The Changing Faces of First Amendment Neutrality: R.A.V. v St. Paul, Rust v Sullivan, and the Problem of Content-Based Underinclusion
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THE CHANGING FACES OF FIRST AMENDMENT NEUTRALITY: R.A.V. v ST. PAUL, RUST v SULLIVAN, AND THE PROBLEM OF CONTENT-BASED UNDERINCLUSION

Consider two cases—the most debated, as well as the most important, First Amendment cases decided by the Supreme Court in the past two Terms: *R.A.V. v St. Paul*,[1] invalidating a so-called hate speech ordinance, and *Rust v Sullivan*,[2] upholding the so-called abortion gag rule. On their face, the cases have little in common; certainly, the Justices deciding them saw no connection. Yet just underneath the surface, the cases have a similar structure, implicate an identical question, and fall within a single (though generally unrecognized) category of First Amendment cases. Along with many other cases to which neither has been assimilated, *R.A.V.* and *Rust* are, on this level, essentially the same—except that the one issue of First Amendment law they posed was answered by the Court in two different ways.

The equation of the cases at first glance is jarring, because an

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[1] 112 S Ct 2538 (1992).

[2] 111 S Ct 1759 (1991).

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orthodox understanding of First Amendment law highlights only the cases' dissimilarities. On such a view, the Court in *Rust* faced the new—and exceedingly difficult—First Amendment problem of selective funding of speech by the government.[3] The question was whether the federal government could fund a range of family planning services, but exclude from such funding abortion counseling, advocacy, or referral. Call this a selective subsidization question or call it an unconstitutional conditions question,[4] the essential nature of the inquiry is the same: it focuses on the government's ability to influence the realm of speech by distributing its own (wholly optional) largesse. By contrast, according to the orthodox view, the Court in *R.A.V.* faced the classic—and largely settled—First Amendment problem of the outright prohibition of a certain kind of speech by the government. The question was whether a municipality could criminalize the use of "fighting words" that provoke violence "on the basis of race, color, creed, religion, or gender." The focus was on the ability of the government to ban speech on the basis of content through use of the government's coercive power. Seen in this light, *Rust* and *R.A.V.* raised different problems, and it is no wonder that the cases provoked divergent responses: a stark rejection of the First Amendment claim in *Rust*, a powerful affirmation of the First Amendment claim in *R.A.V.*[5]

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[3] To call such questions "new" is in a significant sense to compress history. The potential for these questions to emerge has existed in great measure since the rise of the regulatory state, and the Court has decided a number of First Amendment cases involving selective subsidization issues during the past decades. See, for example, *Speiser v Randall*, 357 US 513 (1958). Indeed, even prior to the creation of the regulatory state, issues of this kind could arise in such contexts as government property or employment. See, for example, *McAuliffe v Mayor of New Bedford*, 155 Mass 216, 29 NE 517 (1892). That these issues are still considered in any degree novel may have as much to do with their intractability—with the continuing inability of courts and commentators to resolve them—as with their timing.

[4] Phrased in the language of conditions, the question is whether the government could condition its grant of funding on the content of the recipient's speech.

[5] The variance—and, I will soon argue, the inconsistency—in the Court's responses to *Rust* and *R.A.V.* goes yet further than that suggested in the text. Four of the five Justices who voted to deny the First Amendment claim in *Rust* voted to sustain a broad First Amendment position in *R.A.V.* Those four were Chief Justice Rehnquist and Justices Scalia, Kennedy, and Souter; of the *Rust* majority, only Justice White rejected the broad First Amendment argument in *R.A.V.*, though concurring in the result on narrower grounds. Conversely, the two active Justices who wished to sustain the First Amendment claim in *Rust* (Justices Blackmun and Stevens) rejected the *R.A.V.* majority's broad First Amendment reasoning, though again concurring in the result. Justice O'Connor, who voted with the concurring Justices in *R.A.V.*, declined to take a position on the constitutional question in *Rust*, and in the interim between the two cases Justice Thomas, who joined the *R.A.V.* majority, replaced Justice Marshall, who joined the *Rust* dissent.

But is this the only—is this the best—way to view these cases? Or can they be recast—the issues in them redescribed—so that an underlying similarity leaps out? A few preliminaries at once suggest themselves. First, both cases involve speech of a particularly controversial—many believe deeply harmful—kind. That abortion advocacy is the bane of a certain segment of the political right and that racist speech is the bane of a certain segment of the political left must be considered, for First Amendment purposes, not a distinction, but a core likeness. Next, in each case the government responded to this controversy by engaging in a form of content discrimination, disfavoring certain substantive messages as compared to others. Both cases thus raise general questions of First Amendment neutrality: whether, when, and how the government may tip the scales for (or against) certain messages—or, stated otherwise, to what extent the government is required, with respect to the content of speech, to play a neutral role. But more than this must be said to assimilate the cases, for surely the question of First Amendment neutrality may present itself in different contexts, and different contexts may demand different approaches and legal rules. The key, then, to understanding the connection between *R.A.V.* and *Rust* is to note that in both cases, the issue of neutrality arises in the same way—that in both, the structure of the problem is the same.

How is this so? Briefly stated for now, *Rust* and *R.A.V.* both raise the question: If, in a certain setting, the government need not protect or promote any speech at all, may the government choose to protect or promote only speech with a certain content? *Rust* is easily seen in this light. The government, we believe, is not constitutionally required to promote speech through the use of federal funds.[6] May the government then fund whatever speech it wants? Or does it face constraints in selectively promoting expression? The question is similar in *R.A.V.* The government is not constitutionally required to tolerate any "fighting words" at all. May the government then permit some but not all fighting words? Or is it constitutionally constrained from selectively doling out this favor? The question posed in each case is in an important sense the question of First Amendment neutrality in its starkest form:

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[6] There are exceptions to this widely accepted principle. See note 53. Yet the rule remains generally valid and served as the foundation for *Rust*.

when speech, considered broadly, has no claim to government promotion or protection, what limitations does government face in voluntarily advancing some messages, but not all?

This issue, which I will call the issue of content-based underinclusion, extends far beyond *Rust* and *R.A.V.* themselves. It links a wide variety of First Amendment cases and defines a largely unacknowledged First Amendment category. The question arises in cases involving selective funding of speech (such as *Rust*), selective prohibition of wholly proscribable speech (such as *R.A.V.*), selective bans on speech in non-public forums, and selective imposition of otherwise valid time, place, or manner restrictions (which may or may not involve the use of government property). At present, some of these cases—most notably, those involving funding decisions—are viewed as raising nasty, even intractable issues; others are seen as far more transparent. But if we recognize that all belong to one broad category, we may come to doubt our certainty as to some, even as we may gain guidance on others.

In this article, I view *R.A.V.* and *Rust* as reflecting on each other and, together, as reflecting on a broader range of First Amendment cases. My purpose is to elucidate connections that the Court's discourse has obscured, to explore what turns out to be a far-flung problem, and to essay some steps toward a solution. In Part I, I summarize the opinions in *R.A.V.* and *Rust*, showing how the majority opinion in *R.A.V.* echoes the principal dissent in *Rust* and how the majority opinion in *Rust* anticipates the principal concurrence in *R.A.V.* In Part II, I provide a fuller statement of the structural congruity of the cases and the issue they present, and I connect them with other kinds of First Amendment cases raising the question of content-based underinclusion. Part III considers two objections to this broad linkage: one based on the distinction between penalties and nonsubsidies, the other based on what appears to be the plenary power of the government to engage in speech itself. Finally, Part IV offers some tentative thoughts on the resolution of the problem of content-based underinclusion.

I

R.A.V. arose from the City of St. Paul's decision to charge a juvenile under the St. Paul Bias-Motivated Crime Ordinance for allegedly burning a cross on the property of an African-American

family. The ordinance, as written, declared it a misdemeanor for any person to "place[] on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender . . . ."[7]

The trial court dismissed the charge on the ground that the St. Paul ordinance was overbroad. The Minnesota Supreme Court reversed, holding that the ordinance, as properly construed, banned only expression not protected by the First Amendment. The court relied on *Chaplinsky v New Hampshire*, which declared that "fighting words"—defined as words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace"—could be punished without "rais[ing] any constitutional problem."[8] According to the Minnesota Supreme Court, the St. Paul ordinance was constitutional because it extended only to expression that fell within the *Chaplinsky* formulation (although, of course, not to all such expression): the law covered "fighting words" that injured or provoked violence on the basis of race, color, creed, religion, or gender.[9]

All nine Justices agreed to strike down the ordinance as construed by the Minnesota Supreme Court, but none pretended to have achieved anything more than surface unanimity. Four of the Justices invalidated the law only because, in their view, the Minnesota Supreme Court had failed in its attempt to limit the ordinance to expression proscribable under *Chaplinsky;* the ordinance thus remained overbroad.[10] The majority declined to consider this argument, and the real controversy in the case lay elsewhere. It centered on the following question: Assuming the St. Paul ordinance

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[7] Minn Stat § 292.02 (1990).

[8] 315 US 568, 572 (1942).

[9] See *In re Welfare of R.A.V.*, 464 NW2d 507, 510–11 (1991).

[10] In holding that the St. Paul ordinance reached only "fighting words" as defined by *Chaplinsky*, the Minnesota Supreme Court had suggested that the *Chaplinsky* definition included expression that by its very utterance caused (in the words of the St. Paul ordinance) "anger, alarm or resentment." 112 S Ct at 2559. The four concurring Justices objected to this sweeping understanding of *Chaplinsky*. The Justices stated, in accord with other post-*Chaplinsky* decisions, that the fighting words doctrine articulated in that case in no way allowed the restriction of speech that inflicted only such "injury" as "hurt feelings, offense, or resentment." Id.

reached only expression proscribable under *Chaplinsky*, did the ordinance remain invalid because it reached some, but not all, of this expression—because it banned, on the basis of content, only certain fighting words?

Justice Scalia, writing for the majority,[11] answered the question in the affirmative and invalidated the ordinance on this ground. In prior cases, Justice Scalia readily admitted, the Court had made a judgment that fighting words could be banned entirely—a judgment based on the view that such words are " 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' "[12] The Court even had gone so far as to say that fighting words and other similar categories of expression are " 'not within the area of constitutionally protected speech' " and that the " 'protection of the First Amendment does not extend' " to them.[13] But were these statements to be taken as "literally true"?[14] Did the First Amendment vanish from the landscape because the government had no obligation to permit the utterance of fighting words? Not at all.

What remained fixed on the constitutional terrain was an obligation of content-neutrality, perhaps slightly relaxed in the context of proscribable speech, but still with significant bite. No matter, for example, that the government may proscribe libel; "it may not make the further content discrimination of proscribing *only* libel critical of the government."[15] No matter that a city may ban obscenity; it may not "prohibit . . . only that obscenity which in-

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[11] The majority also included Chief Justice Rehnquist and Justices Kennedy, Souter, and Thomas.

[12] 112 S Ct at 2543 (quoting *Chaplinsky*, 315 US at 572). Justice Scalia's opinion nowhere questioned the fighting words doctrine as formulated in *Chaplinsky;* that doctrine was treated throughout the opinion as a given. It is conceivable that some unstated discomfort with the fighting words doctrine contributed to, or even caused, the *R.A.V.* decision; on this view, the reasoning of the Court in *R.A.V.* operated as a kind of second-best surrogate for the ideal but seemingly intemperate course of overruling the doctrine entirely. Cf. Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv L Rev 4, 28–31 (1988) (explaining various prohibitions on selective government action found in unconstitutional conditions cases as a second-best means of constraining unwisely granted government power). I assume here that the *R.A.V.* Court meant what it said and that its rationale was something more than a pretext for limiting a doctrine it did not like, but felt bound to tolerate.

[13] Id at 2543 (quoting, inter alia, *Roth v United States*, 354 US 476, 483 (1957), and *Bose Corp. v Consumers Union*, 466 US 485, 504 (1984)).

[14] Id.

[15] Id (emphasis in original).

cludes offensive political messages."[16] Similarly, with respect to the case at hand: no matter that a city may bar all fighting words; it may not (as, the majority held, St. Paul did) bar only those fighting words addressing a particular subject or expressing a particular viewpoint.[17] Although the category of fighting words is "unprotected"—although it has, "in and of itself, [no] claim upon the First Amendment"—the government does not have free rein to regulate selectively within the category.[18] Even wholly proscribable categories of speech are not "entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination."[19] To sustain all content discrimination within categories of speech, simply because the categories as a whole are proscribable, would be to engage in "a simplistic, all-or-nothing-at-all approach to First Amendment protection . . . at odds with common sense."[20]

Justice White, in a concurring opinion,[21] took direct issue with this reasoning: for him, the only relevant fact was that fighting words as a category could be banned under the First Amendment. Once the determination had been made that fighting words generally had no claim to First Amendment protection, the conclusion followed that the government could regulate such expression freely—even if that regulation took the form of content discrimination. "It is inconsistent to hold that the government may proscribe an entire category of speech . . . but that the government may not treat a subset of that category differently without violating the First Amendment; the content of the subset is by definition . . . undeserving of constitutional protection."[22] Indeed, such a holding foolishly would force the government to choose between regulating all proscribable speech or none at all.[23] In Justice White's frame-

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[16] Id at 2546 (emphasis deleted).

[17] Id at 2547.

[18] Id at 2545.

[19] Id at 2543.

[20] Id.

[21] Justice White's opinion was joined in full by Justice Blackmun and Justice O'Connor. Justice Stevens joined only the portion of the opinion stating that the ordinance was overbroad; he specifically rejected both Justice White's and Justice Scalia's approaches to the question discussed in the text. I discuss aspects of Justice Stevens's opinion in Part IV.

[22] Id at 2553.

[23] In this manner, Justice White was able to throw back upon Justice Scalia the charge of all-or-nothingism. See id. Justice Stevens charged both opinions with manifesting that apparently discredited approach to First Amendment questions. See id at 2562, 2567.

work, when speech had no claim to constitutional protection, government selectivity made no First Amendment difference;[24] if the government had no obligation to permit fighting words at all, then it faced no constraints in permitting some fighting words but not others.

Turn now to *Rust*, and compare the structure of the argument. The Department of Health and Human Services had issued regulations governing the allocation and use of Title X grants.[25] These regulations prohibited Title X–funded projects from providing abortion counseling or referrals (instead requiring them to provide referrals for prenatal care), as well as from encouraging, promoting, or advocating abortion. Title X grantees challenged the regulations, alleging (among other claims) that they violated the First Amendment.[26] The grantees argued in part that, by virtue of the regulations, the availability of subsidies now hinged on the content of speech—or, more specifically, its viewpoint: the government would subsidize a wide range of speech on family planning and other topics (including anti-abortion speech), but not abortion counseling, referral, or advocacy.

A majority of the Court, speaking through Chief Justice Rehnquist, rejected this argument. The starting point, for the Court, was that the Constitution required no subsidization of speech at all: "'[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.'"[27] For the majority it followed that the government could also subsidize speech selec-

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[24] Justice White stated that the Equal Protection Clause, as distinct from the First Amendment, would pose a barrier to differential treatment not rationally related to a legitimate government interest. See id at 2555. Ahkil Amar suggests that in acknowledging the relevance of the Equal Protection Clause, Justice White may have conceded the crucial point: that even within the realm of unprotected speech, some state action is illegitimate. See Akhil R. Amar, *Comment: The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 Harv L Rev 124, 130 & n 46. The question remains, though: Exactly what state action is illegitimate? Justice White's rational basis test, which would strike down legislation "based on senseless distinctions," 112 S Ct at 2556 n 9, will not lead to the same results as Justice Scalia's demanding First Amendment scrutiny.

[25] Such grants are made under Title X of the Public Health Service Act, 42 USC §§ 300–300a-6 (1988), which provides monies for family planning services. The HHS regulations appear at 42 CFR §§ 59.7–59.10 (1991).

[26] The grantees also argued that the regulations failed to comport with the governing statute and that they violated the Fifth Amendment right of women to choose to have an abortion. The Court rejected both these claims.

[27] 111 S Ct at 1772 (quoting *Regan v Taxation with Representation*, 461 US 540, 549 (1983)).

tively within broad limits:[28] the Court had rejected the proposition "that if the government chooses to subsidize one protected right, it must subsidize analogous counterpart rights."[29] In effect, the "general rule that the Government may choose not to subsidize speech" implied a corollary: the government may choose which speech to fund.[30] And what of the usual First Amendment proscription against viewpoint discrimination? The Chief Justice suggested that in this context the term had no application: when the government "has merely chosen to fund one [speech] activity to the exclusion of the other[,]" the government "has not discriminated on the basis of viewpoint."[31] In allotting funds, the government was entitled to make "value judgment[s]."[32] The government could subsidize speech promoting democracy, but not speech promoting fascism;[33] the government could subsidize speech of family planning clinics (including anti-abortion speech) except for abortion advocacy and referral. All followed from a simple point: "Title X subsidies are just that, subsidies."[34] The statement echoes Justice White in *R.A.V.*: Fighting words are just that, fighting words. When the government has no general obligation, it has no obligation of neutrality.

Justice Blackmun's dissent in *Rust* vigorously disputed this proposition. Justice Blackmun acknowledged that the government generally has a choice whether to fund the exercise of a constitutional right, but he insisted that "there are some bases upon which gov-

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[28] Noting that funding by the government might not "invariably [be] sufficient to justify government control over the content of expression," the Court proposed two potential exceptions: when the subsidy was offered to a university or when the subsidy took the form of providing a public forum. Id at 1776.

[29] Id at 1773.

[30] Id at 1776.

[31] It is conceivable that the Chief Justice intended to make a far narrower point than that suggested in the text: he may have meant only that the particular funding decision at issue did not involve viewpoint discrimination (as generally understood in First Amendment law), because the HHS regulations merely drew a distinction, on the basis of subject matter, between speech concerning preconception family planning and all other speech. In one portion of the opinion, the Court indeed approaches this argument. See id at 1772. But the argument, aside from being fallacious in light of the language of the regulations, see text at note 99, cannot be thought to represent the whole, or even a major part, of the Court's reasoniong: so narrow an interpretation of the decision makes most of the *Rust* opinion, including the statements emphasized in the text, incomprehensible.

[32] Id at 1772.

[33] Id at 1773.

[34] Id at 1775 n 5.

ernment may not rest [a] decision" to fund expression.[35] Selective funding becomes impermissible when based upon the content—most clearly, upon the viewpoint—of the expression. The government may not " 'discriminate invidiously in its subsidies' " of speech by basing them on ideological viewpoint.[36] Thus, Justice Blackmun concluded, "[t]he majority's reliance on the fact that the Regulations pertain solely to funding decisions simply begs the question."[37] The point echoes Justice Scalia in *R.A.V.*: The concurrence's reliance on the fact that the St. Paul ordinance pertains solely to fighting words simply begs the question. Even in this circumstance, the government retains an obligation of neutrality.

Thus do the arguments in *Rust* and *R.A.V.* mirror each other. Between the two cases, the Court switched sides: the dissent in *Rust* became the *R.A.V.* majority, the majority in *Rust* became a concurrence in *R.A.V.* So too did most of the individual Justices trade positions; the difference in the outcome of the cases is hardly due to the change of mind of a single Justice.[38] But the structure of the dispute in the two cases is almost precisely the same. And that is because the *Rust* Court and the *R.A.V.* Court faced the same issue—a distinctive kind of First Amendment neutrality issue, extending far beyond *R.A.V.* and *Rust* themselves, which might best be labeled content-based underinclusion.

II

What, precisely, is content-based underinclusion? Suppose that the government, consistent with the First Amendment, may limit—by prohibiting or by refusing to subsidize—either an entire category of speech or all speech within a particular context. Now suppose that the government declines to go so far: rather than limiting speech to the full extent of its constitutional power, the government chooses to limit only some expression—and that on the basis of content. The resulting government action is, in the ordinary sense, narrower than the action stipulated to be constitutional. That is, the merely partial limitation allows more expres-

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[35] Id at 1781.

[36] Id at 1780 (quoting *Regan*, 461 US at 548); see id at 1782.

[37] Id at 1781.

[38] See note 5.

sion. Yet this "narrower" action incorporates a content-based distinction: it picks and chooses among expression on the basis of what is said. The question thus becomes whether and when a government that has the power to restrict speech generally may instead limit select kinds of expression. Or, looked at from a different angle, the question is whether the government may voluntarily promote or protect some (but not all) speech on the basis of content, when none of the speech, considered in and of itself, has a constitutional claim to promotion or protection.

Such underinclusion—government may ban all speech in a category, but instead bans only some, defined by content—is a particular kind of content-based restriction, by no means equivalent to all government actions falling within the broad content-based category.[39] In many—indeed, most—cases of content-based speech restrictions, the question of inequality between different kinds of expression is wrapped in, and in practice inseparable from, a theoretically distinct issue: the permissibility of the burden placed on the speech affected. Consider, for example, a case arising from a statute that criminalizes in all contexts constitutionally protected speech—say, seditious advocacy. In deciding such a case, the Court usually will not ask whether the government has a sufficient reason to treat speech of one kind (seditious advocacy) differently from speech of another; rather, the Court will ask merely whether the government has a sufficient reason to restrict the speech actually affected.[40] The framing of the inquiry relates to the nature of the problem: in such a case, the issue is not underinclusion, for the government could not cure the constitutional flaw by extending the restriction to all speech regardless of its content.

By contrast, in a content-based underinclusion case, equality is

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[39] Justice Scalia attempts in *R.A.V.* to avoid the term "underinclusiveness" in favor of the broader term "content discrimination," apparently because he thinks the former term more liable to the concurring opinions' charges of First Amendment absolutism. See 112 S Ct at 2545. But content-based underinclusion is no more than a distinctive kind of content-based distinction, and analysis explicitly focusing on underinclusion (when it exists) does no more than respond to the peculiar nature of the governmental action and the peculiar concerns it raises. Justice Scalia himself recognizes the need to distinguish among different kinds of content-based distinctions when he concedes that content-based analysis may take a somewhat different form in the context of wholly proscribable speech than in other First Amendment contexts. See id.

[40] See, e.g., *Brandenburg v Ohio*, 395 US 444 (1969) (per curiam); see generally Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm & Mary L Rev 189, 202–3 (1983).

all that is at issue. Here, the Court usually will state the issue in terms of (and only in terms of) equal treatment. The Court will ask not whether the government has a sufficient reason for restricting the speech affected (taken in isolation), but whether the government has a sufficient reason for restricting the speech affected *and* not restricting other expression.[41] Once again, the framing of the inquiry follows from the structure of the problem. In these cases, by definition, the restriction is permissible but for the inequality, and the constitutional infirmity thus may be erased by extending the restriction to additional speech as well as by eliminating it entirely.[42] The First Amendment functions in these cases solely as a guarantee of some kind of equality on the plane of content.

The issue of content-based underinclusion arises in many settings—all superficially unlike, but all essentially similar.[43] One set of cases presenting the issue involves the selective imposition of otherwise reasonable time, place, or manner restrictions. Assume that a city may ban the use of noisy soundtrucks between sunset and sunrise in residential districts. Now assume that the city, rather than enacting this flat ban, exempts the use of soundtrucks to laud city government. One approach to this law holds that the burden imposed on speech is itself constitutionally permissible, but strikes down the law because of the content-based exemption.[44]

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[41] On occasion the Court has focused on differential treatment without stating that a generally applied restriction of the same kind would be constitutional. But in almost all of the cases in which the Court has framed the question in this manner, such a general restriction on speech at least arguably would have satisfied constitutional standards. See, for example, *Police Dep't v Mosley*, 408 US 92 (1972).

[42] Justices frequently object to the Court's analysis in such cases precisely on the ground that it permits the enactment of a broader speech restriction. See 112 S Ct at 2553 (White concurring); id at 2561–62 (Stevens concurring); *Metromedia, Inc. v San Diego*, 453 US 490, 564 (1981) (Burger dissenting); *Carey v Brown*, 447 US 455, 475 (1980) (Rehnquist dissenting).

[43] See Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, and Mark V. Tushnet, *Constitutional Law* at 1337–62 (Little, Brown, 2d ed 1991), which organizes some cases along the lines I suggest in a section entitled "Equality and Free Expression."

[44] A court also might take either of two different approaches to the law. First, a court might ask whether the government has a compelling reason to burden the speech affected, without any exploration of the scope of the exemption. Under this approach, the content-based exemption serves to heighten the standard of review (to one of compelling interest); the ultimate inquiry, however, remains focused on the permissibility of the burden imposed, irrespective of the exemption. Second, a court might again focus on the permissibility of the burden imposed, but use the exemption not merely to heighten the standard of review, but to discredit the justification for the general speech restriction. For example, in the hypothetical given, a court might reason that if the city allows this exemption, then the city

Under this analysis, the permissibility of the general restriction is irrelevant: the government, even when it has discretion over allowing speech at all, may not grace a certain kind of speech with its special favor.[45]

Many Supreme Court cases reviewing limited time, place, or manner regulations incorporate this understanding of the content-based underinclusion problem and the analysis associated with it. In some of these cases, the regulations applied to the use of public forums. For example, in *Police Dept. v Mosley*,[46] the Court reviewed an ordinance that prohibited picketing on public streets near a school during certain hours, but exempted labor picketing from the general restriction. The Court held the ordinance unconstitutional because of the distinction between labor picketing and other picketing—because the ordinance worked a content-based "selective exclusion from a public place."[47] In other cases, the time, place, or manner restriction has applied outside the realm of public property. Thus, in *Metromedia v San Diego*,[48] the Court considered the

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must view the interest in quiet during evening hours as insignificant, in which case the general restriction must fall. An analysis of this kind, although relying heavily on the exemption, in the end tests the constitutionality of the actual burden imposed on speech and finds that burden excessive. In other words, the exemption itself is not what is invalid; rather, the exemption proves the invalidity of a more general ban. See Stone, *Content Regulation and the First Amendment*, 25 Wm & Mary L Rev at 202–7 (cited in note 40).

[45] The Court in *R.A.V.* itself recognized the link between *R.A.V.* and cases of the kind discussed in the text. The Court compared the proscription of fighting words to the proscription of a noisy soundtruck. See 112 S Ct at 2544–45. The analogy implies that content-based distinctions within a generally proscribable category of speech (such as fighting words) present the same question as content-based distinctions superimposed on an otherwise valid time, place, or manner regulation.

[46] 408 US 92 (1972).

[47] Id at 94; see also *Carey v Brown*, 447 US 455 (1980) (invalidating on the same ground a statute prohibiting all picketing, except labor picketing, on streets surrounding residential places). *City of Lakewood v Plain Dealer Publishing Co.*, 108 S Ct 2138 (1988), presented the same issue in a different form. The case involved standards governing the allocation of city permits for newspaper vending machines. All assumed that the provision of city property (even public forum property) for vending machines was wholly optional, in the sense that the city government could choose whether it wished to allow any machines at all. The majority held that if the city chose to exercise this power, it must do so under standards that would safeguard against content discrimination. The dissent, written by Justice White and closely resembling his opinion in *R.A.V.*, concluded that because the First Amendment did not obligate the city to allow the placement of newsracks on city streets (or, in his words, because the placement of newsracks—like the use of fighting words—was not "protected by the First Amendment"), the city had no obligation to promulgate protective standards. In *Lakewood*, however, even Justice White agreed that were the city actually to engage in content discrimination in allocating newsrack permits, the First Amendment would come into play.

[48] 453 US 490 (1981).

legality of an ordinance restricting the use of billboards unless they fell within certain categories defined by content, such as political campaign signs or signs indicating the temperature or time. Here too, the Court struck down the law on the basis of its selectivity, entirely independent of the extent of the burden that the law imposed on the covered speech. The message in these cases, regardless whether public property was involved, was the same: even if speech generally may be regulated through reasonable time, place, or manner restrictions, such restrictions may not be imposed on speech only of a certain content.

All of these cases thus concern the same issue as *Rust* and *R.A.V.*, although they reach results identical only to the latter. In *Rust*, the Court permitted the government to favor (through funding) certain kinds of speech, on the ground that the government need not have favored any. In *Mosley* and *Metromedia*, the Court refused to allow the government to engage in similar selectivity: to favor (through donating public property or granting a regulatory exemption) certain kinds of speech on the ground that all speech could have been disfavored. If anything, as I will later discuss, *Rust* might be thought to raise a graver First Amendment problem, because the selectivity there was based on viewpoint, whereas in *Mosley* and *Metromedia*, it was based (at least facially) only on subject matter. In any event, the cases raised the same essential issue: the demands of First Amendment neutrality in a sphere in which government action respecting speech is in the first instance optional.

The Court often confronts the identical issue—but handles it differently—when dealing with speech restrictions applicable to non-public forums. Within broad limits, the government may choose to impose in such places sweeping restrictions on speech, so long as generally applicable.[49] Depending on the nature of the non-public forum, the government may have discretion to ban speech entirely. Frequently, however, the government chooses to restrict—in this context, up to the point of banning altogether—

[49] Restrictions must be "reasonable" in light of the nature and purposes of the non-public forum, but this standard frequently allows even wholesale prohibition of speech. For an example of the ease with which the reasonableness standard may be met in the context of non-public forums, see *International Society for Krishna Consciousness, Inc. v Lee*, 112 S Ct 2701 (1992). By contrast, in a public forum (whether traditional or designated), the government has only very narrow discretion to curtail speech generally, through limited time, place, or manner restrictions.

only speech of a certain content. Thus, the question once more arises: in circumstances in which the government need not allow or foster any speech, may it decide to allow or foster some speech on the basis of content?

Two cases will serve to illustrate how the issue arises—and how the Court has handled it—in this context. In *Lehman v City of Shaker Heights*,[50] the Court reviewed a municipal policy of refusing to sell advertising space on city buses to persons who wished to use the space to engage in political speech. After finding that the advertising space did not constitute a public forum, and thus that no general right of access applied, the Court was left with the question whether the municipality could bar only a certain kind of speech. Similarly, in *Greer v Spock*,[51] the Court considered whether a military base, also a non-public forum, could bar speeches and demonstrations of a partisan political nature, while allowing other kinds of expression. In these cases and others,[52] the Court has permitted some content-based distinctions (including those based on subject matter), but has drawn the line at distinctions that are based on viewpoint. The government may not use its broad discretion over the property it owns to advantage some viewpoints at the expense of others, but as in *Lehman* and *Greer* may make other distinctions based on content.

These cases too resemble *Rust* and *R.A.V.*, except in the rules the Court has established and the results it has reached. Banning all fighting words, as in *R.A.V.*, is no more problematic than banning all speech in a non-public forum. Yet in *R.A.V.*, the Court invalidated selective proscription, suggesting that even subject-matter distinctions violated the First Amendment, whereas in *Lehman* and *Greer*, the Court upheld such selective proscription. Perhaps, as I shall later discuss, the cases may be distinguished by virtue of the kind of content discrimination in each. But surely it should make no difference that the one case involves a selective ban within a wholly proscribable category of speech, the others a selective ban within a non-public forum. In both, what is at issue is the ability of the government to restrict some (but not all) speech

[50] 418 US 298 (1974).

[51] 424 US 828 (1976).

[52] See *Perry v Perry*, 460 US 37 (1983) (upholding statute granting preferential access to an interschool mail system); *Cornelius v NAACP*, 473 US 788 (1985) (upholding government policy limiting access to a charity drive aimed at federal employees).

when the government has the discretion to restrict the speech entirely.

From the discussion so far, it may come as little surprise to discover that even within a single setting—that of selective funding decisions—the problem of content-based underinclusion has bedeviled the Court. The government, as a general rule, need not fund any speech, whether through direct expenditures, tax exemptions, or other mechanisms.[53] But what if the government chooses to fund some (but not all) speech on the basis of content? Prior to *Rust*, the Court had confronted on several occasions this issue of selectivity in public funding decisions. In *Arkansas Writers' Project v Ragland*, for example, the Court considered the constitutionality of extending a tax exemption to religious, professional, trade, and sports journals, but not to general-interest magazines.[54] The Court struck down the exemption scheme because it rested on content distinctions, even though turning only on subject matter. In *Regan v Taxation with Representation*, by contrast, the Court approved a congressional decision to grant a tax subsidy to veterans' organizations, but not to other organizations, engaged in lobbying efforts.[55] There, the Court indicated (as it has in the non-public forum cases) that only viewpoint-based selectivity in government funding would violate the First Amendment.[56] Finally, as discussed

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[53] This general rule is burdened with at least one prominent exception. The government has a broad obligation to permit speech in public forums; this donation of property for speech purposes is a form of funding. In addition, the government may have a duty to provide police protection and like services to speakers in certain circumstances. See *Edwards v South Carolina*, 372 US 229, 231–33 (1963); *Cox v Louisiana*, 379 US 536, 550 (1965). Once again, in providing these services, the government effectively funds expression. See generally Owen M. Fiss, *Why the State?*, 100 Harv L Rev 781, 786 (1987); Cass R. Sunstein, *Free Speech Now*, 59 U Chi L Rev 255, 273–74 (1992).

[54] 481 US 221 (1987).

[55] 461 US 540 (1983).

[56] The debate in *Ragland* and *Regan*, as in most such cases, focused explicitly on the question whether the government's power to refuse all funding implied a power to fund selectively. In dissent in *Ragland*, Justice Scalia saw as dispositive "the general rule that 'a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.' " 481 US at 236 (quoting *Regan*, 461 US at 549). In *Regan*, the majority expounded this reasoning, citing the discretion of Congress over "this sort of largesse" and the absence of any First Amendment right to subsidization of speech. 461 US at 549. Other cases presenting substantially the same issue, in the context of government provision of services, are *Board of Education v Pico*, 457 US 853 (1982), in which the Court disapproved the removal of specified books from a school library over the objection that the government had no constitutional obligation to make available any book in a library, and *Southeastern Promotions v Conrad*, 420 US 546 (1975), in which the Court disapproved the exclusion of the musical "Hair" from a city auditorium over the objection that the city had substantial discretion to determine the nature of the entertainment it wished to support.

previously, the Court in *Rust* suggested that in the funding context even the prohibition on viewpoint discrimination does not apply: the discretionary nature of funding decisions obviates any requirement of government neutrality among different kinds of expression.

What appears to emerge from the cases I have discussed—*Rust*, *R.A.V.*, and all the rest—is a set of diverse and contradictory responses to a single (and ubiquitous) First Amendment problem. All these cases, I have argued, pose the issue of content-based underinclusion, and yet the Court has failed to recognize this essential sameness. The argument, however, is so far only half complete. For although I have stated what bonds the cases, I have not yet explored what might be thought to unglue them. Perhaps there are real differences among these cases—distinctions that reseparate in a principled manner what I have grouped together.

III

In this Part, I consider two objections to the proposition that *Rust* and *R.A.V.* belong to a single category of cases in which the government engages in content-based underinclusion. The first objection turns on the distinction between penalties and nonsubsidies, familiar from the Court's treatment of unconstitutional conditions cases. Cases such as *Rust*, it is said, involve nonsubsidies, whereas cases such as *R.A.V.* involve penalties; and selectivity with respect to nonsubsidies, but not penalties, is permissible. But the distinction between nonsubsidies and penalties founders in cases involving content-based underinclusion; perhaps more important, even if the distinction could be drawn, it would have no significance within this set of cases.

The second objection to viewing these cases as part of a single category relies on the government's plenary power to engage in speech itself. If the government has power to speak unrestrictedly, the argument runs, so too does the government have uncurtailed power to hire "agents" to engage in speech activities: thus does the government action in a case like *Rust*, but not in a case like *R.A.V.*, receive constitutional approval. But this approach also overlooks the distinctive character of content-based underinclusion cases, here by misunderstanding the way in which government action in these cases relates to the government's own expression. Both approaches fail to distinguish *Rust* and *R.A.V.*; both fail to fracture

the category of content-based underinclusion; both fail to answer the question of First Amendment neutrality that category poses.

A

At the base of *Rust* lies the view that nonsubsidies and penalties are different—different in the sense that they can be distinguished from each other, and different also in the sense that the distinction matters. The government may not "penalize" a person for engaging in abortion advocacy, but the government may refuse to "subsidize" such speech, even if it subsidizes other, competing expression. The distinction between nonsubsidies and penalties runs across the gamut of unconstitutional conditions cases, whether or not involving the First Amendment; in these cases, the most common approach is to label governmental actions as either a penalty or a nonsubsidy, to declare the former coercive and unconstitutional, to declare the latter noncoercive and constitutionally permitted.[57]

This distinction prompts an obvious response to the argument I have been making. In discussing *Rust*, *R.A.V.*, and other cases, I have formulated the issue at stake in something like the following way: When may the government permit or subsidize some (but not all) speech on the basis of content in circumstances in which it need not permit or subsidize any? A skeptic might claim that the disjunctives in this statement are doing all the work—in other words, that I am conflating, through these simple "or"s, two separate inquiries. One question (raised, for example, by *Rust*) involves selective subsidies; the other (raised, for example, by *R.A.V.*) involves selective penalties. In that distinction, the argument further runs, lies a critical difference.

A first response to this argument contests the ease—or even the coherence—of an effort to sort out penalties from nonsubsidies in any content-based underinclusion case. In funding cases such as *Rust*, government action that seems to be a mere nonsubisdy becomes a penalty if viewed from a different, and no more contestable, perspective. Less obviously, the same is true (in reverse) of non-funding cases involving underinclusion, such as *R.A.V.*: gov-

[57] See, for example, *Regan*, 461 US 540; *Harris v McRae*, 448 US 297 (1980); *Speiser v Randall*, 357 US 513 (1958).

ernment action that seems, intuitively, a penalty becomes a mere nonsubsidy with a similar change in perspective.

Consider first a selective funding case like *Rust*, in which the difficulty of drawing the penalty/nonsubsidy distinction has frequently been noted.[58] In refusing to provide grants for abortion referrals, is the government penalizing or merely declining to subsidize this exercise of First Amendment rights? The answer rests upon the choice of a position—to use the inevitable jargon, a baseline—from which to measure the action. If the starting point assumes an absence of funding for any family planning services, including abortion referral, then the government action at issue is a nonsubsidy. If, by contrast, the starting point assumes funding for all family planning services, including abortion referral, then the government decision is a penalty.

The difficulty in such cases arises from the task of determining which position to adopt given that the action occurs within a realm of (frequently exercised) government prerogative. Presumably, the government action at issue should be viewed from the position of whatever state of affairs—funding or non-funding—is in some sense normal or natural. But in a world in which the government may and frequently does fund private speech and other activity, but has no general constitutional obligation to do so, the choice of this position is by no means obvious. What is the normal or natural state of affairs in such a world? Stated otherwise, what is a citizen (here, a family planning provider) entitled to expect? Nothing? Something? If the latter, what? The answers frequently are elusive.

Perhaps less obviously, the same difficulties attend any attempt to categorize the governmental action at issue (as penalty or nonsubsidy) in a case like *R.A.V.* A direct prohibition of speech, backed by sanctions, might seem the archetypal penalty. But the question in an underinclusion case, such as *R.A.V.*, is in fact more complicated. Remember that the government, acting within the Constitution, either may permit or may ban fighting words; the First Amendment has nothing to say respecting that decision. If that is so, we may measure the government action at issue from either of two perspectives. We may assume a perspective in which

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[58] See, for example, Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U Pa L Rev 1293 (1984); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv L Rev 1413 (1989); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism*, 70 BU L Rev 593 (1990).

the government tolerates all fighting words; in that case, the prohibition of racial fighting words indeed smacks of a penalty. But alternatively, we may assume a perspective in which the government prohibits all fighting words; in that case, a ban on racial fighting words seems a mere nonsubsidy (with any exemption from the general prohibition counting as a subsidy).

As in the funding cases, the choice between the two stances—protection of fighting words or no protection of fighting words—is frequently unclear, and for much the same reason. Given a world in which the government may (and frequently does) but need not protect fighting words, either stance may seem justified. In this context too, it is no mean feat to determine the normal or natural state of affairs, or a citizen's entitlement. And thus in this context too, it is no mean feat to characterize the government action at issue as either a penalty or a nonsubsidy.

Consider, for example, two alternative avenues that a municipality might take to achieve the result of the St. Paul ordinance. First, suppose that a city government initially outlawed all fighting words and then, at some later date, repealed the measure except as to racial fighting words. The repealer in this example is as optional as the provision of funds in *Rust*. It follows that the remaining prohibition, no less than the refusal to fund abortion advocacy, can be considered a mere nonsubsidy. Or, second, suppose that a city government enacted a statute prohibiting fighting words generally, but then exempting, as a special act of legislative grace, non-racial fighting words. Here too, an obvious argument can be made that the exemption is a subsidy, all else nothing more than a refusal to subsidize.

This characterization seems more natural in the hypothetical cases than in *R.A.V.* itself, but that in no way undermines the point I am making. The characterization seems more apt because in choosing a stance from which to view government action, we instinctively consider how the world looked prior to the action and whether the action singles out certain speech for favorable or unfavorable treatment.[59] But this is—or, at the very least, should

[59] See Kreimer, 132 U Pa L Rev at 1359–71 (cited in note 58). Kreimer explicitly advocates the use of these factors to classify government action as a penalty or a nonsubsidy and to determine, on the basis of this classification, the action's constitutionality. My own proposed analysis does not depend on these considerations because it views as essentially irrelevant in the underinclusion context the determination whether government action constitutes a penalty or subsidy. See text following note 64.

be—as true in funding cases as in non-funding underinclusion cases such as *R.A.V.* What the hypothetical cases show is that the same debate over the proper characterization of government action may arise in each of these contexts.

Thus far, the discussion suggests two points: first, that cases like *R.A.V.* and *Rust* cannot easily be distinguished on the ground that the one involves a penalty, the other a subsidy; and second, that the distinction fails because, as shown previously, the cases alike emerge from an area of government discretion. Lest it be at all unclear, I emphasize that I am not, either here or elsewhere in this essay, equating funding cases with all cases involving a direct prohibition of speech. Rather, I am equating funding cases with a specific kind of non-funding case—that involving underinclusion. In these cases, as in funding cases, classification of the government action at issue (as penalty or nonsubsidy) is problematic. It is so because these cases, like funding cases, arise against a backdrop of government prerogative: government may, but need not, act with respect to the speech at issue. Were the Constitution to command a certain action, the problem would evaporate. If the First Amendment, say, required the government to protect fighting words, the requirement itself would establish the proper baseline, and any deviation from the protection of fighting words would constitute a penalty. Similarly in the funding cases, if the Constitution required the government to pay for the exercise of speech rights, any refusal to fund speech would penalize the speaker. The difficulty arises when government has no such general obligation—when (assuming no breach of applicable neutrality requirements) it can protect or not protect, fund or not fund as it chooses.

The essential point applies well beyond the particular contexts of *Rust* and *R.A.V.* As we have seen, general government prerogative exists in a number of First Amendment contexts: not only when the government decides whether to fund speech (*Rust*), or to ban speech falling within proscribable categories (*R.A.V.*), but also when the government decides whether to prohibit speech in nonpublic forums, as in *Greer*, or to issue reasonable time, place, or manner regulations, as in *Mosley*. Here too we may ask whether the government, in allowing only non-political speech on an army base, has penalized political speech or subsidized non-political speech. Or whether the government, in permitting only labor speech around a school during certain hours, has granted a subsidy to labor speech or imposed a penalty on all other expression.

In all of these underinclusion cases, we may play out endless arguments about whether government action with respect to some (but not all) speech has subsidized or penalized; we may say that the government has subsidized expressive activities in declining to exercise the full powers allotted to it under the First Amendment, or we may say that the government has penalized expressive activities in exercising only some subset of those powers. What alone is clear is that the subsidy/penalty line, properly understood, fails to separate any one of the contexts involving content-based underinclusion from the others. If one can be classified as a mere subsidy case, so too can they all.

The argument so far, however, seems subject to the objection that it disregards the ordinary meaning of the terms "subsidy" and "penalty." In common parlance, to subsidize speech means to pay for it; the government subsidizes expression when it picks up the costs of such activity, transferring them from a speaker to taxpayers generally. By contrast, to penalize speech means to impose a burden on a speaker—by fine or other means—that extends beyond requiring her to pay for her own expression.[60] From this standpoint, *Rust* involves a subsidy because the government is paying for speech (thus redistributing from taxpayers to speaker), whereas *R.A.V.* involves a penalty because the government is imposing an extra cost on the speaker (thus effectively redistributing in the opposite direction). Therein, it might be said, lies the difference.[61]

A bit of examination, however, reveals otherwise. The reason is simple: There are many ways for the government to pay for speech,

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[60] Richard Epstein and Michael McConnell, in slightly different ways, build their conceptions of the whole unconstitutional conditions doctrine on this redistributive conception of the subsidy/penalty distinction (although McConnell also believes that some government actions counting as subsidies under this analysis still may violate the First Amendment). See Epstein (cited in note 12); Michael W. McConnell, *Unconstitutional Conditions: Unrecognized Implications for the Establishment Clause*, 26 San Diego L Rev 255 (1989).

[61] Under this approach, some "funding" cases of course will turn out to involve penalties, rather than subsidies. One example is *FCC v League of Women Voters*, 468 US 364 (1984), in which the Court invalidated a statute prohibiting broadcasters who received any federal monies from airing editorials; the effect of the statute was not merely to cut off government funding of editorials (a nonsubsidy under this approach), but to cut off funding of all the broadcaster's activities if it aired editorials (a penalty under this approach because the benefits withheld went beyond the costs of the speech). See Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 Harv L Rev 989, 1016–17 (1991). The primary point I will make is different: that "non-funding" underinclusion cases like *R.A.V.* may turn out to involve subsidies under a test focusing on whether government is merely refusing to pay for speech or exacting some additional cost from the speaker.

and all content-based underinclusion cases—regardless whether they involve the writing of a check from tax revenues—involve some mechanism by which the government picks up some of the costs of a speaker's expression.

Consider in this regard the ordinance in *R.A.V.*, which regulated a brand of fighting words. Such expression, by definition, imposes a cost not merely on other individuals (the targets of the fighting words), but on society at large: fighting words "are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[62] It is indeed partly because of the social cost caused by fighting words that the Court has placed them in a wholly proscribable category. May it then not be said that in declining to regulate fighting words, the government picks up the cost of the speech, effectively paying (or forcing other citizens to pay) for it? The regulation of fighting words then appears a mere nonsubsidy, the refusal to regulate a classic example of subsidization.[63] Under this approach to the penalty/subsidy distinction, there is no more a constitutional "penalty" on speech in *R.A.V.* than there was in *Rust*. Both involve decisions to subsidize some expressive activities and not others.

Other kinds of content-based underinclusion cases also raise, in this sense, the issue of selective subsidization. Return here to the non-public forum cases such as *Greer*, which involved speech on a military base. The donation of such public property—property whose ordinary use is to some extent incompatible with expression—constitutes a subsidy, an absorption by the public of the costs associated with allowing expressive activity in the forum. The

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[62] *Chaplinsky v New Hampshire*, 315 US 568, 572 (1942). The cost of fighting words may take a number of forms. If such words "by their very utterance inflict injury," they will at least impose a direct harm on their target; if they "tend to incite an immediate breach of the peace," they will impose as well a cost on the general public, including money spent for police protection.

[63] The same is true of the regulation of speech falling within any other category of wholly or partially proscribable expression, such as obscenity or some kinds of libel. Such regulation appears a mere nonsubsidy, in that it operates to prevent the speaker from transferring significant costs to the public; conversely, a refusal to regulate in these areas works as a subsidy, with the public determining to absorb the costs of the expression. For discussions of the way in which constitutional privileges in libel law subsidize speakers at the expense of those defamed, see Richard A. Posner, *Economic Analysis of Law* § 27.2 at 670 (Little, Brown, 4th ed 1992); Frederick Schauer, *Uncoupling Free Speech*, 92 Colum L Rev 1321, 1326–43 (1992).

denial of access to such property, by contrast, appears as a simple refusal to subsidize expression.[64] The same is true of cases arising from selective imposition of otherwise valid time, place, or manner restrictions, such as *Metromedia*. Here too, the government has determined that speech (in the form of billboards) imposes costs on the public. With respect to certain kinds of speech, that cost is absorbed by the taxpayers; with respect to other kinds of speech, the cost is thrown back on the speaker.

The ability to view all underinclusion cases in this manner again springs from their common grounding in a sphere of government discretion. As a general rule, the government has discretion to regulate or limit speech (assuming no violation of neutrality principles) precisely when such regulation plausibly may be described as a mere nonsubsidy in the sense just described. Thus, even if we view the subsidy/penalty line as appropriately defined by the direction of redistribution (from the speaker to the public or from the public to the speaker), cases such as *R.A.V.*—cases in which the government starts with general discretionary powers—appear not very different from direct funding cases like *Rust*. Whatever differences may exist in the form of the subsidy cannot be thought of constitutional significance.

But more than this may be said, for even if the penalty/subsidy distinction could serve to separate some underinclusion cases from others (*Rust*, for example, from *R.A.V.*), the distinction would remain, in the context of underinclusion cases, essentially irrelevant. Assume for the moment that the action involved in *R.A.V.* constitutes a "penalty." The First Amendment objection to the action cannot focus on the penalty itself—cannot focus, for example, on the extent to which it, relative to a subsidy, cuts off speech—given that the fighting words doctrine permits the government to penalize

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[64] The relation of this analysis to public forum doctrine raises interesting questions. As previously noted, the government has a broad obligation to donate public forums for expressive purposes. The public forum cases thus might be viewed as stating an exception to the general rule that the government need not subsidize expression; indeed, I have considered public forums as forced subsidies at note 53. In keeping with the understanding of subsidies and penalties used in this discussion, however, we might consider the public forum cases not to involve subsidies at all. If public forums are at least in part defined as places compatible with expressive activity, then permitting speech in such places imposes few additional costs on the public. Cf. McConnell, *The Selective Funding Problem*, 104 Harv L Rev at 1033 (cited in note 61). This case, however, becomes more difficult to make as public forums are increasingly defined, as they have been in recent years, simply in terms of some historical criteria. See *International Society for Krishna Consciousness v Lee*, 112 S Ct 2701 (1992).

all speech of this kind. The objection instead must turn on government selectivity: the government has (dis)favored some speech on illegitimate grounds. In other words, if a selective penalty in a case like *R.A.V.* is constitutionally forbidden, the reason must have everything to do with the selection, and nothing to do with the penalty, which is, in and of itself, perfectly permissible. And if this is so, any distinction between a case like *R.A.V.* and a case like *Rust* cannot lie in the differing terms "penalty" and "subsidy." These terms should be viewed as constitutionally irrelevant; what has meaning in the cases—and in all underinclusion cases—is government selection. The Court's focus should be on this issue, and not on a set of terms bearing no real relation to it. The penalty/subsidy distinction provides meager aid in explaining *Rust*, *R.A.V.*, or any other case of content-based underinclusion.

B

Unstated in any decision, but perhaps vaguely perceived by the Justices, is another notion—this one relating to the government's own speech—that may explain the divergent outcomes in *Rust* and *R.A.V.* and, more broadly, challenge the existence of a single category of content-based underinclusion cases encompassing *Rust*, *R.A.V.*, and others. The argument starts from the premise—not undisputed but generally accepted—that the First Amendment places few limits on the government's own expressive activities; by and large, the government may speak as it chooses.[65] Of course, as a physical if not a constitutional matter, "the government" cannot speak; it can speak only through employees and agents. To say, then, that the First Amendment allows the government to speak is to say that the First Amendment allows the government (more precisely, its employees and agents) to hire employees and agents to do its speaking for it.[66]

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[65] For purposes of this discussion, I accept the premise that the First Amendment imposes only minor limits on the government's own speech. For a lengthy and critical exploration of this premise, see Mark G. Yudof, *When Government Speaks* (University of California Press, 1983).

[66] The Supreme Court has indicated that the First Amendment protects even an individual's decision to hire or otherwise pay for a speaker, but also has suggested that the constitutional interest in such vicarious speech is of some lesser magnitude than the interest in direct speech. See *Buckley v Valeo*, 424 US 1 (1976) (discussing why a limitation on contributions to political campaigns poses fewer constitutional problems than a limitation on direct campaign expenditures).

From this premise emerges a claim that (at least some) government funding cases differ from all other cases of content-based underinclusion. When the government funds speech, even of hitherto private parties, the government is merely hiring agents to engage in speech for it. In paying for speech, it is speaking; if the latter is permissible, so is the former. Thus a decision like *Rust* becomes justifiable: in funding certain kinds of speech, the government effectively is engaging in the speech, and so the Constitution imposes few limits. But the same cannot be said, or so the argument goes, of a case like *R.A.V.*, which involves restrictions on the speech of private parties. The government's plenary power over its own speech provides a constitutional basis for decisions to fund expression of a particular kind, but provides no basis for decisions, even if wholly voluntary, to permit speech of a certain content.[67]

This argument can be contested on two independent grounds. The first disputes the equation of "government speech" and government funded speech. The second disputes the differentiation, with respect to "government speech," of funding decisions and other kinds of content-based underinclusion.

To appreciate some of the difficulties involved in equating government speech with government funding—because government can speak, it can fund others to speak—consider the following hypothetical: a city council enacts an ordinance providing that any person who endorses the actions of city government shall be entitled to a cash grant or tax exemption.[68] The city government itself—by which I mean municipal employees acting in their official capacity—constitutionally could engage in speech of this kind, and such speech might drown out, and hence render ineffective, countervailing expression. Given this power to speak, the hypothetical subsidy scheme cannot be attacked on the bare ground that it skews public debate about municipal government; the government's own speech also may have a skewing effect. And yet, the hypothetical

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[67] I am grateful to my colleague Michael McConnell for raising this argument with me, though I do not think it should be taken (at least in this barebones form) as a statement of his position.

[68] Few would question the equivalence of a cash grant or other direct expenditure and a tax exemption, deduction, or credit in a scheme of this kind. As the Supreme Court has recognized, "Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system." *Regan v Taxation with Representation*, 461 US 540, 544 (1983). Indeed, such tax provisions frequently are referred to as "tax expenditures." See Bernard Wolfman, *Tax Expenditures: From Idea to Ideology*, 99 Harv L Rev 491 (1985).

funding scheme seems (at the least) constitutionally problematic—far more so than what might be called direct government speech. The First Amendment problems also seem severe in a case, more closely analogous to *Rust*, in which the government makes cash grants not to the public at large, but to all political clubs for purposes of speech endorsing city government. Why do these funding programs appear to present greater constitutional difficulties than the government's own expression?[69]

As an initial matter, when the government itself speaks in favor of a position, we (the people) know who is talking and can evaluate the speech accordingly. (When the government speaks to laud itself, we may pay the speech little attention.) By contrast, when the government finances hitherto private parties to do its speaking, we may have little understanding of the source of the expression. This problem is particularly acute if we do not know of the existence of the funding scheme; then we will consistently mistake the interested for the impartial. But even if we know of the funding scheme, we will face a problem of attribution. The speakers may have engaged in the same expression without any government funding; alternatively, the speakers may have foregone their expression (or even espoused a different view) in the absence of a subsidy. We do not know whether to treat the speakers as independent or as hired guns. We thus may give the speech more (or less) weight than it deserves.

A related concern is that the funding scheme will operate to distort or influence the realm of private expression in a manner that systemically advantages public power. When the government speaks directly, it merely adds a voice (though perhaps a resounding one) to a conversation occurring among private parties. When the government speaks through subsidy schemes, it may change and reshape the underlying dialogue. What once were private choices—shall I praise the city government, criticize it, or say nothing at all?—now become in some measure governmental, as citizens calculate a set of economic incentives offered to them by government actors. The resulting choices by private individuals and organizations may give greater volume to the government's voice than the government could have achieved on its own. As

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[69] For a related discussion of this question, see Cass R. Sunstein, *The Speech Market* (Free Press, forthcoming).

important, such funding schemes may subvert the very ability of a private sphere to provide a countermeasure to government power.

Rust illustrates the way in which government funding may have both more potent and more disruptive effects than direct government speech, even holding expenditures constant. The impact of the government's own speech on abortion questions likely pales in comparison to the impact of advice and counseling given to pregnant women by health care providers. (The reason relates not only to the source of the speech—an apparently independent professional—but also to the time at which it occurs.) How better, then, to communicate an anti-abortion message: through direct speech or through selective subsidization of health care providers? The latter course amplifies the government's own message at the same time as (and partly because) it wreaks havoc on the ability of those private parties in the best position to challenge the message to provide a counterweight to government authority.[70]

But even if, or to the extent that, government funding decisions can be equated with government speech, so too can other content-based underinclusive government actions. Suppose (to borrow a hypothetical from Justice Scalia's opinion for the Court in *R.A.V.*) a city council enacts an ordinance prohibiting those legally obscene works—but only those legally obscene works—that do not include an endorsement of the municipal government.[71] The hypothetical involves an exemption from otherwise permissible regulation, rather than a direct cash grant or an exemption from taxation. Yet, as shown previously, no reason exists for treating the one as different from the others. In the regulatory exemption case, the government is still paying for speech in every significant respect: the speaker receives a benefit for expressing views supportive of city government, and the government absorbs costs of the expression that normally would be borne by the speaker. The mechanism is different, but the essential act is the same. If the government

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[70] I do not claim that every government funding program will pose these dangers or that no funding program should be assimilated to government speech. A funding program may be constructed in so narrow a fashion as to appear identical (or nearly so) to the government's own expression. This will be true when the constitutional concerns I have discussed are slight or absent. But as I will show, the same may be said of other (non-funding) decisions involving content-based underinclusion. The fact of funding is neither necessary nor sufficient to transform content-based underinclusive action into government expression.

[71] 112 S Ct at 2543.

"speaks" when it pays for speech by private parties, then the government is speaking in the *R.A.V.* Court's hypothetical.

The point can be made across the entire range of content-based underinclusion cases. In *Rust*, of course, the government made a direct cash grant for some kinds of expresssion, but not for others. In *R.A.V.*, which Justice Scalia saw as perfectly analogous to his obscenity hypothetical, the government offered some expression an exemption from otherwise applicable regulation of a proscribable speech category. The same mechanism is involved in cases, such as *Metromedia*, in which certain kinds of speech receive an exemption from otherwise reasonable time, place, or manner restrictions on expressive activity. And in some sense, the non-public forum cases bridge the gap: a rule that allows certain speech but not other speech on, say, a military base, as in *Greer*, can be viewed either as a direct grant (of certain rights in property, rather than of cash) or as an exemption from a generally applicable regulation prohibiting speech in a certain context. The key point is that the government actions in all these cases stand in a similar relation to government speech: in all, the government uses its powers, within a sphere of general discretion, to pick up the costs of speech—to pay for speech—of a particular content.

The argument based on government speech thus appears of limited consequence. The argument does not successfully challenge my central thesis: that there exists a single category of content-based underinclusion cases, all of which—regardless whether they involve direct funding—raise the same First Amendment issue. Nor does the government speech approach provide a comprehensive way of dealing with this issue. We can doubtless find instances of content-based underinclusion—again, some involving direct funding, some not—in which the government appears to be doing little more than speaking itself.[72] Yet surely, with respect to each

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[2] In the non-public forum context, for example, we might wonder about a legal doctrine that would permit a general to speak to troops on a restricted military base about, say, alcohol use, but would preclude the general from inviting an expert on alcohol dependency to give a similar speech. An example of this kind suggests that courts might well recognize the possibility that, in a particular case, speech by a nominally private party should be treated as government speech. The inquiry should focus on the concerns mentioned above: whether the speech is clearly attributable to the government and whether the government's action, in promoting the speech, threatens to interfere with the realm of private discourse in a way direct government speech would not. Indeed, it is possible that even direct government expression should be tested by standards of a similar kind.

kind of content-based underinclusion mentioned, we will find many (almost certainly, many more) cases in which the government, through use of its discretionary funding or regulatory powers, is doing something more than speaking—is in fact influencing and shaping the world of private discourse in a way that accords with its own beliefs of what kinds of speech should be promoted. *R.A.V.* arguably is one example; *Rust* arguably is another. To treat all this as permissible government speech is to ignore the scope and effect of the government action and the constitutional problems such actions may raise. It is to evade the critical question: In a sphere of general discretion over speech, when may government prefer private speech of a certain content to private speech of another?

IV

The cases I have discussed raise a common First Amendment issue and call for a common constitutional analysis. I do not suggest that all cases of content-based underinclusion must "come out" in the same manner. I do not, for example, assert that if *R.A.V.* is right, then *Rust* must be wrong, or vice versa. I claim only that these cases, and others raising the issue of content-based underinclusion, should be subjected to the same constitutional standards.

Establishing those standards is no easy task. The problem of selective funding alone has confounded generations of judges and constitutional scholars. I have argued that selective funding cases must be assimilated to other instances of content-based underinclusion. The difficulty, therefore, far from being eased, is in fact broadened.

In this part, I thus offer a preliminary—and necessarily sketchy—view of the proper constitutional approach to cases raising the issue of content-based underinclusion. I start by sorting through, in a more concrete fashion than I have done before, the diverse and conflicting ways the Court has responded to this problem. I then suggest, taking into account the effect and motive of government action, a distinction between two kinds of content-based underinclusion: that involving subject matter, which generally is acceptable; and that involving viewpoint, which generally is not. Finally, harking back to *Rust* and especially to *R.A.V.*, I pro-

pose certain modifications to this simple division of the cases—instances in which subject matter–based distinctions should raise constitutional concern and, perhaps too, instances in which viewpoint-based distinctions should be tolerated.

The Court, failing to recognize the common problem of content-based underinclusion, has employed a variety of constitutional standards in the kinds of cases discussed in this article. At one extreme, the Court has indicated that within a sphere of general discretion, the government has near-complete freedom to make content-based distinctions with respect to speech. At the other extreme, the Court has stated that the government is barred (at least in the absence of the most compelling justification) from making any such distinctions. Between these two positions lie others, sometimes only half-articulated, premised on the notion that not all content-based distinctions are alike. Thus, the Court at times has indicated that within an area of general discretion, the government may restrict speech on the basis of subject matter or speaker, but not on the basis of viewpoint. These various standards sometimes correspond to the different contexts in which the problem of content-based underinclusion arises, so that in each context a single standard holds sway. More confusingly, a plurality of these standards may coexist and compete within even a single subcategory of content-based underinclusion cases.

The greatest disarray, as I have noted, appears in the selective funding cases, in which the Court has adopted the full range of positions just described. Prior to *Rust*, the Court had indicated that in the funding context, some kinds of content discrimination mattered profoundly, though precisely what kinds remained uncertain. Thus, in *Arkansas Writers' Project, Inc. v Ragland*,[73] the Court explicitly rejected any distinction between subject matter–based and viewpoint-based regulation, stating that all content-based regulation was subject to strict scrutiny.[74] By contrast, in *Regan v Taxation with Representation*,[75] the Court held that the government, in

[73] 481 US 221 (1987).

[74] Id at 230. The stringency of the Court's analysis may be attributable to a special concern about press regulation. The Court emphasized that "selective taxation of the press—either singling out the press as a whole or targeting individual members of the press—poses a particular danger of abuse by the State." Id at 228. A standard so strict applying to all funding decisions would prevent almost all government funding of expression.

[75] 461 US 540 (1983).

funding speech, could make some kinds of content-based distinctions, but suggested in dicta that funding on the basis of viewpoint would violate the Constitution.[76] Finally, in *Rust* the Court took the position that the government could fund expression as it wished, in accordance with its "value judgments."[77] In the context of funding, the whole question of content discrimination—including viewpoint discrimination—became irrelevant.

In each of the other contexts discussed in this article, the Court has concluded that even within a sphere of general discretion, the First Amendment prohibits the government from making certain kinds of content distinctions; the Court, however, has adopted a less rigorous approach in non-public forum cases than in others. In the non-public forum cases, the Court has denied the government only the power to make viewpoint distinctions; regulations based on subject matter or speaker identity, so long as they satisfy a toothless reasonableness inquiry, are permitted.[78] By contrast, in cases such as *Metromedia* or *Mosley*, in which the Court considered limited time, place, or manner regulations involving either no public property or a public forum, the Court generally has applied strict scrutiny to all content-based exemptions, regardless whether the exemptions pertain to particular viewpoints or to more general subject matter categories. Here, the Court repeatedly has held that the government "may not choose the appropriate subjects for public discourse," even if, in doing so, "the government does not favor one side over another."[79]

The Court in *R.A.V.* leaned toward the position taken in cases such as *Mosley*, although with numerous hedges and qualifications.

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[76] Id at 548, 550 (disapproving funding decisions " 'aimed at the suppression of dangerous ideas' " (quoting *Cammarano v United States*, 358 US 498 (1959)); id at 551 ("[A] statute designed to discourage the expression of particular views would present a very different question.") (Blackmun concurring). The Court, in approving speaker-based funding decisions and disapproving viewpoint-based funding decisions, expressed no opinion on the permissibility of funding decisions based on the subject matter of speech. In other cases, however, the Court has treated similarly speaker-based and subject matter–based restrictions, distinguishing both from restrictions based on viewpoint. See, for example, *Perry v Perry*, 460 US 37 (1983); *Cornelius v NAACP*, 473 US 788 (1985).

[77] 111 S Ct at 1772.

[78] Thus, for example, the Court in *Greer v Spock*, 424 US 828 (1976), allowed a military base to exclude all partisan political speakers, and the Court in *Lehman v City of Shaker Heights*, 418 US 298 (1974), permitted a muncipal transportation system to refuse to post political advertisements. See also *Cornelius*, 473 US at 806; *Perry*, 460 US at 49.

[79] *Metromedia, Inc. v San Diego*, 453 US 490, 515, 518 (1981) (plurality); see *Carey v Brown*, 447 US 455, 460–61, 462 n 6 (1980); *Police Dep't v Mosley*, 408 US 92, 95, 99 (1972).

The *R.A.V.* Court, of course, ruled that at least some content-based distinctions within a proscribable category of speech violate the Constitution: "the First Amendment imposes . . . a 'content discrimination' limitation upon a State's prohibition of proscribable speech."[80] But what is the exact content of this limitation? The Court made clear that in the context of proscribable speech, the constitutional ban extends beyond explicit viewpoint-based distinctions; indeed, in the first statement of its holding, the Court declared the St. Paul law unconstitutional because it made distinctions "solely on the basis of the subjects the speech addresses."[81] Yet the Court declined to say that in this sphere the First Amendment renders suspect all content-based restrictions: "the prohibition against content discrimination is not absolute. It applies differently in the context of proscribable speech than in the area of fully protected speech."[82] Repeatedly asking whether a regulation would pose a "significant danger of idea or viewpoint discrimination," the Court listed a series of constitutionally unobjectionable content-based distinctions.[83] The list closed with the suggestion that, within a proscribable category of speech, content-based distinctions may be permissible so long as they present "no realistic possi-

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[80] 112 S Ct at 2545.

[81] Id at 2542. The Court later concluded that the ordinance also discriminated with regard to viewpoint, but as I will discuss, this argument at least raised questions; the Court's decision thus depended heavily on the ban on subject matter restrictions. With respect to this ban, the majority opinion differed not only from Justice White's approach, but also from Justice Stevens's alternative analysis. Unlike Justice White, Justice Stevens would view certain content-based distinctions within proscribable categories of speech as constitutionally troubling. But Justice Stevens, unlike the *R.A.V.* majority, apparently would accord automatic strict scrutiny only to those content distinctions based explicitly on viewpoint. See id at 2568–69.

[82] Id at 2545.

[83] Id at 2545–47. First on the list were distinctions supported by the very factor that rendered the entire category of speech proscribable. To use one of Justice Scalia's examples, the government could prohibit, from the broad category of legally obscene materials, only the "most lascivious displays of sexual activity." Id at 2546. As each of the concurrences noted, this exception may have covered the St. Paul ordinance, which reasonably could be viewed as an attempt to prohibit, from the entire category of fighting words, those which "by their very utterance" inflict the greatest injury or pose the greatest danger of retaliatory violence. See id at 2556, 2565. Justice Scalia also excepted from rigorous constitutional scrutiny laws containing content distinctions based on the "secondary effects" (i.e., noncommunicative effects) of speech, as well as laws directed against conduct but incidentally covering a content-based subcategory of proscribable speech. See id at 2546–47. Finally, Justice Scalia would have viewed more leniently (although his reasoning on this count is mysterious) a prohibition of speech falling within a proscribable category that is "directed at certain persons or groups," id at 2548—yet another exception that reasonably could have been used to insulate the St. Paul ordinance from strict review.

bility that official suppression of ideas is afoot."[84] Whether a regulation prohibiting expression on certain subjects ever could fall within this "general exception" to the ban on content discrimination was left uncertain.

What then is the right approach? When, if ever, will some manner of content-based underinclusion invalidate a speech regulation? As I have said, the same constitutional standards should govern all of the various kinds of cases discussed in this article. I do not mean to suggest that the government interests underlying the underinclusive regulation of speech will be identical in all contexts. The nature of the government action at issue—for example, direct funding of speech or regulation of speech within a non-public forum—will sometimes provide distinctive justifications for content-based underinclusion.[85] Thus, in acting as manager of a military base, the government may have—as it claimed to have in *Greer*—peculiar reasons for restricting some speech, such as the interest in insulating a military establishment from partisan political causes. Similarly, in providing direct funding out of public coffers, the government frequently will have to take into account the limited availability of revenues devoted to a particular program or purpose. But because each kind of government action discussed in this article affects First Amendment rights in the same way, each should be held to the same set of justificatory burdens. The remaining question concerns the appropriate content of these burdens. That question is best approached by focusing on the nature of the First Amendment problem in all of these cases.

Thus recall what the Court confronts in each one of these contexts. The government is operating within a sphere of general discretion: it can refuse to promote or allow any speech at all. Instead, the government chooses to advance or permit some, but not other, speech on the basis of content. If the Court strikes down the action, citing content discrimination, the government can return to a general ban, becoming (in terms of total quantity of speech) more, rather than less, speech restrictive. The government can prohibit all fighting words, can bar all speakers from a military base, can

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[84] Id at 2547. As an illustration of a content-based distinction posing no threat of censorship of ideas, Justice Scalia hypothesized an ordinance prohibiting only those obscene motion pictures featuring blue-eyed actresses.

[85] Cf. Sullivan, 102 Harv L Rev at 1503 (cited in note 58); Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism*, 70 BU L Rev at 607 (cited in note 58).

prevent any person from using a noisy soundtruck, can decline to fund any speech. If all this is so, one way to approach the problem at least becomes clear. What we need to ask is when content discrimination resulting in more speech is of greater constitutional concern than content neutrality resulting in less. We can begin, in other words, to tackle the essential issue in all of these cases by rephrasing it (somewhat crudely) in the following terms: When is some speech worse than none?[86]

A proper response to this inquiry should focus on both the effects and the purposes of content-based underinclusive action. In other words, government regulation allowing some speech may raise greater constitutional problems than regulation allowing no speech at all either because the former has graver consequences than the latter or because the former more likely proceeds from an improper impulse. Both considerations suggest an initial, broad distinction between underinclusive action based on viewpoint and underinclusive action based on subject matter.

Consider first the possible consequences of underinclusive regulation of speech on the realm of public discourse.[87] Sometimes, such regulation will place particular messages at a comparative disadvantage and, in doing so, will distort public debate. An example is Justice Scalia's hypothetical ordinance prohibiting all legally obscene materials except those containing an endorsement of city government. Such a law leaves untouched speech supportive of city government, while restricting speech critical of city government, thereby skewing discourse on this issue. That obscenity (like fight-

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[86] It might be argued that framing the inquiry in this way assumes unjustifiably that the government will respond to the invalidation of a content-based distinction by expanding the reach of the speech restriction, rather than by eliminating it entirely. This objection recognizes, quite correctly, that in some circumstances an apparently "greater" power is in fact practically or politically constrained; in that event, if the "lesser" power is removed, the government will not exercise its authority at all. See Kreimer, 132 U Pa L Rev at 1313 (cited in note 58). But in the settings discussed in this article, the objection appears to have only slight weight. The more expansive powers here—enacting limited time, place, or manner restrictions, establishing broad speech restrictions for non-public forums, declining to fund speech, proscribing categories of speech like fighting words or obscenity—are in most instances not merely theoretically but actually available; the government very frequently exercises such powers. We indeed may wish to keep in mind that in some cases, the government as a practical matter will not be able to—or, perhaps more frequently, will not wish to—expand the coverage of a speech restriction, but the central inquiry in these contexts remains as I have described it in the text.

[87] See Stone, *Content Regulation and the First Amendment*, 25 Wm & Mary L Rev at 198–200, 217–27 (cited in note 40), for a full discussion of these issues in connection not with content-based underinclusion, but with content-based discrimination generally.

ing words) is by definition unprotected makes no difference to the analysis; the distortion relates to ideas and messages extrinsic to that category. It is true that the distorting effect occurs at the margin; persons opposed to city government can communicate this message through means other than obscenity. Yet the ordinance remains more constitutionally problematic than a total ban on obscenity, which would have no skewing effect at all on the debate concerning city government.[88] Precisely the same point can be made in the context of direct funding. Assume our city council, informed of the decisions in *R.A.V.* and *Rust*, instead passed a law providing for public funding of all speech endorsing incumbent city officials in their campaigns for reelection. Such a law similarly provides a comparative advantage to messages of endorsement, thereby again skewing public debate. As with the obscenity statute, the skewing effect makes the statute more troublesome than a complete absence of public funding.[89]

Not all instances of content-based underinclusion, however, will have such problematic effects. Contrast to the viewpoint-based laws used above a set of regulations discriminating in terms of general subject matter. First, suppose that the city council enacts a law prohibiting all obscene materials except those dealing in any way with government affairs. It is no longer so clear that a total ban on obscenity would better serve First Amendment interests. At least facially, the law does not skew public debate about matters

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[88] Of course, a total ban on obscenity removes all obscene messages from the world of public discourse, which in some other world might be thought a constitutional problem of large dimension. The premise here—accepted by the Supreme Court—is that eliminating obscenity per se from the realm of public debate raises no First Amendment problem whatsoever. A premise of similar kind exists in all cases of content-based underinclusion.

[89] The notion of a skewing effect, as set forth in the text, of course assumes that distortion arises from government, rather than from private, action. That assumption may be misplaced. If there is "too much" expression of a particular idea in an unregulated world, then government action specially disfavoring that idea might "un-skew," rather than skew, public discourse. See Fiss, 100 Harv L Rev at 786–87 (cited in note 53); Sunstein, *Free Speech Now*, 59 U Chi L Rev at 295–97 (cited in note 53). An understanding of this point has special relevance in considering underinclusive government action. With respect to such actions, the only constitutional worry is equality among ideas; restriction, taken alone, need not concern us. The situation is very different in the case of other kinds of speech restrictions, whose unconstitutionality may rest as much or more in considerations of personal autonomy as in considerations of equality. See generally David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 Colum L Rev 334 (1991). Nonetheless, I think the assumption used here to measure distortion is generally, although not invariably, proper. Any other would allow the government too great—and too dangerous—an authority to decide what ideas are overrepresented or underrepresented in the market.

involving government, as the viewpoint-based obscenity ordinance did.[90] Of course, the law allows the use of obscene materials to speak about government affairs, while restricting the use of those materials to speak about a host of other subjects. But neither those who wish to speak on such subjects nor their potential audience can claim in any real sense that the ordinance harms them more than would a ban on all obscene materials. The law, viewed solely in terms of effects on public debate, thus appears consistent with the First Amendment. And once again, the same is true of a similar statute involving the mechanism of direct funding. Assume that the city council passes a law providing for public funding of all candidates for elected office. Here too, the statute makes a content-based distinction: one kind of speech is funded, all other speech is not. But as long as the law covers all candidates and parties, no one can complain that the subsidy plan has effects on public debate that are constitutionally more troublesome than a refusal to subsidize at all.[91]

Yet effects are not all that matter in considering the permissibility of content-based underinclusion; we also must take into account the purposes underlying the government action.[92] Notwithstanding that another, more speech restrictive action could have been taken (assuming a proper purpose), the purpose of *this* action—the action in fact taken—must fall within the range of constitutional legitimacy. What objectives fall outside that range? It is a staple of First Amendment law that no government action may be taken because public officials disapprove of the message communicated. The flip side of this principle, as Geoffrey Stone has noted, is that "the government may not exempt expression from an otherwise general restriction because it agrees with the speaker's views."[93] Thus, as the *R.A.V.* Court stated: "The government may not regulate use [of fighting words] based on hostility—or favoritism—towards the

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[90] I consider at text accompanying note 110 problems relating to viewpoint-differential consequences of such facially viewpoint-neutral laws. It may well be that this statute looks sufficiently odd to heighten concerns about such consequences.

[91] In covering all parties and candidates, the hypothetical statute stands on firmer ground than the subsidy scheme approved in *Buckley v Valeo*, 424 US 1 (1976), which funds some candidates and not others and thus may well distort debate on critical public matters.

[92] Again, Geoffrey Stone provides a fuller discussion of these issues, in the context of discussing content-based discrimination generally, in *Content Regulation and the First Amendment*, 25 Wm & Mary L Rev at 212–17, 227–33 (cited in note 40).

[93] Id at 228.

underlying message expressed."[94] Other constitutionally disfavored justifications for government action also appear in the cases—most notably, that the government may not restrict expression because it will offend others. Once again, as said in *R.A.V.*, selective limitations on speech may not be justified by "majority preferences."[95] Regardless whether the government could achieve the same or greater effects with another end in mind, the existence of such illegitimate aims should invalidate the action at issue.

The distinction between viewpoint-based restrictions and subject matter–based restrictions serves as a useful proxy in evaluating the purpose, as in evaluating the effects, of underinclusion. A return to the set of hypotheticals offered above illustrates this point. The actions singling out for favorable treatment endorsements of city government can be presumed to stem from an illegitimate motive: what legitimate reason could lie behind these regulations? A similar danger presents itself with regard to any government action favoring or disfavoring a particular viewpoint: if suppression of the viewpoint does not lie directly behind the action, at least attitudes toward the viewpoint may influence the decision.[96] By contrast, government actions covering speech of a variety of viewpoints, even if on a single topic, less probably emerge from government (or majority) approval or disapproval of a particular message, precisely because they apply to a range of diverse messages. So, for example, the statute providing funds for campaign speech likely stems from a desire to reduce corruption, and the ordinance granting an exemption to obscenity involving discussion of government affairs may arise from the view (common and usually permissible in First Amendment law, though reflecting a kind of favoritism) that political speech is of special constitutional value.[97] The key point is that just as subject matter restrictions will less often skew debate than viewpoint restrictions, so too will they less often arise from constitutionally improper justifications.[98]

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[94] 112 S Ct at 2545.

[95] Id at 2548.

[96] See Stone, *Content Regulation and the First Amendment*, 25 Wm & Mary L Rev at 231 (cited in note 40).

[97] Again, however, this hypothetical regulation seems so eccentric that a closer examination into both purpose and effects might be in order. See note 90 and text at note 110.

[98] See Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U Chi L Rev 81, 108 (1978).

So far, then, we appear to have a simple way to test government action of the kind this article addresses. Viewpont-based regulation should receive the strictest constitutional scrutiny, both because it skews public debate in a way a general ban (or refusal to subsidize) would not and because it more likely arises from an impermissible motive. By contrast, subject matter–based regulation, which generally raises concerns of purpose and effect no greater than would a general ban, should receive less searching examination, involving (as in the case of content-neutral regulations) a general balancing analysis.

Thus, for example, in *Rust*, the Court first would decide whether the selective subsidization rested on the speaker's viewpoint. There seems little serious argument on this score: the regulations, quite explicitly, prohibited funded projects from "encourag[ing], promot[ing] or advocat[ing] abortion," as well as from engaging in abortion referral and counseling; at the same time, the regulations permitted funded projects to engage in anti-abortion advocacy and required them to refer women for prenatal care and adoption services.[99] Once the determination of viewpoint discrimination is made in this manner, a strong presumption of unconstitutionality would attach, rebuttable only upon a showing of great need and near-perfect fit. If the government could not make this showing, the subsidization scheme would be struck down, leaving the government with the option of funding either less or more speech relating to abortion.

This result accords with the principles, relating to the purpose and effects of government regulation, underlying a strict presumption against viewpoint-based underinclusion. The regulations at issue in *Rust* can hardly be understood except as stemming from government hostility toward some ideas (and their consequences) and government approval of others: the subsidization scheme, as the majority itself noted, reflected and incorporated a "value judgment."[100] Further, the regulations, in treating differently opposing points of view on a single public debate, benefitted some ideas at the direct expense of others and thereby tilted the debate to one side. For both these reasons, a refusal to fund any speech relating to

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[99] 42 CFR §§ 59.8(a)(2), 59.8(b)(4), 59.10, 59.10(a) (1990); 53 Fed Reg 2927 (1988).

[100] 111 S Ct at 1772.

abortion would have been constitutionally preferable to the funding scheme that the regulations established.

Before this analysis becomes too comfortable, however, a final look at *R.A.V.* is in order. That case, far more than *Rust*, poses serious challenges—on every level—to the simple approach suggested so far: to the ability to distinguish between viewpoint-based and subject matter–based underinclusion, to the relaxed constitutional standard applying to subject matter–based underinclusion, and to the presumed impermissibility of viewpoint-based underinclusion. In so doing, *R.A.V.* forces modifications to the analytical structure presented thus far, as well as a continued willingness to test that structure against the concerns of purpose and effect giving rise to it.

To see the difficulties *R.A.V.* presents, we should consider, as an initial matter, whether the St. Paul ordinance discriminated on the basis of viewpoint or subject matter. This undertaking involves three separate inquiries: first, whether the ordinance on its face discriminated on the basis of viewpoint or subject matter; second; whether the ordinance in practice discriminated on the basis of viewpoint or subject matter; and third, which measure of discrimination (facial or operational) is to control if the answers to the first two questions differ. In exploring these issues, and attempting to draw more general lessons from them, I will refer frequently to Justice Scalia's and Justice Stevens's contrasting characterizations of the St. Paul ordinance.

Viewed purely on its face, the St. Paul ordinance, as construed by the Minnesota Supreme Court, appears to discriminate only on the basis of subject matter. The ordinance proscribed such fighting words as caused injury on the basis of race, color, creed, religion, or gender—that is, such fighting words as caused injury on the basis of certain selected topics. For this reason, Justice Stevens viewed the ordinance as at most a subject matter restriction:[101] all fighting words, uttered by any speaker of whatever viewpoint, concerning another person's "race, color, creed, religion, or gender" were forbidden. Even Justice Scalia frequently referred to the ordinance in this manner; in apparent acknowledgment of the

[101] Justice Stevens initially argued that the ordinance was based neither on viewpoint nor on subject matter, but only on the injury caused by the expression. 112 S Ct at 2570. For discussion of this point, see text at notes 116–17.

statutory language, he described the law as regulating expression "addressed to . . . specified disfavored topics," as policing "disfavored subjects," and as "prohibit[ing] . . . speech solely on the basis of the subjects the speech addresses."[102] Thus, if the analysis I have proposed is correct, and if a law is to be classified as viewpoint based or subject matter based solely by looking to the face of the statute, then Justice Scalia erred in finding the discrimination worked by the statute to be unconstitutional.

Beyond the question of facial discrimination, however, lurked another issue: Did the statute discriminate in its operation on the basis of viewpoint? Justice Stevens insisted that it did not. Describing how the ordinance would apply to both sides of a disputed issue, Justice Stevens noted: "[J]ust as the ordinance would prohibit a Muslim from hoisting a sign claiming that all Catholics were misbegotten, so the ordinance would bar a Catholic from hoisting a similar sign attacking Muslims."[103] Or (to take a simpler example) just as the ordinance would prevent the use of racial slurs by whites against blacks, so too would it prevent the use of racial slurs by blacks against whites.[104] Justice Scalia admitted this much, but nonetheless suggested that the ordinance operated in a viewpoint discriminatory manner. In some debates, Justice Scalia reasoned, the regulation would "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules."[105] As an example, Justice Scalia noted that a sign saying that all Catholics were misbegotten would be prohibited, because the sign would insult on the basis of religion, but a sign saying that all anti-Catholic bigots were misbegotten would be permitted.

The conflict between Justice Scalia and Justice Stevens on this point serves as a reminder that the decision whether a statute dis-

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[102] 112 S Ct at 2542, 2547; see id at 2570 (Stevens dissenting).

[103] 112 S Ct at 2571. Justice Stevens assumed in this example that the signs would constitute fighting words.

[104] Akhil Amar makes the interesting point that Justice Stevens seemed to go out of his way to avoid this obvious example, using instead a hypothetical involving two minority groups. Amar notes too that Justice White's opinion appeared to assume that the statute was asymmetrical, in the sense that it protected vulnerable social groups from dominant social groups, but not vice versa. See Amar, 106 Harv L Rev at 148–50 (cited in note 24). To the extent the statute is read in this manner—and Amar points out that the explicit examples in the statute (burning crosses and swastikas) are consistent with this reading—the viewpoint discrimination inherent in the statute becomes quite obvious.

[105] Id at 2548.

criminates on the basis of viewpoint may be highly contestable.[106] The very notion of viewpoint discrimination rests on a background understanding of a disputed issue. If one sees no dispute, one will see no viewpoints, and correspondingly one will see no viewpoint discrimination in any action the government takes.[107] Similarly, how one defines a dispute will have an effect on whether one sees a government action as viewpoint discriminatory. Justice Stevens understood the public debate on which the St. Paul ordinance acted as a dispute between racism of different stripes.[108] With respect to this dispute, the ordinance took a neutral position and effected a neutral result. Justice Scalia, by contrast, saw the dispute as one between racists and their targets and/or opponents. With respect to this dispute, the ordinance appeared to take a side. By prohibiting fighting words based on race, while allowing other fighting words, the law barred only the fighting words that the racists (and not the fighting words that their targets) would wish to use.

In this conflict, Justice Scalia seems to me to have the upper hand: the St. Paul ordinance, in operation, indeed effected a form of viewpoint discrimination. We can all agree that a law applies in a viewpoint discriminatory manner when it takes one side of a public debate. We should also all be able to agree that one way of taking sides is by handicapping a single contestant—and further, that one way of handicapping a contestant is by denying her a particular means of communication (such as fighting words).[109] The

[106] The difficulty may arise in considering either facial or operational viewpoint discrimination. Had the ordinance, on its face, prohibited all racist fighting words, the debate between Justice Scalia and Justice Stevens presumably would have been the same. Justice Stevens would have argued that the statute on its face did not discriminate on the basis of viewpoint because it prohibited all kinds of racist fighting words. Justice Scalia, by contrast, would have argued that the statute was facially viewpoint discriminatory because it prohibited the fighting words used by racists, but not the fighting words directed at them.

[107] See Catharine A. MacKinnon, *Feminism Unmodified* (Harvard, 1987) at 212 ("What is and is not a viewpoint, much less a prohibited one, is a matter of individual values and social consensus.").

[108] Justice Stevens at one point acknowledges a debate between proponents of bigotry and proponents of tolerance, but he insists that the ordinance also is neutral with respect to this debate. Thus, Justice Stevens says that the "response to a sign saying that 'all [religious] bigots are misbegotten' is a sign saying that 'all advocates of religious tolerance' are misbegotten.' " 112 S Ct at 2571. This statement has a lovely symmetry, but also a sense of unreality. Presumably, bigots wish to direct their speech not to abstract advocates of tolerance, but to members of a despised group. The question *R.A.V.* presents is whether the government can impose limits on the bigots' desire to do so. Here, Justice Stevens ignores this issue by reframing the public debate.

[109] That a regulation deprives a speaker only of a particular means of communication does not make the regulation any less an example of viewpoint discrimination. Indeed, almost all

St. Paul ordinance, it is true, handicaps both sides (and therefore neither side) when Jews and Catholics, whites and blacks scream slurs based on religion or race at each other. But surely race-based fighting words occur (indeed, surely they usually occur) in something other than this double-barreled context. In most instances, race-based fighting words will be all on one side, because only racists use race-based fighting words, and racists usually do not assail only each other. When the dispute is of this kind, the government effectively favors a side in barring only race-based fighting words. To put the point another way, if a law prohibiting the display of swastikas takes a side, no less does a law that punishes as well the burning of crosses.

Yet even if this is so, the question remains how to categorize a statute (such as the St. Paul ordinance) that discriminates on the basis of viewpoint only in operation, and not on its face. Do we classify the St. Paul ordinance as a subject matter restriction (in keeping with the face of the statute) or as a viewpoint restriction (in keeping with the way it works in practice)? Or, to put the question in a more meaningful way, regardless of the label we attach to the statute, do we treat it as discriminating on the basis of viewpoint or of subject matter?

When a statute has so unbalanced a practical effect as the St. Paul ordinance, I think, it must be treated in much the same manner as a statute that makes viewpoint distinctions on its face. I have argued that underinclusive actions based on subject matter generally should receive relaxed scrutiny because they pose little danger of skewing public debate on an issue or arising from an illegitimate motive; thus, they usually will be no worse (and because less speech restrictive, often a great deal better) than a refusal to allow or subsidize any speech at all. But a subject matter restriction of the kind in *R.A.V.* flouts this reasoning. Here, the restriction, although phrased in terms of subject matter, meaningfully applied only to one side of a debate and thus had a tilting effect as profound as a

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cases of underinclusion function only to remove a particular means of communication from the speaker: the speaker may not use fighting words; the speaker may not use a noisy soundtruck; the speaker may not use the grounds of a military base; the speaker may not use government funds. In all of these cases, the government does not act to eliminate completely an idea from the realm of public discourse, but may nonetheless take a side. That the government's action deprives a speaker only of a means of communication is relevant, if at all, not to the question whether the action is viewpoint-based, but to the question whether, even if viewpoint-based, the action should be allowed.

viewpoint-based regulation; the ordinance, though facially prohibiting "race-based" fighting words, might as well have prohibited racist fighting words—that is, fighting words expressing the view of racism. And precisely because the law operated in this way, the likelihood that it stemmed from impermissible motives must be treated seriously; knowing that the ordinance would restrict only a particular point of view, legislators might well have let their own opinion, or the majority's opinion, of that viewpoint influence their voting decision.[110] The ordinance thus presented the same dangers as a facially viewpoint-based speech regulation.

It might be argued that in admitting this much, I have compromised fatally the position that underinclusive actions based on subject matter generally should not be subject to strict constitutional scrutiny. After all, many subject matter restrictions have viewpoint-differential effects; in all such cases, it might be said, precisely the same arguments for strict scrutiny would apply. Further, the argument might run, it may be difficult to distinguish these subject matter restrictions from others, and it may be wise as a general matter to overprotect speech; thus, we perhaps should look upon all subject matter restrictions with suspicion. But this argument ignores the special feature of underinclusion cases: that in such cases, invalidating a subject matter restriction will as likely (perhaps more likely) lead to less, as to more, expression. In this kind of case, a defensive, overprotective approach seems inappropriate: we should treat subject matter restrictions harshly only when they pose real dangers of distorting effects or impermissible motive. To the extent, then, that the *R.A.V.* opinion stands for the proposition that all content-based underinclusion violates the Constitution,[111] the opinion is in error.

This aspect of the analysis, no doubt, raises difficult questions. One set involves the determination at what point the viewpoint differential effects of a regulation that on its face involves subject matter alone should begin to give rise to suspicion. Need we worry only about statutes such as that involved in *R.A.V.*, in which the

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[110] As the *R.A.V.* Court noted, St. Paul argued that the law was necessary, among other reasons, to show that speech expressing hatred of groups was "not condoned by the majority." 112 S Ct at 2548. It is difficult to conceive of a more illegitimate purpose for regulating speech.

[111] See text at notes 80–84 for discussion of the ambiguity of the *R.A.V.* opinion on this question.

regulation effectively restricts one side alone, or need we worry too about statutes with lesser, but still noticeable, viewpoint-based effects? Another set of questions involves the technique used to identify troublesome regulations. Should we use case-by-case analysis, or should we try to devise some more general standard to separate out the most dangerous restrictions based facially on subject matter? Whatever the precise answers to these questions, though, the basic point remains: on some occasions, a regulation that on its face involves only subject matter must be treated as if it involved viewpoint; on most occasions, it need not.

In this statement, however, a final question lurks: When, if ever, may we tolerate viewpoint-based underinclusive actions? Suppose, for example, that the government wished to fund private speech warning of the dangers of tobacco. Would the government also be required to fund private speech minimizing the health risks associated with smoking? One answer to this question is to insist on strict viewpoint neutrality in the support of private speech; then, if the government wished to express an anti-smoking message, it would have to disdain private speech and do the job itself. Yet this answer runs contrary to many of our intuitions. The same point can be made by using a hypothetical along the lines of *R.A.V.* Suppose that the government banned all (but only) those legally obscene materials that featured actors smoking cigarettes. Would this action seem any more objectionable than the example Justice Scalia gave of innocuous selectivity within a proscribable category—the prohibition of all (but only) those obscene materials featuring blue-eyed actresses?[112] The smoking ordinance may seem, if anything, less troublesome; it, at least, has a reason. And yet the ordinance discriminates on the basis of viewpoint.

I cannot here consider in detail the circumstances in which viewpoint-based underinclusion should be upheld. I will note, however, a few points that may serve to structure future inquiry regarding this issue. These relate, first, to the possibility that some viewpoint-based underinclusion may be adequately justified even under a compelling interest test, and, second, to the more remote possibility that some viewpoint-based underinclusion need not be subjected at all to this most stringent standard.

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[112] 112 S Ct at 2547.

The initial point is—or should be—obvious: strict scrutiny need not invalidate a viewpoint-based underinclusive action. The test, as stated by the Court, is whether the regulation is both necessary and narrowly tailored to serve a compelling interest.[113] In *R.A.V.*, the Court mistakenly interpreted this test to create a *per se* rule against viewpoint underinclusion. Action of this kind, the Court said, is never necessary, because the government can always enact a broader speech regulation.[114] But if the speech additionally covered by a broad regulation fails to advance the interest asserted, why must the government restrict it as well? Assume, for example, that the government has a compelling interest in ensuring that children do not start smoking; assume as well that speech extolling cigarettes in the immediate vicinity of a school leads children to start smoking. Must the government, to prevent this speech, enact a law that restricts speech in the vicinity of schools to the full extent allowed under the Constitution? Would such a law be either "necessary" or "narrowly tailored" to serve the asserted interest? The questions answer themselves. A viewpoint-based underinclusive action should not be held invalid (as it was in *R.A.V.*) on the mere ground that it is, by definition, underinclusive. If the government can show—if, for example, St. Paul could have shown—that it has a compelling interest, that it must regulate speech to achieve that interest, and that it has regulated all (but only) such speech as is necessary to achieve the interest, then the government action should pass strict scrutiny.[115]

The second point I make more tentatively: indeed, I pose it as a question: Must all viewpoint-based underinclusive actions be subject to strict scrutiny, or are there some "viewpoints" that in the context of underinclusion need not be treated as such? The examples I have used, relating to viewpoints on tobacco use, seem to suggest that not all viewpoints are alike, although it is difficult to fashion a principled reason why. If our intuitions rebel against the idea that the government cannot fund speech discouraging

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[113] See, for example, *Perry v Perry*, 460 US 37, 45 (1983); *Cornelius v NAACP*, 473 US 788, 800 (1985).

[114] See 112 S Ct at 2550.

[115] See *Burson v Freeman*, 112 S Ct 1846 (1992), for a recent First Amendment case in which the Court understood the compelling interest standard in this manner (although perhaps misapplied it). In keeping with the essential thesis of this article, I believe this standard should govern in all cases of viewpoint-based underinclusion, including funding decisions.

smoking without also funding its opposite, they do so for some combination of three reasons, each of which exists in tension with common First Amendment principles. First, the debate in this case, by its nature, offers the hope of right and wrong answers—answers subject to verification and proof. Second, society has reached a shared consensus on the issue; the answers, in addition to being verifiable, are widely believed. And third—and most important—one side of the debate appears to do great harm. When these factors join, a viewpoint regulation may appear justifiable whenever a more general regulation could exist. Then, government disapproval of a message may seem no longer illegitimate, because the disapproval emerges from demonstrable and acknowledged harms; then too, the distortion of debate resulting from the government action may appear not vice, but virtue. Some speech here seems better than none.

Justice Scalia's and Justice Stevens's opinions in *R.A.V.* included a debate on just these issues. Justice Stevens first characterized the St. Paul ordinance not as viewpoint-based, not even as subject matter–based, but as injury-based: the ordinance banned speech that caused a special and profound harm. Justice Scalia mocked this approach, dismissing it as "word-play": "What makes the [injury] produced by violation of this ordinance distinct from the [injury] produced by other fighting words is nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message."[116] Replied Justice Stevens: the Court failed to comprehend "the place of race in our social and political order"; were it to do so, it would recognize that race-based fighting words were a grave social evil, causing "qualitatively different" harms from other fighting words.[117] St. Paul, on this view, had done nothing more than respond, neutrally and legitimately, to real-life concerns; and any resulting skewing effect, given these concerns, need hardly trouble us. To put the position most starkly (more starkly than Justice Stevens did): Even if, in some technical sense, the statute involved viewpoint, it was viewpoint we could cease to recognize as such for purposes of constitutional analysis.

The position of Justice Stevens cannot be right as a general matter. Almost all viewpoint-based regulations can be viewed as "harm-based" regulations, responding neutrally not to ideas as

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[116] 112 S Ct at 2548.

[117] Id at 2565, 2570 n 9.

such, but to their practical consequences. We may indeed take as a given that almost all viewpoints anyone would wish to restrict cause arguable harms in some fashion. So, for example, in *Rust*, supporters of the regulations might argue that the selective funding corresponds not to viewpoints, but to demonstrable injuries (in the eyes of many) produced by abortion advocacy and counseling. And were we to treat such a case differently on the ground that there is no consensus on the "harmfulness" of this speech's consequences, then we would transform the First Amendment into its opposite—a safe haven for only accepted and conventional points of view.

Yet Justice Scalia's studied refusal to acknowledge or discuss the injuries caused by the speech in *R.A.V.* remains troubling. Here we have speech that, taken alone, has no claim to constitutional protection. The government responds to the special nature of this speech—to the special evil it causes—by in fact refusing to protect it. Perhaps this harm should be evaluated only in determining whether the government has met its high burden of justifying a distinction based on viewpoint. (Certainly, contrary to Justice Scalia's approach, the harm should be evaluated for this purpose.) The question that remains open for me is whether profound and indisputable harms can be taken into account for the purpose of lowering the standard of review applicable to viewpoint-based underinclusion—whether and when they may negate our usually justifiable concerns about the effects and motive of such government action. It may be possible to develop guidelines for this purpose—guidelines that will isolate and harshly confine a set of underinclusion cases in which viewpoint distinctions should be tolerated. But until we perform this feat, we could do far worse than to rely on a no-viewpoint distinction rule to handle cases of content-based underinclusion.

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For now, it may be less important to solve the problem of content-based underinclusion than to understand that there is a problem to be solved. My claim throughout this article has been that a certain set of cases—cases generally treated as if they have nothing in common with each other—raise a common issue and demand a common answer. The cases come in four general categories. The two most recently treated by the Court (though in widely

divergent ways) are typified by *Rust* and *R.A.V.*, the former involving selective funding of speech, the latter involving selective bans on speech within a wholly proscribable speech category. Add to these two others: cases involving selective bans on speech within a non-public forum and cases involving selective imposition of otherwise reasonable time, place, or manner restrictions, whether or not related to government property. The cases differ in context, but they share a structure transcending dissimilarities—a structure calling for acknowledgment by the Court and an effort to devise a uniform approach.

The problem these cases present is a problem of First Amendment neutrality, in as stark a form as can be found. In all these cases, the government may refuse to allow or subsidize any speech; the question remains when the government may refuse to allow or subsidize some (but not all) speech on the basis of content—when the government may give a special preference to expression of a certain kind. The cases cannot be distinguished by means of the subsidy/penalty distinction. The government action in all of these cases can be viewed as a subsidy; in each, the government voluntarily favors—and pays for—a certain kind of expression. More, labeling the action a subsidy or penalty is in these cases immaterial; assuming the government action constitutes a penalty, the problem lies not in the penalty itself, but in the government's selectivity—a problem that remains in the exact same form if the action is viewed a subsidy. For much the same reasons, the cases also cannot be distinguished by resort to an expansive notion of government speech. The action in all of these cases can be so characterized; and unless the government speech analogy has a power so far unsuspected in First Amendment law, it cannot displace the core issue in the cases. That issue must be confronted in whatever context it arises: when the government need not protect or promote any speech—when the speech itself has no claim upon the First Amendment—what limits remain on the government's power of selection?

I have suggested one approach to the problem; no doubt there are others worthy of attention. And were the Supreme Court to address the question in this way, no doubt the Justices would differ with respect to the solution. At least then, however, the debate in these cases would concern what under the First Amendment should matter. The answer might remain unclear, but the Court would have understood the question.