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# Speaker Discrimination: The Next Frontier of Free Speech

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# SPEAKER DISCRIMINATION: THE NEXT FRONTIER OF FREE SPEECH

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ABSTRACT

Citizens United v. FEC *articulated a pillar of free speech doctrine that is independent from the well-known controversies about corporate personhood and the role of money in elections. For the first time, the Supreme Court clearly said that discrimination on the basis of the identity of the speaker offends the First Amendment. Previously, the focus of free speech doctrine had been on the content and forum of speech, not on the identity of the speaker. It is possible that protection from speaker identity discrimination had long been implicit in free speech case law, but has now been given more full-throated articulation. Or it is possible that the Court has actually introduced a conceptually new free speech doctrine. Either way,* Citizens United *has the potential to reshape free speech law far beyond the corporate speech and campaign finance contexts. This Article explores the basis of the speaker discrimination doctrine and points to potential implications. It shows that while the speaker discrimination principle had not been previously articulated clearly, it is a convincing explanation for much earlier First Amendment cases and thus should not be understood as an entirely new development. The speaker discrimination principle holds considerable potential to clarify otherwise confused areas of free speech jurisprudence. In particular, the bar against identity discrimination should operate as a limiting principle on forum-based speech restrictions. To illustrate this potential, this Article examines the potential application of speaker discrimination to school speech cases, especially those involving off-campus speech. At the same time, the Court's embrace of speaker discrimination raises important questions in critical legal theory about why the identity of a speaker might matter in addition to the substance of what a person chooses to say.*



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## I. INTRODUCTION

*Citizens United v. FEC*[1] is famously controversial for equating communications by corporations with free expression by human beings, a premise that has become a recurring lighting rod in American political discourse.[2] But this controversy has led to an under appreciation of an important contribution that *Citizens United* made to First Amendment jurisprudence which is entirely severable from questions about corporate personhood and election law.

Modern free speech cases typically focus extensively on content neutrality and on distinguishing public and nonpublic fora.[3] In *Citizens United*, the majority of the Supreme Court announced what may be a new pillar of free speech law. With *Citizens United*, the Court for the first time gave full-throated articulation to the principle that discrimination on the basis of the identity of the speaker is offensive to the First Amendment, even when there is no content discrimination. This newly articulated doctrine has the potential to reshape free speech law far beyond the corporate and election contexts.

There are two views that one may take about what the Court said about speaker discrimination in *Citizens United*. The view promoted by the dissent in the 5-4 decision was that the majority essentially invented this "pillar" of its reasoning without a solid foundation in pre-existing case law.[4] For the dissenters, the speaker discrimination principle appeared just as divisive as the corporate personhood portions of the majority decision.[5] Based on the perception that speaker

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1. 558 U.S. 310 (2010).

2. During the 2012 presidential election, President Barack Obama ridiculed Governor Mitt Romney for saying that corporations are people. *See, e.g.*, Amy Gardner & Felicia Sonmez, *In Formal Campaign Kick-Off, Obama Dings Romney's 'Corporations Are People' Line*, WASH. POST (May 5, 2012), http://articles.washingtonpost.com/2012-05-05/politics/35454922_1_obama-campaign-romney-campaign-michelle-obama. In a similar vein, in 2013, senators proposed a constitutional amendment providing that corporations are not people. *See* Press Release, Sen. Jon Tester, Tester's Constitutional Amendment: Corporations Are Not 'People' (June 18, 2013), *available at* http://www.tester.senate.gov/?p=press_release&id=2970; *see also* Rep. Adam Schiff, *The Supreme Court Still Thinks Corporations Are People*, THE ATLANTIC (July 18, 2012, 3:11 PM), http://www.theatlantic.com/politics/archive/2012/07/the-supreme-court-still-thinks-corporations-are-people/259995/ (congressman proposing constitutional amendment).

3. *See* McCullen v. Coakley, No. 12-1168, slip op. at 9 (U.S. June 26, 2014) (noting that prohibition on content discrimination is "the guiding First Amendment principle"). For a critique of the content-focused approach, see Barry P. McDonald, *Speech and Distrust: Re-Thinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347 (2006).

4. 558 U.S. at 419-420 ("The second pillar of the Court's opinion is its assertion that 'the Government cannot restrict political speech based on the speaker's . . . identity.' . . . Like its paeans to unfettered discourse, the Court's denunciation of identity-based distinctions may have rhetorical appeal but it obscures reality.") (J. Stevens, dissenting) (internal quotation marks and citations omitted).

5. *See infra* Part 0.

discrimination principle was wholly new, doubts have already been expressed about whether the Court really meant to announce a broad new principle.[6] But another view—and in my opinion, the better one—is that *Citizens United* did not invent a new doctrine, but rather gave new, clearer articulation to a principle that had long been implicit and underappreciated in free speech jurisprudence. Under either view, *Citizens United* may in the long run serve as a foundation for a new frontier of speech law, independent of its impact on campaign finance regulation. Moreover, the speaker discrimination principle is at its core a progressive idea that embraces the importance of identity and the symbolic power of having a voice, independent of what one chooses to say. But because the Court first clearly articulated this doctrine in such a broadly controversial decision, there is significant danger that merits of this aspect of the decision will be underappreciated.

This Article makes the case that the speaker discrimination principle in *Citizens United* deserves widespread support and application. I will show that the underlying principle that speaker discrimination infringes free speech has long been implicit in case law, even if it had not been clearly spelled out. In particular, I demonstrate that the renowned First Amendment case, *City of Chicago v. Mosley*, should be understood as an early application of the speaker discrimination doctrine because the regulation at issue restricted who could protest outside of a public school more than it restricted what they could say.[7] As a result, *Citizens United* should be understood as articulating and explaining a set of principles that have long been implicit in the case law. Now that the Court has more explicitly articulated the doctrine, it can be more readily applied in future cases; but this does not mean that the Court suddenly invented a new rule without any precedent.

The speaker discrimination doctrine, now that it is clearly articulated, raises important questions about problematic areas of First Amendment law, such as limitations on speech in so-called limited public fora, restrictions on speech by public employees, and prohibitions on non-citizens participating in election campaigns. But these tensions may only be brought to the Court's attention if speech advocates first embrace the merit and potential power of the speaker discrimination doctrine.

By incorporating the idea of the speaker's identity and voice into First Amendment doctrine, the *Citizens United* majority borrowed a central tenet of critical legal theory and, at the same time, touched on

6. *See* Michael W. McConnell, *Reconsidering* Citizens United *as a Press Clause Case*, 123 YALE L.J. 412, 420-22 (2013).

7. *See infra* Part 0.

a challenging question. Even among those who advocate for the inclusion of more diverse voices in public discourse, there is little consensus about why speaker identity matters. Consider a recent controversy that illustrates this ambiguity. In early 2012, there was considerable outcry on the political left when all-male congressional panels held hearings on reproductive rights without allowing any women to speak.[8] But even among those who protested, there was no consensus on exactly why the all-male hearing was a problem. Is it always objectionable when Congress hears only male voices on any issue, or is this objection relevant only when the subject of discussion is reproductive freedom, an issue that has unique impact on women? Moreover, would the objection be addressed simply by inviting any woman to speak, or must that woman express a particular viewpoint? Both in law and in critical legal theory, there is little clarity about how we should disentangle the identity of a speaker from the substance of speech, and about whether the two can ever actually be separated.

The Supreme Court has long struggled to adopt a unitary philosophy about why the U.S. Constitution protects free speech. The most commonly repeated rationale has been the idea that there should be a free marketplace for ideas. But this does not explain the Court's recognition that identity is as much a part of speech as explicit content. Nor does it explain the Court's longstanding protection of artistic expression or expression without a clearly articulated idea. A better explanation for the broad sweep of the First Amendment is that a broad conception of free speech helps to allow diverse groups of people to coexist by allowing a means by which everyone can pursue individual expression while also negotiating their place in society. *Citizens United* should thus be understood both as a step away from the marketplace model of free speech and as a step toward autonomy and agency rationales for free expression.

As a practical doctrinal matter, it is important to identify the impact that this new pillar of free speech law might make on other types of cases. I argue that speaker discrimination can help to clarify the limits of speech limitations that are tied to limited public fora. The principle that identity-based restrictions on speech offend the Constitution should operate as a limiting principle to contain the impact of forum-based restrictions on speech. As an illustration, I will look at school speech cases, especially cases where students are disci-

8. *See, e.g.*, Laura Bassett, *GOP Men Debate Anti-Abortion Bill as Female Colleagues Protest in the Hallway*, HUFFINGTON POST (Jan. 15, 2014, 2:07 PM), http://www.huffingtonpost.com/2014/01/15/house-gop-abortion_n_4603349.html; George Zornick, *Republican Hearing on Contraception: No Women Allowed*, THE NATION (Feb. 16, 2012, 11:14 AM), http://www.thenation.com/blog/166311/republican-hearing-contraception-no-women-allowed.

plined at school for off-campus speech, which is an area of free speech jurisprudence that has confused circuit courts. The school speech question is apropos to speaker discrimination because the *Mosley* decision related specifically to protests outside a public school where the local government asserted concern about disruption to the educational environment.[9] The newly clarified speaker discrimination doctrine should be helpful to clarify lingering questions about the regulation of speech in the school context.

This Article proceeds as follows. Part II explains the free speech landscape before *Citizens United* with regard to speaker identity, while Part III suggests reasons why the speaker identity question was not clearly addressed by the Court prior to 2010. Part IV explains why this issue emerged in the context of *Citizens United*, how the majority filled the speaker identity gap, and the reaction of the four dissenting justices. Part V explores why speaker identity matters to freedom of speech. Part VI shows that, while the speaker discrimination doctrine had not been previously articulated so clearly, it is a convincing explanation for much earlier First Amendment cases. In Part VII, I turn to the potential that speaker discrimination holds to clarify otherwise confused areas of free speech jurisprudence, with particular focus on school speech cases. I conclude in Part VIII, pointing out problematic areas of case law that should be re-considered in light of the speaker discrimination doctrine.

## II. THE SPEAKER IDENTITY GAP

In Norman Rockwell's famous poster *Freedom of Speech*, part of the Four Freedoms series, a slightly rumpled man in working class clothing—he literally wears a blue collar—stands to speak at a crowded public meeting. We do not know what he says. But just over his right shoulder an older, gray-haired man in a black suit and tie looks up intently to listen. The idea seems to be that in the United States, even an average man's voice matters, and everyone has the right to stand and speak.[10] It seems beside the point that we do not know what this meeting is even about.

What is surprising about this painting is that its romantic vision of American free speech had until recently been only partially incorporated into First Amendment doctrine. While Rockwell found that he could depict the idea of free speech without identifying the content

9. *See infra* Part 0.

10. Women are barely pictured in the painting, and all the faces are white. The painting illustrates diversity only in terms of social class, with depictions of working class and white collar, presumably wealthier, white men. In this way, the painting seems very much a creature of the 1940s. However, the point of the painting would seem to work equally well if the speakers represented a broader array of races, ethnicities, and genders.

of speech, content has traditionally been the central issue for courts in speech cases. The starting point for free speech doctrine is content neutrality.[11] The First Amendment has little tolerance for content discrimination, especially in a public forum, and even less tolerance for viewpoint discrimination.[12] There are, of course, some exceptions. Government may impose time, place, and manner restrictions on many forms of public expression, but the regulations must be content neutral.[13] Government may restrict fighting words and may also punish violent threats. Hurtful communications that do not involve matters of public concern may lead to a tort of intentional infliction of emotional distress.[14] But the touchstone for analysis of all of these issues is content.

The other major theme in free speech cases is forum.[15] Despite the strong protection of free expression in the American constitution, there are certain locations where the government clearly should have more latitude to restrict speech than it does in a public park.[16] To take an easy illustration, freedom of speech obviously applies differently to a police officer watching demonstrators gather on the National Mall than it does to a public school teacher who requires students to be quiet during math class. In both cases, a government employee might in a literal sense impair the ability of citizens to express themselves how and when they want to. But the contexts are obviously not the same, and the First Amendment protects freedom of speech more broadly in one than the other.

Although Rockwell used a public meeting as the quintessential free speech forum for his illustration, it is not actually the most permissive forum in constitutional law. Despite the romantic view presented by Rockwell—and much earlier by Alexis de Tocqueville's ear-

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11. *See* 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 3:1 (2014), *available at* Westlaw ("The characterization of a law as content-based or content-neutral is enormously important, for it often effectively determines the outcome of First Amendment litigation."); *see also* McCullen v. Coakley, No. 12-1168, slip op. at 9 (U.S. June 26, 2014) (noting that prohibition on content discrimination is "the guiding First Amendment principle").

12. Viewpoint discrimination is a narrower category than content discrimination. Content discrimination prohibits certain types of communication and certain subject matter. SMOLLA. § 3:8. Viewpoint discrimination "regulates speech based upon agreement or disagreement with the particular position the speaker wishes to express." *Id.* § 3:9.

13. *See* Grayned v. City of Rockford, 408 U.S. 104, 115 (1972).

14. The tort is limited by the First Amendment if it restricts the "free flow of ideas and opinions on matters of public interest and concern." Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988). *See generally* SMOLLA, *supra* note 11, § 24:10 (discussing the *Falwell* case).

15. *See* Thomas P. Crocker, *Displacing Dissent: The Role of "Place" in First Amendment Jurisprudence*, 75 FORDHAM L. REV. 2587, 2587-88 (2007).

16. *See* Aaron H. Caplan, *Invasion of the Public Forum Doctrine*, 46 WILLAMETTE L. REV. 647, 651 (2010).

ly 19th Century appreciation of town meetings in New England[17]—public comment at public meetings is often limited. The reason for this is fairly straightforward. City council and school board meetings need to have agendas. They need to be able to control when different issues are brought up, who can speak and for how long. Otherwise, a single disruptive speaker could use the First Amendment to prevent any business from being conducted in public meetings. Such meetings are thus an example of limited public fora, wherein the government may restrict speech by subject matter but not necessarily by viewpoint.[18] Thus, a town board may be able to limit when citizens may make comments about tax rates (subject matter), but once public comment is open, the board may not only allow people to speak in favor of higher taxes while silencing those who want to protest their tax burdens (viewpoint discrimination).[19]

This distinction between subject matter and viewpoint still leaves unclear the issue that Rockwell wanted to illustrate most pointedly. Rockwell in particular wanted to show that in an American public meeting, a rich man should have to be willing to listen to a common man. This hardly seems controversial, but it is actually not well established in our jurisprudence. Since we do not know what the man is saying, we cannot easily fit it into a viewpoint discrimination analysis. Some courts had hinted at the speaker identity issue, but the inclination was to relate speaker discrimination to content discrimination, which had a more established jurisprudential basis.[20] Until *Citizens United*, the Supreme Court actually never quite said that everyone should be able to stand and speak, independent of what they choose to say. In more precise doctrinal terms, the Court had never explicitly said that the government would need a particularly compelling justification to restrict who may speak. We could call this the speaker identity gap.

In a 2004 (pre-*Citizens United*) case that brings Rockwell's painting directly to mind, the Court of Appeals for the Eleventh Circuit approved a municipal rule limiting the speech of non-residents during city council meetings.[21] Several lower courts had noted that municipalities had the authority to cut off speech to prevent chaotic meetings.[22] The Eleventh Circuit Court of Appeals found that the city

17. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 57-58 (J.P. Mayer & Max Lerner eds., George Lawrence trans., Harper & Row 1966) (1835).

18. Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829-30 (1995) (holding that content-based discrimination is permissible in limited public fora but that viewpoint discrimination is not permissible).

19. *Id.*

20. *See id.*

21. Rowe v. City of Cocoa, 358 F.3d 800, 803-04 (11th Cir. 2004).

22. *Id.* at 803.

had an interest in efficient meetings, and thus could restrict the participation of non-residents.[23] But there are many ways to maintain order without excluding an entire class of people from the opportunity to be heard. The town could put a limit on the number of speakers who would be heard or the length of time they could speak. But the town chose to limit participation in a public meeting based on the identity of the speaker.

In the mid-1980s, the Court explicitly endorsed exclusions based on speaker identity with regard to limited public fora. In *Perry Education Association*, the Court held that a school district's collective bargaining agreement could exclude a rival teacher's union from communicating through the school mail system.[24] The Court noted that even in a limited public forum, the government could not discriminate against the speaker's "view," although it could impose reasonable limitations to ensure that the forum is used "for its intended purposes . . . ."[25] The union argued that its exclusion amounted to viewpoint discrimination, but the Court disagreed: "We believe it is more accurate to characterize the access policy as based on the *status* of the respective unions rather than their views. Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity."[26] The *Perry* Court went on to hold that the case would come out no differently if analyzed as an Equal Protection Clause case.[27] In *Cornelius*, the Court repeated these principles to permit excluding the exclusion of the National Association for the Advancement of Colored People (NAACP) from the Combined Federal Campaign, which solicits donations from federal employees.[28] The Cornelius Court found that the government could exclude the NAACP because it would be seen as "political" or "controversial," thus undermining the purposes of the limited forum.[29]

*Perry* and *Cornelius* appeared to give government wide latitude to choose among speakers in limited public fora, and would seem to explain the Eleventh Circuit's decision on excluding non-residents from municipal meetings. But these cases also illustrate the difficulty in

23. *Id.* at 803-04.

24. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 52-55 (1983).

25. *Id.* at 46.

26. *Id.* at 49.

27. *Id.* at 54.

28. Cornelius v. NAACP Legal Def. and Educ. Fund, 473 U.S. 788, 806 (1985) ("Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." (internal citations omitted)).

29. *Id.* at 810, 812.

distinguishing identity-based discrimination from viewpoint discrimination. This is perhaps most obvious in the *Cornelius* case. The reason why the NAACP could be considered controversial was, presumably, because of its views on civil rights issues. But the exclusion of non-residents from a local government meeting also illustrates why viewpoint and speaker are difficult to separate. What if a nonresident developer wanted to address city leaders? What if a nonresident had information relevant to city policies? What if a nonresident had a complaint about how the city treats nonresidents? If a town board opened meeting to public comment on property taxes but then limited the forum to people who actually own property, our well-established doctrines of free speech would not clearly indicate that anything is wrong.

These examples illustrate how even facially neutral restrictions on who may speak can do a great deal to impair the public's ability to engage in free debate.[30] The difference between a legitimate limitation on expression and an unconstitutional interference with free debate will often appear to be a matter of degree.[31] The decisive point was that the Court of Appeals did not have an analytical method or a doctrinal tool that clearly fit a speech restriction based on content or viewpoint. The Eleventh Circuit relied on the fact that in a town meeting content discrimination is permissible, but viewpoint discrimination is not.[32] But a residency requirement is really neither of these. It is a restriction on who can speak, not the subject matter or the viewpoint.

## III. WHY SPEAKER DISCRIMINATION REMAINED IMPLICIT RATHER THAN EXPLICIT IN FREE SPEECH CASE LAW

Cases that raise speaker discrimination issues can often be decided on alternative grounds, which explains why the Court did not fully articulate the doctrine until *Citizens United*. For example, the Court may have taken a step to limit government authority in limited public fora in *Good News Club v. Milford Central School*, where the Court found that a school violated a Christian organization's free speech rights when it refused to let it use school facilities that were open to secular civic organizations.[33] The holding could be explained as discrimination based on the religious identity of the organization. But the Court did not quite frame it that way. The club wished to hold programs devoted to subject matter that the school otherwise

30. *See* McDonald, *supra* note 3, at 1410; Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 54-55 (1987).

31. Stone, *supra* note 30, at 55.

32. Rowe v. City of Cocoa, 358 F.3d 800, 803-04 (11th Cir. 2004).

33. 533 U.S. 98, 109-12 (2001).

permitted, so that the prohibition was solely based on its religious orientation.[34] As a result, the Court labeled the exclusion a matter of viewpoint discrimination.[35]

*Good News Club* thus could be read as shifting weight back to the prohibition on viewpoint discrimination, which seemed to have had little impact in the earlier *Cornelius* and *Perry* cases, in which the Court permitted governments to exclude a labor union and a civil rights organization from limited fora.[36] But since *Good News Club* followed *Rosenberger v. University of Virginia*, a case that also involved discrimination against religiously oriented speakers, it was not clear whether the Court was changing its approach in cases that lacked a religious element.[37] Both cases focused extensively on Establishment Clause questions, and thus may not appear readily applicable to other contexts. But more to the point, since viewpoint discrimination is often hard to distinguish from speaker discrimination, the Court often has not had to spell out the speaker discrimination concept in so many words.[38]

This phenomenon can be seen in the early free speech case *Hague v. CIO*, where a local ordinance banned labor organizers from holding public meetings.[39] That case concerned what the Court today would call a public forum, and thus any content discrimination would be potentially offensive to the First Amendment. The city discriminated against labor advocacy and against "Communists or Communist organizations."[40] The exclusions were thus both a form of content and viewpoint discrimination and identity-based discrimination. But the Court did not need to tease the two types of discrimination apart to decide the matter.

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34. *Id.* at 108.

35. *Id.* at 107.

36. *See id.* at 106, 122. In both cases, it would not have been difficult to attribute a viewpoint to the union or to the NAACP, just as a viewpoint was attributed to a Christian organization in *Good News Club*. This was especially the case in *Cornelius*, since the NAACP was excluded because it was "controversial." As a result, a reasonable reading of *Cornelius* and *Perry* might indicate that the ostensible bar on viewpoint discrimination did not have much decisive force.

37. *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829-30 (1995). *But see* Jason E. Manning, Comment, Good News Club v. Milford Central School*: Viewpoint Discrimination or Endorsement of Religion?*, 78 NOTRE DAME L. REV. 833 (2003) (noting ambiguity about whether the Court is analogizing religion to secular viewpoints for free speech purposes or overtly privileging religion at the expense of the separation of church and state).

38. *See, e.g.*, McCullen v. Coakley, No. 12-1168, slip op. at 25-27 (U.S. June 26, 2014) at 2526, 2539-2540 (striking down a statute creating a buffer zone around reproductive health clinics that exempted certain types of people, but doing so because less intrusive means were available to accomplish the state's objectives.)

39. Hague v. Comm. for Ind. Org., 307 U.S. 496, 514-16 (1939).

40. *Id.* at 501.

When a certain type of speaker is excluded because of religiosity, the case is likely to center on the question of whether the state has a legitimate Establishment Clause rationale.[41] If a speaker were to be excluded on the basis of a protected classification, the Equal Protection Clause would settle the issue in a more straightforward manner. As the name implies, the speaker discrimination principle suggests that there is an anti-discrimination component to the First Amendment. But for this to matter, we need to understand what the First Amendment might add that would not accomplished by reference to Equal Protection.

The first key for a plaintiff to successfully challenge a government policy on constitutional grounds is to convince a court to apply heightened scrutiny. This then shifts the burden to the government to show an especially important interest and that the policy is well-tailored to achieve that interest.[42] There are two established triggers to heightened scrutiny. The first is if the government discriminates on the basis of a suspect classification, such as race[43] or gender.[44] The other trigger for heightened scrutiny is an infringement of a fundamental right, and thus a potential violation of due process.[45] Freedom of speech has been recognized by the Court as a fundamental right since 1925.[46]

If a state were to ban people from speaking on the basis of race, heightened scrutiny would apply because of the equal protection violation. In the most egregious cases, it would be unnecessary for a court to consider whether the First Amendment also protects against discrimination based on speaker identity. So, if a town were to say that only white people may speak at a public meeting, a court could strike down the regulation based solely on the Equal Protection Clause. The speaker identity gap in free speech doctrine becomes far more important where the identity-based discrimination is not based on a suspect classification in terms of the equal protection. In this situation, the only route to heightened scrutiny is to argue that there is an interference with a fundamental right. To make this case, a plaintiff would need to argue that to impair someone from being able

41. *See, e.g., Good News Club*, 533 U.S. at 114-15.

42. Precise formulations vary. In classic strict scrutiny, the policy must be narrowly tailored to a compelling state interest; but in other heightened scrutiny cases, the Court uses different adjectives, such as "important" and "closely tailored." *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 388 (1978).

43. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

44. United States v. Virginia, 518 U.S. 515, 531 (1996).

45. *See Zablocki*, 434 U.S. at 389 (When a law interferes with the exercise of a fundamental right, "it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only these interests.").

46. Gitlow v. New York, 268 U.S. 652, 666 (1925).

to speak based on who they are rather than what they say is a violation of free speech. But this is not something that the Supreme Court had ever said clearly before 2010. As one commentator observed five years before *Citizens United*, there was "no singular First Amendment approach to speaker discrimination in relation to content discrimination."[47]

A factual scenario that illustrates this gap can be seen in the 1951 case *Niemotko v. Maryland*.[48] The City of Havre de Grace, Maryland, denied a group of Jehovah's Witnesses a permit to hold Bible talks in a public park on Sundays. The testimony at trial had indicated that the permit was denied because the applicants got into a verbal argument with the Parks Commissioner, who also appeared to have a negative opinion of Jehovah's Witnesses.[49] The Court recognized that this implicated both the First Amendment and Equal Protection:

> The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body.[50]

The Supreme Court thus noted three separate possible constitutional violations: equal protection, freedom of religion, and freedom of speech. The reference to equal protection is interesting because, six decades after this case was decided, there is still debate as to whether religion is a suspect classification under the Equal Protection Clause.[51] However, we can put this question to the side for present purposes.

*Niemotko* might have been a chance for the Court to apply the Bill of Rights holistically, rather than analyze each Amendment separately and independently from one another.[52] Nevertheless, *Niemotko* was easiest to resolve as a freedom of religion case. A religious group was denied a permit to use a public park due to religious animus, impairing the fundamental right of free exercise and perhaps the Establishment Clause to boot. Precisely because this was an easy case, the Court did not have to examine the impairment of free speech in depth. But if it did, the religious animus against Jehovah's Witnesses could have been construed as content discrimination—the park's

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47. John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1130 (2005).

48. 340 U.S. 268, 269-70 (1951).

49. *Id.* at 272.

50. *Id.*

51. *See* Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909 (2013).

52. *See, e.g.*, Thomas P. Crocker, *The Political Fourth Amendment*, 88 WASH. U. L. REV. 303 *passim* (2010) (arguing for a holistic approach to the Fourth Amendment that would incorporate values from the First and other Amendments).

commissioner objected to the content of the religious meeting—which would not be a neutral time, place and manner regulation.

However, there is another scenario suggested by *Niemotko* that would have been more challenging. What if there had not been evidence of religious animus in the permit denial? The Court noted that "the Mayor testified that the permit would probably have been granted if, at the hearing, the applicants had not started to 'berate' the Park Commissioner for his refusal to issue the permit."[53] What if the evidence showed that the city had denied the Jehovah's Witnesses a permit simply due to personal animus toward one of their leaders? Without evidence that the denial was based on religion, the freedom of religion violation would fall away. It would also be more difficult to show that there was content discrimination. The denial of the permit to use the park for expressive purposes would be based on the identity of the speaker, not on what he planned to express.

Denying a permit to meet in the park because of the identity of the person making the request could be framed as an Equal Protection problem, but this scenario would require invoking the class-of-one doctrine.[54] But this doctrine has been clouded by confusion. As articulated by the Court in the *Olech* case, class-of-one cases call only for rational basis review.[55] Lower courts have divided on whether a plaintiff must show malice or animus in order to prevail.[56] Judges and commentators have lamented the "doctrinal morass" that followed the *Olech* decision.[57] The more straightforward approach would be to understand the denial of a permit to gather and meet in a park as a free speech problem, which should attract strict scrutiny because it is a fundamental rights violation. But since the permit denial was based on the speaker's identity, not on the content or subject matter of the meeting, a court would have to first conclude that speaker discrimination interferes with the freedom of speech. The court would have had to confront the speaker identity gap.

Consider also a hypothetical mechanism by which a clever but ill-willed government could exploit the speaker identity gap to exert influence over public debate. The clever dictator would need to be wary

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53. *Niemotko*, 340 U.S. at 272.

54. *See* Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

55. *Id.* ("Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.").

56. *See* Shaun M. Gehan, *With Malice Toward One: Malice and the Substantive Law in "Class of One" Equal Protection Claims in the Wake of* Village of Willowbrook v. Olech, 54 ME. L. REV. 329, 333 (2002).

57. *See* Alex M. Hagen, *Mixed Motives Speak in Different Tongues: Doctrine, Discourse, and Judicial Function in Class-of-One Equal Protection Theory*, 58 S.D. L. REV. 197, 204 (2013) (quoting Judge McConnell of the Court of the Appeals for the Tenth Circuit).

of the overlap between free speech and the Equal Protection Clause. Since racial and gender classifications are suspect under the Equal Protection Clause, the clever censor would search for other categories that accomplish the similar goals while not triggering heightened scrutiny. But if the government were to discriminate against a class of speakers based on some less suspect ground, the Equal Protection Clause might require only rational basis review. Restrictions based on youth, property ownership, education levels, gun ownership, and dozens of other criteria can be highly predictive of political opinions; and yet, the restrictions would not attract heightened scrutiny under the Equal Protection Clause. Since the Supreme Court had never clearly said that discrimination based on speaker identity offends the First Amendment, the Equal Protection analysis might conceivably carry the day.

To illustrate this potential reach of the speaker identity gap, consider three hypothetical scenarios inspired by the 1963 March on Washington. Recall that the Kennedy Administration was initially opposed to the march and was anxious until the very last moment about how it would be conducted.[58] Since the event required a permit to use the National Mall, there was the potential for the government to try to interfere. But there would have been several different ways in which the Administration might have tried to do this.

First, consider an easy case. Imagine that the government had denied the March organizers a permit and openly stated that it was because they planned to advocate for civil rights legislation. Since the National Mall has been called "the quintessential public forum in the civic life of the nation,"[59] this would be a textbook case of viewpoint discrimination and an obvious violation of the First Amendment.

Second, imagine that the government permitted the march to take place, but prohibited black people from speaking to large public gatherings in the District of Columbia. This would clearly violate the Equal Protection Clause (race being a suspect classification). Since the Equal Protection Case here would be so simple, a court would not need to reach the First Amendment question.

Third, imagine that the Administration, knowing that it could neither prohibit the march based on the substantive message (viewpoint discrimination) nor limit the participants according to race, decided instead to try to indirectly exclude certain speakers it regarded as problematic. They might have focused on John L. Lewis, the head of the Student Nonviolent Coordinating Committee (SNCC), who origi-

58. David Matthews, *Kennedy White House Had Jitters Ahead of 1963 March on Washington*, CNN ONLINE (last updated Aug. 28, 2013, 12:24 PM), http://www.cnn.com/2013/08/28/politics/march-on-washington-kennedy-jitters/.

59. ISKCON of Potomac, Inc. v. Kennedy, 61 F.3d 949, 959 (D.C. Cir. 1995).

nally planned to deliver a sharp critique of the Kennedy approach to civil rights.[60] Noticing that Lewis was only twenty-three-years-old, imagine that the government imposed a condition that speakers at large gatherings on the National Mall must be at least thirty years of age. To justify this, imagine that the Federal Bureau of Investigation issued an expert opinion claiming that youth is correlated with higher risk of incitement and security disruptions.[61] It should nevertheless be obvious that something offensive to the Constitution is taking place, precisely because such measures can be so easily used to interfere with speech. But in this scenario, well-established constitutional doctrines do not offer an easy solution.

In this last scenario, the government would not be directly banning speakers in favor of civil rights; Martin Luther King, Jr. was thirty-four and thus could still have appeared, as could an unlimited number of other older leaders. Thus, there would no facial viewpoint discrimination. There certainly could be an equal protection challenge to the age restriction, but since people under age thirty are not a suspect class and the government would have at least a superficial justification for the rule, the restriction might have survived rational basis review. Moreover, to argue this case as a focus on age discrimination would be a distraction from what is really going on. What this hypothetically imagines is an effort by government to manipulate public expression, and so it is the First Amendment that should be the primary touchstone. But First Amendment case law did not clearly address situations like this. So long as the speaker identity gap in First Amendment doctrine remained, there was at least a plausible constitutional ambiguity that might allow a government censor to substantially limit public dissent by regulating who can speak rather than focusing on what they can say.

I am not necessarily suggesting that a federal court in 1963 would actually have permitted the hypothetical exclusion that I proposed to go forward. I suspect that a federal judge would have seen through such a manipulative, technocratic exclusion of an activist from speaking in the Nation's premier public forum. I suspect that most judges would understand that prohibiting a person from giving a speech on the National Mall offends the values of the First Amendment. Before *Citizens United*, the speaker discrimination principle may have been an illustration of what Akhil Reed Amar calls the "unwritten Consti-

60. *See* Sonia Grant, *March on Washington: John Lewis' Speech - Then and Now*, HUFFINGTON POST POLITICS: THE BLOG (last updated Oct. 16, 2013, 5:12 AM), http://www.huffingtonpost.com/sonia-grant/john-lewis-march-on-washington_b_3767330.html.

61. As we will see in Part III, the City of Chicago offered a very similar justification for limiting who would picket outside of schools in the 1972 *Mosley* case.

tution."[62] In fact, in the realm of free speech it is not uncommon for forms of expression to enjoy constitutional protection even when doctrinally it is not entirely clear why.[63] Moreover, as I will argue in this Article, the speaker discrimination principle has been implicit in free speech cases for a long time.

My point is that until 2010, the Court had failed to articulate the principle of speaker discrimination and that a gap in articulated constitutional doctrine has a number of negative consequences. It raises uncertainty, which in the free speech context may silence expression. It increases the danger that judicial decision-making will appear subjective, a danger that in speech cases appears especially acute when judges are asked to protect speech with which they personally disagree.[64] In a marginal case, it increases the risk of judicial inconsistency and error. For instance, in the Eleventh Circuit's case regarding exclusion of nonresidents from city council meetings, the court was not forced to explain why this form of speaker discrimination was more permissible than other forms.[65] This does not necessarily mean that the Eleventh Circuit was wrong in this case. But an advantage of articulated doctrine is that it forces judges to ask certain questions, and thus reduces the chance that important issues will be simply ignored. Courts can reach the correct result without such structure, but they are more likely to make mistakes.

As Justice O'Connor explained in her concurrence in *City of Lague v. Gilleo*, there is good reason to prefer explicit rules of law in the free speech arena.[66] These dangers are especially real given that in practical terms a restriction on speech, especially if the government attempts any form of prior restraint, is likely to be argued in court in the context of a request of a preliminary or emergency injunction. There will not necessarily be an opportunity for extensive briefs and reply briefs or for extensive judicial deliberation. A plaintiff will have to show—in a motion that is likely to be written under extreme time pressure—that they are likely to succeed on the merits. This is much

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62. *See* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION (2012) (discussing how case law has, overtime, altered constitutional protection past its strict, textual interpretations).

63. *See, e.g.*, Mark Tushnet, *Art and the First Amendment*, 35 COLUM. J.L. & ARTS 169 *passim* (2012) (examining the unclear doctrinal rationales for considering nonrepresentational art to be protected free speech).

64. *See* Adam Liptak, *For Justices, Free Speech Often Means 'Speech I Agree With,'* N.Y. TIMES, May 6, 2014, at A15, *available at* http://www.nytimes.com/2014/05/06/us/politics/in-justices-votes-free-speech-often-means-speech-i-agree-with.html?_r=0.

65. Rowe v. City of Cocoa, 358 F.3d 800, 803 (11th Cir. 2004).

66. 512 U.S. 43, 60 (1994) (O'Connor, J., concurring) (defending the Court's focus on content neutrality because "[i]t is a rule, in an area where fairly precise rules are better than more discretionary and more subjective balancing tests").

easier to do when there is a clearly articulated rule from the Supreme Court.

## IV. *CITIZENS UNITED* AND SPEAKER DISCRIMINATION

### *A. The* Citizens United *Majority*

Although it has attracted relatively little attention, the speaker identity gap in free speech case law was a central issue in *Citizens United*.[67] The most well-known controversy about *Citizens United* is whether the Court was correct to see government discrimination against corporate speakers as a threat to free speech. But for this question to be have been relevant, the Court first had to conclude that discrimination based on speaker identity is a free speech problem sufficient to trigger heightened scrutiny. As we have seen, the Court had not previously said this clearly, and in limited public forum cases like *Perry* and *Cornelius*, it had actually said the opposite.[68]

Previously, in *First National Bank of Boston v. Bellotti*, the Court found unconstitutional a state statute that prohibited corporations and banking associations from communicating about most pending voter initiatives.[69] The Massachusetts statute at issue permitted corporate interventions in initiative campaigns only where the initiative "materially . . . affect[s] [any of] the property, business or assets of the corporation," and specifically prohibited corporations from campaigning on initiatives related to income taxation.[70] These restrictions were thus triggered by the intersection of speaker identity (a corporation or banking association) and subject matter (related to the company's business or assets). Such rules had a fairly obvious substantive impact; businesses were not able to pool their resources for political advocacy. Pro-business viewpoints were clearly targeted for special restrictions.

The Court struck down the Massachusetts law, but the Court explained its decision as a routine application of the content discrimination rule.[71] The *Bellotti* Court introduced the idea that speaker discrimination is a problem by saying that the Massachusetts statute "amounts to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in pub-

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67. *Cf.* Citizens United v. FEC, 558 U.S. 310, 394 (2010) (Stevens, J., dissenting) (noting that the prohibition on speaker discrimination formed a "basic premise" for the majority's reasoning).

68. *See* discussion *supra* Part 0.

69. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 795 (1978).

70. *Id.* at 768.

71. *Id.* at 784-85 ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." (citation omitted)).

lic debate over controversial issues . . . ."[72] But the *Bellotti* Court did not elaborate on what it meant or why identity-based restrictions on speech are a constitutional problem. *Citizens United* raised the question more cleanly. This is because, unlike the Massachusetts statute in *Bellotti*, the restrictions on independent campaign expenditure at issue in *Citizens United* did not depend on the content of the speech, except that corporations, unions, and non-profits could not communicate about candidates.

The Court took this opportunity to finally remove the ambiguity that had surrounded identity-based speech restrictions. It stated emphatically that speaker discrimination is prohibited by the First Amendment: "Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. . . . Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers."[73] This means that a restrictive policy that impairs the freedom of just one type of speaker should trigger heightened scrutiny. "The First Amendment protects speech and speaker, and the ideas that flow from each."[74] The speaker identity gap was thus filled.

Doctrinally, it is important that *Citizens United* says that speaker discrimination may offend the Constitution "[q]uite apart from the purpose or effect of regulating content . . . ."[75] As I will explore in more detail in the next Part of this Article, there are many different ways to conceive of speaker identity and why it might matter to freedom of expression. One perspective is that it is simply another mechanism by which a government might control the content of what is said. It may not always be possible to disentangle speech from speaker. But by stressing that speaker discrimination is a concern "apart from" content discrimination, the Court made clear that speaker discrimination should be understood as an independent, standalone infringement on freedom of speech, even when content discrimination is harder to show.[76] A plaintiff trying to challenge a state policy should be able to achieve heightened scrutiny simply by showing that the state is regulating who can speak. There would be no need to allege or prove that the regulation was a pretext for content discrimination or that it has the effect of content discrimination. The mere fact of discrimination based on the identity of the speaker would be enough.

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72. *Id.* at 784.

73. *Citizens United*, 558 U.S. at 340.

74. *Id.* at 341.

75. *Id.* at 340.

76. *Id.*

We can see the immediate potential impact of this new development in First Amendment law if we return to the 11th Circuit's decision about the exclusion of non-residents from speaking at town meetings in *Rowe v. City of Cocoa*.[77] In that case, the Court of Appeals noted that subject matter discrimination is permissible in a limited public forum, though viewpoint discrimination is not.[78] Since a residency restriction is not a viewpoint restriction, the court assumed that it was permissible.[79] But had this case arisen after *Citizens United*, the analysis would have had to go farther—or at a minimum the Court of Appeals would have had to decide if *Citizens United's* holding on speaker discrimination applies in a limited public forum such as a town meeting. The residency requirement is neither a content nor a viewpoint restriction. But it is clearly a restriction based on speaker identity. Under *Citizens United*, such a restriction would attract heightened scrutiny. Given that there were a number of other ways the town could have maintained order in its public meetings, the result would likely be different.

Precisely because the new articulation of the speaker discrimination doctrine is such an important step, there are doubts about whether the Court really meant what it said. In a recent essay, Professor Michael W. McConnell dismissed the speaker discrimination part of *Citizens United* as being overly sweeping and indicated skepticism about whether the Court will follow through.[80] Professor McConnell's main point was that *Citizens United* could have been resolved on narrower grounds.[81] That may be correct, but it was not the path the Court chose, and it would be an error to dismiss this aspect of the decision. The justices in the *Citizens United* majority were offered several paths toward a narrower ruling, and they decided that they had to take the broader, sweeping route.[82] Assuming that the justices in the majority do not want to be seen as acting on subjective political agendas, their legal reasoning should be taken seriously and the Court should be expected to apply it to other cases.[83]

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77. Rowe v. City of Cocoa, 358 F.3d 800 (11th Cir. 2004) (discussed *supra* Part II).

78. *Id.* at 804.

79. *Id.* at 803-04 ("A bona fide residency requirement, as we have here, does not restrict speech based on a speaker's *viewpoint* but instead restricts speech at meetings on the basis of residency.").

80. McConnell, *supra* note 6, at 448-49 (suggesting that the Court misapplied previous precedents and that its holding could be better explained as a Press Clause decision).

81. *Id.* at 415.

82. Citizens United v. FEC, 558 U.S. 310, 322-26 (dismissing several proposed means by which the Court could hold for Citizens United but avoid a sweeping constitutional decision).

83. *Cf.* Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 618 (2011) (suggesting that the Court's campaign finance decisions are doctrinally incoherent but can be explained by a "political sensibility").

Professor McConnell correctly observes that since *Citizens United* the Court has declined to strike down restrictions on non-citizen participation in election campaigns.[84] That is certainly a form of speaker discrimination. But the Court upheld it in a one line, per curiam affirmance of a Court of Appeals decision that analyzed the case under strict scrutiny. Thus, at least doctrinally, the Court was not confronted with a case that conflicted with what should happen under *Citizen United*'s speaker discrimination holding.[85] The discrimination against non-citizens deserved new and closer scrutiny. But it would go too far to suggest that this limited post-*Citizens United* engagement with the issue indicates that the Court is backing away from its doctrinal holding regarding speaker discrimination.

The best way to put to rest doubts about speaker discrimination in *Citizens United* is to show that this doctrine has broader merit and was not merely a results-oriented means to an end for justices who wanted to strike down restrictions on corporate involvement in election campaigns. In the next Part, I will explain why speaker identity matters to expression and why it thus deserves special protection under the First Amendment. In Part 0, I will show that while *Citizens United* articulated the speaker discrimination doctrine in newly clear terms, the underlying principle was evident in older First Amendment cases. It is thus wrong to criticize this aspect of *Citizens United* for breaking away from established free speech jurisprudence.

### *B. The* Citizens United *Dissent*

If one wants to find evidence that the speaker discrimination holding in *Citizens United* broke entirely new doctrinal ground, one needs look no farther than the reaction of the four dissenting justices. Indeed, Justices Stevens, Ginsburg, Breyer and Sotomayor found much to object to in the *Citizens United* judgment. They believed the Court had violated principles of judicial restraint by deciding the case on broad grounds and by addressing the free speech rights of for-profit corporations, since *Citizens United* was actually a non-profit organization.[86] And they objected to the equation of corporate speech with speech by people. Even if they had conceded the speaker discrimina-

84. McConnell, *supra* note 6, at 448 (citing Bluman v. FEC, 132 S. Ct. 1087 (2012) (per curiam)).

85. Bluman v. FEC, 800 F. Supp. 2d 281, 285 (D.C. Cir 2011) (deciding that the regulation could survive strict scrutiny and thus that it was unnecessary to determine which level of scrutiny applied), *aff'd*, 132 S. Ct. 1087 (2012). Curiously, the D.C. Circuit's decision in *Bluman* relied heavily on the *Citizens United* dissent while skirting the speaker discrimination issue that emerges from the majority's decision. *Id.* at 289. There are reasons to believe that the Court needs to re-visit the issue of non-citizen speech rights. *See* discussion *infra* Part VII.

86. 558 U.S. at 319.

tion issue, there are solid grounds on which to dissent from the majority on the campaign finance questions. Speech can be restricted if the regulation is tailored to fit a valid government interest.[87] Such a case can be made for campaign finance regulation.[88] One could also contest the equation of corporate speech with individual speech in the electioneering context.[89]

Kathleen Sullivan has written that the real debate between the majority and dissent in *Citizens United* is a clash between libertarian conceptions of free speech (the majority) and an egalitarian approach that ultimately values political equality over complete freedom of speech.[90] She writes that Justice Stevens' egalitarian view:

> has both an antidiscrimination component and an affirmative action component. The former bars government from discriminating against marginal, dissident, or unpopular viewpoints that are likely to suffer political subordination or hostility. The latter enforces a kind of preference or forced subsidy for marginal, dissident, or unpopular viewpoints by barring the attachment of speech-restrictive conditions to the receipt of public benefits.[91]

This certainly can explain the contrasting views on the Court on the question of campaign finance regulation. It goes particularly to the debate over whether the government may restrict corporate speech to prevent the "distorting effects of immense aggregations of wealth . . . ."[92] Overruling *Austin v. Michigan Chamber of Commerce*,[93] the majority rejected the egalitarian approach, arguing that the government has no constitutional role " 'in equalizing the relative ability of individuals and groups to influence the outcome of elections.' "[94]

This debate became even more central in 2014's *McCutcheon v. FEC*, where the same five-justice majority struck down aggregate caps on individual campaign donations.[95] While *Citizens United* rejected the proposed government's interest in preventing the distortion of national political debate through unfettered corporate spending, *McCutcheon* focused more on the fear that direct campaign dona-

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87. *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1456 (2014) (explaining the similarity of strict scrutiny and the "closely drawn" test).

88. *Citizens United*, 558 U.S. at 452-60 (Stevens, J., dissenting).

89. *See, e.g.*, Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in* Citizens United, 61 CASE W. RES. L. REV. 495, 497 (2011).

90. Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 146-48 (2010).

91. *Id.* at 148.

92. Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 660 (1990).

93. *Id.* at 669.

94. *Compare* Citizens United v. FEC, 558 U.S. 310, 349-50 (2010) (quoting Buckley v. Valeo, 424 U.S. 1, 48 (1976)), *with id.* at 441-43 (Stevens, J., dissenting).

95. McCutcheon v. FEC, 134 S. Ct. 1434, 1462 (2014).

tions carry the danger of corruption. The Court in *McCutcheon* limited this government interest to quid pro quo bribery.[96] The dissent in *McCutcheon*, per Justice Breyer, saw the danger of corruption in broad terms.[97] But in both cases, the dissenters' central concern was that average Americans will be pushed out of political life because they will not have the required monetary resources to be heard: "Where enough money calls the tune, the general public will not be heard."[98]

However, the antidiscrimination or egalitarian approach to free speech is difficult to square with the dissenters' reluctance to prohibit speaker discrimination in *Citizens United*. The dissenters in *Citizens United* were explicitly willing to permit speech restrictions against a variety of less wealthy segments of the general public—students, noncitizens, prisoners, government employees, non-citizens, enlisted soldiers. They wrote:

> The Government routinely places special restrictions on the speech rights of students, prisoners, members of the Armed Forces, foreigners, and its own employees. When such restrictions are justified by a legitimate governmental interest, they do not necessarily raise constitutional problems. In contrast to the blanket rule that the majority espouses, our cases recognize that the Government's interests may be more or less compelling with respect to different classes of speakers, and that the constitutional rights of certain categories of speakers, in certain contexts, " 'are not automatically coextensive with the rights' " that are normally accorded to members of our society.[99]

There is reason to be surprised that none of the four dissenters saw more value in the speaker discrimination portion of Justice Kennedy's opinion.[100] Justice Kennedy sought to put speaker discrimination in the context of the repression of "disadvantaged person[s] . . . ."[101] Advocates of campaign finance regulation would seem to have a similar concern. One could imagine an elegant dissent that embraced Kennedy's desire for an inclusive national discourse, but then took him to task for not grasping how unrestrained money in

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96. *Id.* at 1441.

97. *Id.* at 1466-67 (Breyer, J., dissenting) ("[T]he anticorruption interest that drives Congress to regulate campaign contributions is a far broader, more important interest than the plurality acknowledges. It is an interest in maintaining the integrity of our public governmental institutions.").

98. *Id.* at 1467.

99. *Citizens United*, 558 U.S. at 420-22 (Stevens, J., dissenting) (citations omitted) (quoting Morse v. Frederick, 551 U.S. 393 396-97, 404 (2007)).

100. One reason to be surprised by this Part of the dissent is that Justice Stevens had appeared to endorse the opposite view in *Los Angeles Police Department*. *See* discussion *infra* Part 0.

101. *Citizens United*, 558 U.S. at 340-41.

politics drowns out these voices and degrades the worth and standing of Americans who may have something to say but less wealth with which to broadcast it. But that is not the path the dissenters chose.

With Justice Stevens writing, they recognized correctly that the speaker discrimination principle was the "basic premise" for the majority's reasoning.[102] They sharply contested the validity of this premise, just as they attacked the better known parts of the majority decision. We need to wonder why they disputed this and if they were on solid ground. The dissenters hinted that speaker discrimination may have some place in free speech doctrine (but in very hedged terms). They noted that, while the First Amendment "frowned on" speaker discrimination, it did not prohibit all such distinctions.[103] But they then rejected the majority's version of the speaker discrimination principle in sweeping, sharp terms:

> The basic premise underlying the Court's ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity, including its "identity" as a corporation. While that glittering generality has rhetorical appeal, it is not a correct statement of the law.
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> . . . .
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> . . . Like its paeans to unfettered discourse, the Court's denunciation of identity-based distinctions may have rhetorical appeal but it obscures reality.[104]

Endorsing restrictions on the expressive rights of civil servants, soldiers and students is clearly in tension with the idea that average people should not take a back seat in political life. But it stems from a longstanding problem in First Amendment law. The dissent conflates forum-based speech restrictions with speaker-based restrictions. Although the dissent claimed that elections were different, Justice Stevens' opinion asserted that speech restrictions based on identity are constitutionally permissible in a number of non-election contexts, such as those involving students, prisoners, soldiers, and civil servants.[105] For such people, the dissent said, "The Government routinely places special restrictions on [] speech rights. . . ."[106]

The dissent accomplishes this through a shift in phrasing rather than fully articulated logic. For instance, Justice Stevens cited in a footnote the *Bethel School District* case,[107] where the Court said that

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102. *Id.* at 394 (Stevens, J., dissenting).

103. *Id.* at 422-23.

104. *Id.* at 394, 420.

105. *Id.* at 420.

106. *Id.*

107. *See id.* at 420 n.41.

"the constitutional rights *of students in public school* are not automatically coextensive with the rights of adults in other settings."[108] But in the *Citizens United* dissent, Justice Stevens said "[t]he Government routinely places special restrictions on the speech rights *of students* . . . ."[109] As we will see in more detail in Part 0, the Court has indeed endorsed speech restrictions in the school context, but it has not endorsed general limits on the right of students to speak freely. By dropping the context, the *Citizens United* dissent makes a very different and vastly broader claim about the power of the state to limit speech.

The dissent promotes a similarly broad reading of other forum-based cases. For example, in *Jones v. North Carolina Prisoners' Labor Union, Inc.,* the Court affirmed the authority of prison officials to prevent inmates from organizing a quasi-union to promote better working conditions in the prison. In that case, the Court's rationale was based entirely on the exigencies of operating a prison:

> The fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment, which are implicit in incarceration.
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> . . . .
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> . . . In a prison context, an inmate does not retain those First Amendment rights that are "inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."[110]

The justices in *Jones* gave no indication that they would have approved of restrictions on communication outside prison about prison conditions. In fact, they stressed that the prison authorities were not preventing inmates from communicating with the outside world.[111] Yet, in *Citizens United* the dissent asserts that the Court has broadly endorsed limits on the speech of prisoners, again without reference to the context.[112]

The dissent thus illustrates an important problem with forum doctrine. Even when it is clear that the government can legitimately restrict speech in a certain context, we need a limiting principle by which to contain these restrictions. As we can see in the slippage of language in the dissent, there is a danger that once speech re-

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108. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) (emphasis added).

109. *Citizens United*, 558 U.S. at 420 (Stevens, J., dissenting) (emphasis added).

110. Jones v. N.C. Prisoner's Union, 433 U.S. 119, 125, 129 (1977) (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974)).

111. *Id.* at 131 (noting that limitations on bulk mailing were reasonable under the First Amendment because "other avenues of outside informational flow by the Union remain[ed] available" to communicate with prisoners).

112. *Citizens United*, 558 U.S. at 420 (Stevens, J., dissenting).

strictions are approved in one context, the speech restrictions can begin to follow the people, rather than remain tethered to the context where they were originally justified. Thus a restriction on speech in school can morph into a limitation on the speech rights of students at all times and in all places. I will revisit some of these speech settings in Part 0. I argue that an immediate benefit of the speaker discrimination doctrine is that it can provide the necessary limiting principle to prevent forum doctrine from swallowing the speech rights of whole classes of people.

However, before addressing this potential application of the speaker discrimination doctrine, I will address two other issues. In Part 0, I will make the case that there is good reason for free speech doctrine to be concerned about speaker identity, not only content and viewpoint. In Part 0, I will argue that *Citizens United* did not really invent an entirely new principle of law. Instead, a suspicion of speaker discrimination has long been part of free speech law, but it had not previously been so explicitly explained by the Court.

## V. WHY DOES SPEAKER IDENTITY MATTER?

### *A. Beyond the Marketplace of Ideas*

To understand how the Court came to recently recognize speaker identity as an important component of speech, it is important to first summarize the complexity that the Court has long encountered in trying to articulate the value of free expression generally. The question of whether speaker discrimination is a free expression problem depends on why we protect free expression to begin with. Yet, as a leading treatise summarizes, "[c]ontemporary free speech jurisprudence is a befuddling array of theories, methods, formulas, tests, doctrines and subject areas."[113] As I will now endeavor to show, some theories of free speech explain the broad sweep of the Free Speech Clause better than others. The most commonplace justification for free speech, the so-called marketplace of ideas, appears particularly inadequate to the task. But other theories, such as the liberty/autonomy theory of speech or the agency theory seem to come much closer to the majority's approach in *Citizens United*.

The classic American explanation for the purpose of free speech is the marketplace of ideas, often traced to Oliver Wendell Holmes' 1919 dissent in *Abrams v. U.S.*:[114]

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113. SMOLLA, *supra* note 11, § 2:2.

114. SMOLLA, *supra* note 11, § 2:4 ("The marketplace theory is perhaps the most famous and rhetorically resonant of all free speech theories, though it has often been attacked by modern scholars.").

> [M]en have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .[115]

The idea that free speech promotes competition for the best ideas resonates across a wide range of arenas, from our adversarial system of justice to the rigorous testing of scientific theories in academic research.[116] The marketplace rationale is sufficient to explain the philosophical opposition to censorship and to defend the basic right of citizens to critique their political leaders.[117] It also explains cases where the Court has recognized the right of the public to receive information.[118] It explains the unique American permissiveness toward hate speech, an issue on which the United States parts ways with other western democracies and with international human rights law.[119]

As Professor Cass Sunstein observed two decades ago, Holmes' conception of the market stemmed from two ideas that were always in tension with another. On the one hand, the marketplace of ideas promises to produce a better understanding of truth through testing and debate, even though Holmes's expressed "skepticism about prevailing understandings of truth" and thus doubted whether there was always an objective truth to be discovered.[120] The marketplace metaphor implies that there is some truth or an objectively better idea that will be identified through competition. It is easiest to apply to the contest of articulable ideas, to matters of debate, where messages are clashing with each other.[121] It does not easily encompass expres-

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115. Abrams v. United States, 250 U.S. 616, 630 (1919).

116. *See* CHRIS DEMASKE, MODERN POWER AND FREE SPEECH 29-52 (2009) (providing that the Supreme Court has used the marketplace metaphor in a wide variety of speech contexts over many decades of jurisprudence).

117. *See generally* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 25 (1993).

118. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762-65 (1976) (striking down restrictions on information that could be distributed by pharmacists).

119. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 387 (1992) (citing the "specter that the Government may effectively drive certain ideas or viewpoints from the marketplace' " to strike down a hate speech statute (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991))); *see also* International Covenant on Civil and Political Rights art. 20(2), Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) ("Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.").

120. SUNSTEIN, *supra* note 117, at 25.

121. *Cf. R.A.V.*, 505 U.S. at 392 ("One must wholeheartedly agree with the Minnesota Supreme Court that '[i]t is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear,' but the manner of that confrontation

sion that does not directly clash with some other expression, or that does not clearly articulate a message at all. The marketplace metaphor is especially hard to apply to expression that has no clearly articulable content. How can the marketplace for ideas include expression that does not clearly express any clearly identifiable idea? Perhaps a bad ideology like racism can be countered by an effectively communicated good idea, like tolerance. But can bad art be remedied by good art? Can a bad song be corrected by playing a better one?

As Professor David A. J. Richards taught, the idea that truth will be found through the contest of ideas may be an unstable foundation for the expansive protection of free expression that we have come to take for granted in the United States.[122] Richards observed that the scope of desired debate can be defined narrowly or broadly, and if the aim of free speech is to produce a fair debate that will yield the best ideas, then there might be a need for government intervention to keep the debate focused.[123] Richards' point is that many of the situations that seem to best epitomize the adversarial testing of ideas in fact involve considerable regulation of speech, such as courtrooms or parliaments where expression can be limited if it strays from externally imposed rules of order.[124] Rather than keep government out of the speech regulation, a devotion to the marketplace of ideas may actually call for heavy government regulation of speech, to keep the debate within bounds, much as a judge keeps order in a courtroom. But the American concept of free speech rejects such a role for government in public fora, even if it means allowing speech that actually aims to thwart democracy or hinder the search for truth.[125]

As the Supreme Court itself has noted on occasion, a strict and direct application of the marketplace metaphor might lead to a fair degree of repression of any speech that seems not to directly contribute to the competitive marketplace of ideas. The Court observed this problem with reference to abstract art in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*: "[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,'

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cannot consist of selective limitations upon speech. . . . The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content." (alteration in original) (quoting *In re* Welfare of R.A.V., 464 N.W.2d 507, 508 (Minn. 1991)) (citations omitted)).

122. DAVID A. J. RICHARDS, FREE SPEECH AND THE POLITICS OF IDENTITY 18-22 (1999).

123. *Id.* at 20.

124. *See id.* at 20-22.

125. *See id.* at 20 ("If such attacks should be protected, as current American law indeed requires, it seems rather strained to justify such protection on the ground that it invariably advances democracy when the speech it allows may sometimes self-consciously aim to subvert it. We value such speech intrinsically, certainly not because it always advances democratically determined policies and aims.").

would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll."[126] This remark is interesting in two respects. First, the Court (per Justice Souter) considered art to be "unquestionably" protected by the First Amendment, and yet, he did not (or could not) articulate exactly why this should be so.[127]

Second, it is interesting that the Court brought up Jackson Pollock in a case concerning a parade. In *Hurley*, the Court held that it would violate parade organizers' free speech rights to force them to include gay, lesbian, and transgender participants.[128] Parades seem like a fairly conventional form of political communication, but the Court actually found it difficult—and in the end unnecessary—to pin down a single discernable message from the parade.[129] The organizers of a parade may choose to include a wide array of participants, each with different specific messages, but which together may nevertheless communicate something, "[r]ather like a composer" writing a score for an orchestra.[130]

While the marketplace of ideas focuses on political debates as the most obviously protected form of expression, in *Hurley* the Court found that it was easier to understand painting and music as a form of free speech, and to protect political speech by analogy.[131] To be protected by the First Amendment, speech need not be valued only for its explicit content. Andy Warhol's Campbell's soup paintings are probably not, literally, just about soup. Sometimes, the most important aspects of communication are nuanced and difficult to articulate, but they can still be protected by the First Amendment. The abstractions of art proved useful to explain the nuances of political expression rather than the other way around. This suggests that the marketplace of ideas may not be as central to freedom of speech as often imagined.

The marketplace of ideas as it has been applied seems to begin and end with the regulation of content and viewpoint. Despite its frequent repetition and intrinsic appeal, the marketplace metaphor is not especially helpful for understanding the full breadth of free speech, and especially not the doctrine of speaker discrimination. Professor Richards suggests that improving democratic debates may actually be a secondary benefit of free speech, but not its primary ra-

126. 515 U.S. 557, 569 (1995) (citation omitted).

127. *See generally* Tushnet, *supra* note 63.

128. *Hurley*, 515 U.S. at 557, 574.

129. *Id.* at 574.

130. *Id.*

131. *See id.*

tionale.[132] This is a critical insight to be able to understand the Supreme Court's new announcement of a ban on speaker discrimination. If all we are interested in is a contest of ideas, who expresses the ideas would not seem especially important.

### *B. Diversity and Autonomy*

Another famous Supreme Court rationale for broad protection of free speech is Justice Brandeis' opinion in *Whitney v. California*, where he argued that the remedy to bad speech is more speech:

> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.[133]

On the surface, the more speech rationale seems to be just another version of the marketplace of ideas. Brandeis clung to the idea that free debate will permit the best ideas to prevail when arguments can be tested by counterargument.[134] But the idea that we should encourage more speech potentially goes farther than the marketplace of ideas metaphor.

The idea that more speech is a good thing can encompass the principle that allowing more voices to be heard is a good in and of itself, even if it does not always yield objective truth. The actual nature of political debate suggests that it is not always possible for the public to reach a consensus. Political struggles are rarely won the way litigation can be closed through res judicata; some debates simmer endlessly and with intensity. In a democracy, people with irreconcilable ideologies must coexist with neither side necessarily winning once and for all.[135] In this respect, clashing ideas about public policy are not necessarily so different from clashing conceptions about what

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132. *See* RICHARDS, *supra* note 122, at 21.

133. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

134. *See* SUNSTEIN, *supra* note 117, at 26-28 (comparing the arguments of Holmes and Brandeis).

135. For instance, the Supreme Court has recently taken note of ongoing, unresolved public debate concerning affirmative action. *See* Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1630 (2014). Other potential examples might include public debates over abortion, the size and role of government in the economy, the wisdom of higher taxes on the wealthy, and immigration policy.

makes good art. Clashing perspectives must coexist, just as clashing tastes in art and music must coexist.

In a diverse society, more speech may just lead to more speech, and that may be good enough. Rather than a marketplace where the best idea wins out, the First Amendment may exist to promote diversity in expression in which there need not be a definitive victor, nor even direct competition. Being open to more speech means that more speakers have an outlet through which to express themselves, and more people can find the kind of speech they want to hear. Allowing all such voices to express themselves offers an outlet by which the equal value of all may be acknowledged, and by which some resulting tension between people who have different preferences may be relieved.

The Supreme Court raised the issue of diversity directly in *Cohen v. California*, a case concerning a man who insisted that the First Amendment protected his right to wear a jacket emblazoned with the slogan "Fuck the Draft" into a courthouse.[136] He was prosecuted for "offensive conduct."[137] California argued that this was not really content discrimination because Mr. Cohen could have found a more polite turn of phrase by which to communicate his displeasure with military conscription.[138] In a narrow view of the marketplace of ideas metaphor, this is a plausible argument. But the Court understood that there was more to Mr. Cohen's jacket than simply communicating a concrete political viewpoint.

> [M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. . . . We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message . . . .[139]

The principle that free speech includes inexpressible elements as well as articulated ideas is critical to finding a rationale for free speech beyond the marketplace of ideas.

Professor C. Edwin Baker argued that the First Amendment protects "not a marketplace, but rather an arena of individual liberty."[140]

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136. 403 U.S. 15, 15 (1971).

137. *Id.*

138. *Cf.* R.A.V. v. City of St. Paul, 505 U.S. 377, 391-92 (1992) ("But 'fighting words' that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person's mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents. . . . St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.").

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

140. C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 5 (1989).

*Cohen* embraces this view. *Cohen* is often quoted for the line, "[O]ne man's vulgarity is another's lyric."[141] But behind this one-liner, the *Cohen* decision managed to articulate a vision of free speech linked directly to the diversity of American society:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[142]

Combined with the recognition that people have different tastes, the Court's desire to place the decision about what should be expressed "into the hands of each of us" necessarily means there will be a wide range of views expressed.[143] It allows people to express themselves for their own personal benefit, not just to contribute to public debate. As Professor Sunstein wrote: "There is also an important connection between free speech and individual self-development. The opportunity to create art or literature, like the opportunity to read the products of other minds, is crucial to the development of human capacities."[144] Expanding on this idea, Professor Richards argues that free speech is an outgrowth of each person's right to moral independence.[145] He calls this the "[t]oleration [m]odel" of free speech, rooted in the Constitution's embrace of freedom of conscience.[146]

The marketplace of ideas and the other rationales for free speech are not mutually exclusive. As Thomas Emerson wrote in the early 1960s, together they all help to justify the expansive concept of free expression that we have in the United States.[147] These background ideas provide a foundation from which to understand the value of speaker identity. Free speech is about more than just literal content.

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141. 403 U.S. at 25.

142. *Id.* at 24.

143. *Id.*

144. SUNSTEIN, *supra* note 117, at 129-30.

145. RICHARDS, *supra* note 122, at 21.

146. *Id.* at 22-28 (discussing the tolerance model and James Madison's advocacy for toleration).

147. THOMAS EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 4-5 (1963) (stating free speech may be justified as a form of individual liberty, as a path toward finding truth, as a means of encouraging civic engagement, and as a means of promoting social stability).

### *C. Content Versus Voice*

In *Citizens United*, Justice Kennedy's opinion offers two main explanations for why a prohibition on speaker discrimination must flow from the First Amendment.[148] The first is that "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content."[149] The second was this: "By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice."[150] I will take each of these ideas in turn.

The premise that control of who may speak will permit the government to control the content of what is said ties the speaker discrimination principle directly to the marketplace of ideas theory of free speech. This puts speaker discrimination on firm doctrinal ground, since content discrimination has proven to be a solid and fairly workable pillar of free speech doctrine over decades of testing.[151] This rationale addresses the March on Washington hypothetical that I raised regarding the speaker list wherein the government could have developed a manipulative restriction on younger speakers in order to keep more threatening viewpoints at bay.[152]

But the connection between speaker and content is not simple. We know that there are correlations between various markers of identity and political opinions. For instance, churchgoers appear much more likely to vote for Republican candidates, while unmarried voters favor Democrats.[153] Thus, if the government were able to reduce the ability of certain kinds of people to express themselves, it could tilt public debate in one direction or another. At the macro-level, it seems logical that preferring certain speakers over others would impact the overall mix of viewpoints that are heard. But this logic may not be as convincing at the level of an individual speaker or an individual case. Polling data may show convincingly that, on average, identity markers such as religion, race, income, and marital status predict political orientation, but this is more useful in understanding voting patterns of large numbers of people than the opinions that individuals might express.

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148. Citizens United v. FEC, 558 U.S. 310 (2010).

149. *Id.* at 340.

150. *Id.* at 340-41.

151. *See* Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231 (2012).

152. *See supra* Part 0.

153. *See* Jeff Jacoby, *How the Marriage Gap Favors Obama*, BOSTON GLOBE (July 22, 2012), http://www.bostonglobe.com/opinion/2012/07/21/how-marriage-gap-favors-obama/NAouV0N4JUL49z7GLSMP7K/story.html; Susan Page, *Churchgoing Closely Tied to Voting Patterns*, USA TODAY, http://usatoday30.usatoday.com/news/nation/2004-06-02-religion-gap_x.htm (last updated June 3, 2004, 9:41 AM).

Resting solely on the correlation between identity and content could lead in problematic directions. There are plenty of people who break from the pack of their demographic categories in forming their opinions. It would seem that freedom of speech should exist in part to facilitate opinions that are unconventional or surprising. By analogy, in *Grutter v. Bollinger*, the Court recognized that diversity in higher education is not strictly about ensuring that there are minority students present to "express some characteristic minority viewpoint on any issue."[154] By the same token, it would be problematic to justify preventing speaker discrimination simply so that individuals can be spokesmen for their presumed demographic identity.

Critical legal theorists have had to puzzle with this dilemma, since they have pushed for the inclusion of a wider diversity of voices in public life, especially from people at the bottom of racial, gender, and economic hierarchies. Yet, as Devon Carbado noted more than a decade ago in a thoughtful essay on this problem, "although the people on the bottom speak in a different voice, that voice in not monolithic."[155] This raises the question of whether there is a particular viewpoint that needs to be expressed, or if the value of including more voices is more than the mere content of what they might say. For instance, is it possible to advocate the inclusion of women in public debate without resorting to a kind of essentialism by implying that there is a single women's experience that a woman is likely to communicate?[156]

One answer to this is that a substantive message can come across differently depending on who the messenger is. In fact, one can send a message simply by selecting certain people as representatives, even if they do not necessarily say anything at all.[157] The point here is less about the speaker and the message than about the listener and the way the message is received. Consider as an example two prominent abolitionists from the Civil War era, Frederick Douglass and Thaddeus Stevens. One of them was an escaped slave, an African-American. The other was a white congressional leader. In substance, they were largely on the same side of major debates of their day, but it would be very wrong to think that they were interchangeable. In terms of persuasion, their different identities could give a different

154. 539 U.S. 306, 333 (2003).

155. Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283, 1298 (2002).

156. *See* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588 (1990).

157. Consider, for instance, the decision by President Obama to name gay athletes to the American delegation at the Sochi Olympics, which was understood as a statement against Russian repression against the LGBT community. *See* Cindy Boren, *Obama Names Openly Gay Athletes to Sochi Olympic Delegation*, WASH. POST (Dec. 18, 2013), http://www.washingtonpost.com/blogs/early-lead/wp/2013/12/18/obama-names-openly-gay-athletes-to-sochi-olympic-delegation/.

kind of potency to what they said, which could change in different contexts.

Stevens may have drawn legitimacy from the fact that he was white and from the elite, which may have made him more persuasive in some quarters. Psychological research has shown that values-based political messages are more likely to be persuasive to listeners if the listener perceives that the speaker has shared values or political backgrounds.[158] By contrast, Douglass could draw on the fact that when he spoke of slavery, even if he spoke in general or abstract terms, listeners would know that he was drawing from lived experience. Minority speakers are often seen as possessing "authenticity" or "credibility" when they speak on issues relevant to minorities.[159] This does not mean that they really can claim to speak more legitimately, that their ideas are necessarily better, or that there is a single authentic minority experience to communicate anyway. But what they say may nevertheless be received differently.[160]

The Court has directly wrestled with the question of whether speaker identity changes the communicative meaning of speech in *City of Ladue*, where the Court struck down a municipal restriction on homeowners' rights to post political signs outside their houses.[161] The city argued that residents have adequate other channels by which to communicate their political opinion.[162] But the Court rejected this because of the connection between speech and the identity of the speaker:

> Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else . . . . Precisely because of their location, such signs provide information about the identity of the "speaker." . . . A sign advocating "Peace in the Gulf" in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child's bedroom window or the same message on a bumper sticker of a passing automobile. An espousal of socialism may carry different implications when displayed on the grounds of

158. *See* Thomas E. Nelson & Jennifer Garst, *Values-Based Political Messages and Persuasion: Relationships Among Speaker, Recipient, and Evoked Values*, 26 POL. PSYCHOL. 489 (2005).

159. *See* Carbado, *supra* note 155, at 1299-1304.

160. In recent popular culture, the gap between perceived voice and actual perspective was dramatized in a 2014 episode of *Mad Men*, where in the context of a late-1960s advertising agency, some male executives promoted the work of a female colleague because she would be seen as representing "the voice of moms," even though she was single and childless and her work was high quality and the product of a collaboration with many male colleagues. *See Mad Men: Waterloo* (AMC television broadcast May 25, 2014).

161. City of Ladue v. Gilleo, 512 U.S. 43, 46 (1994).

162. *Id.* at 56.

> a stately mansion than when pasted on a factory wall or an ambulatory sandwich board.[163]

The recognition that speaker identity matters to the meaning of speech connects closely to the right to engage in anonymous speech. If the speaker's identity is actually itself a form of community, can a speaker decide to hide his or her identity so as to change that message? In *McIntyre v. Ohio Elections Commission*, the Supreme Court said "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."[164] The Court has repeatedly held that states may not require people to announce their identities to the government or even wear identification badges when they engage in expressive activities such as distribute leaflets or canvas door-to-door.[165] One reason for protecting anonymous speech is to encourage more speech, because many people may feel intimidated into silence otherwise.[166] This concern is evident in *NAACP v. Button*, which protected the right of civil rights organizations in the Jim Crow South to keep their membership rolls secret.[167] But another reason is that content and speaker identity are closely linked, so that if speakers were required to reveal their identities, the government would be exercising a kind of editorial control.[168]

The connection between speaker identity and expressive content can be seen even more clearly in the Court's willingness to protect the right to assume false identities. In *McIntyre*, the Court said "an author generally is free to decide whether or not to disclose his or her true identity."[169] The free speech value of lying about one's identity varies considerably. In *United States v. Alvarez*, where the Court struck down the Stolen Valor Act on free speech grounds, the defendant had falsely claimed to have been a marine while speaking at a public meeting.[170] Mr. Alvarez's lie was a "pathetic attempt to gain

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163. *Id.* at 56-57 (also citing Aristotle for the proposition that speaker identity may enhance or deplete the persuasive power of the message).

164. 514 U.S. 334, 342 (1995).

165. *See* Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 168 (2002) (striking down an ordinance requiring a permit in order to engage in door-to-door canvasing); Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 204 (1999) (holding that a measure that requires people who are collecting petition signatures to wear identity badges violates the First Amendment); Talley v. California, 362 U.S. 60, 65 (1960) (holding that an ordinance that bans anonymous leafleting violates the First Amendment).

166. *See* Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1542 (2007).

167. NAACP v. Button, 371 U.S. 415, 442-44 (1963).

168. Lidsky & Cotter, *supra* note 166, at 1543.

169. *McIntyre*, 514 U.S. at 341.

170. United States v. Alvarez, 132 S. Ct. 2537, 2542 (2012). *But see* United States v. Chappell, 691 F.3d 388, 399-400 (4th Cir. 2012) (holding that the First Amendment does

respect," since honor and respect flow from military service.[171] But by defending Mr. Alvarez's right to lie, the Court also offers protection to more sympathetic speakers. Consider, for instance, John Howard Griffin's 1976 book *Black Like Me*, in which a white author records his experience living for six weeks as a black man, in an effort to highlight the impact of race in American life. More recently, a group of online journalists conducted an experiment by posting political comments on Internet discussion sites with false photographs of themselves in which they purported to have a different race or gender. They then recorded how their postings were received differently depending on who readers thought they were—illustrating vividly the relevance that speaker identity has for the way speech is received.[172]

It should be noted that the Court has cut back on anonymous or false identity speech in the context of campaign finance, suggesting that the right to anonymous speech may be context-specific.[173] In *Citizens United*, the Court reaffirmed its previous decisions that disclaimer and disclosure requirements are permissible in campaign finance regulation.[174] The Court found that such regulations must be subject to "exacting scrutiny," but they do not ultimately prevent anyone from speaking and serve the purpose of providing more information to the public.[175] Although this appears to be an exception unique to electioneering, it is clearly in tension with cases like *McIntyre*, *NAACP*, and *Watchtower Bible*, where the Court worried that requiring disclosure of speakers' identities could have a silencing effect.

### *D. Speech and Dignity*

Perhaps the most surprising part of *Citizens United* is the majority's strong assertion that excluding a person or group of people from the right to speak "deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice."[176] Justice Kennedy's majority opinion appears in this passage to recognize that the right to speak is a marker

not invalidate prosecution for impersonating a police officer because of the closer nexus to fraud or criminal activity).

171. *Alvarez*, 132 S. Ct. at 2542.

172. PJ Vogt & Alex Goldman, *[TLDR the internet, shorter] #31 – Race Swap*, ONTHEMEDIA.COM (July 17, 2014, 3:35 PM), http://www.onthemedia.org/story/31-race-swap-experiment/.

173. *See* Lidsky & Cotter, *supra* note 166, at 1547-50 (describing conflicting case law about anonymous speech, especially in campaign finance contexts).

174. Citizens United v. FEC, 558 U.S. 310, 319 (2010) ("The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.").

175. *Id.* at 366-67 (reaffirming the decisions in *Buckley v. Valeo* and *McConnell v. FEC*).

176. *Id.* at 340-41.

of standing in society, possibly analogous in legal terms to the right to sue and be sued and the right to be heard, or more to the point, to the right to be recognized as a person.[177]

The concept that disadvantaged people have a unique voice has long been a theme in critical race theory.[178] Ensuring that these voices can be heard sends an important message that they are valuable. For instance, Carbado explained the value of hearing voices from the bottom of American racial hierarchies in terms very similar to Justice Kennedy's words: "Importantly, the concern about voice can but need not be about what is being *said*. The fundamental issue is whether the races on the bottom have the opportunity both to speak and to be heard, that is to say, to participate in the production of knowledge."[179]

Justice Kennedy's idea that speech can help establish social standing connects to the theory that expression can be a means by which marginalized people acquire a measure of agency or power. Feminist writers have noted that focusing on male dominance over women often portrays women simply as passive victims.[180] Instead, women can be described as having "partial agency" over their lives, even if they exist in an environment that favors men.[181] Women and minorities are often *relatively* powerless but not entirely powerless in political, economic, and social life.[182] Professor Chris Demaske has used this idea to argue that free speech can promote equality by giving otherwise powerless people a measure of agency.[183] The ability to express oneself facilitates interactions through which power differences may be negotiated.[184] This does not mean that social hierarchies will be easily dismantled, but it offers oppressed people a measure of influence.[185]

*Citizens United* is explicit that speaker discrimination "need not be about what is being *said*."[186] The opinion stresses more ephemeral

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177. *Cf.* Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature,* 132 U. PA. L. REV. 561, 566-67 (1984) (analogizing the importance of scholars of color writing about civil rights to establishing standing and the real party in interest in civil procedure).

178. *See, e.g.*, Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 95-96 (1990); Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 MICH. J. RACE & L. 5, 10 (2004) (discussing the importance of having a "voice of color" on the federal bench).

179. Carbado, *supra* note 155, at 1305.

180. Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 326-27 (1995).

181. *Id.* at 354-55.

182. DEMASKE, *supra* note 116, at 68.

183. *See id.* at 74-79.

184. *Id.* at 68.

185. *Id.*

186. Carbado, *supra* note 155, at 1305.

ideas, like worth and respect. Here, *Citizens United* builds on the Court's earlier recognition that there are inexpressible aspects of free speech. It also means, for the first time, that the Supreme Court managed to articulate a vision of free speech close to what Norman Rockwell illustrated during World War II. When the working class man in that picture stands to speak, we do not need to know what he wants to say. We simply need to see that by being allowed to speak, he is able to claim standing and respect in society. His right to have a voice is protected by the Constitution, now explicitly recognized by the Supreme Court.

## VI. SPEAKER DISCRIMINATION'S EARLY, MISUNDERSTOOD BIRTH

Long before *Citizens United*, commentators had noted that the Court's free speech case law indicated a skepticism toward any policy that called on the government to distinguish one kind of speaker or institution from another.[187] Yet, the only precedent that the *Citizens United* majority provided for the speaker discrimination principle was *First National Bank of Boston v. Bellotti*, a 1978 case that also involved election-related restrictions on speech by corporations.[188] The *Bellotti* analogy obscures the potential reach of the speaker discrimination principle and invites an unfortunate degree of cynicism. Because both *Citizens United* and *Bellotti* expanded the speech rights of corporations, some readers may have difficulty taking at face value the Court's professed concern for the voice of the "disadvantaged."

Nevertheless, despite the limited citations provided by the majority, the origins of the speaker discrimination principle can be traced to several other cases involving speech by flesh and blood human beings. One clear foundation for the speaker discrimination doctrine is the *City of Ladue* decision (1994), which I discussed in Part 0. In that unanimous decision, the Court acknowledged the powerful connection between speaker identity and the persuasive impact of speech.[189] That case involved the closing off of a particular medium of expression, and thus it did not directly involve a speech restriction directed at certain people.[190] But it is a small step from acknowledging that speaker identity is important to speech to acknowledging that freedom of speech must include protection against policies that limit the ability of certain people to speak.

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187. *See* Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 84 (1998) ("American free speech doctrine has never been comfortable distinguishing among institutions.").

188. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 784 (1978).

189. City of Ladue v. Gilleo, 512 U.S. 43, 56 (1994).

190. *See Id*.

Another clue to these deeper roots of the speaker discrimination doctrine can be found in a 1999 dissent written by Justice Stevens and joined by Justice Kennedy. The case of *Los Angeles Police Deptarment v. United Reporting Publishing Corp*.[191] concerned a California law that allowed public access to arrest records only for certain prescribed reasons, and specifically prohibited obtaining arrestees' addresses in order to sell products or services.[192] Justice Stevens thought that the real purpose of the law was to prevent solicitation by attorneys, which he thought constitutionally problematic because "it relies on discrimination against disfavored speech."[193] One might have expected this observation to be backed up solely by a reference to *Bates v. State Bar of Arizona*, the Court's leading case on free speech implications for attorney advertising.[194] But Justice Stevens offered a footnote offering an additional justification: "Our cases have repeatedly frowned on regulations that discriminate based on the content of the speech *or the identity of the speaker*."[195] Thus, in 1999 Justice Stevens effectively foreshadowed the central argument that Justice Kennedy developed more fully in *Citizens United*. He was able to find numerous citations where the Court had struck down speech restrictions connected at least in part to the speaker's identity.[196]

I would argue that the First Amendment's anti-discrimination potential can be seen even earlier in the 1972 case of *Police Department of Chicago v. Mosley*, which I will argue should be understood as the Court's seminal speaker discrimination case.[197] *Mosley* was one half of a pair of free speech cases that stemmed from racial conflict in urban Illinois schools in the late 1960s.[198] Earl Mosley was prosecuted for picketing a local high school, carrying a sign that said " 'Jones High School practices black discrimination. Jones High School has a black quota.' "[199] He believed that the school deliberately kept its black enrollment artificially low so that white students would remain in the majority.[200] In the companion case, *Grayned v. City of Rockford*, demonstrators protested the exclusion of black students from the cheerleading team, called for the hiring of black teachers, and

191. 528 U.S. 32, 34 (1999).

192. The seven Justice majority upheld the statute on the narrow ground that the case did not properly present a facial challenge to the statute. *Id.* at 40-41.

193. *Id.* at 47 (Stevens, J., dissenting).

194. Bates v. State Bar of Ariz., 433 U.S. 350, 384 (1977).

195. *L.A. Police Dep't*, 528 U.S. at 47 n.5 (Stevens, J., dissenting) (emphasis added).

196. *Id.*

197. Police Dep't of Chi. v. Mosley, 408 U.S. 92, 101-02 (1972).

198. *See* Grayned v. City of Rockford, 408 U.S. 104, 105 (1972).

199. *Mosley*, 408 U.S. at 93.

200. Brief for Petitioner at 6, Police Dep't of Chi. v. Mosley, 408 U.S. 92 (1972) (No. 70-87), 1971 WL 133359, at *6.

called for the inclusion of black history in the school curriculum.[201] In both cases, the demonstrators were prosecuted under ordinances that banned picketing outside schools, but an exception was made for "the peaceful picketing of any school involved in a labor dispute."[202] The exception applied only to "labor picketing,"[203] and it is clear that this meant picketing by school employee union members, not by students, parents, or other activists.[204]

The Supreme Court found that Mosley's First Amendment rights were violated. Writing for the Court, Justice Marshall framed the case this way: "The question we consider here is whether this selective exclusion from a public place is permitted. Our answer is 'No.' "[205] Echoing *Neimotko*, the Court explained that "we analyze this ordinance in terms of the Equal Protection Clause of the Fourteenth Amendment. Of course, the equal protection claim in this case is closely intertwined with First Amendment interests . . . ."[206] As in *Neimotko*, the *Mosley* Court never explained precisely how the two Amendments applied, but it is worth pausing over the matter.

It is not immediately obvious that the Chicago/Rockford ordinances would have failed equal protection analysis independent of free speech concerns. The case would have been easier under the Fourteenth Amendment if the Chicago and Rockford police had targeted picketers by race, but the demonstrators made no such claim. In fact, although the subject of the protests was race, the protestors made a point of telling the Court that the demonstrators were a racially mixed group.[207] Moreover, the cities had plausible rationales for allowing only labor pickets outside schools. They argued that picketing outside schools generally disrupts education, but that labor picketing was usually non-disruptive and that prohibiting it might be problem-

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201. *Grayned*, 408 U.S. at 105.

202. *Id.* at 107. *Grayned* also involved an anti-noise ordinance, which was upheld on different grounds. *See id.* at 107-08.

203. *Mosley*, 408 U.S. at 94.

204. *Cf.* Brief for Petitioner at 1, Police Dep't of Chi. v. Mosley, 408 U.S. 92 (1972) (No. 70-87), 1971 WL 133359, at *11 ("[V]iolence and disorders have been for the most part eliminated from labor picketing, which nowadays is usually token, symbolic picketing. Student demonstrations, parents' demonstrations and civil rights demonstrations often result in mass picketing, sit-ins, [sic] violence. These palpable differences justify the exemption of labor picketing from the ordinance before the Court.").

205. *Mosley*, 408 U.S. at 94.

206. *Id.* at 94-95.

207. Brief for Appellant at 9, Police Dep't of Chi. v. Mosley, 408 U.S. 92 (1972) (No. 70-87), 1971 WL 133358, at *5-6, 9 ("The appellant, Richard Grayned, a Negro, was arrested along with approximately forty (40) other males of about two hundred (200) persons, both black and white, male and female, who were participating in a noon-time demonstration in front of Rockford's West High School."). There was evidently an allegation of sex discrimination by the police in arresting only males, but this issue was not raised in the case. *Id.*

atic under labor law.[208] Thus, using Fourteenth Amendment analysis alone, the Chicago/Rockford ordinances might have survived under rational basis review.[209]

The *Mosley* and *Grayned* cases thus turned on free speech, not equal protection alone, or alternatively on a holistic understanding of the intersection of the two. The question is what kind of speech restriction did the Chicago/Rockford ordinances impose? The Court alluded to the idea of speaker discrimination by characterizing the ordinances as "selective exclusion." But rather than expand on this idea, Justice Marshall's opinion shifts to the more familiar ground of content discrimination: "The central problem with Chicago's ordinance is that it describes permissible picketing *in terms of its subject matter*. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign."[210] This is only partially correct. Of course limiting picketing rights to labor unions will effectively predetermine the range of views that will be expressed on the picket signs. But content discrimination is only half the story in *Mosley*, if that much. A teacher's union on strike might express opinions on a wide range of issues, from working hours and wages to curricular concerns. The ordinances did not prescribe that picketing may only address issues that are subject to labor negotiations. Rather, they simply limited who could picket.

The civil rights dispute that gave birth to the *Mosley* and *Grayned* cases illustrate why the issue was more about who could speak, not about what they would be allowed to say. Although we know that employee unions were permitted to picket, we do not know what their views were about the protestors' demands. What we know is that the schools in these cities were embroiled in a volatile and high stakes debate about racial discrimination in the daily life of American public education. These racial issues in the schools affected many groups of people, including the school staff, students and parents.[211] Most of the picketers were students protesting conditions in their own schools.[212] Writing separately about the Illinois school protests in the *Grayned* decision, Justice Douglas noted that most of the picketers were stu-

208. Brief for Petitioner, *supra* note 204, at 11,

209. The cities' justification for limited pickets to labor organizations is similar to my hypothetical, *see supra* Part II, in which the government might prevent younger activists from speaking on the National Mall because there may be a correlation between youth and the risk that protests will become disorderly.

210. *Mosley*, 408 U.S. at 95 (emphasis added).

211. *See, e.g,,* Amanda Paulson, *Race in school discipline: Study looks at silence among educators*, THE CHRISTIAN SCIENCE MONITOR (Dec. 17, 2014) (discussing the role of teachers and staff in racial discrimination in schools).

212. Grayned v. City of Rockford, 408 U.S. 104, 123 (1972) (Douglas, J., dissenting in part).

dents protesting conditions in their own school and that this kind of dissent represents "the best First Amendment tradition."[213] But under the Chicago and Rockford ordinances, only the employees were permitted to engage in this tradition. It would not matter what side the employees took, even if the employees were divided. Only the employees had the right to speak. Regrettably, the facts of *Mosley* have been largely forgotten, and the case has been cited to uphold forms of speaker discrimination. For instance, in the case about excluding non-residents from town meetings the Eleventh Circuit cited *Mosley* for the proposition that only exclusions based on content were impermissible under the First Amendment.[214] I would suggest that is a misreading of the case because it ignores the facts of the dispute and thus disregards the context for the Court's concern about "selective exclusion."[215]

The speech restriction in *Mosley* offends the First Amendment for reasons explained in *Citizens United*: "By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice."[216] In this way, *Mosley* should be understood as the Court's first, clear speaker discrimination case. But its holding was not coherently and persuasively explained by the Court until thirty-eight years later.[217] If the Court had expanded more on what it meant by "selective exclusion" in *Mosley*, we might have had four decades of jurisprudence refining the principle of speaker discrimination. Instead, the idea remained dormant until its clearer articulation in *Citizens United*.[218]

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213. *Id.* at 124.

214. Rowe v. City of Cocoa, 358 F.3d 800, 804 (11th Cir. 2004).

215. *See Mosley*, 408 U.S. at 95.

216. Citizens United v. FEC, 558 U.S. 310, 340-41 (2010).

217. A somewhat more recent decision that might also be understood as a speaker discrimination case is *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 65-66, 75-79 (1990). There, a 5-4 majority of the Court struck down a state government political patronage system on First Amendment grounds, holding that the Republican Governor could not make Republican Party membership a general condition for hiring or promotion in public employment. The majority reasoned that to penalize state employees' for their private, personal political beliefs would infringe freedom of speech. Another way to describe this might be that public employees would have less political liberty than non-public employees and that the Illinois governor was thus restricting private free speech based on the identity of the speaker. *Id.*

218. Two years before *Citizens United*, a federal district court denied that *Mosley* prohibited discrimination based on the identity of a speaker. *See* ACLU v. Denver, 569 F. Supp. 2d 1142, 1173-74 (D. Colo. 2008). *But see* Summum v. Duchesne City, 482 F.3d 1263, 1273 (10th Cir. 2007) ("In addition to exclusions based on viewpoint or subject matter, exclusions based on the speaker's identity trigger strict scrutiny when the forum at issue is public.").

## VII. A POSSIBLE APPLICATION OF THE DOCTRINE

### *A. Limiting Who May Speak in the Limited Public Forum*

The Supreme Court launched forum doctrine in the early 1970s—*Mosley* is one of the seminal sources—and it has since come to occupy a decisive place in free speech cases.[219] The basic premise of forum doctrine is fairly straightforward. We understand that a march on Washington or a protest in a green outside city hall should be protected strongly by the First Amendment—the classic public forum. Our Constitution allows protestors to picket outside the White House, but they cannot storm into the Oval Office to express their views, for the obvious reason that this would disrupt the ability of the government to carry out its normal functions. By the same token, the First Amendment does not entitle people to disrupt classes in a public school or obstruct a military training exercise just because they have something to say. At the extremes, these distinctions are not difficult or especially controversial. But the challenge is in articulating a doctrinal basis for making these distinctions, which becomes essential in the more difficult cases.

In the background, there is a difference between free speech on public versus private property. The Court has found that there is little free speech protection on private property, so that shopping malls are allowed to exclude protestors.[220] But this bright line is inadequate to explain the difference between different kinds of public property—the public square versus a public high school classroom, for example. To explain why different kinds of government property are different, the courts developed the idea of a traditional public forum, with the National Mall held up at the quintessential forum where the government would be especially hard pressed to justify restrictions on what can be said.[221] By contrast, in nonpublic fora—schools, prisons, government offices—the government has more latitude to restrict speech.[222]

The *Mosley* case played a critical role in the emergence of this doctrine.[223] The *Mosley* judgment includes a broad statement about the constitutional evils of any measures that "restrict expression because of its message, its ideas, its subject matter, or its content."[224] But as

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219. *See* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1731-34 (1987).

220. In *Davis v. Massachusetts*, a case now overruled, the Court upheld a restriction on protests in Boston Common because it is state property. 167 U.S. 43 (1897).

221. ISKCON of Potomac, Inc. v. Kennedy, 61 F.3d 949, 959 (D.C. Cir. 1995).

222. *See* Caplan, *supra* note 16, at 651.

223. *See* Post, *supra* note 219, at 1731-32.

224. Police Dept. of Chi. v. Mosley, 408 U.S. 92, 95 (1972).

others have ably pointed out: "Such a sweeping pronouncement can only work (if at all) in a prescribed area. The Court has accordingly applied it only to direct governmental regulation of expression and regulation within the traditional public fora of streets, parks, and sidewalks."[225] In the companion case of *Grayned*, the Court clarified that the government could in fact restrict how people express themselves in public places, for instance through a noise ordinance, so long as such time, place, and manner restrictions were content neutral and narrowly tailored to further the State's legitimate interest.[226]

The idea is simple enough on the surface. But forum doctrine has turned out to be more complicated than one might have initially thought.[227] We have already seen in Part 0 some of the challenges in the limited public forum cases such as *Perry* and *Cornelius*, where the Court gave governments wide latitude to restrict access to non-traditional channels of communication. But we have also seen in the *Good News Club* case that the rule prohibiting viewpoint discrimination can restrict government power even in limited public fora. This raises the question whether limited public fora—or at least some limited for a—may not be consequentially different from more traditional public fora, at least in some cases, some of the time. It may not be so easy to distinguish content from viewpoint in many cases. Moreover, it remains unclear why the government could exclude the NAACP from a charity drive in *Cornelius* because it is "controversial," but a religious group could not be excluded from school grounds.[228]

A common complaint about forum doctrine is that it has distracted judges from the values at the heart of the First Amendment. Courts have recognized a wide range of fora where the government needs to be able to restrict speech in order to function. School, prisons, military bases, government offices, and courtrooms are indeed leading examples. Thus, a great deal of recent free speech litigation focuses on whether the location and context where a person wishes to speak constitutes a public forum and, if not, on whether the government has a legitimate reason to restrict the speech. Rather than grapple with the value (and potential harm) of permitting different kinds of speech in different contexts, free speech cases now often turn on formalistic categorization of the forum. Within less than two decades of its birth, a leading scholar summarized the situation:

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225. Kendrick, *supra* note 151, at 235-36.

226. Grayned v. City of Rockford, 408 U.S. 104, 119 (1972).

227. *Cf.* Caplan, *supra* note 16, at 647 (analogizing public form doctrine to an invasive plant).

228. *See generally* discussion *supra* Parts 0 and 0.

> The doctrine has in fact become a serious obstacle not only to sensitive first amendment analysis, but also to a realistic appreciation of the government's requirements in controlling its own property. It has received nearly universal condemnation from commentators and is in such a state of disrepair as to require a fundamental reappraisal of its origins and purposes.[229]

As Aaron H. Caplan has described, not only is there confusion about what constitutes a public forum, but confusion also surrounds how many categories of public fora exist.[230] In practical terms, forum doctrine has redefined the playing field of free speech cases. Much as in an equal protection case, the battle is often won or lost by defining the level of scrutiny to apply; free speech cases are often won or lost in a struggle to define the context where the speech takes place. If it is a public forum, the government will probably lose. If it is a nonpublic forum, the restrictions on expression are likely to be upheld. The struggle to define different kinds of fora has become the dominant question for some lower courts in many free speech cases.[231] This often produces confused reasoning in cases that might have been resolved more directly through other means.[232] Justice Breyer warned that the tendency to rely on rigid categorizations of different fora might "turn 'free speech' doctrine into a jurisprudence of labels."[233]

The touchstone for making this categorization is whether the place(s) in question "have traditionally served as a place for free public assembly and communication of thoughts by private citizens . . . ."[234] By its nature, the traditional use test is difficult to adapt to any new situation that has no obvious root in tradition. Forum doctrine shifted the focus from the expression at issue—this being the natural focus of a free speech controversy—to a more abstract inquiry into the nature of a particular location.[235] It is rooted in a nostalgic, romantic idea of public debate in the village square, and thus it is at best only useful to handle the kinds of fora that might have been known in Eighteenth or Nineteenth Century New Eng-

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229. Post, *supra* note 219, 1715-16 (footnote omitted).

230. *See* Caplan, *supra* note 16, at 654.

231. *See id.* at 647-48.

232. For examples, see *id.* at 661-64.

233. Pleasant Grove City v. Summum, 555 U.S. 460, 484 (2009) (Breyer, J., concurring) (citing United States v. Kokinda, 497 U.S. 720, 740-43 (1990) (Brennan, J., dissenting)); *see also* Justice John Paul Stevens, The Freedom of Speech, Address at Ralph Greggory Elliot First Amendment Lecture at Yale Law School (Oct. 27, 1992), *in* 102 YALE L.J. 1293, 1302 (1993) ("My experience on the bench has convinced me that these categories must be used with caution and viewed with skepticism. Too often, they neither account for the facts at issue nor illuminate the interests at stake.").

234. This oft-repeated test derives from *Greer v. Spock*, 424 U.S. 828, 838 (1976).

235. *See* Post, *supra* note 219, at 1719-23.

land. These sorts of locations are physically bounded.[236] But what about the Internet? Our most vibrant new expressive forum is not just non-traditional; the Internet is not rooted in any particular physical space. The erosion of physical boundaries for speech makes it increasingly important to delineate whether a speech limitation is tied to a forum or the people who inhabit that forum. But forum doctrine has offered few tools by which to draw this line.

Having announced in *Citizens United* that speaker discrimination offends the First Amendment, the Court needs to reconcile how this principle coexists with the statements in *Perry* and *Cornelius* affirming identity-based restrictions in limited public fora.[237] The most straightforward answer would seem to be that identity-based restrictions, much like content limitations, may be upheld if reasonably tied to the purposes of the forum. I would argue that forum-based speech restrictions may be unreasonable if they begin to follow the person, rather than remaining rooted in the particular forum. As we have seen in the *Citizens United* dissent, there can be a dangerous slippage from case law allowing speech restrictions in a limited public forum, such as a school or a military base, to restrictions on the expressive rights of the people who inhabit that forum.[238] I would argue that the prohibition on speaker discrimination in *Citizens United* should operate as a limiting principle on forum-based speech restrictions. Forum doctrine permits the government to designate different levels of permissible speech in different contexts. But the speaker discrimination doctrine is based on the premise that the government cannot establish different degrees of free speech for different classes of people. Forum-based restrictions would go too far if they produced a situation where an entire class of people has less free speech at all times.

The introduction of a limiting principle on forum doctrine can be helpful in resolving cases that have proven challenging for the courts and worrying for commentators. As Erwin Chemerinsky observed, a central problem with relaxed constitutional scrutiny on speech restrictions in schools, prisons, and the military is that "these are the places where judicial review is most essential. . . . Unfortunately, individuals in these institutions generally have nowhere else to turn for protection."[239] In the realm of freedom of speech, speaker discrimination addresses this worry, at least in part, but perhaps not in the direct manner that Chemerinsky originally sought. It draws a clearer

236. For a case focusing on the physical boundary of a nonpublic forum, see McCullen v. Coakley, No. 12-1168, slip op. (U.S. June 26, 2014).

237. *See* discussion *supra* Part 0.

238. *See* discussion *supra* Part 0

239. Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 441-42 (1999).

outer boundary around the principals' authority over their schools or on military commanders' authority over their units and bases. It ensures that these otherwise powerless people retain the opportunity to express themselves and to have a voice in society at least in some portion of their lives.

### *B. The Case of School Speech*

Many different types of limited fora have given rise to their own speech restrictions concerning the people who inhabit the particular forum at issue, and for each there is a different line of First Amendment case law. To name just a few: There are cases about the military.[240] There are cases about public school teachers.[241] There are cases about public prosecutors.[242] These cases largely follow a common logic.[243] There is tension between the free speech rights of the affected individuals and the operational and managerial needs of the government agency with which they work. With each progressive fact pattern the Court struggles to articulate how this balance should be struck. But each context involves its own complexity, and so it not possible to explore them all in a single article.

To illustrate how speaker discrimination may act as a limiting principle on forum-based speech restrictions, I will focus here on cases involving students' speech in public schools. In particular, I will focus on cases where schools seek to punish off-campus speech by students, a challenge which is coming up with increasing urgency in school speech cases, especially as schools seek to control bullying on social media.

We know from *Tinker v. Des Moines Independent Community School District* and its progeny that the First Amendment does apply in school, yet schools may prohibit speech that would cause "substantial disruption" to school activities.[244] This means, for example, that schools have significantly more latitude to discipline students who use vulgarity at school than the government would normally have to

240. *See* Brown v. Glines, 444 U.S. 348 (1980); Parker v. Levy, 417 U.S. 733 (1974).

241. *See* Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410 (1979); City of Madison Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n, 429 U.S. 167 (1976); Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

242. *See* Garcetti v. Ceballos, 547 U.S. 410 (2006); Connick v. Myers, 461 U.S. 138 (1983).

243. *See generally* Aaron H. Caplan, *Freedom of Speech in School and Prison*, 85 WASH. L. REV. 71 (2010) (supporting the proposition that school and prison free speech cases are decided with a common logic, along with military and public employee cases as well).

244. 393 U.S. 503, 514 (1969); *see also Givhan*, 439 U.S. at 414 (balancing public employees' interests in speech versus the state's interest); *City of Madison Joint Sch. Dist. No. 8*, 429 U.S. at 173, 175-76 (the right to free speech could be limited if petitioning could create a clear and present danger, but the limitation was a substantial impact on free speech); *Pickering*, 391 U.S. at 566-67 (noting the types of disruption and harm the regulated speech could cause).

punish vulgarity on the street.[245] We also know from *Morse v. Frederick* that a high school principal can punish a student for displaying a pro-drug use sign at a school-sanctioned event off campus.[246] This might seem to prove that forum-based restrictions need not be limited by campus boundaries. But *Morse* is about the authority of the principal at a school event, not the general free speech rights of students out of school.[247]

The Supreme Court has offered much less guidance with regard to student speech that originates off-campus and not at any school-function, yet nevertheless impacts school life in some way.[248] Can a school that has a strong anti-drug policy on campus punish a student for signing an online petition to legalize marijuana? A school may require respect for authority on school grounds, but can it punish a student for criticizing school officials on a website? Bullying would probably be the most sympathetic case for an expanded view of school authority. But is bullying a fellow high school student on Facebook or Instagram—off campus and outside school hours—the same as doing so in school hallways or at a school events?

It is unfortunate that courts considering such school speech problems do not usually consider the facts of *Mosley*. As we have seen, *Mosley* can be understood as a speaker discrimination case. But it can also be seen as a school speech case, arising as it does from protests by students and members of the community about policies inside public schools. They were doing so just barely off campus, but the cities of Chicago and Rockford argued that the protests disrupted education. *Mosley* and *Grayned* concerned criminal prosecution. But what if the discipline had been imposed on student protestors by the schools themselves?

If the punishment in *Mosley* and *Grayned* had been meted out by school authorities, the cases might have appeared different to some courts, even though it would still be a government official using state power to limit who can protest. Some lower courts have assumed that *Tinker* applies whenever schools use their student disciplinary au-

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245. Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986). For an excellent commentary on *Bethel*, see Aaron H. Caplan, *Public School Discipline for Creating Uncensored Anonymous Internet Forums*, 39 WILLAMETTE L. REV. 93, 133 (2003) ("Among *Bethel*'s oddities is its willingness to use state power to teach students that society disapproves of vulgarity, even though society itself may only punish vulgar speech through social disapproval, not the application of state power.").

246. 551 U.S. 393, 396-97 (2007).

247. *See* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 920 (3d Cir. 2011) (en banc) (finding a First Amendment violation when a school punished a student for creating "on a weekend and on her home computer, a MySpace profile . . . making fun of her middle school principal").

248. *See* Steve Varel, Note, *Limits on School Disciplinary Authority over Online Student Speech*, 33 N. ILL. U. L. REV. 423, 450-51 (2013).

thority to regulate expression, no matter where the expression takes place.[249] This is sometimes justified by *Tinker*'s holding that schools may limit speech that poses a substantial disruption to education. This rationale has a sweeping impact, since virtually anything in the lives of a student may have a substantial disruption on their schooling. As a result, teenagers would effectively enjoy far more limited version of the First Amendment other Americans, not just at school events and on school grounds, but at all times and in all places.

Arguably, the Supreme Court has already addressed the off-campus question, at least in passing. In *Fraser*, where a student was disciplined for giving a profanity-laden speech at a school event, the Court said: "Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected."[250] Nevertheless, in the absence of a clearer Supreme Court decision about off-campus student speech, lack of clarity has emerged at the circuit court level.[251] It would be customary to call this a circuit split, but on close reading it seems more that several circuits have deliberately adopted a fact-specific approach that consciously refuses to resolve the doctrinal problem in any predictable way.[252] It is thus not entirely clear that the circuits are really split, or if they are all equally and similarly confused. This is perhaps understandable, given the extremes of the kind of expressions to which teenagers are prone. But it also leaves students with little clear notice about the limits of freedom of speech.

Two recent cases from the Courts of Appeals for the Third and Ninth Circuits illustrate the challenge for school districts and courts. In *Layshock v. Hermitage School District*, the Third Circuit sitting en banc refused to apply *Tinker* to a seventeen-year-old who used his grandmother's computer to create a profane MySpace parody of his high school principal.[253] The Third Circuit suggested that deference to school discipline "rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate."[254] But the court held back from resolving the issue definitively.[255] Two concurring judges wrote separately to stress that *Tinker* "can be applicable to off-campus speech."[256]

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249. *See id.*

250. *Morse*, 551 U.S. at 405.

251. *See* Wynar v. Douglas Cnty. Sch. Dist., 728 F.3d 1062, 1068-69 (9th Cir. 2013) (summarizing the circuit split).

252. *See, e.g.*, *id.* at 1069 (declining "to try and craft a one-size fits all approach").

253. 650 F.3d 205, 216 (3d Cir. 2011) (en banc).

254. *Id.* at 219 (quoting Thomas v. Bd. of Educ., 607 F.2d 1043, 1045 (2d Cir. 1979)) (internal quotation marks omitted).

255. *Id.*

256. *Id.* at 220 (Jordan, J., concurring).

The reasons for the Third Circuit's hesitation may be evident in the Ninth Circuit's decision in *Wynar v. Douglas County School District*.[257] Operating entirely off campus, a Nevada high school student sent specific and escalating instant messages to friends threatening to conduct a school shooting on a specific date, after which the school expelled him.[258] Noting the obvious, the court observed that "[a] student's profanity-laced parody of a principal is hardly the same as a threat of a school shooting," and held that the student's First Amendment rights were not violated.[259] This much is probably uncontestable. But the Ninth Circuit waded into more problematic waters by reasoning that Landon's threats were not protected speech because of *Tinker* and because he was a student, rather than because such threats are never protected no matter who the speaker may be.[260] Inside or outside school, violent threats and intimidation are not protected by the First Amendment.[261] The shooting threats were likely a Class C Felony under Nevada criminal law.[262] It is thus not clear why the court needed to adopt the lower level of free speech protection inherent in *Tinker*.[263] By doing so, the Court of Appeals left the door open to the possibility that students simply have less free speech rights than other people. This is the kind of slippage from forum-based restrictions to person-based restrictions for which *Citizens United* ought to be highly relevant.

The nagging question is what schools may do about off campus bullying that stops short of threats of violence, but where the potential for severe emotional distress among teenagers deserves considerable public concern.[264] I would suggest that for out of school bullying, the key First Amendment touchstone is probably *Snyder v. Phelps*,[265] instead of *Tinker*. In *Snyder*, the Court found that the First Amendment prevents a tort claim for intentional infliction of emotional distress for homophobic picketing at a military funeral, even though

257. 728 F.3d 1062.

258. *Id.* at 1064-65.

259. *Id.* at 1065, 1069.

260. *Id.* at 1069.

261. *See* Virginia v. Black, 538 U.S. 343, 347-48 (2003) (upholding ban on cross burning because it had the intent to intimidate); R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992) ("[T]hreats of violence are outside the First Amendment . . . ."); Watts v. United States, 394 U.S. 705, 707-08 (1969) (noting that states may prohibit a "true 'threat' ").

262. NEV. REV. STAT. ANN. § 200.571 (West 2014) (harassment); *id.* § 200.575 (stalking).

263. An advantage of following the normal analysis applied to threatening speech is that it allows courts to distinguish imminent threats with an intent to harm from private rants. *See, e.g.*, Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 617 (5th Cir. 2004).

264. For a more in depth analysis of the intersection of free speech with criminal harassment and tort law, see Aaron H. Caplan, *Free Speech and Civil Harassment Orders*, 64 HASTINGS L.J. 781 (2013).

265. 562 U.S. 443 (2011).

such picketing inflicts serious emotional pain on its targets.[266] But while this seems to indicate an unsympathetic response to the perils of bullying, *Snyder* actually leaves open several possibilities for schools to address social media bullying in a constitutional manner. *Snyder* turned on the distinction between speech that is a matter of public concern, not purely private speech.[267] *Snyder* does not eliminate the tort of intentional infliction of emotional distress. In *Snyder*, the picketing involved an issue that was the subject of public debate––the presence of gays in the military.[268] And it took place outside, in public areas.[269] Schools may thus have greater latitude where the bullying involves private speech or does not touch on matters of public concern. In other words, schools might be able to discipline students whenever a tort for infliction of emotional distress could survive First Amendment scrutiny.

The speaker discrimination doctrine should not necessarily preclude schools exercising some authority over student conduct off campus. But as courts confront these cases, *Citizen United* should add a limiting factor to the analysis. The more schools assert authority off campus, the more it is essential to ensure that their students are not excluded as a class from the full benefits of the First Amendment. Schools are on safe ground if they take action that would normally be constitutionally permitted if taken against an adult outside the school context. Thus, the First Amendment should not prevent schools from intervening if students engage in private speech that might constitute an actionable tort for intentional infliction of emotional distress or in speech prosecutable under criminal statutes. The *Wynar* and *Layshock* holdings are explainable in these terms. The advantage of this approach is that it would not render students any less protected by the First Amendment than any other person. But courts invite schools to tread into more treacherous territory by applying *Tinker* outside of school because this approach appears to restrict students' free speech based on their identity, and without any clear limiting principle. Bringing speaker discrimination doctrine into this analysis can clarify this area of law by offering a limiting principle to prevent sensible forum-based restrictions on speech from restricting free expression for whole categories of people.

## VIII. CONCLUSION

The principle that speaker discrimination offends the First Amendment is founded on three related insights. First, by regulating

266. *Id.* at 1220.
267. *Id.* at 1215.
268. *Id.* at 1216.
269. *Id.* at 1217.

who may speak, the government could gain a powerful tool to control the content of what is said since, on average, personal identity correlates with political opinions. Second, even where the content of speech appears identical, the identity of a speaker shapes how the content of communication is received and interpreted. Third, freedom of speech in a democracy involves the right to have a voice and an opportunity for self-expression, independent of the content of what one chooses to say.

Now that this doctrine of speaker discrimination is clearly articulated, the next step is for its application to be tested in other circumstances, outside the election context, and, perhaps, to reassess some older cases as well. As we have seen, there is a need to reconcile the speaker discrimination doctrine with the Court's jurisprudence governing restrictions on limited public fora. In addition, the speaker discrimination principle appears to be in tension with other cases in two main areas, each of which deserves reconsideration in light of *Citizens United*: one concerns prohibitions on non-citizens participating in election campaigns.[270] This restriction remains good law even though it has been clear for nearly seven decades that "[f]reedom of speech and of press is accorded aliens residing in this country."[271] Even if one accepts that there is a strong government interest in preventing foreigners from corrupting American elections, it is not clear why this interest extends to long term residents of the United States just as much as to noncitizens who reside abroad. Moreover, it is unclear why the Court has embraced disclosure rules as a suitable remedy for the dangers posed by unrestrained money in politics, but does not see disclosure as sufficient to guard against the danger posed by noncitizens participation in campaign funding.

Another area of tension concerns electioneering by public employees. In the 1973 decision *United States Civil Service Commission v. National Association of Letter Carriers*, the Court upheld the Hatch Act's restrictions on public employees taking "an active part in political management or in political campaigns," even when they are off duty.[272] But the broad sweep of the Hatch Act was amended by Congress in 1993, substantially limiting the impact of this decision.[273] Moreover, in 1990 the Court issued a decision protecting the First Amendment right of public employees to private partisan political

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270. *See supra* note 85 and accompanying text for a discussion of *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.C. Cir. 2011).

271. Bridges v. Wixon, 326 U.S. 135, 148 (1945) (citing Bridges v. California, 314 U.S. 252 (1941)).

272. 413 U.S. 548, 551 (1973) (quoting 5 U.S.C. § 7324(a)(2)) (internal quotation marks omitted).

273. Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, 107 Stat. 1001.

affiliations in a non-election context.[274] Especially after *Citizens United*'s emphatic rejection of identity-based restrictions on speech, there is reason to question whether *Letter Carriers* remains on solid footing.

It seems relevant that the cases that seem most in conflict with the speaker discrimination principle relate to elections, and so the zone of difficulty may be specific to the ambivalence that surrounds any regulation of partisan speech in an electoral democracy. For better or for worse, in *Citizens United* and *McCutcheon*, the Court pointedly rejected the proposition that fear of the appearance of corruption is sufficient to justify a restriction on political speech, limiting the anti-corruption rationale to quid pro quo exchanges of money for official acts.[275] The Court needs now to re-examine why—or if—the involvement of non-citizen residents or public servants in election campaign pose a greater risk of corruption.[276] These are questions for the future, but they illustrate the potential capacity for the speaker discrimination doctrine to bring coherency to areas of free speech jurisprudence that have been conflicted up to now.

One has to wonder if the sharp divisions on the Court about campaign finance regulation clouded the dissenters' ability to see this as a potential area of agreement. My argument is that critics of the *Citizens United* decision, beginning with the four dissenting justices, have not understood the importance and value of the speaker discrimination principle. In my view, they were confused by free speech case law that had over-emphasized forum and devalued expression by a diversity of voices. Disagreement about many aspects of *Citizens United* related to campaign financing will go on. But its holding with regard to speaker discrimination deserves wide support.

The Supreme Court's articulation of a new pillar of free speech law calls out for lawyers to bring cases that ask the Supreme Court to apply the speaker discrimination principle outside the corporate context. Such cases can be an important test of whether the Roberts Court is in actuality a "free speech court" or merely a conservative

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274. *See supra* note 217 and accompanying text for a discussion of *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990),

275. Citizens United v. FEC, 130 S. Ct. 876, 910 (2010); McCutcheon v. FEC, 134 S. Ct. 1434, 1441-42 (2014).

276. In *U.S. Civil Service Commission v. National Ass'n of Letter Carriers*, the Court explained its holding in terms of a generalized fear of "improper influences" that seems quite similar to the general anti-corruption interest that the Court has rejected with regard to the role of money in politics. 413 U.S. at 564 ("[T]he judgment of Congress, the Executive, and the country appears to have been that partisan political activities by federal employees must be limited if the Government is to operate effectively and fairly, elections are to play their proper part in representative government, and employees themselves are to be sufficiently free from improper influences.").

court that favors corporations.[277] Assuming that the Court meant what it said, the articulation of the speaker discrimination doctrine is a positive development. The Supreme Court has acknowledged that having a voice in public life plays a role in the struggle for respect in a diverse society. That is a good thing.

277. Erwin Chemerinsky, The Roberts Court and Freedom of Speech, Speech at the Federal Communications Bar Association's Distinguished Speaker Series (Dec. 17, 2010), *in* 63 FED. COMM. L.J. 579, 579, 582 (2011) (arguing that the Roberts Court has not consistently defended free speech, except when consistent with conservative ideology).