, the Court suspended the usual presumption of constitutionality, and placed the burden of persuasion on the government.<sup>88</sup> In that regard, the *Thomas* Court's reasoning is significant to the subsequent development of the incidental regulation test, as well as the development of the entire range of free speech issues.<sup>89</sup>

Although the pre-*O'Brien* cases involved some fascinating factual circumstances and questionable governmental efforts to limit the exercise of speech interests, the Court did not provide a clearly articulated constitutional standard. In the absence of such a standard, the speech interests remained vulnerable. The uncertainty was, by itself, a chilling factor for free speech.<sup>90</sup>

### B. *The Seminal Decision: United States v. O'Brien*

The fundamental decision in the history of the incidental regulation doctrine was *United States v. O'Brien*.<sup>91</sup> The defendant, O'Brien, and several of his colleagues ceremonially burned their draft cards on the steps of a municipal building in Boston, with the intent to communicate opposition to the Vietnam War.<sup>92</sup> O'Brien was later convicted of violating the 1965 amendment to the Selective Service Act, which, among other things, required that all registrants have their draft card in their possession.<sup>93</sup> Specifically, the trial court found that he vio-

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84. *Id.* at 537.

85. *See id.* at 530-32.

86. *Id.* at 529-30.

87. *Id.*

88. *Id.*

89. *See* Emerson, *supra* note 67, at 441.

90. *Cf.* L. TRIBE, *supra* note 4, at 1038 (In areas in which the Court has not been able to formulate a rule under the first amendment, it has "been forced to swallow laws whole or invalidate them in their entirety.").

91. 391 U.S. 367 (1968).

92. *Id.* at 369-70.

93. *Id.* at 370-71.

lated the provision that prohibited an individual from "willfully and knowingly" destroying a draft card.<sup>94</sup> Although the First Circuit affirmed the conviction and remanded the case for resentencing,<sup>95</sup> it held that the 1965 amendment amounted to an unconstitutional abridgment of protected speech.<sup>96</sup> The Supreme Court of the United States, however, upheld the statute.<sup>97</sup>

As noted above, the *O'Brien* Court had little precedential guidance in terms of doctrinal background. Nevertheless, the Court quickly dispensed with the question of whether protected speech existed, resting on the assumption that O'Brien's conduct constituted protected expression.<sup>98</sup> The primary question for the *O'Brien* Court was the constitutionality of the 1965 amendment as applied to the particular act of destroying the draft card.

The *O'Brien* Court premised its analysis on its understanding of the governmental purpose underlying the 1965 amendment. The Court presumed that the challenged amendment was adopted in an effort to regulate nonspeech conduct.<sup>99</sup> It also presumed that, despite the absence of a purposeful effort to restrict protected expression, the amendment had had an adverse effect on protected expression such as O'Brien's.<sup>100</sup> Recognizing this convergence of circumstances, the Court examined this conduct regulation with a test significantly more rigorous than the rational basis test.<sup>101</sup> Indeed, in announcing what would later become known as the incidental regulation test, the *O'Brien* Court held that, in order to sustain a governmental regulation against a free speech challenge, the government must show that, first, the regulation "is within the Constitutional power of the Government"; second, the governmental interest is "unrelated to the suppression of free expression"; third, the regulation furthers a "substantial governmental interest"; and fourth, the regulation is "no greater than is essential to the furtherance of that interest."<sup>102</sup>

It is apparent that the Court has used the incidental regulation

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94. *Id.* at 370.

95. *Id.* at 371 & n.6.

96. *Id.* at 371; *O'Brien v. United States*, 376 F.2d 538, 541-42 (1st Cir. 1967).

97. *O'Brien*, 391 U.S. at 372.

98. *Id.* at 376.

99. *Id.* at 375.

100. *Id.* at 376-77. The Court merely assumed that O'Brien's conduct was protected. *Id.* at 376.

101. *Id.* at 377; see *United States v. Albertini*, 472 U.S. 675, 689 (1985). Through the use of this test, the Court indicated that it would focus on the nature of the asserted governmental interest in the regulation. See *O'Brien*, 391 U.S. at 37; Note, *supra* note 7, at 671-72.

102. *O'Brien*, 391 U.S. at 377. The order of the four prongs of the incidental regulation test has been reorganized for analytical reasons that will be developed more fully in the text. For a summary of the analysis of these prongs, see *infra* text accompanying notes 314-36.

test to focus on those alleged abridgments of protected expression that arise from the effect of the generally applicable regulations of non-protected conduct. Even when the effect on protected speech was dramatic,<sup>103</sup> the adverse impact of such regulations was nonpurposeful, and was therefore considered incidental.<sup>104</sup>

The four prongs of the *O'Brien* standard are distinct from, but easily comparable to, the elements of tests that the Court has applied to content or TPM regulations. The constitutional power prong was primarily an examination, under due process standards, of the government's ability to regulate in the area.<sup>105</sup> The function of the unrelat- edness prong, like the content-neutrality prong of the TPM test, was to confirm that the challenged regulation was enacted for purposes independent of regulating the content of protected expression.<sup>106</sup> Analogous to the compelling interest subtest, the substantial govern- mental interest prong evaluated the quality of the governmental inter- est asserted on behalf of the regulation.<sup>107</sup> The no greater than essential prong, like the least restrictive alternative analysis in a strict scrutiny test, was a means criterion.<sup>108</sup>

Although commentators have criticized the *O'Brien* Court,<sup>109</sup> there was, until quite recently, nearly universal agreement that the *O'Brien* test was an appropriate standard for judicial review of non- speech governmental regulations.<sup>110</sup> In the two decades since *O'Brien*, the Court has applied the test frequently;<sup>111</sup> yet it has changed the test incrementally, and correspondingly, has limited the protection of free speech interests.

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103. *O'Brien's* jail term is an example of a "dramatic" effect on protected speech. See *O'Brien*, 391 U.S. at 369 n.2.

104. For a discussion of the distinction between purposeful and incidental restrictions of speech, see Schauer, *supra* note 1, at 782; Day, *supra* note 6, at 209-10.

105. See *O'Brien*, 391 U.S. at 377.

106. *Id.* at 385-86.

107. See *id.* at 381 ("vital interest in having a system for raising armies").

108. See *id.* at 382 ("an appropriately narrow means"). Any means test is a test of the sincerity of the government's asserted purpose. See, e.g., *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 295 (1985) (Rehnquist, J., dissenting); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464, 469 (1969).

109. See L. TRIBE, *supra* note 4, at 982-83; Stone, *supra* note 2, at 110-11; see also Redish, *supra* note 6, at 149 (stating that "*O'Brien* illustrates how defining the relevant governmental interest can alter the mode of analysis").

110. See *Arcara v. Cloud Books, Inc.*, 106 S. Ct. 3172, 3179 (1986) (Blackmun, J., dis- senting).

111. See *infra* text accompanying notes 113-305. The decision whether to categorize a decision as an incidental regulation case was based, for present purposes, on an assessment of the significance of the issue to the Court's ultimate decision. Basically, this article discusses cases in which the Court considered the government's argument that the challenged restriction was a nonpurposeful regulation of noncommunicative conduct.



### III. THE POST-*O'BRIEN* HISTORICAL DEVELOPMENT OF THE INCIDENTAL REGULATION DOCTRINE

In each of the post-*O'Brien* decisions discussed below, the Court has either concluded or assumed that the activity in question is protected.<sup>112</sup> Concentration on this set of decisions permits the development of an understanding of the status of the incidental regulation doctrine. Taken together, these decisions demonstrate an eroding judicial commitment to free speech values.

#### A. *Procunier v. Martinez*

After the *O'Brien* decision, one of the earliest applications of the incidental regulation standard was in *Procunier v. Martinez*.<sup>113</sup> In *Procunier*, a class of inmates in a California prison challenged the prison's policy regarding mail censorship.<sup>114</sup> The Court, in a unanimous decision, determined that the critical issue in the case was "the appropriate standard of review."<sup>115</sup> To address that issue, the Court examined "decisions . . . dealing with the general problem of incidental restrictions on First Amendment liberties imposed in furtherance of legitimate governmental activities."<sup>116</sup> Following this review, the *Procunier* Court applied the test from *O'Brien*.<sup>117</sup>

The *Procunier* Court placed the burden on the government to show that its mail censorship regulations furthered an "important or substantial governmental interest unrelated to the suppression of expression."<sup>118</sup> The substantial state interest was security and safety in the prison setting.<sup>119</sup> Because this was an "interest unrelated to the suppression of expression,"<sup>120</sup> the Court determined that the government satisfied three of the four prongs.<sup>121</sup> The Court concluded, however, that the government had "failed to show that these broad

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112. See, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). This article does not address the issue of whether certain conduct should be given protected status.

113. 416 U.S. 396 (1974).

114. *Id.* at 398. The plaintiffs also challenged a regulation banning attorney-client interviews by law students and legal paraprofessionals, but that claim is not germane to this discussion. See *id.*

115. *Id.* at 406.

116. *Id.* at 409.

117. *Id.* at 412-14; see Comment, *Backwash Benefits for Second Class Citizens: Prisoners' First Amendment and Procedural Due Process Rights*, 46 U. COLO. L. REV. 377, 402 n.111 (1975); Note, 6 SETON HALL L. REV. 167, 178 (1974).

118. *Procunier*, 416 U.S. at 413.

119. *Id.*

120. *Id.*

121. *Id.* at 413-16. But cf. Comment, *supra* note 117, at 401 (purpose in *Procunier* was censorial, thus the *O'Brien* test was inappropriate). Apparently, the Court presumed the

restrictions were . . . necessary,"<sup>122</sup> and therefore held that the mail censorship regulations were unconstitutional.<sup>123</sup> In its first application of the incidental regulation standard, the Court indicated that the means prong of the *O'Brien* test was more rigorous than a mere rational basis inquiry.

### B. *The Young v. American Mini Theatres Concurrence*

Justice Powell's concurring opinion in *Young v. American Mini Theatres*<sup>124</sup> marked the next significant development in the evolution of the incidental regulation doctrine. The city of Detroit had passed a zoning ordinance requiring the dispersion of adult motion picture theaters.<sup>125</sup> Two theater owners challenged its constitutionality.<sup>126</sup> Justice Powell, apparently casting the swing vote, based his decision on the determination that the ordinance "implicat[ed] First Amendment concerns only incidentally and to a limited extent."<sup>127</sup>

Justice Powell first determined that the "Anti-Skid Row Ordinance" did not have the effect of suppressing expression.<sup>128</sup> He concluded that, under the circumstances, the appropriate test was the *O'Brien* test,<sup>129</sup> and consequently found that its prongs were met.<sup>130</sup>

Although the satisfaction of the means prong of the *O'Brien* test

satisfaction of the first prong, not even mentioning it in its application of the *O'Brien* test. For a discussion of this prong, see *infra* notes 314-15 and accompanying text.

122. *Procunier*, 416 U.S. at 415. *Procunier* is doctrinally important because it offered a definition of the means prong: The means "must be generally necessary to protect one or more . . . legitimate governmental interests." *Id.* at 414. The Court, however, subsequently limited this interpretation. See *United States v. Albertini*, 472 U.S. 675 (1985); *infra* text accompanying notes 263-78.

123. *Procunier*, 416 U.S. at 416; see Note, *supra* note 117, at 180. The *Procunier* Court held that a governmental restriction failed to satisfy the incidental regulation test. *Procunier*, 416 U.S. at 416. To the extent that *Procunier* is considered to be one of the *O'Brien* progeny, it remains as a refutation of Professor Stone's assertion that "[the *O'Brien* standard] has never resulted in the invalidation of an incidental restriction of speech." Stone, *supra* note 2, at 110-11.

124. 427 U.S. 50, 73 (1976) (Powell, J., concurring). For a discussion of *American Mini Theatres*, see Note, *Young v. American Mini Theatres, Inc.: Creating Levels of Protected Speech*, 4 HASTINGS CONST. L.Q. 321, 351 (1977); and Note, *Equal Protection and the First Amendment: Zoning Away Skid Row*, 31 U. MIAMI L. REV. 713 (1977).

125. *American Mini Theatres*, 427 U.S. at 52.

126. *Id.* at 55.

127. *Id.* at 73 (Powell, J., concurring); see Recent Case, 42 MO. L. REV. 461, 467 (1977).

128. *American Mini Theatres*, 427 U.S. at 77 (Powell, J., concurring). Justice Powell had concluded that the "impact of the ordinance . . . is incidental and minimal." *Id.* at 78.

129. *Id.* at 79; see Case Comment, *Ordinance Banning "For Sale" Signs Violates First Amendment*, 1978 WASH. U.L.Q. 258, 261 n.32.

130. *American Mini Theatres*, 427 U.S. at 80 (Powell, J., concurring). Justice Powell found the government's interest in zoning to be "both important and substantial." *Id.* He also concluded that the purposes underlying the ordinance were "unrelated to any suppression of free expression." *Id.* at 80-81. In this regard, Justice Powell emphasized that "an intent or

was the primary issue that Justice Powell addressed in his concurrence, the doctrinal significance of his opinion may be its analysis of the unrelatedness prong, which had not yet been defined.<sup>131</sup> Justice Powell, in a footnote, stated that "an intent or purpose to restrict the communication itself because of its nature would make the *O'Brien* test inapplicable."<sup>132</sup> In this fashion, Justice Powell demonstrated that the unrelatedness prong is essentially an examination of the underlying purpose or motive that animated the governmental action.<sup>133</sup> Justice Powell's analysis also suggested that the unrelatedness prong serves as a threshold for the other prongs, and therefore, for the application of the incidental regulation standard.<sup>134</sup>

### C. *Buckley v. Valeo*

Decided in the same year as *American Mini Theatres*, the Court in *Buckley v. Valeo*<sup>135</sup> also addressed the threshold role of the unrelatedness prong in the incidental regulation standard. In *Buckley*, the Court confronted various provisions of the Federal Election Campaign Act Amendments of 1974, which, in response to the perceived problems of excessive campaign spending and the Watergate era, represented the congressional limitations on political campaign contributions and expenditures.<sup>136</sup> The court of appeals considered the regulation of contributions and expenditures an incidental regulation of free expression, and relied upon *O'Brien* to uphold the Act.<sup>137</sup>

In reversing, the Supreme Court of the United States first deter-

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purpose to restrict the communication itself because of its nature would make the *O'Brien* test inapplicable." *Id.* at 81 n.4.

As in *Procunier*, the most salient issue in Justice Powell's concurrence appeared to be the means prong. *See id.* at 81-82. Justice Powell's evaluation of the dispersion program led him to conclude that "the degree of incidental encroachment . . . was the minimum necessary." *Id.* at 81. Hence, Justice Powell concluded that this ordinance was "not greater than necessary." *Id.* at 81-82.

Justice Powell's opinion was clearly hedged by various qualifications. He was forced to distinguish the earlier case of *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), stating that he recognized the "possibility of using the power to zone as a pretext for suppressing expression." *American Mini Theatres*, 427 U.S. at 84 (Powell, J., concurring). Because he found that no such pretext was involved in this case, he agreed with the majority that the ordinance survived the constitutional challenge. *Id.*

131. *American Mini Theatres*, 427 U.S. at 81 n.4 (Powell, J., concurring).

132. *Id.*

133. *See id.*; *see also* Note, *supra* note 7, at 673 (The question posed by the unrelatedness prong is "whether a contested statute is motivated by a desire to regulate speech.").

134. *American Mini Theatres*, 427 U.S. at 81 n.4 (Powell, J., concurring).

135. 424 U.S. 1 (1976) (per curiam).

136. 424 U.S. at 6-7.

137. *Id.* at 15-16; *see* Nicholson, *Buckley v. Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974*, 1977 WIS. L. REV. 323, 333 n.43.

mined that the Act was "aimed in part at equalizing the relative ability of all voters to affect electoral outcomes."<sup>138</sup> Under these circumstances, the Court found that the congressional purpose was an "interest in regulating" that "[arose] in some measure because the communication allegedly integral to the conduct [was] itself thought to be harmful."<sup>139</sup> In addition to the integral communicative nature of the conduct, the Court noted that the regulation of contributions "could have a severe impact on political dialogue."<sup>140</sup> In this fashion, the *Buckley* Court concluded that, because the Act was aimed at controlling money in the political process, and because money was inevitably related to speech, the threshold for applying the *O'Brien* test was not present.<sup>141</sup> It found *O'Brien* to be "inapposite, for money is a neutral element not always associated with speech but a necessary and integral part of many, perhaps most, forms of communication."<sup>142</sup> Thus, the regulation in *Buckley* failed the unrelatedness prong of the incidental regulation standard.

For present purposes, the *Buckley* decision is significant because it identified two issues regarding the unrelatedness prong that courts must address before examining the validity of the contested regulation. First, courts must determine that the purposes underlying the challenged regulation are aimed at nonspeech behavior rather than speech behavior.<sup>143</sup> Second, courts must determine that these non-speech purposes are genuinely unrelated to the suppression of free expression.<sup>144</sup>

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138. *Buckley*, 424 U.S. at 17; see Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1, 24-25.

139. *Buckley*, 424 U.S. at 17 (quoting *United States v. O'Brien*, 391 U.S. 367, 382 (1968)); see Polsby, *supra* note 138, at 25.

140. *Buckley*, 424 U.S. at 21.

141. *Id.* at 17.

142. *Id.* at 65 n.76. Since the Court's conclusion in *Buckley*, at least one commentator has concluded that *Buckley* was not an incidental regulation doctrine decision. See Post, *The Management of Speech: Discretion and Rights*, 1984 SUP. CT. REV. 169, 194 n.110. This article includes *Buckley* within the incidental regulation doctrine, as did the court of appeals, because, even if the incidental regulation test was not satisfied, the Court applied it. See Wright, *supra* note 51, at 1008. Judge Wright has presented a persuasive critique of the *Buckley* majority's analysis. He would apply the *O'Brien* standard because the Act regulated "the excessive use of money as a blight on the political process." *Id.*

143. See *Buckley*, 424 U.S. at 65 n.76.

144. See *id.*; Note, *supra* note 7, at 673. The *Buckley* decision also suggests that determining the satisfaction of the unrelatedness prong is not a narrow test. The campaign expenditure regulation applied to all money, not to money expended by a particular viewpoint. See *Buckley*, 424 U.S. at 17. The fact that the *Buckley* Court concluded that a subject matter regulation failed the unrelatedness prong undercuts any argument that unrelatedness is limited to viewpoint discrimination. See Wright, *supra* note 51, at 1008 n.36.

D. *Linmark Associates v. Township of Willingboro*

Like *Buckley*, the Court's decision in *Linmark Associates v. Township of Willingboro*<sup>145</sup> is significant because of its treatment of the unrelatedness prong. The township, purportedly to avoid the flight of its white residents, passed an ordinance prohibiting the posting of "for sale" signs on residential properties.<sup>146</sup> The challengers wanted to place such signs on their property, and thus brought a declaratory action against the township.<sup>147</sup>

Although the township argued that the appropriate standard was the incidental regulation standard, the Court eventually determined that the regulation was a subject matter regulation, and accordingly, applied the content regulation standard.<sup>148</sup> Under the more stringent scrutiny, the Court indicated that, because the township had merely assumed that the regulation would reduce panic selling, it was unable to meet its burden of persuasion.<sup>149</sup> In this regard, the township's failure to provide any data regarding "white flight" and "panic selling" was fatal.<sup>150</sup>

Although *Linmark* is not actually an incidental regulation decision,<sup>151</sup> it sheds some light on the nature of the unrelatedness prong. By rejecting the use of the incidental regulation test, the Court concluded, at least implicitly, that regulating truthful speech for the purpose of preventing white flight and panic selling was not unrelated to the suppression of free expression.<sup>152</sup>

E. *Brown v. Glines*

The next landmark decision in the history of the incidental regulation standard was *Brown v. Glines*.<sup>153</sup> Justice Powell's majority opinion provides some insight into the nature of the means prong of the incidental regulation standard.

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145. 431 U.S. 85 (1977).

146. *Id.* at 87-88.

147. *Id.* at 86.

148. *Id.* at 96-97; see Note, *The Effect of First Amendment Protection of Commercial Speech on Municipal Sign Ordinances*, 29 SYRACUSE L. REV. 941, 949 (1978). In addition to arguing for the applicability of the incidental regulation test, the township advanced other theories: First, a definitional exception based on the commercial speech doctrine; and second, a TPM regulation. *Linmark*, 431 U.S. at 92-94. The Court, however, primarily focused on determining the appropriate standard. *Id.* at 94.

149. *Linmark*, 431 U.S. at 95-96.

150. *Id.* at 96.

151. The Court reserved any ruling as to whether the ordinance would survive the incidental regulation test. *Linmark*, 431 U.S. at 94 n.7.

152. See *id.* at 96.

153. 444 U.S. 348 (1980).

*Glines* involved Air Force regulations requiring an officer to obtain approval of the base commander before circulating any petitions.<sup>154</sup> *Glines*, who was a captain in the Air Force Reserve, drafted petitions to Congress, complaining about various Air Force grooming standards. He was reassigned when he gave one of the petitions to another military person without seeking prior approval.<sup>155</sup> He brought an action challenging the disciplinary reassignment, and prevailed at the trial and appellate levels.<sup>156</sup> The Supreme Court of the United States, however, upheld the regulations.<sup>157</sup>

Justice Powell applied the incidental regulation standard and found that the regulations protected the substantial governmental interest of military morale and readiness, which was "unrelated to the suppression of free expression."<sup>158</sup> With respect to the means prong, the Court determined that the regulations did not control the use of regular outlets of information, such as newsstands, on Air Force bases.<sup>159</sup> Under these facts, the Court held that the Air Force regulations were "no more than is reasonably necessary" to implement the military goals.<sup>160</sup>

The *Glines* decision sparked vigorous dissents regarding the application of the incidental regulation standard. Justice Brennan, for example, attacked the majority's analysis of the means test,<sup>161</sup> concluding that the Air Force regulations were an "excessive response" to any military interest in morale and discipline.<sup>162</sup> Perhaps more significantly, Justice Stewart's dissent focused on the threshold issue of unrelatedness.<sup>163</sup> Under his reasoning, this regulation could never survive the unrelatedness prong because the preclearance regulation, as applied in this case, was a purposeful, content restriction.<sup>164</sup> Under these circumstances, the use of the incidental regulation test was inappropriate.<sup>165</sup>

Justice Stewart also raised the issue of whether the Court examined the challenged regulation on its face or as applied to the

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154. *Id.* at 351.

155. *Id.*

156. *Id.* at 351-52.

157. *Id.*

158. *Id.* at 354-55; see Comment, *Brown v. Glines: Bowing to the "Shibboleth of Military Necessity,"* 47 BROOKLYN L. REV. 249, 258 (1980).

159. *Glines*, 444 U.S. at 355.

160. *Id.*

161. *Id.* at 367 (Brennan, J., dissenting); see Comment, *supra* note 158, at 261-62, 262 n.74.

162. *Glines*, 444 U.S. at 368 (Brennan, J., dissenting).

163. *Id.* at 377 (Stewart, J., dissenting).

164. *Id.*

165. See *id.*

facts of this particular case. As the Court demonstrated in *Linmark*, mere facial neutrality is not sufficient to determine unrelatedness.<sup>166</sup> The *Glines* Court, however, insisted on limiting its analysis to the face of the regulation. The problem, as Justice Stewart suggested, is that almost any statute can be drafted in such a way as to appear facially neutral.<sup>167</sup> By ignoring the application of the statute, the Court failed to examine the purposes underlying the particular regulation.<sup>168</sup> As such, the *Glines* decision may mark the start of a degenerative phase of the incidental regulation standard.

F. *Consolidated Edison Co. of New York v. Public Service  
Commission of New York*

The unrelatedness issue was also critical in *Consolidated Edison Co. of New York v. Public Service Commission of New York*.<sup>169</sup> In direct contrast to *Glines*, however, the Court appeared to understand the need to examine a regulation as it is applied.<sup>170</sup>

Consolidated Edison had placed written statements asserting its favorable view towards nuclear energy in its billing envelope.<sup>171</sup> Upon an environmental group's request to place its own insert in the next month's billing envelope in order to rebut Consolidated Edison's statements, the Public Service Commission of New York banned all such inserts.<sup>172</sup> After Consolidated Edison's unsuccessful appeals of the commission's order, the Supreme Court of the United States reversed.<sup>173</sup>

The unrelatedness issue was raised when the commission argued that, "because the order '[was] only secondarily concerned with the subject matter of Consolidated Edison communications,' " the appli-

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166. *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 93 (1977); see *Buckley v. Valeo*, 424 U.S. 1, 65 n.76 (1976) (per curiam). The issue of facial neutrality appears to have been settled as early as the *O'Brien* decision. After all, the statute in *O'Brien* was facially neutral, but the Court examined its constitutionality as applied to *O'Brien*. See *supra* text accompanying notes 91-111.

167. See *Glines*, 444 U.S. at 374-76 (Stewart, J., dissenting).

168. See *id.* at 376. It is difficult to reconcile the Court's treatment of the unrelatedness prong in *Glines* with either prior or subsequent decisions. Perhaps the only explanation is that *Glines* was a decision involving the military. See Post, *supra* note 142, at 199-200; cf. *Goldman v. Weinberger*, 475 U.S. 503, 514-15 (1986) (Brennan, J., dissenting) (free exercise claim).

169. 447 U.S. 530 (1980). The case also raised a corporate speech issue, but that issue will not be addressed here. See *id.* at 533-35.

170. See *id.* at 540 n.9. Justice Powell wrote both the *Consolidated Edison* and *Glines* opinions.

171. *Consolidated Edison*, 447 U.S. at 532.

172. *Id.* Although the point will be developed in the text, it should be noted that the commission's order was a subject matter regulation.

173. *Id.* at 533.

cable standard is the incidental regulation test.<sup>174</sup> The Court rejected this argument, specifically holding that, because the "bill insert prohibition does not further a governmental interest unrelated to the suppression of speech,"<sup>175</sup> the regulation failed the unrelatedness prong.<sup>176</sup>

The Court's opinion revealed several noteworthy points. First, as in *Buckley*, the *Consolidated Edison* Court treated the unrelatedness prong as a threshold issue that must be satisfied before applying the other prongs of the incidental regulation test.<sup>177</sup> In this fashion, the *Consolidated Edison* decision demonstrated that, as of 1980, the unrelatedness prong was a serious, nondeferential examination of governmental purposes.

Second, the Court implicitly answered one of the unresolved issues regarding the incidental regulation test: Whether a subject matter regulation could satisfy the unrelatedness prong. Because the restriction in *Consolidated Edison* was a complete ban on all billing inserts, it would have to be considered a subject matter regulation, rather than a more narrow viewpoint regulation.<sup>178</sup> For doctrinal purposes, the *Consolidated Edison* decision demonstrates that the government cannot satisfy the unrelatedness prong merely by using a subject matter regulation rather than a viewpoint regulation.<sup>179</sup>

Third, it is difficult, if not impossible, to reconcile the decision in *Consolidated Edison* with that in *Glines*. Yet the Court continued to use the incidental regulation standard, and in fact, began to apply it outside of its earlier confines.

#### G. *NAACP v. Claiborne Hardware Co.*

*NAACP v. Claiborne Hardware Co.*<sup>180</sup> illustrates the Court's application of the incidental regulation standard in a new context: First amendment associational rights. In *Claiborne*, the Court overturned, on first amendment grounds, a judgment against black civil

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174. *Id.* at 540 n.9 (quoting Brief for Appellee at 9 n.3). The commission also argued that the restriction was merely a TPM regulation. *See id.* at 535.

175. *Id.* at 540 n.9. Because the ban imposed by the government in this case was a subject matter regulation, the Court's decision should be recognized as undercutting any argument that the unrelatedness prong is violated only by a viewpoint regulation. *See id.*

176. *Id.*

177. *See id.*; *Buckley v. Valeo*, 424 U.S. 1, 65 n.76 (1976) (per curiam).

178. Day, *supra* note 6, at 199 n.24; Stone, *supra* note 12, at 239-42. For a discussion of a range of content discrimination, see Baker, *supra* note 12, at 959.

179. *See Consolidated Edison*, 447 U.S. at 537-40. None of the restrictions that the Court subjected to the incidental regulation test, with the possible exception of the draft card regulation in *O'Brien*, were readily identifiable as viewpoint regulations.

180. 458 U.S. 886 (1982).



rights protesters.<sup>181</sup>

In the late 1960's, black citizens in a Mississippi community presented demands for racial equality to the all-white city officials.<sup>182</sup> When the demands were rejected, the black civil rights activists instituted an economic boycott of white merchants in the city.<sup>183</sup> The merchants responded by suing in state court, claiming that the boycott was illegal, and seeking to enjoin future boycotts.<sup>184</sup> The trial court rejected the defendants' first amendment associational freedom assertion, and returned a verdict against the boycotters in the amount of approximately \$1¼ million.<sup>185</sup> Although the Supreme Court of Mississippi upheld the judgment under a tort theory,<sup>186</sup> the Supreme Court of the United States reversed.<sup>187</sup>

The *Claiborne* opinion, written by Justice Stevens, is long and convoluted. For present purposes, the first step of the Court's analysis was the determination that "the boycott clearly involved constitutionally protected activity."<sup>188</sup> The Court then determined the appropriate standard by which to evaluate the restriction imposed by the state court tort judgment.<sup>189</sup> The Court stated that a "[g]overnmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances."<sup>190</sup>

It is clear, therefore, that the *Claiborne* Court applied the *O'Brien* test.<sup>191</sup> It concluded that the state court's findings were "constitutionally insufficient," and thus the restriction failed to satisfy the means prong.<sup>192</sup> Finally, the Court held that "[t]o impose liability without a finding that the NAACP . . . ratified unlawful conduct would impermissibly burden the rights of political association."<sup>193</sup>

One implication of *Claiborne* is that, with sufficiently detailed findings of fact, a state court judgment of this magnitude could have

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181. *Id.* at 934.

182. *Id.* at 889; see Note, *supra* note 7, at 659-60.

183. *Claiborne*, 458 U.S. at 889.

184. *Id.*

185. *Id.* at 892-93.

186. *Id.* at 894.

187. *Id.* at 934.

188. *Id.* at 911.

189. *Id.* at 912.

190. *Id.*

191. See *id.*; Harper, *The Consumer's Emerging Right to Boycott: NAACP v. Claiborne Hardware and Its Implications for American Labor Law*, 93 YALE L.J. 409, 413 n.20 (1984); see also Note, *The Political Boycott: An Unprivileged Form of Expression*, 1983 DUKE L.J. 1076, 1088 (arguing that the *Claiborne* Court misapplied the incidental regulation test).

192. *Claiborne*, 458 U.S. at 933-34.

193. *Id.* at 931; see Harper, *supra* note 191, at 417.

withstood constitutional muster. Yet the use of a state court judgment as a weapon in a civil rights struggle is more analogous to a congressional attempt to regulate political activities through regulating campaign contributions. Under the unrelatedness analysis in *Buckley*,<sup>194</sup> even a detailed factual record would constitute a regulatory effort integral to the content of the speech. Following the *Buckley* analysis, any court arguably would direct its order towards the speech itself. The *Clairborne* decision was curiously silent on that issue, its silent treatment perhaps constituting more than "benign neglect."

#### H. *Seattle Times Co. v. Rhinehart*

Although the *Clairborne* opinion never adequately addressed the question of whether action by a state court constituted a regulation unrelated to the suppression of expression, this issue was somewhat clarified two years later in *Seattle Times Co. v. Rhinehart*.<sup>195</sup> In a unanimous opinion written by Justice Powell, the Court rejected a free speech challenge to the use of a protective order under Rule 26(c) of the Federal Rules of Civil Procedure.<sup>196</sup>

Rhinehart was the leader of a small religious group.<sup>197</sup> After the defendant newspaper wrote articles about Rhinehart and the group's other members, Rhinehart brought a defamation action in state court.<sup>198</sup> When the newspaper undertook discovery of the religious group's financial condition, Rhinehart sought a protective order under the state version of Rule 26(c).<sup>199</sup> The trial court, after a hearing, issued the order, prohibiting the dissemination of any discovered financial information.<sup>200</sup> The newspaper, however, challenged the nondissemination order.<sup>201</sup>

Applying the incidental regulation standard,<sup>202</sup> the *Rhinehart*

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194. See *supra* text accompanying notes 138-42.

195. 467 U.S. 20 (1984).

196. *Id.* at 29-37.

197. *Id.* at 22-23.

198. *Id.*

199. *Id.* at 24-25.

200. *Id.* at 27.

201. *Id.*

202. See Post, *supra* note 142, at 179-80 (The *Rhinehart* Court used the incidental regulation test from *Procunier* and *O'Brien*). But see Note, *Seattle Times v. Rhinehart: Making "Good Cause" a Standard for Limits on Dissemination of Discovered Information*, 47 U. PITT. L. REV. 547, 567 (1986) (not recognizing the Court's use of the incidental regulation standard).

Certain courts and commentators have concluded that *Rhinehart* did not involve first amendment considerations. *E.g.*, *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1119 (3d Cir. 1986); Note, *Seattle Times: What Effect on Discovery Sharing*, 1985 WIS. L. REV. 1055,

Court first examined the "extent of the impairment" of the newspaper's free speech interest, and found that it was not sufficient to raise the "specter of government censorship."<sup>203</sup> In this regard, the Court emphasized that the newspaper could publish financial information gathered from independent sources.<sup>204</sup>

The *Rhinehart* Court essentially found that there was a substantial governmental interest involved: Prevention of discovery abuse.<sup>205</sup> As to the means prong, the Court suggested that the protective order was "no greater than necessary" because the issue regarding the scope of the protective order had been decided at a hearing.<sup>206</sup> Under these circumstances, the Court held that the protective order did "not offend the First Amendment."<sup>207</sup>

The *Rhinehart* decision suggests that the use of an adversary hearing alone satisfies the means prong of the incidental regulation test.<sup>208</sup> Regarding the unrelatedness prong, the *Rhinehart* Court failed to use the degree of scrutiny used in *Consolidated Edison*.<sup>209</sup> This doctrinally quizzical aspect of *Rhinehart* pales, however, in comparison to the Court's analysis in two other decisions that year.

### I. *City Council v. Taxpayers for Vincent*

The first of these two decisions was *City Council v. Taxpayers for Vincent*.<sup>210</sup> The plaintiffs consisted of both the campaign committee for, and sign service company affiliated with, Vincent, a political candidate.<sup>211</sup> As part of the campaign, the plaintiffs were attaching Vincent's political posters to the utility poles in the election district.<sup>212</sup>

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1070. *But see* *Worrell Newspapers of Indiana, Inc. v. Westhafer*, 739 F.2d 1219, 1223-24 n.4 (7th Cir. 1984). Yet the *Rhinehart* Court decided that, under the circumstances, the governmental interests satisfied the incidental regulation standard, outweighing the extant free speech interests. *Rhinehart*, 467 U.S. at 35-36.

203. *Rhinehart*, 467 U.S. at 32.

204. *Id.* at 34.

205. *Id.*

206. *See id.* at 24-25, 36-37.

207. *Id.* at 37. Justices Brennan and Marshall essentially agreed with the use of the incidental regulation standard in this case. *See id.* at 37-38 (Brennan, J., concurring).

208. *Id.* at 36-37. This should not be surprising because such a hearing probably would be the least restrictive alternative for achieving control over discovery. *See supra* text accompanying note 14. Interestingly, one commentator concluded that the *Rhinehart* Court abandoned the traditional means test. *See Post, supra* note 142, at 181-82.

209. *See Post, supra* note 142, at 181 n.65. Professor Post concluded that the *Rhinehart* Court "was deeply misguided." *Id.* at 236. He argued convincingly that the protective order should have failed the unrelatedness prong. *See id.* at 180-81. His further conclusion that the facts would fail the means test, however, is less persuasive. *See id.* at 181-82.

210. 466 U.S. 789 (1984).

211. *Id.* at 792-93.

212. *Id.*

Pursuant to a Los Angeles city ordinance that banned the posting of any signs on public utility poles, the city routinely removed Vincent's political campaign posters, along with other signs.<sup>213</sup> The plaintiffs sued to enjoin the city's removal of these campaign posters.<sup>214</sup>

The facts of *Taxpayers for Vincent* suggest that this case would be an unlikely candidate for the application of the incidental regulation test. No symbolic speech was involved, and the speech at issue was political.<sup>215</sup> The Court, however, relied primarily on *O'Brien* to resolve the free speech issue posed by the city's sign removal policy.<sup>216</sup>

In applying the incidental regulation test, the *Taxpayers for Vincent* Court determined that the ordinance was unrelated to the suppression of expression because the trial court had found that the ordinance applied to all candidates.<sup>217</sup> The Court's unprecedented suggestion that mere evenhandedness can satisfy the unrelatedness prong of the incidental regulation standard is patently inconsistent with *Consolidated Edison*,<sup>218</sup> and signifies an abrupt departure from prior doctrine.<sup>219</sup>

With regard to the other prongs of the incidental regulation test, the Court determined that the governmental interest in avoiding visual clutter satisfied the substantial governmental interest prong,<sup>220</sup> and that the means prong was satisfied because the ban on the political campaign posters was part of a general ban on visual clutter.<sup>221</sup> Accordingly, the Court concluded that the ordinance survived the incidental regulation test.<sup>222</sup> The *Taxpayers for Vincent* Court, how-

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213. *Id.* at 793.

214. *Id.*

215. *See id.* Political speech is frequently treated as though it were on the "highest rung of the hierarchy of First Amendment values." *Carey v. Brown*, 447 U.S. 455, 467 (1980). The *Taxpayers for Vincent* opinion, however, did not rely on such an analysis.

216. *See Taxpayers for Vincent*, 466 U.S. at 804-05; *see Note, supra* note 50, at 229.

217. *See Taxpayers for Vincent*, 466 U.S. at 804-05.

218. *See supra* text accompanying notes 174-79.

219. *See Day, supra* note 6, at 212. Perhaps the most obvious sign of this departure is the fact that Justice Stevens provided no authority for the proposition that the mere evenhanded application of a regulation constitutes viewpoint neutrality. *See Taxpayers for Vincent*, 466 U.S. at 804.

220. *Taxpayers for Vincent*, 466 U.S. at 807.

221. *Id.* at 808-10.

222. *Id.* at 817. As an alternative basis for its decision, the *Taxpayers for Vincent* Court held that, because the ban was applied evenhandedly, it also satisfied the TPM test. *See id.* at 808-10. The use of the TPM test and the incidental regulation test in these factual circumstances marks an important doctrinal development because the Court explicitly relied on the theory that the two tests were interchangeable in deciding a classic symbolic speech case. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984). In *Clark*, the Court decided that, even if sleeping overnight were a protected form of expression, federal government regulations of national parklands satisfied both the TPM and incidental regulation tests. *See id.* at 298.

ever, had departed radically from the traditional incidental regulation standard.

J. *Clark v. Community for Creative Non-Violence*

That same year, the Court decided *Clark v. Community for Creative Non-Violence*.<sup>223</sup> The Court's analysis in *Clark* began with the observation that, although the National Park Service had promulgated regulations that limited overnight camping to "campgrounds,"<sup>224</sup> neither LaFayette Park nor the Mall in Washington, D.C. was designated as a campground.<sup>225</sup> Upon application, the National Park Service issued the plaintiff, Community for Creative Non-Violence (CCNV), a permit to conduct a demonstration at these locations regarding the plight of the homeless.<sup>226</sup> Although the permit allowed the erection of two symbolic tent sites, the National Park Service specifically denied permission for the CCNV demonstrators to sleep overnight.<sup>227</sup>

Under these facts, *Clark* appeared to be a classic symbolic speech case, and therefore, a likely candidate for analysis under the incidental regulation test. Indeed, at one point, the Court applied the *O'Brien* test.<sup>228</sup> Yet, pursuant to the theory that the prohibition on overnight sleeping was solely a regulation of the "manner" in which the expressive activity could be conducted, the Court also examined the anticamping regulation under the TPM test.<sup>229</sup>

Although the TPM test appears to be the basis of the Court's rationale, *Clark* also is doctrinally significant for its application of the incidental regulation standard. The *Clark* decision, concluding that the "four-factor standard" of *O'Brien* was "little, if any, different from the standard applied to time, place, or manner restrictions,"<sup>230</sup> provided new dimensions to the incidental regulation test. In fact, the *Clark* Court may have created a hybrid test, applicable to all content-neutral regulations.<sup>231</sup> The impact of this hybridization on the incidental regulation standard may be profound. In particular, *Clark*

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223. 468 U.S. 288 (1984).

224. *Id.* at 290.

225. *Id.*

226. *Id.* at 291-92.

227. *Id.* at 292.

228. *Id.* at 298-99.

229. *Id.* at 293-98. One striking aspect of both *Clark* and *Taxpayers for Vincent* is the addition of the narrowly tailored prong to the *Heffron* formulation of the TPM test. *Id.* at 293; *Taxpayers for Vincent*, 466 U.S. at 808. By this process, both the TPM and incidental regulation tests reached a high degree of similarity.

230. *Clark*, 468 U.S. at 298.

231. See *City of Renton v. Playtime Theatres*, 476 U.S. 41 (1986); Day, *supra* note 6, at 215.

appears to reduce the protection traditionally afforded by the unrelatedness prong<sup>232</sup> because, under the *Clark* hybrid test, the scrutiny of the government's purposes would be relegated to merely a question of whether the government is neutral as to viewpoint.<sup>233</sup>

Some elaboration on this point, however, is necessary. In *O'Brien* and other incidental regulation cases, the government had to show that, even if the regulation had some impact on protected expression, it had been adopted for purposes unrelated to the suppression of protected speech.<sup>234</sup> Moreover, mere viewpoint neutrality had never traditionally constituted unrelatedness.<sup>235</sup> The *Clark* decision, however, appears to equate unrelatedness with viewpoint neutrality. Through this dilution of the unrelatedness prong, the *Clark* Court has drastically mitigated the level of protection afforded by the incidental regulation test.<sup>236</sup> Taken together, *Taxpayers for Vincent* and *Clark* may strip the incidental regulation test of its primary doctrinal significance: The unrelatedness inquiry.

#### K. *Wayte v. United States*

One year after *Clark*, the Court decided *Wayte v. United States*,<sup>237</sup> a contemporary version of *O'Brien*. After legislative action and Executive orders reestablished registration with the Selective Service System, the defendant, Wayte, refused to register.<sup>238</sup> During this time, the Selective Service had a "policy of passive enforcement."<sup>239</sup> Pursuant to its policy, the Selective Service sent Wayte a letter urging him to register.<sup>240</sup> Rather than respond, Wayte wrote letters to the

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232. See Day, *supra* note 6, at 222.

233. See *id.* at 223.

234. See *United States v. Albertini*, 472 U.S. 675, 687 (1985); *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

235. See generally Day, *supra* note 6, at 223.

236. For a discussion of the reduction of protection, see Schauer, *supra* note 1, at 787-88; Stone, *supra* note 2, at 110; and Note, *Clark v. Community for Creative Non-Violence: The Demise of First Amendment Protection for Symbolic Expression?*, 36 MERCER L. REV. 1371, 1398-99 (1985).

237. 470 U.S. 598 (1985).

238. *Wayte*, 470 U.S. at 600-01. The Military Selective Service Act provides:

[I]t shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

50 U.S.C. § 453(a) (1982).

239. *Wayte*, 470 U.S. at 601.

240. *Id.* at 601-02.

President, stating his intent not to register.<sup>241</sup> Wayte's letters, along with similar protest letters, were placed in a special file of the Selective Service.<sup>242</sup> The Selective Service eventually referred 286 names, including Wayte's, to the Department of Justice for further action.<sup>243</sup> With respect to those names, the Department established a "beg" policy under which it urged nonregistrants to comply.<sup>244</sup> The federal government also provided a grace period.<sup>245</sup> Wayte, however, never registered, and eventually was indicted.<sup>246</sup> As of the date of his trial, only thirteen of the 286 people had been indicted.<sup>247</sup>

After disposing of Wayte's challenge to the government's enforcement policy on selective prosecution grounds,<sup>248</sup> the Court addressed Wayte's first amendment challenge.<sup>249</sup> Wayte asserted that the selective enforcement policy violated both his right to free speech and his right to petition<sup>250</sup> because, although the policy "did not overtly punish protected speech as such, it inevitably created a content-based regulatory system with a concomitantly disparate, content-based impact on non-registrants."<sup>251</sup> The Court rejected Wayte's contention by applying the incidental regulation standard.<sup>252</sup>

The *Wayte* Court found neither the first nor third prongs to be in dispute.<sup>253</sup> Thus, the Court applied only the second and fourth prongs of the test.<sup>254</sup> The Court first concluded that the governmental interests in national security, prosecutorial efficiency, and the deterrence of nonregistration were sufficient to satisfy the second prong.<sup>255</sup> The Court then determined that the government's means did not impose any "special burden" on the defendant, emphasizing that the

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241. *Id.* at 601.

242. *Id.*

243. *Id.* at 602.

244. *Id.*

245. *Id.* at 603.

246. *Id.*

247. *Id.* at 604 n.3. The Selective Service estimated that, as of the time of Wayte's indictment, approximately 674,000 men had failed to register. *See id.* at 604 n.4. Although some of these failures may have been the result of oversight or ignorance, the numbers alone suggest that a serious problem existed for the Selective Service. *See Note, Constitutional Law: The Conflict of First Amendment Rights and the Motive Requirement in Selective Enforcement Cases*, 39 OKLA. L. REV. 498, 499 (1986).

248. *See Wayte*, 470 U.S. at 607-10. The Court utilized an equal protection analysis. *Id.* at 608.

249. *Id.* at 610.

250. *Id.* at 610 n.11. The Court subjected both challenges to a free speech analysis. *Id.*

251. *Id.*

252. *See id.* at 611-13.

253. *Id.* at 611.

254. *See id.* at 611-13.

255. *Id.*

“passive enforcement policy” was “only an interim enforcement.”<sup>256</sup> Under these circumstances, because the government could not locate most nonregistrants,<sup>257</sup> the Court concluded that the “policy . . . [met] the final requirement of the *O’Brien* test.”<sup>258</sup>

In some ways, *Wayte* was an uncomplicated case. In light of the *O’Brien* decision, there was little doubt that the government could satisfy the substantiality prong. The *Wayte* Court’s analysis of the means prong, however, was disturbing.<sup>259</sup> From a doctrinal perspective, the *Wayte* Court ignored the fact that the government’s decision to prosecute was based exclusively on passive enforcement.<sup>260</sup> In effect, the Court indicated that the means subtest was not particularly rigorous.<sup>261</sup> In this regard, the *Wayte* decision foreshadowed the Court’s decision in *United States v. Albertini*.<sup>262</sup>

#### L. *United States v. Albertini*

The Court subsequently clarified the problematic analysis in *Wayte* of the means prong in the 1985 decision of *United States v. Albertini*.<sup>263</sup> In 1972, Albertini was convicted of “conspiracy to injure Government property” upon obtaining and destroying secret Air Force documents.<sup>264</sup> At that time, he received a “bar letter,” forbidding him to enter the base without the written permission of the base commander.<sup>265</sup>

In 1981, after the announcement of an open house at an Air Force base, Albertini and some friends reentered the base without written permission<sup>266</sup> in order to undertake a “peaceful demonstration criticizing the nuclear arms race.”<sup>267</sup> He unfurled a banner and distributed leaflets without disrupting any activities.<sup>268</sup> He was convicted, however, of violating a federal statute<sup>269</sup> that makes it

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256. *Id.* at 613.

257. *Id.*

258. *Id.*

259. *See id.*

260. *See* Shane, *Equal Protection, Free Speech, and the Selective Prosecution of Draft Nonregistrants*, 72 IOWA L. REV. 359, 360 (1987).

261. *See Wayte*, 470 U.S. at 613; Shane, *supra* note 260, at 385. Although the *Wayte* Court did not address the issue with clarity, it implied that the burden of persuasion may rest on the challenger. *See Wayte*, 470 U.S. at 613-14.

262. 472 U.S. 675 (1985).

263. *Id.*

264. *Id.* at 677.

265. *Id.*

266. *Id.* at 678.

267. *Id.*

268. *Id.*

269. *Id.* at 679. Albertini was prosecuted and convicted under 18 U.S.C. § 1382 (1982). *Id.*



unlawful to reenter a base after having been barred.<sup>270</sup> Although the Ninth Circuit reversed Albertini's conviction on free speech grounds, the Supreme Court of the United States rejected Albertini's argument, and reversed.<sup>271</sup>

The *Albertini* Court clearly applied the incidental regulation standard.<sup>272</sup> Justice O'Connor, writing for the majority, recognized that the "[a]pplication of a facially neutral regulation that incidentally burdens speech satisfies the First Amendment" if it satisfies the *O'Brien* standard.<sup>273</sup> With respect to the incidental regulation standard, Albertini's arguments focused primarily on the means prong. He asserted that the governmental interests at the military base could be served equally by security methods and the existence of punishment for the destruction of property.<sup>274</sup> In essence, Albertini argued that the government had less intrusive means available.<sup>275</sup>

Although the Court agreed that there were less intrusive alternatives, it asserted that the not greater than necessary prong was not the equivalent of a least restrictive alternative analysis.<sup>276</sup> The Court held that the means prong was satisfied "so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."<sup>277</sup>

The *Albertini* Court did not explain its conclusion that the not greater than necessary prong was not the equivalent of a least restrictive alternative analysis. The Court's drastic reduction of the level of protection afforded by the not greater than necessary prong, however, is doctrinally significant. The Court's interpretation of this prong through the perspective of the decisionmaker rather than the challenger amounts to nothing more than a rational basis test.<sup>278</sup> After *Albertini* and *Wayte*, it appears that the means prong is satisfied as long as the governmental regulation rationally pursues the asserted governmental interest.

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270. *Id.* at 677.

271. *Id.* at 677, 679, 687. On the government's appeal to the Supreme Court of the United States, Albertini urged the Court to affirm on the grounds that those persons with bar letters had been allowed to attend open houses on other bases, enforcement was not essential to security, and the government's interests were served by both security measures at the open house and statutes that punish misconduct. *Id.* at 688.

272. *Id.* at 687-88.

273. *Id.*

274. *Id.* at 688.

275. *Id.*

276. *Id.* at 688-89.

277. *Id.* at 689.

278. *See id.*; Stone, *supra* note 2, at 110-11.

M. *Arcara v. Cloud Books, Inc.*

One of the last decisions by the Burger Court arguably involved the incidental regulation standard. Indeed, the facts in *Arcara v. Cloud Books, Inc.*<sup>279</sup> appeared to present a classic incidental regulation case. The defendants ran an adult book store in upstate New York.<sup>280</sup> After the county sheriff's undercover investigation revealed illicit sexual activities and solicitation for prostitution on the premises of the book store, the district attorney filed a civil action under a red light abatement statute to close the premises for one year.<sup>281</sup>

The defendants denied any allegations and moved for partial summary judgment, which the trial court denied.<sup>282</sup> Although the court ordered the book store to be closed for one year, and the appellate court affirmed,<sup>283</sup> the Court of Appeals of New York reversed the decision on first amendment grounds.<sup>284</sup> In an opinion authored by Chief Justice Burger, however, the Supreme Court of the United States reversed, upholding the application of the statute.<sup>285</sup>

In light of *Wayte* and *Albertini*, the result may not have been a surprise, but the *Cloud Books* Court's analysis had a novel twist. The Court determined that the incidental regulation test was not even implicated because the sexual activity at the book store involved "absolutely no element of protected expression."<sup>286</sup> The Court reasoned that, because the state sought only to eliminate the illicit sexual activities, the incidental regulation standard was simply not applicable.<sup>287</sup> In other words, without the presence of protected expression, only the rational basis standard applied.

For purposes of this article, two potential readings of *Cloud Books* exist. First, one could read Chief Justice Burger's opinion as suggesting that the incidental regulation test does not exist.<sup>288</sup> The problem with this interpretation, however, is that merely because the

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279. 106 S. Ct. 3172 (1986). For a discussion of *Cloud Books*, see Note, *The Content Distinction and Freedom of Expression: Arcara v. Cloud Books, Inc.*, 20 CREIGHTON L. REV. 893 (1987).

280. *Cloud Books*, 106 S. Ct. at 3173.

281. *Id.* at 3173-74. For a discussion of state court cases that have analyzed similar statutes, see Note, *supra* note 279, at 903-07, 911-12.

282. *Cloud Books*, 106 S. Ct. at 3174.

283. *Id.*

284. *Id.*

285. *Id.* at 3178.

286. *Id.* at 3176-77; see Note, *supra* note 279, at 908 (stating that the *Cloud Books* Court applied a lower scrutiny "than that which the *O'Brien* standard demands").

287. *Cloud Books*, 106 S. Ct. at 3178.

288. *Cf.* Stone, *supra* note 2, at 110 (questioning whether *Cloud Books* "exhaust[ed] the circumstances in which the Court will review a law that has only an incidental effect on free expression"). See generally Kurland, *Posadas de Puerto Rico v. Tourism Company*: "'Twas

government based its order on the unprotected activity does not mean that the Court should remove all protection. Under a traditional incidental regulation analysis, satisfaction of the unrelatedness prong does not exempt the governmental regulation from application of the other prongs of the test.<sup>289</sup> The unrelatedness prong is only the threshold—not the entire test.<sup>290</sup>

Second, *Cloud Books* might be read as indicating that the Court misapplied the incidental regulation standard. As Justice Blackmun properly observed in his dissent, the one-year closure statute had “a severe and unnecessary impact on the First Amendment rights of booksellers”<sup>291</sup> and should have failed the incidental regulation standard because it was “not narrowly tailored.”<sup>292</sup> Although *Cloud Books* may be reconciled with the traditional incidental regulation analysis under this second alternative, other recent decisions suggest that the first reading might be more accurate. A review of these decisions indicates that the *Cloud Books* Court may have turned the retreat of the incidental regulation doctrine into a rout.

#### N. *Turner v. Safley*

The case of *Turner v. Safley*<sup>293</sup> is important because it embodies a revision of the *Procunier* decision.<sup>294</sup> In *Safley*, prison inmates challenged a Missouri prison regulation that governed correspondence between inmates at different institutions.<sup>295</sup> Such correspondence was permitted only if the authorities at each prison agreed.<sup>296</sup> Both the district and appellate courts viewed the regulation as a content regulation and applied a strict scrutiny analysis.<sup>297</sup> The Supreme Court of the United States, however, applied a lower standard and reversed.<sup>298</sup>

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*Strange, 'Twas Passing Strange: 'Twas Pitiful, 'Twas Wondrous Pitiful,*” 1986 SUP. CT. REV. 1, 2 (discussion of later opinions of the Burger Court).

289. See *United States v. Albertini*, 472 U.S. 675, 687-88 (1985); *Brown v. Glines*, 444 U.S. 348, 355 (1980); *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

290. See Note, *supra* note 7, at 684-85. Justice Blackmun's dissent echoed the traditional incidental regulation doctrine by asserting that the free speech clause “protects against all laws . . . [and] not just those specifically directed at expressive activity.” *Cloud Books*, 106 S. Ct. at 3179 (Blackmun, J., dissenting).

291. *Cloud Books*, 106 S. Ct. at 3181 (Blackmun, J., dissenting).

292. *Id.* at 3180.

293. 107 S. Ct. 2254 (1987).

294. For a discussion of *Procunier*, see *supra* text accompanying notes 113-23.

295. See *Safley*, 107 S. Ct. at 2257-58. The inmates also challenged a regulation relating to inmate marriages. *Id.* at 2257. This article, however, does not address this aspect of *Safley*.

296. *Id.* at 2258. The regulation exempted correspondence between immediate family members, and correspondence related to legal matters from this requirement. *Id.*

297. *Id.* at 2258-59.

298. *Id.* at 2261-64.

Although the Court did not rely explicitly on the incidental regulation doctrine, it held that "a lesser standard of scrutiny is appropriate in determining the constitutionality of the prison rules."<sup>299</sup> Through rather bold definitional balancing, the Court suggested that communication among prisoners was simply not protected as a free speech interest.<sup>300</sup>

The *Safley* majority reread *Procunier* as an "audience rights" case.<sup>301</sup> In *Safley*, the prisoners apparently did not assert that the regulation had any impact on nonprisoner protected interests. Because all communication was between inmates, the Court seemingly rejected the notion that protected expression was at stake, maintaining that all that was necessary was that the regulation be "reasonably related to legitimate penological interests."<sup>302</sup>

*Safley* is doctrinally significant primarily because it provides some insight into what the Court may have sought to accomplish in *Cloud Books*. The Court's approach in *Safley* indicates that *Cloud Books* may have been an attempt to remove, through some ad hoc process, certain adult entertainment from protected status. Although the *Cloud Books* Court was unable to muster a majority for a pogrom against pornography, a majority of the Justices in *Safley* were willing to take a blanket approach with respect to prisoners' rights.<sup>303</sup>

Although the reasoning in *Safley* possibly could have profound implications, a discussion of definitional balancing is beyond the scope of this article. For doctrinal purposes, the tragedy of *Safley* is not so much the decision itself, but the dicta, which, as in *Albertini*, confuses content-neutrality with unrelatedness.<sup>304</sup> Such language is inconsistent with the traditional analysis of the unrelatedness prong.<sup>305</sup>

#### IV. THE DOCTRINAL STATUS OF THE INCIDENTAL REGULATION TEST

The incidental regulation doctrine has had, during its twenty-year life span, a colorful and dynamic history. Although the standard originated in the context of symbolic speech, the Court has broadened

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299. *Id.* at 2257.

300. *Id.* at 2263-64. Definitional balancing is, of course, a technique that the Court has employed regularly. See, e.g., *supra* text accompanying notes 85-89.

301. *Id.* at 2260.

302. *Id.* at 2261.

303. See *id.* at 2259-62.

304. See *id.* at 2262-64; *United States v. Albertini*, 472 U.S. 675, 689 (1985).

305. See *supra* text accompanying notes 131-52.

its application dramatically.<sup>306</sup> Moreover, with the explicit addition of a means prong to the TPM test, the Court apparently has closely aligned the previously independent free speech tests.<sup>307</sup> These are significant—if not doctrinally revolutionary—developments.

An understanding of these events requires an appreciation of the status of the elements of the test originally announced in the *O'Brien* decision. Under these circumstances, the balance of this article will focus on the status of the various elements of the incidental regulation test, including the allocation of the burden of persuasion.

### A. *The Burden of Persuasion*

One salient feature of free speech jurisprudence is that, in the face of a colorable free speech claim, the normal presumption of constitutionality is suspended, and the burden of persuasion rests with the governmental regulators.<sup>308</sup> Even outside the area of content regulation, it is generally understood that speech normally has protection with respect to the burden of persuasion.<sup>309</sup> Although little scholarship exists regarding the role of the burden of persuasion in the incidental regulation standard,<sup>310</sup> it is obviously significant. To the extent that the elements of the test may lack clarity, the burden of persuasion may be determinative of the outcome in a particular decision.<sup>311</sup>

A review of the history of the standard indicates that the burden rests with the government.<sup>312</sup> In contrast to decisions on the content-based track or under the TPM standard, however, the burden of persuasion with regard to the application of the incidental regulation test does not appear to have had any serious consequences because of the Court's interpretation of the test. As will be discussed below, the Court has decreased the level of protection afforded by the various substantive elements of the test. Because the Court has made each element relatively easy for the government to fulfill, there has been no need to shift the burden.<sup>313</sup>

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306. See *supra* text accompanying notes 153-68.

307. See Day, *supra* note 6, at 222.

308. See *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 583 n.6 (1983); *Widmar v. Vincent*, 454 U.S. 263, 270 (1981).

309. See *Preferred Communications*, 476 U.S. at 494-96.

310. Cf. Stone, *supra* note 2, at 108 (stating that the Court presumes that laws that have an incidental effect do not raise a first amendment issue).

311. See Note, *supra* note 108, at 474.

312. See *Procunier v. Martinez*, 416 U.S. 396, 412 (1974); *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968); see also *Healy v. James*, 408 U.S. 169, 184 (1972) (citing *O'Brien* for the proposition that "the burden was upon [the government] to justify its decision").

313. The Court may use the burden of persuasion as an alternative basis for its decision.

### B. *Within the Constitutional Power of the Government*

This part of the incidental regulation test<sup>314</sup> is perhaps the easiest to analyze. It represents the normal due process standard that is applicable in any constitutional case.<sup>315</sup> The incidental regulation decisions have never depended on this question because, in every instance, the government is able to identify some legitimate area of governmental power. Accordingly, unless the Court were to abandon the incidental regulation standard altogether, this prong of the test should remain dormant.

### C. *The Unrelatedness Prong*

The unrelatedness prong is a unique aspect of the incidental regulation test; no other test features an analogous prong. The history of the Court's interpretation of the unrelatedness prong suggests two conclusions. First, this prong is the starting point for the rest of the test. Even though the *O'Brien* Court listed this as the third prong of the standard,<sup>316</sup> commentators have recognized, from a very early point, that it was actually the initial inquiry.<sup>317</sup> In recent decisions, moreover, the Court has repeatedly treated this prong as the threshold subtest.<sup>318</sup>

Second, the unrelatedness prong is an examination of the purpose underlying the regulation.<sup>319</sup> This prong determines whether the government sought to impose a purposeful regulation on protected speech interests.<sup>320</sup> In assessing this purpose, the Court looks to the effect of the regulation<sup>321</sup> and the degree of impact.<sup>322</sup>

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See Note, *supra* note 108, at 474 n.52. This observation of the Court's practice, along with the other observations noted in the text, are offered as descriptions of the current state of the incidental regulation test. They do not represent the author's view as to how the standard should be applied.

314. See *O'Brien*, 391 U.S. at 377 ("within the constitutional power").

315. One commentator has stated that the first element of the *O'Brien* test "is superfluous in light of what is normally designated criterion." Recent Development, *Free Speech and Public Utilities: Consolidated Edison Co. v. Public Service Commission*, 44 ALB. L. REV. 515, 523 n.50 (1980).

316. See *O'Brien*, 391 U.S. at 377.

317. See, e.g., Ely, *supra* note 1, at 1484.

318. See *Consolidated Edison Co. of New York v. Public Serv. Comm'n of New York*, 447 U.S. 530, 540 n.9 (1980); *Buckley v. Valeo*, 424 U.S. 1, 65 n.76 (1976) (per curiam).

319. See *Consolidated Edison*, 447 U.S. at 540 n.9.

320. See *id.*; *Young v. American Mini Theatres*, 427 U.S. 50, 81 n.4 (1976) (Powell, J., concurring); Day, *supra* note 6, at 210.

321. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982).

322. See Stone, *supra* note 2, at 81-86. At least until recent times, arguments regarding so-called "secondary effects" have not sidetracked the Court. See *City of Renton v. Playtime Theatres*, 475 U.S. 41, 47-48 (1986); Stone, *supra* note 2, at 106 n.243; *Leading Cases*, 100 HARV. L. REV. 100, 200 (1986) ("contrived secondary effects").

In sum, the unrelatedness prong is a threshold examination of the governmental purpose underlying the restriction. Unless the government establishes that its regulation advances purposes unrelated to the suppression of expression, the Court's analysis will not reach the other prongs of the incidental regulation test.

#### D. *The Substantive Quality of the Governmental Interest*

After the threshold of unrelatedness is satisfied, the next subtest is the substantial governmental interest prong. Initially, there may have been some confusion about the requirements of this prong. The uncertainty existed because the governmental interests in *O'Brien* probably could have been classified as compelling.<sup>323</sup> Although the *O'Brien* decision did not clarify this issue, recent decisions have concluded that this prong does not require much more than a legitimate governmental interest.<sup>324</sup>

In particular, the *Rhinehart* decision established that the substantial governmental interest prong was satisfied by a concern about discovery abuse in civil cases.<sup>325</sup> The *Wayte* decision also may clarify the nature of the subtest because the military preparedness interest in *Wayte* involved a peacetime posture.<sup>326</sup> Neither peacetime preparedness nor prevention of discovery abuse are interests that confidently could be classified as compelling governmental interests.

For purposes of the incidental regulation standard, however, the governmental interest does not have to rise to the compelling level applicable to strict scrutiny. The incidental regulation decisions demonstrate that the government can satisfy this prong merely through proof of the existence of some governmental concern.<sup>327</sup>

#### E. *The Means Prong*

Although the Court recognized the significance of the means—or not greater than necessary—prong at an early point,<sup>328</sup> the prong has proved to be one of the most elusive, yet pivotal, aspects of the incidental regulation standard. Perhaps this is best illustrated by the fol-

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323. For a discussion of these interests, see *United States v. O'Brien*, 391 U.S. 367, 377-82 (1968).

324. See *Stone*, *supra* note 2, at 51 (As long as the governmental interest is "not imaginary," it can satisfy the substantiality prong.).

325. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 (1984).

326. See *Wayte v. United States*, 470 U.S. 598, 612 (1985).

327. See, e.g., *supra* text accompanying notes 158, 255; see also *Stone*, *supra* note 2, at 51 (characterizing a substantial interest as one that "has substance" rather than one that is "important").

328. See *Procunier v. Martinez*, 416 U.S. 396, 413 (1974).

lowing comparison. In *Procunier*, although the government was able to advance the important interest of prison safety, the Court invalidated the regulations on the grounds that they failed to meet the means prong.<sup>329</sup> Yet, as evidenced in the decisions of *Wayte* and *Albertini*, the Court has reduced the means scrutiny to the rational basis level.<sup>330</sup> At present, the only regulation that would not satisfy the means test would be a complete ban.<sup>331</sup>

The Court's analysis in *Safley* best illustrates this conclusion. When faced with a regulation on prisoner correspondence arguably unconstitutional under *Procunier*, the *Safley* Court jettisoned the use of the incidental regulation test altogether.<sup>332</sup> Apparently recognizing that a complete ban on inmate-to-inmate correspondence would not survive the means prong of the incidental regulation standard, the Court simply used a rational basis standard.<sup>333</sup>

As Professor Baker has noted, a means test is "an aid in characterizing the purpose of the law."<sup>334</sup> The Court apparently has recognized this in the incidental regulation cases.<sup>335</sup> Presently, the flaccid nature of the Court's means scrutiny suggests that the incidental regulation test may have devolved into a mere rational basis inquiry.<sup>336</sup>

## V. CONCLUSION

As Dean Stone has recently stated: "The test of a test is . . . its application."<sup>337</sup> To the extent that the incidental regulation test can be evaluated by its application, it largely has failed its traditional purposes. The failure did not occur overnight, but only as a result of incremental chipping over the course of twenty years.

Although the constitutional power prong was never an obstacle to governmental regulation, the other elements of the standard seemed, in the early years, to provide some degree of judicial scrutiny.

329. *Id.* at 415.

330. See Harper, *supra* note 191, at 414; Schauer, *supra* note 1, at 787; *supra* text accompanying notes 259-78.

331. Cf. Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., 107 S. Ct. 2568, 2572 (1987) (regulation prohibiting all protected expression by creating a "First Amendment Free Zone" violated the first amendment because it was overly broad).

332. Turner v. Safley, 107 S. Ct. 2254, 2264 (1987).

333. See *id.* at 2257, 2264. For a discussion of *Safley*, see *supra* text accompanying notes 294-306.

334. Baker, *supra* note 12, at 963 n.59. Although Professor Baker was addressing the TPM standard, his observation has general applicability to any of the tests employed by the Court.

335. See *supra* notes 237-78 and accompanying text; see also Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 284 & n.17 (1985) (examination of the means is a test of the government's sincerity).

336. See United States v. Albertini, 472 U.S. 675, 688 (1985); Stone, *supra* note 2, at 51.

337. Stone, *supra* note 2, at 52.



Over the years, however, the level of scrutiny has deteriorated. The substantiality prong, for example, has devolved into a lower level of scrutiny.<sup>338</sup> Moreover, after *Wayte* and *Albertini*, the means prong has been reduced to a rational basis test.<sup>339</sup>

In light of the lowered scrutiny of the various prongs, the only protective prong in the incidental regulation test may be the unrelatedness prong. Yet, to the extent that the Court in *Taxpayers for Vincent* and *Clark* has transformed the prong into a content-neutral subtest, the unrelatedness prong may also have lost its historic significance.<sup>340</sup>

An obvious danger in the Court's recent reduction of the incidental regulation test to a rational basis review is that the Court will now place content regulations on the content-neutral track.<sup>341</sup> There, under a rational basis analysis, these regulations will be routinely upheld.<sup>342</sup> Under these circumstances, there can be little doubt that the Court's recent decisions regarding the incidental regulation doctrine represent a regressive approach to the protection traditionally afforded free speech interests.

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338. See *supra* text accompanying notes 324-27.

339. See *supra* text accompanying notes 330-36.

340. See Day, *supra* note 6, at 223; *supra* text accompanying notes 218-36.

341. See *San Francisco Arts & Athletics, Inc., v. Olympic Comm.*, 107 S. Ct. 2971, 2981 (1987) (content regulation treated as "incidental to the primary congressional purpose," and tested under *O'Brien*); Day, *supra* note 6, at 219 n.159.

342. *City of Renton v. Playtime Theatres*, 475 U.S. 41, 47-50 (1986) (regulation that was content-based on its face was tested by TPM standard); Stone, *supra* note 2, at 79.