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CONTENT-BASED CONFUSION AND PANHANDLING:  
MUDDLING A WEATHERED FIRST AMENDMENT DOCTRINE  
TAKES ITS TOLL ON SOCIETY'S LESS FORTUNATE

*By Clay Calvert\**

\* Professor & Brechner Eminent Scholar in Mass Communication and Director of the Marion B. Brechner First Amendment Project at the University of Florida, Gainesville, Fla. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. Member, State Bar of California. The author thanks Keran Billaud, Joanna Bomfim, Kevin Bruckenstein, Alexa Jacobson, Tershone Phillips and Brock Seng of the University of Florida for their research and editing assistance that contributed to this article.

## ABSTRACT

This article examines multiple problems now plaguing the fundamental dichotomy in First Amendment jurisprudence between content-based and content-neutral regulations of speech. The troubles were highlighted by the U.S. Supreme Court's 2014 divided decision in *McCullen v. Coakley*. Building from *McCullen*, this article uses a quartet of federal court rulings from 2014 and 2013 involving anti-begging ordinances affecting the homeless as analytical springboards for examining these issues in depth. Ultimately, the article proposes a three-step framework for mitigating the muddle and calls on the nation's high court to take action to clarify the proper test for distinguishing between content-based and content-neutral regulations.

## INTRODUCTION

A time-tested, fundamental dichotomy in First Amendment<sup>1</sup> jurisprudence involves distinguishing governmental regulations of protected speech<sup>2</sup> that are content based from those that are content neutral.<sup>3</sup> This distinction is important because content-based regulations of speech are typically subjected to the heightened strict scrutiny standard of judicial review,<sup>4</sup> while content-neutral regulations are examined under a more re-

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<sup>1</sup> The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666–67 (1925).

<sup>2</sup> Despite the First Amendment's absolutist language of Congress making "no law" abridging the freedom of speech, the U.S. Supreme Court has identified several categories of expression that receive no First Amendment protection. See *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (listing, as unprotected categories of speech, "advocacy intended, and likely, to incite imminent lawless action," obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud and "speech presenting some grave and imminent threat the government has the power to prevent"); *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (identifying obscenity, incitement and fighting words as categories of speech falling outside the ambit of First Amendment protection); *United States v. Stevens*, 559 U.S. 460, 468–69 (2010) (identifying obscenity, defamation, fraud, incitement and speech integral to criminal conduct as types of speech not protected by the First Amendment); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245–46 (2002) (opining that "[t]he freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children").

<sup>3</sup> See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 758 (3d ed. 2006) (asserting that "[i]n countless First Amendment cases . . . the Court has invoked the content-based/content-neutral distinction as the basis for its decisions").

<sup>4</sup> See *Brown*, 131 S. Ct. at 2738 (asserting that because a California law limiting minors' access to violent video games "imposes a restriction on the content of protected speech, it is invalid unless California

laxed, intermediate scrutiny test.<sup>5</sup> The latter's leniency jibes squarely with Professor Edward Eberle's observation that "commitment to the doctrine of content neutrality is a pole star of First Amendment law."<sup>6</sup> The former's rigor, in turn, comports with Dean Erwin Chemerinsky's assertion that "[n]o principle of free speech law is more basic than that the government cannot regulate speech based on its content unless there is a compelling reason to do so."<sup>7</sup>

In brief, as Professor Dan Kozlowski succinctly writes, the Supreme Court "has devised tests to review content-based and content-neutral regulations (strict scrutiny for content-based regulations, a more lenient intermediate scrutiny for those regulations deemed content neutral)."<sup>8</sup> In theory, this bifurcated approach seems simple and tidy,<sup>9</sup> but as Professor Leslie Kendrick wrote in 2012, the Supreme Court's application of it is derided by some scholars as "unprincipled, unpredictable and deeply incoherent."<sup>10</sup> Indeed, Justice Anthony Kennedy admitted some twenty years ago that

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can demonstrate that it passes strict scrutiny – that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest"); *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000) (asserting that a content-based speech restriction can only stand judicial review "if it satisfies strict scrutiny," opining that "[i]f a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest," and adding that "if a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative"). In *United States v. Alvarez*, a four-justice plurality, in issuing the judgment of the Court, did not use the term "strict scrutiny" when referring to the standard applied to content-based laws, but instead labeled it "exacting scrutiny." 132 S. Ct. at 2548.

<sup>5</sup> See *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002) (noting "that municipal ordinances receive only intermediate scrutiny if they are content neutral"); *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 189 (1997) (asserting that "[a] content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests," and labeling these requirements as "the standards for intermediate scrutiny").

<sup>6</sup> Edward J. Eberle, *Cross Burning, Hate Speech, and Free Speech in America*, 36 ARIZ. ST. L.J. 953, 972 (2004).

<sup>7</sup> Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 GREEN BAG 413, 424 (2009).

<sup>8</sup> Dan V. Kozlowski, *Content and Viewpoint Discrimination: Malleable Terms Beget Malleable Doctrine*, 13 COMM. L. & POL'Y 131, 131–32 (2008).

<sup>9</sup> As Professor Leslie Kendrick recently encapsulated it in 2012, under this approach the Supreme Court initially "performs a content analysis, which seeks to determine which laws are 'content based' and which 'content neutral' – that is, which laws regulate speech because of its content and which do not. After distinguishing content-based from content-neutral laws, the Court must give each its appropriate level of review. This is the scrutiny analysis. Content-based laws receive strict scrutiny, which nearly always proves fatal. Meanwhile, content-neutral laws receive what the Court calls "intermediate scrutiny," in practice a highly deferential form of review which virtually all laws pass. Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 237 (2012) (citations omitted).

<sup>10</sup> *Id.* at 233.

“[d]eciding whether a particular regulation is content based or content neutral is not always a simple task.”<sup>11</sup>

Perhaps even more troubling, the Court’s June 2014 opinion in the abortion clinic case of *McCullen v. Coakley* demonstrates that the justices today cannot even agree when a regulation is content based or content neutral.<sup>12</sup> In *McCullen*, five justices – Chief Justice John Roberts and Associate Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan – concluded that a Massachusetts statute<sup>13</sup> affecting speech near reproductive healthcare facilities in the Bay State was content neutral.<sup>14</sup> In stark contrast, a trio of justices – Antonin Scalia, Anthony Kennedy and Clarence Thomas – held that the statute “should be reviewed under the strict-scrutiny standard applicable to content-based legislation.”<sup>15</sup> Justice Samuel Alito, in turn, went even further to find that the law was not simply just content based, but also represented an instance of viewpoint-based discrimination<sup>16</sup> – a sub-category of content-based regulations<sup>17</sup> that is almost always unconstitutional as “an egregious form of content discrimination.”<sup>18</sup>

This article analyzes the current confusion courts confront in determining when a law is content based through the lens of four recent lower-court cases affecting the speech rights of the homeless and others to beg for money or food.<sup>19</sup> Most notably, in September 2014, a three-judge panel of the U.S. Court of Appeals for the Seventh Circuit fractured two-to-one in *Norton v. City of Springfield*.<sup>20</sup> The judges split over whether an ordinance prohibiting panhandling in Springfield, Illinois’ downtown historic district was con-

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<sup>11</sup> *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994).

<sup>12</sup> *McCullen v. Coakley*, 134 S. Ct. 2518, 2541 (2014).

<sup>13</sup> MASS. GEN. LAWS ch. 266, § 120E1/2 (2014).

<sup>14</sup> *See McCullen*, 134 S. Ct. at 2534 (holding that the “Act is content neutral” and finding that the “Act is neither content nor viewpoint based and therefore need not be analyzed under strict scrutiny”).

<sup>15</sup> *Id.* at 2548 (Scalia, J., concurring in judgment).

<sup>16</sup> *See id.* at 2549 (Alito, J., concurring) (opining that “[i]t is clear on the face of the Massachusetts law that it discriminates based on viewpoint. Speech in favor of the clinic and its work by employees and agents is permitted; speech criticizing the clinic and its work is a crime. This is blatant viewpoint discrimination”).

<sup>17</sup> *See* Jamin B. Raskin & Clark L. LeBlanc, *Disfavored Speech About Favored Rights: Hill v. Colorado, the Vanishing Public Forum and the Need for an Objective Speech Discrimination Test*, 51 AM. U. L. REV. 179, 195 (2001) (calling viewpoint discrimination “a subset of content discrimination”).

<sup>18</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *see* Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 696 (2011) (observing that “[t]he prevention of viewpoint discrimination has long been considered the central concern of the First Amendment”).

<sup>19</sup> *See infra* Part II (examining recent lower-court rulings regarding panhandling).

<sup>20</sup> *Norton v. City of Springfield*, 768 F.3d 713, 714, 718, 723 (7<sup>th</sup> Cir. 2014).

tent based or content neutral.<sup>21</sup> The ordinance defined panhandling as “[a]ny solicitation made in person upon any street, public way, public place, or park in the city, in which a person requests an immediate donation of money or other gratuity from another person.”<sup>22</sup> It also made clear that begging with a sign and without a vocal request was not panhandling.<sup>23</sup>

Writing for the two-judge majority in *Norton*, Judge Frank Easterbrook concluded that Springfield’s panhandling law was content neutral.<sup>24</sup> He tellingly added, however, that “[w]e do not profess certainty about our conclusion.”<sup>25</sup> Nonetheless, applying the intermediate scrutiny standard for time, place and manner regulations, Easterbrook found the ordinance was constitutional.<sup>26</sup>

Dissenting, Judge Daniel Manion explained that he did “not join the opinion of the court because the City of Springfield’s panhandling ordinance is a content-based regulation of speech, subject to strict scrutiny. By concluding that the ordinance is content-neutral, the court misapplies the Supreme Court’s content-based regulation jurisprudence.”<sup>27</sup> The distinction proved pivotal for Judge Manion, who found the law unconstitutional under a strict scrutiny analysis because Springfield “has not alleged that the ordinance’s method of restricting speech is the least restrictive means to further a compelling government interest.”<sup>28</sup> In brief, the Seventh Circuit in *Norton* split over whether Springfield’s statute was content based or content neutral, and this disagreement, in turn, ultimately resulted in different views about the statute’s constitutionality.

This article demonstrates that much of the confusion in sorting out whether laws that target begging are content based or content neutral stems directly from a threshold problem. Specifically, lower courts cite and apply very different standards and tests to determine whether panhandling statutes are content based or content neutral.<sup>29</sup> The article illustrates that some of the tests are convoluted and complex, while others are seemingly simple and straightforward. It also argues that courts may be conflating considera-

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<sup>21</sup> *Id.* at 714, 717–18, 722–23; see also SPRINGFIELD, ILL., CODE §131.06(e) (2014), available at <https://www.municode.com/library/il/springfield>.

<sup>22</sup> SPRINGFIELD, ILL. CODE §131.06(a)(1) (2014), available at <https://www.municode.com/library/il/springfield>.

<sup>23</sup> *Id.*

<sup>24</sup> *Norton*, 768 F.3d at 717.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 717–18.

<sup>27</sup> *Id.* at 718 (Manion, J., dissenting).

<sup>28</sup> *Id.* at 723 (Manion, J., dissenting).

<sup>29</sup> *Infra* Part II.

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tion of the intent and purpose behind a law in this threshold determination with whether the goals are compelling or significant *after* a standard of scrutiny has been chosen. Without an agreed-upon test that is clear and concise, confusion will continue to reign, leaving those who depend on begging for a living left in the legal lurch.

Part I of this article initially provides a brief overview of begging as a form of expression generally protected by the First Amendment.<sup>30</sup> It then reviews the U.S. Supreme Court's pronouncements, including in *McCullen*, on how to distinguish content-based laws from those that are content neutral.<sup>31</sup> Next, Part II examines the different tests employed by courts in a quartet of recent cases to decipher whether statutes and ordinances regulating begging are content based or content neutral.<sup>32</sup> Part III then asserts that courts might subtly be reluctant or hesitant to classify anti-begging laws as content based because they recognize that the governmental interests underlying them simply cannot rise to the compelling level necessary to satisfy strict scrutiny.<sup>33</sup> Finally, the article concludes in Part IV by arguing that unless a clear test – one that is straightforward in its application – is adopted by all courts, the dichotomized First Amendment landscape that separates content-based laws from content-neutral ones increasingly grows more blurry and, in turn, less useful.<sup>34</sup> Part IV proposes such a standard.

#### I. A PAIR OF PRIMERS: BEGGING AS SPEECH AND TESTS FOR CONTENT-BASED REGULATIONS

This part has two sections, the first of which illustrates that begging is now generally recognized by courts as a form of expression safeguarded by the First Amendment. The second section then examines some of the Supreme Court's efforts, including most recently in *McCullen v. Coakley*,<sup>35</sup> to establish tests for parceling out content-based laws from content-neutral ones.

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<sup>30</sup> *Infra* notes 35–64 and accompanying text.

<sup>31</sup> *Infra* notes 65–102 and accompanying text.

<sup>32</sup> *Infra* notes 103–96 and accompanying text.

<sup>33</sup> *Infra* notes 197–226 and accompanying text.

<sup>34</sup> *Infra* notes 227–48 and accompanying text.

<sup>35</sup> *McCullen v. Coakley*, 134 S. Ct. 2518 (2014).

### A. Begging as Speech

A recent *New Yorker* magazine cartoon depicts two scruffy, disheveled men standing on a sidewalk, their arms extended outward, holding baseball caps as makeshift donation baskets while a man in a business suit strides by.<sup>36</sup> “Remember – we’re not begging. We’re crowdfunding,” says one beggar to the other.<sup>37</sup> The humorous, modern-day vernacular certainly is witty and amusing, but the efforts by municipalities around the nation to crack down on begging are no laughing First Amendment matter.

Although the U.S. Supreme Court has never squarely addressed whether begging constitutes speech for First Amendment purposes,<sup>38</sup> courts today widely agree that it falls within the ambit of that amendment. As the U.S. Court of Appeals for the Sixth Circuit wrote in 2013, the Second, Fourth and Eleventh Circuits have “held that begging is a type of solicitation protected by the First Amendment. We find these cases to be persuasive authority, as well, for our holding that begging is a form of solicitation that the First Amendment protects.”<sup>39</sup> The Fourth Circuit observed the same year that “begging is communicative activity within the protection of the First Amendment.”<sup>40</sup> The debate, in fact, is so well settled that in the 2014 case of *Norton v. City of Springfield*,<sup>41</sup> the parties stipulated that “panhandling is a form of speech, to which the First Amendment applies.”<sup>42</sup>

These decisions regarding begging and panhandling are founded upon the more general premise, as one federal court put it in 2014, that “[c]haritable solicitation by individuals is protected by the First Amendment.”<sup>43</sup> Indeed, thirty-five years ago the U.S. Supreme Court in *Village of Schaumburg v. Citizens for a Better Environment* held that it was “clear” that “charitable solicitations in residential neighborhoods are within the protections of the First Amendment.”<sup>44</sup> The Court later extended that principle

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<sup>36</sup> David Sipress, *Remember – We’re Not Begging*, NEW YORKER, June 24, 2013, [http://www.condenaststore.com/-sp/Remember-we-re-not-begging-We-re-crowdfunding-New-Yorker-Cartoon-Prints\\_i9651688\\_.htm](http://www.condenaststore.com/-sp/Remember-we-re-not-begging-We-re-crowdfunding-New-Yorker-Cartoon-Prints_i9651688_.htm).

<sup>37</sup> *Id.*

<sup>38</sup> See Julia Koestner, Comment, *Begging the (First Amendment) Question: The Constitutionality of Arizona’s Prohibition of Begging in a Public Place*, 45 ARIZ. ST. L.J. 1227, 1234 (2013) (noting that the “Court has not explicitly extended constitutional protection to begging”) (emphasis added).

<sup>39</sup> Speet v. Schuette, 726 F.3d 867, 875 (6th Cir. 2013).

<sup>40</sup> Clatterbuck v. City of Charlottesville, 708 F.3d 549, 553 (4th Cir. 2013).

<sup>41</sup> Norton v. City of Springfield, 768 F.3d 713 (7th Cir. 2014).

<sup>42</sup> *Id.* at 714.

<sup>43</sup> ACLU of Idaho v. City of Boise, 998 F. Supp. 2d 908, 916 (D. Idaho 2014).

<sup>44</sup> Village of Schaumburg v. Citizens for a Better Env’t, 444 U.S. 620, 633 (1980).

to solicitations within airport terminals.<sup>45</sup> The Ninth Circuit recently reiterated the solicitation-is-speech proposition, calling it “beyond dispute that solicitation is a form of expression entitled to the same constitutional protections as traditional speech.”<sup>46</sup> Courts now recognize that “charitable solicitation and begging are equivalent forms of speech for First Amendment purposes.”<sup>47</sup>

The judiciary, however, has not always viewed begging in this way. In fact, just twenty-five years ago, the U.S. Court of Appeals for the Second Circuit wrote in *Young v. New York City Transportation Authority* that “common sense tells us that begging is much more ‘conduct’ than it is ‘speech’” and that “[w]hether with or without words, the object of begging and panhandling is the transfer of money. Speech simply is not inherent to the act.”<sup>48</sup> Ultimately, the Second Circuit concluded in *Young* that the only message “common to all acts of begging is that beggars want to exact money from those whom they accost. While we acknowledge that [subway] passengers generally understand this generic message, we think it falls far outside the scope of protected speech under the First Amendment.”<sup>49</sup> That conclusion, although perhaps startling today, comports with the fact that “[c]ourts historically enforced statutory proscriptions of begging without challenge.”<sup>50</sup> Thus, as one scholar asserts, “only within the past twenty-five years have courts elucidated that begging constitutes speech within a First Amendment framework.”<sup>51</sup>

To the extent that begging occurs on public sidewalks, it seems to merit special protection because, “‘time out of mind,’ public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum.”<sup>52</sup> The U.S. Supreme Court recently reinforced this principle in the Westboro Baptist Church case of *Snyder v. Phelps*.<sup>53</sup> Chief

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<sup>45</sup> See *Int’l Soc’y for Krishna Consciousness, Inc., v. Lee*, 505 U.S. 672, 674–75, 677, 679, 685 (1992) (writing, in the context of a Port Authority of New York and New Jersey regulation forbidding the repetitive solicitation of money or distribution of literature within airport terminals, that “it is uncontested that the solicitation at issue in this case is a form of speech protected under the First Amendment”).

<sup>46</sup> *ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784, 792 (9th Cir. 2006).

<sup>47</sup> *New York v. Hoffstead*, 905 N.Y.S.2d 736, 738 (N.Y. App. Term 2010).

<sup>48</sup> *Young v. New York City Transit Auth.*, 903 F.2d 146, 153–54 (2d Cir. 1990).

<sup>49</sup> *Id.* at 154.

<sup>50</sup> Charles Feeney Knapp, Comment, *Statutory Restriction of Panhandling in Light of Young v. New York City Transit: Are States Begging Out of First Amendment Proscriptions?*, 76 IOWA L. REV. 405, 408 (1991).

<sup>51</sup> Clay Calvert, *Fringes of Free Expression: Testing the Meaning of “Speech” Amid Shifting Cultural Mores & Changing Technologies*, 22 S. CAL. INTERDIS. L.J. 545, 584 (2013).

<sup>52</sup> *Frisby v. Schultz*, 487 U.S. 474, 480 (1988) (quoting *Hague v. Comm. Indus. Orgs.*, 307 U.S. 496, 515 (1939)).

<sup>53</sup> *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).



Justice John Roberts wrote for the *Snyder* majority that “a public place adjacent to a public street . . . occupies a ‘special position in terms of First Amendment protection.’”<sup>54</sup> More recently, Chief Justice Roberts opined for the *McCullen* majority that, “[c]onsistent with the traditionally open character of public streets and sidewalks, we have held that the government’s ability to restrict speech in such locations is ‘very limited.’”<sup>55</sup> Ultimately, then, public sidewalks are “traditionally open to expressive activity.”<sup>56</sup>

Unfortunately, the Supreme Court’s decisions involving regulations on solicitation are in the context of venues not considered traditional public fora and not akin to public streets and sidewalks. They have, instead, dealt with public fair grounds,<sup>57</sup> airports<sup>58</sup> and U.S. Post Office sidewalks.<sup>59</sup>

The criminalization of begging, of course, is highly controversial, given both the individual-level and macro-level importance of such expression. As Professor Nancy Millich asserted two decades ago, begging “should be accorded the highest level of First Amendment protection. The beggars’ message, and indeed their very presence, contributes to the interchange of ideas regarding homelessness. Their presence and activities also convey the truthful information that American citizens are living as destitute, homeless castaways.”<sup>60</sup> Certainly, beyond beggars’ individual needs for sustenance, “the presence of beggars makes it impossible for [people] to be oblivious to the poverty in their midst.”<sup>61</sup> American Civil Liberties Union attorneys Helen Hershkoff and Adam Cohen observe that “[b]egging is speech that adds to both societal and individual enlightenment: it provides information

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<sup>54</sup> *Id.* at 1218 (quoting *United States v. Grace*, 461 U.S. 171, 180 (1983)).

<sup>55</sup> *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (quoting *Grace*, 461 U.S. at 177).

<sup>56</sup> *United States v. Kokinda*, 497 U.S. 720, 727 (1990).

<sup>57</sup> *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981) (calling it “clear that there are significant differences between a street and the fairgrounds,” pointing out that “[a] street is continually open, often uncongested, and constitutes not only a necessary conduit in the daily affairs of a locality’s citizens, but also a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment,” and adding, in the context of the Minnesota fair at issue, which was “a temporary event attracting great numbers of visitors who come to the event for a short period to see and experience the host of exhibits and attractions,” that “any comparisons to public streets are necessarily inexact”).

<sup>58</sup> *See Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992) (holding that airport “terminals are nonpublic fora”).

<sup>59</sup> *See Kokinda*, 497 U.S. at 727 (concluding that “[t]he postal sidewalk at issue does not have the characteristics of public sidewalks traditionally open to expressive activity,” and adding that “[t]he sidewalk leading to the entry of the post office is not the traditional public forum sidewalk”).

<sup>60</sup> Nancy A. Millich, *Compassion Fatigue and the First Amendment: Are the Homeless Constitutional Castaways?*, 27 U.C. DAVIS L. REV. 255, 275 (1994).

<sup>61</sup> Jonathan Mallamud, *Begging and the First Amendment*, 46 S.C. L. REV. 215, 217 (1995).

about poverty and the lives of poor people.”<sup>62</sup> Furthermore, attorney Farida Ali passionately argues in a 2014 law journal article that:

[W]hile the sight of homeless persons begging or wandering the streets may be unpleasant to some people, criminalizing the homeless for soliciting donations or loitering fails to address the causes underlying such conduct in the first place. Indeed, communities would be better served by recognizing that the presence of homeless persons offers a realistic measure of the city’s economic, social, institutional, and political disposition.<sup>63</sup>

Similarly, attorney Daniel Mark Cohen adds that “expressions of begging convey facts about the speaker’s personal condition” and, in turn, “the very purpose, and exalted value, of the exchange of social and political ideas is for the prevention, alleviation, or reversal of individual human suffering, the very purpose the beggar’s speech serves.”<sup>64</sup> Ultimately, it is clear that begging constitutes speech and, in particular, a very important and controversial variety of it.

## B. Distinguishing Content-Based Laws from Content-Neutral Laws: A Mixed Bag of Tests and a Cauldron of Confusion

This section explores some of the different approaches taken by the U.S. Supreme Court for determining if a regulation is content based or content neutral. As quickly becomes evident, a law that facially distinguishes between types of content can nonetheless, in some instances, be held content neutral if the Court finds that it is supported by a legislative purpose or goal that allegedly is unrelated to suppressing the message in question.

### 1. Does Enforcement Depend Upon What Is Being Said?

In penning the majority opinion in *McCullen v. Coakley*, Chief Justice John Roberts began by noting that the first step of the analysis is a facial review – to consider whether the law at issue “draw[s] content-based distinctions on its face.”<sup>65</sup> He then articulated what seems, at first blush, to be a

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<sup>62</sup> Helen Hershkoff & Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896, 898 (1991).

<sup>63</sup> Farida Ali, *Limiting the Poor’s Right to Public Space: Criminalizing Homelessness in California*, 21 Geo. J. on Poverty L. & Pol’y 197, 226 (2014).

<sup>64</sup> Daniel Mark Cohen, *Begging the Court’s Pardon: Justice Denied for the Poorest of the Poor*, 14 ST. THOMAS L. REV. 825, 857 (2002).

<sup>65</sup> *McCullen v. Coakley*, 134 S. Ct. 2518, 2523 (2014).

clear, concise facial test for establishing if a law is content based – namely, if it requires “‘enforcement authorities’ to ‘examine the content of the message that is conveyed to determine whether’ a violation has occurred.”<sup>66</sup> Put more bluntly, do police or law enforcement officials need to listen to what is being said – the content of the message – to decide if a crime has occurred? This query, in fact, tracks the Chief Justice’s citation in *McCullen* to his earlier opinion for the Court in *Holder v. Humanitarian Law Project*.<sup>67</sup> There, Roberts suggested that a regulation is content based if its application “‘depends on what they say.’”<sup>68</sup>

Under this rule, as applied by the majority in *McCullen*, it would seem that any regulation singling out personal requests for immediate donations of money or food from other forms of solicitation is content based. For instance, in considering the constitutionality of a Boise, Idaho, ordinance that prohibited “‘non-aggressive solicitations for donations of money or property in other public areas,’”<sup>69</sup> U.S. District Judge Edward Lodge concluded in 2014 that the law was likely content based.<sup>70</sup> Judge Lodge reasoned:

The purpose of the ordinance is to suppress particular speech related to seeking charitable donations and treats this speech content different than other solicitation speech. The ordinance does not restrict solicitation of signatures for petition on a matter of public concern, political support solicitation, religious solicitation, etc. in the same public areas. It only restricts solicitation speech for donations of money or property.<sup>71</sup>

In other words, a police officer would need to listen to the content of a query to determine if it violated the Boise ordinance. A request for some items would be perfectly permissible, while a request for another item – an immediate donation of money, specifically – is not. Similarly, in his dissent in *Norton*, Judge Daniel Manion adopted a what-did-they-say approach in holding that a Springfield, Illinois, anti-begging law was content based.<sup>72</sup> Manion observed that:

A police officer seeking to enforce the City’s ordinance must listen to what the speaker is saying in order to determine whether the speaker has violated the ordinance. Indeed, the officer must determine on which side of at least three different verbal distinctions the speech falls when evaluating whether the ordinance has been violated. . . . The officer cannot answer any of these questions

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<sup>66</sup> *Id.* (quoting *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984)).

<sup>67</sup> *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

<sup>68</sup> *Id.* at 27.

<sup>69</sup> *ACLU of Idaho, Inc. v. City of Boise*, 998 F. Supp. 2d 908, 913 (D. Idaho 2014)

<sup>70</sup> *Id.* at 916.

<sup>71</sup> *Id.*

<sup>72</sup> *Norton v. City of Springfield*, 768 F.3d 713, 718 (7th Cir. 2014) (Manion, J. dissenting).

without listening to and understanding what the speaker is saying. That is precisely the sort of situation that the Supreme Court said involves a content-based regulation.<sup>73</sup>

In summary, one seemingly easy way to suss out a content-based law simply is to ask whether its application depends upon or entails an examination by law enforcement authorities of what is being communicated. Do, in other words, the meaning of the words make a difference? Unfortunately, this unadorned approach does not always end the judicial analysis, as the next sections illustrate?

## 2. Is the Regulation Concerned with the Direct Impact of the Message on Its Audience and Listeners?

Returning to the high court's 2014 decision in *McCullen*, Chief Justice Roberts added for the majority that an otherwise facially content-neutral statute is not, in fact, so "if it were concerned with undesirable effects that arise from 'the direct impact of speech on its audience' or '[l]isteners' reactions to speech.'" <sup>74</sup> Putting this test to practice as applied to Massachusetts' buffer-zone law, Roberts explained that "if, for example, the speech outside Massachusetts abortion clinics *caused offense or made listeners uncomfortable*, such *offense or discomfort* would not give the Commonwealth a content-neutral justification to restrict the speech."<sup>75</sup> In other words, these reasons, which relate to the negative impact of speech on its audience, would make the restrictions content based.

The emphasized portion of Roberts' statement above is critical when it comes to anti-begging laws. These laws are, at bottom, concerned about shielding passersby from potential negative reactions – offense, discomfort, fear, duress – they might experience when asked for money. Such direct-impact audience reactions to the speech, in turn, may result in a so-called secondary effect<sup>76</sup> – namely, a downstream negative economic effect in a municipality if people are deterred from shopping or working in an area because they allegedly experience distress or discomfort when verbally confronted by beggars.<sup>77</sup>

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<sup>73</sup> *Id.* at 721.

<sup>74</sup> *McCullen v. Coakley*, 134 S. Ct. 2518, 2531–32 (2014) (quoting *Boos v. Berry*, 485 U.S. 312, 321 (1988)).

<sup>75</sup> *Id.* at 2532 (emphasis added).

<sup>76</sup> See *infra* Part I.B.4 (addressing the secondary effects doctrine).

<sup>77</sup> See Patricia K. Smith, *The Economics of Anti-Begging Regulations*, 64 AM. J. ECON. & SOC. 549, 552 (2005) ("Beggars become most worrisome to merchants and neighborhood residents if their presence

Yet, it is the direct impact on the audience that triggers this secondary effect, thus rendering nugatory a secondary effects argument to try to make the regulation content neutral. The secondary effect here thus might be referred to as a pass-through secondary effect, since it only occurs once the message passes through the reaction of its audience.

Offense and discomfort with speech that occurs in public venues like the sidewalks and street corners where begging often transpires are not sufficient reasons to abridge First Amendment speech rights. In *Cohen v. California*, the Court upheld the right to convey the offensive, clothing-based message “Fuck the Draft”<sup>78</sup> in a public courthouse. In doing so, the Court noted the reduced expectations of privacy in public places<sup>79</sup> and emphasized that “presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense.”<sup>80</sup> The remedy for people offended in public places is to avert their eyes<sup>81</sup> or, in the case of beggars’ spoken requests, to simply walk on by.

Indeed, in protecting the right to burn the American flag as a form of symbolic speech, Justice William Brennan wrote for the Court in *Texas v. Johnson* that “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>82</sup> The Court, fourteen years before *Johnson*, found in *Erznoznik v. City of Jacksonville* that “[m]uch that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.”<sup>83</sup>

Similarly, if a municipality asserts that the direct impact on the audience of speech by beggars is fear, that too would not be sufficient to justify cen-

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impedes the local economy. Retail shop owners often complain that beggars deter potential customers . . . Concern over the negative monetary consequences of begging may be especially important when the local economy depends heavily on tourism”).

<sup>78</sup> 403 U.S. 15, 16 (1971).

<sup>79</sup> *See id.* at 21–22 (“[W]hile it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of one’s own home.”).

<sup>80</sup> *Id.* at 21.

<sup>81</sup> *See id.* (“Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes.”).

<sup>82</sup> 491 U.S. 397, 414 (1989).

<sup>83</sup> 422 U.S. 205, 210 (1975).

sorship, unless the speech actually amounted to a true threat of violence.<sup>84</sup> True threats constitute one of the very categories of speech not protected by the First Amendment.<sup>85</sup> In general, however, fear by itself is not sufficient to restrict speech. As Justice Louis Brandeis famously observed more than eighty-five years ago, “[f]ear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears.”<sup>86</sup>

In summary, it seems that under either of the first two approaches addressed above – namely, whether enforcement of a regulation depends on listening to what is being said and whether a regulation is concerned with the direct impact and reaction of the message on its audience – statutes that single out begging for money or food are content based. But as the next sub-section makes clear, there is yet another method the Supreme Court has embraced to sort out content-based laws from content-neutral ones.

### 3. Was the Regulation Adopted Because the Government Disagrees with the Message Being Censored?

The quest for distinguishing content-based laws from content-neutral ones becomes muddled when courts go searching for legislative intent and purpose. In determining whether a sound-amplification ordinance affecting a bandshell in New York City’s Central Park was content based or content neutral, the Supreme Court in *Ward v. Rock Against Racism* wrote that “[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech *because of disagreement with the message it conveys*.”<sup>87</sup> Writing the opinion of the Court, the then-recently appointed Justice Anthony Kennedy added that

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<sup>84</sup> See *Virginia v. Black*, 538 U.S. 343, 359–60 (2003) (defining true threats as “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals,” and adding that “[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death”).

<sup>85</sup> See *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2102) (identifying true threats as one of the few categories of speech not protected by the First Amendment and citing the Court’s decision in *Watts v. United States*, 394 U.S. 705 (1969), to support that proposition); see generally Eugene Volokh, *One-To-One Speech vs. One-To-Many Speech, Criminal Harassment Laws, and “Cyberstalking”*, 107 NW. U. L. REV. 731, 751 (2013) (observing that “speech about people can be punished when it constitutes a ‘true threat’ of criminal attack”).

<sup>86</sup> *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

<sup>87</sup> 491 U.S. 781, 791 (1989). (emphasis added).

“[t]he government’s purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.”<sup>88</sup>

Under this tack, then, the legislative purpose and intent behind a regulation affecting speech is key: if the purpose is unrelated to a disagreement with the content of the message, then the regulation is content neutral. Justice Kennedy reiterated and reinforced this purpose-based approach in 2011 in *Sorrell v. IMS Health Inc.*, quoting favorably language from *Ward*.<sup>89</sup> In *Sorrell*, which addressed the constitutionality of a Vermont law restricting “the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors,”<sup>90</sup> Kennedy added that even if a “measure on its face appeared neutral as to content and speaker, its purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional.”<sup>91</sup>

Yet, in concluding that the law at issue in *Sorrell* was content based, Kennedy focused on the fact that “[b]oth on its face and in its practical operation, Vermont’s law imposes a *burden based on the content of speech* and the identity of the speaker.”<sup>92</sup> He added that the law “is directed at certain content and is aimed at particular speakers.”<sup>93</sup> In other words, Kennedy seemed to be concerned more with the terms of the law (“on its face”) and in its “practical operation” when analyzing it rather than with its purpose.

In fact, Justice Kennedy clearly suggested in 2002 that there is no need for examining legislative intent because “whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based.”<sup>94</sup> In other words, in accord with Chief Justice Roberts’ observation in *McCullen*,<sup>95</sup> the first step – which seemingly can also be the last step – is to examine the face of the law, not its legislative purpose.

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<sup>88</sup> *Id.*

<sup>89</sup> 131 S. Ct. 2653, 2664 (2011).

<sup>90</sup> *Id.* at 2659.

<sup>91</sup> *Id.* at 2664.

<sup>92</sup> *See id.* at 2665, 2667 (concluding that the statute “imposes a speaker- and content-based burden on protected expression, and that circumstance is sufficient to justify application of heightened scrutiny”) (emphasis added).

<sup>93</sup> *Id.*

<sup>94</sup> *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring).

<sup>95</sup> *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) (asserting that “to begin, the Act does not draw content-based distinctions on its face”).

Indeed, Chief Justice Roberts suggested in *McCullen* that legislative intent is only considered when a *facially neutral law* allegedly “disproportionately affect[s] speech on certain topics.”<sup>96</sup> He explained that “[t]he question in such a case is whether the law is ‘justified without reference to the content of the regulated speech.’”<sup>97</sup>

Nonetheless, a purpose-based approach to the content-based/content-neutral issue has led legislative bodies to suggest so-called content-neutral objectives under the secondary effects doctrine. That doctrine is described in the next sub-section.

#### 4. The Secondary Effects Doctrine

Further complicating the process of identifying content-based and content-neutral laws is the secondary effects doctrine. As Professor John Fee explains it, this doctrine “provides that a regulation will be treated as content-neutral and subject to intermediate scrutiny, despite its content-discriminatory form, if the primary purpose of the regulation is to control the secondary effects rather than the primary effects of speech.”<sup>98</sup> The doctrine typically applies when municipalities or states attempt to zone sexually oriented businesses (SOBs).<sup>99</sup> First Amendment defense attorney Herald Price Fahringer notes that secondary effects typically include things “such as a rise in crime or a decline in property values, rather than a perceived unpleasantness of having adult videostores or topless bars in a given neighborhood.”<sup>100</sup> Indeed, Professor Daniel Linz and his colleagues point out that these “effects have most often included alleged increases in crime, decreases in property values, and other indicators of neighborhood deterioration in the area surrounding the adult business. Typically, communities have either conducted their own investigations of potential secondary effects or have relied on studies conducted by other cities or localities.”<sup>101</sup>

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.* (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986)).

<sup>98</sup> John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, 292 (2009).

<sup>99</sup> See Clay Calvert & Robert Richards, *The Free Speech Coalition & Adult Entertainment: An Inside View of the Adult Entertainment Industry, Its Leading Advocate & the First Amendment*, 22 CARDOZO ARTS & ENT. L.J. 247, 277 (2004) (noting that “municipalities rely on a doctrine called secondary effects to support” ordinances targeting sexually oriented businesses).

<sup>100</sup> Herald Price Fahringer, *Zoning Out Free Expression: An Analysis of New York City’s Adult Zoning Resolution*, 46 BUFFALO L. REV. 403, 413 (1998).

<sup>101</sup> Bryant Paul et al., *Government Regulation of “Adult” Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects*, 6 COMM. L. & POL’Y 355, 356 (2001).



The secondary effects doctrine really amounts, as Professor George Smith II and Gregory Bailey assert, to an “exception to the strict scrutiny test” because “[c]ritical analysis demonstrates that zoning ordinances targeting SOBs cannot qualify as content-neutral.”<sup>102</sup> In fact, as another commentator notes, the “secondary effects test evolved because the Court recognized that zoning ordinances targeted solely at adult businesses (rather than all businesses) were content based regulations.”<sup>103</sup> As such, Professor Ashutosh Bhagwat labels the secondary effects doctrine “an extremely odd one, as it seems clearly inconsistent with the Court’s approach to content neutrality elsewhere in its First Amendment jurisprudence, and though it has been cited elsewhere, the Court has actually relied upon it only in the context of sexually oriented speech.”<sup>104</sup> The real problem, Bhagwat points out, is that lower courts have taken the secondary effects doctrine and “extended [it] beyond the arena of regulations of sexually oriented businesses to which the Supreme Court has confined it, into other areas of First Amendment analysis – with predictably troubling results.”<sup>105</sup>

Furthermore, Professor Lynn Mills Eckert criticizes the secondary effects for confusing “the question of whether a law is content-based with whether localities have a sufficient purpose for regulation.”<sup>106</sup> She also points out that many supposed secondary effects “are not so secondary. Such a critique focuses on the impact of the pornographic speech rather than the effects of the regulation. Increases in prostitution or increases in sexual harassment are directly related to the pornographic message.”<sup>107</sup>

Joining in the chorus of criticism is David Hudson, a scholar with the First Amendment Center, who bluntly asserts that the “doctrine continues to wreak havoc in First Amendment jurisprudence” by allowing “government officials to claim that patently content-discriminatory regulations – often those that restrict only businesses featuring adult-oriented expression – are treated as content-neutral.”<sup>108</sup> In fact, as Professor Seth Kreimer put it after

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<sup>102</sup> George P. Smith II & Gregory P. Bailey, *Regulating Morality Through the Common Law and Exclusionary Zoning*, 60 CATH. U. L. REV. 403, 437–38 (2011).

<sup>103</sup> Shima Baradaran-Robison, *Viewpoint Neutral Zoning of Adult Entertainment Businesses*, 31 HASTINGS CONST. L.Q. 447, 459 (2004).

<sup>104</sup> Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 797 (2007).

<sup>105</sup> *Id.* at 804.

<sup>106</sup> Lynn Mills Eckert, *The Incoherence of the Zoning Approach to Regulating Pornography: The Exclusion of Gender and a Call for Category Refinement in Free Speech Doctrine*, 4 GEO. J. GENDER & L. 863, 878 (2003).

<sup>107</sup> *Id.* at 879.

<sup>108</sup> David L. Hudson, Jr., *The Secondary-Effects Doctrine: Stripping Away First Amendment Freedoms*, 23 STAN. L. & POL’Y REV. 19, 19–20 (2012).

conducting a thorough analysis of multiple opinions, several justices on the nation's high court even consider the secondary effects doctrine to be "a bit of a cheat."<sup>109</sup>

The controversial and contested doctrine was first hatched by the Supreme Court nearly forty years ago in *Young v. American Mini Theatres, Inc.*<sup>110</sup> There, the Court considered the constitutionality of a Detroit zoning ordinance that distinguished between movie theaters that exhibit sexually explicit adult movies and those that do not.<sup>111</sup> The Court wrote that Detroit's "determination was that a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films. *It is this secondary effect which these zoning ordinances attempt to avoid*, not the dissemination of 'offensive' speech."<sup>112</sup>

Ten years later, in *City of Renton v. Playtime Theatres, Inc.*, the high court expressly clarified that "zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations."<sup>113</sup> The Court, in an apparent attempt to distinguish what might be considered primary effects from secondary effects, wrote that the interests underlying Renton, Washington's SOB zoning law were "unrelated to the suppression of free expression"<sup>114</sup> and were "not to suppress the expression of unpopular views."<sup>115</sup> Instead, the interests were, among other things, "to prevent crime, protect the city's retail trade, [and] maintain property values."<sup>116</sup>

In 2002, Justice Sandra Day O'Connor reiterated *Renton's* secondary effects principle in *City of Los Angeles v. Alameda Books*, writing that "the Renton ordinance was aimed not at the content of the films shown at adult theaters, but rather at the secondary effects of such theaters on the surrounding community, namely at crime rates, property values, and the quality of

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<sup>109</sup> Seth F. Kreimer, *Good Enough for Government Work: Two Cheers for Content Neutrality*, 16 U. PA. J. CONST. L. 1261, 1297 (2014).

<sup>110</sup> 427 U.S. 50 (1976); see Britt Cramer, *Zoning Adult Businesses: Evaluating the Secondary Effects Doctrine*, 86 TEMP. L. REV. 577, 587 (2014) (identifying *Young* as the case in which "[t]he secondary effects doctrine was first introduced").

<sup>111</sup> *Id.* at 52.

<sup>112</sup> *Id.* at 71 n.34 (emphasis added).

<sup>113</sup> 475 U.S. 41, 49 (1986).

<sup>114</sup> *Id.* at 48.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

the city's neighborhoods. Therefore, the ordinance was deemed content neutral."<sup>117</sup>

In a critical concurring opinion in *Alameda Books*,<sup>118</sup> Justice Anthony Kennedy wrote that primary effects, in contrast to secondary effects, are related to the impact of speech on its audience, such as when messages "change minds" and "prompt actions."<sup>119</sup> He added that "a city may not attack secondary effects indirectly by attacking speech."<sup>120</sup> This language goes a long way toward explaining why laws that target begging in the name of helping businesses thrive are content-based laws and should be subjected to strict scrutiny review. In particular, begging "prompts actions" by people who might not want to shop in an area where beggars are present. It is this direct impact of the speech, as it "change[s] minds" on its audience about where to conduct business, that harms a municipality's economy.

Furthermore, Kennedy frankly admitted that categorizing zoning laws that target SOBs as content-neutral regulations is a legal fiction and that, instead, "[t]hese ordinances are content based and we should call them so."<sup>121</sup> Despite this confession, he carved out an intermediate scrutiny exception for such zoning measures, writing that "a zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny."<sup>122</sup>

Ultimately, secondary effects is a contested doctrine that the Supreme Court has confined to the zoning of sexually oriented businesses. The Court has never applied it to anti-begging statutes.

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<sup>117</sup> *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 434 (2002).

<sup>118</sup> See Matthew D. Bunker et al., *Strict in Theory, But Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL'Y 349, 360 (2011) (Kennedy's concurrence in *Alameda Books* has been identified as "the controlling concurrence" in the case).

<sup>119</sup> *Alameda Books*, 535 U.S. at 444 (Kennedy, J., concurring) (As Kennedy opined, secondary effects are "unrelated to the impact of the speech on its audience." By implication, then, primary effects must be *related* to the impact of the speech on its audience (emphasis added)).

<sup>120</sup> *Id.* at 450.

<sup>121</sup> *Id.* at 448.

<sup>122</sup> *Id.* at 448, 449 (As Kennedy put it, "the government has no power to restrict speech based on content, but there are exceptions to the rule" and that "zoning regulations do not automatically raise the specter of impermissible content discrimination, even if they are content based, because they have a prima facie legitimate purpose: to limit the negative externalities of land use.").

### 5. The Close Call Scenario

In *Holder v. Humanitarian Law Project*, Justice Stephen Breyer authored a dissenting opinion that was joined by Justices Ruth Bader Ginsburg and Sonia Sotomayor.<sup>123</sup> In it, Breyer opined that where “a statute applies criminal penalties and *at least arguably does so* on the basis of content-based distinctions, I should think we would scrutinize the statute and justifications ‘strictly’ – to determine whether the prohibition is justified by a ‘compelling’ need that cannot be ‘less restrictively’ accommodated.”<sup>124</sup> The emphasized language is pivotal because it suggests that in a close-call scenario – one in which it is not definitively clear if a law is content based or content neutral – courts should err on the free speech side by calling it content based and require the government prove its constitutionality under strict scrutiny.

In summary, the Court has provided multiple ways for distinguishing content-based laws from content-neutral ones. It also has carved out an exception from strict scrutiny analysis regulations zoning SOBs under the legal fiction known as the secondary effects doctrine. The next part illustrates how some lower courts are now grappling with the content-based-versus-content-neutral issue in the context of local ordinances that restrict individuals who request an immediate donation of money or food.

## II. FERRETING OUT CONTENT-BASED REGULATIONS: DIVERGENT APPROACHES BREED DIVERGENT DECISIONS ON THE RIGHT TO BEG IN PUBLIC PLACES

When an Arizona appellate court in 2011 considered the constitutionality of a Phoenix ordinance banning panhandlers from orally asking passersby for cash after dark, it astutely observed that “in determining whether the amended ordinance violates the First Amendment, logically we first would consider whether the distinctions drawn by the ordinance discriminate based on the content of speech. The authorities that guide that determination, however, are *not altogether consistent*.”<sup>125</sup> In light of such recognized judicial inconsistency, the court ultimately punted on making a decision. It reasoned, instead, that “[w]e need not try to reconcile these precedents . . . because even if we assume the prohibition added to the

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<sup>123</sup> *Holder v. Humanitarian Law Project*, 561 U.S. 1, 40 (2010) (Breyer, J., dissenting).

<sup>124</sup> *Id.* at 45.

<sup>125</sup> *State v. Boehler*, 262 P.3d 637, 641 (Ariz. Ct. App. 2011) (emphasis added).

Phoenix ordinance in 2003 is content-neutral, it cannot survive constitutional scrutiny.”<sup>126</sup> In other words, regardless of which standard – strict or intermediate scrutiny – the court would apply, the regulation would not pass constitutional muster.

Although judicial dodges like this on the content-based-versus-content-neutral issue may be acceptable when a statute cannot satisfy either level of scrutiny, they certainly are not preferable and, in turn, are not possible when the level of scrutiny would, indeed, make a key difference in deciding a statute’s fate. With this in mind, this part analyzes four recent federal court decisions – three at the appellate court level, one at the trial court level – affecting the right to beg and the various tests deployed therein to ferret out content-based laws from content-neutral ones. The decisions are addressed in reverse chronological order, starting with the most recent<sup>127</sup> and proceeding to the oldest. They were selected for analysis due to their recency and because they illustrate divergent tacks (and disparate results) in addressing the content-based issue.

#### A. Norton v. City of Springfield

In September 2014, the U.S. Court of Appeals for the Seventh Circuit considered the constitutionality of a Springfield, Illinois law banning, in its downtown historic district, panhandling.<sup>128</sup> The measure defines panhandling as an “as an oral request for an immediate donation of money” and exempts from its strictures both written signs requesting money and oral requests for money to be donated at a later date.<sup>129</sup> The ordinance was challenged by Don Norton and Karen Otterson, both of whom regularly panhandle in the area.<sup>130</sup> They alleged to having “been arrested numerous times even though they don’t verbally request money” but instead hold signs.<sup>131</sup>

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<sup>126</sup> *Id.* at 643.

<sup>127</sup> A more recent decision regarding panhandling was issued after this article was written. In *Reynolds v. Middleton*, the Fourth Circuit reversed the trial court’s grant of summary judgment in favor of Henrico County. No. 13-2389, 2015 WL 756884, at \*1 (4th Cir. Feb. 24, 2015). The appellate court found that the ordinance prohibiting the act of soliciting while “standing” in medians was not narrowly tailored to serve a significant government interest. *Id.* at \*8.

<sup>128</sup> *Norton v. City of Springfield*, 768 F.3d 713, 714 (7th Cir. 2014).

<sup>129</sup> *Id.*

<sup>130</sup> Deana Stoisch, *Cahnman Defends City’s Panhandling Ordinance*, STATE JOURNAL-REGISTRAR (Sep. 7, 2013, 12:01 AM), <http://www.sj-r.com/article/20130907/News/309079955>.

<sup>131</sup> *Id.*

As noted earlier, the appellate court split two-to-one on whether this amounted to a content-neutral law and, in turn, whether it was constitutional.<sup>132</sup> Judge Frank Easterbrook, in penning the majority opinion upholding the law, observed the threshold problem at the center of this article – namely, that “[o]ther courts of appeals have divided on the question whether rules similar to Springfield’s are content-based.”<sup>133</sup>

Judge Easterbrook also referenced a key problem that plagues ordinances that attempt to narrow their scope by applying only to particular subsets of begging (oral, for instance, rather than written) instead of applying more broadly to all forms of solicitation. In particular, he wrote that the “rule that regulation of speech must be narrowly tailored . . . becomes an engine of destruction, because every effort to narrow a rule will distinguish some speech from other speech and so, in plaintiffs’ view, doom it.”<sup>134</sup> Put differently, a Catch-22 occurs for legislative bodies because an attempt to narrow a content-neutral statute’s reach may transform it into a content-based law and thus subject it to a more rigorous – in particular, strict scrutiny – standard of judicial review.

Judge Easterbrook’s test for determining if the Springfield ordinance should be subjected to strict scrutiny can only be described as convoluted and cumbersome when compared to the tests described in Part I, Section B of this article. Specifically, Judge Easterbrook initially suggested that not all content-based regulations are subject to strict scrutiny, reasoning here that “the ‘content-based’ restrictions that require special justification are a *subset* of those that depend on the subject-matter of the speech.”<sup>135</sup> In other words, for Judge Easterbrook, there is an essential dichotomy between “subject-matter (usually allowed) and content-based (usually forbidden) distinctions”<sup>136</sup> in First Amendment jurisprudence.

In terms of the latter, usually forbidden category, the judge opined there are actually two types of content-based regulations for which such special justifications (apparently, meaning a compelling interest per strict scrutiny) must be found – one “that restricts speech *because of the ideas* it conveys” and one “that restricts speech *because the government disapproves* of its message.”<sup>137</sup>

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<sup>132</sup> *Norton*, 768 F.3d 713.

<sup>133</sup> *Id.* at 714.

<sup>134</sup> *Id.* at 715.

<sup>135</sup> *Id.* at 717.

<sup>136</sup> *Id.*

<sup>137</sup> *Norton v. City of Springfield*, 768 F.3d 713, 717 (7th Cir. 2014) (emphasis added).

Did Springfield's ordinance fall into either of these two suspect categories of content-based regulations? Judge Easterbrook said the answer was no, asserting "[i]t is hard to see an anti-panhandling ordinance as entailing either kind of discrimination."<sup>138</sup> At this point, Judge Easterbrook went into an analysis that seemingly suggests that begging for money, in and of itself, lacks the kind of value that merits a strict scrutiny analysis. "'Give me money right now' does not express an idea or message about politics, the arts, or any other topic on which the government may seek to throttle expression in order to protect itself or a favored set of speakers," he wrote.<sup>139</sup>

Yet, in fact, the government may seek to squelch such requests to paternalistically protect *others*, even if not itself, from messages with which they disapprove.<sup>140</sup> Indeed, the government often seemingly disapproves of beggars' messages because requests for money may deter people from shopping in particular areas of town.<sup>141</sup> That those messages do not relate to art or politics does not make them inherently less worthy of First Amendment protection.

Judge Easterbrook also found it important that enforcement of Springfield's ordinance is indifferent as to "the pitch used"<sup>142</sup> when asking for money. In other words, an individual's stated reason behind a request for an immediate donation of money makes no difference, with a request "because I'm homeless" being treated in the same fashion under the ordinance as a request "because my daughter is sick" or "because the distribution of income is inequitable."<sup>143</sup> Because the "why," as it were, was treated indifferently by Springfield, its statute was content neutral.

Judge Easterbrook even added a dose of First Amendment theory to his analysis. He opined that "Springfield has not meddled with the marketplace of ideas" because "what activates the prohibition is *where* a person says something (in the 'downtown historic district') rather than what position a person takes on a political or literary question."<sup>144</sup> The marketplace of ideas theory, of course, was imported into First Amendment jurisprudence nearly 100 years ago in *Abrams v. United States*.<sup>145</sup> That is when Justice Oliver Wendell Holmes, Jr. famously reasoned in a dissenting opinion that:

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> See Smith, *supra* note 77, at 551–52.

<sup>141</sup> Smith, *supra* note 77, at 552.

<sup>142</sup> Norton v. City of Springfield, 768 F.3d 713, 717 (7<sup>th</sup> Cir. 2014).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.<sup>146</sup>

Holmes' economic metaphor for a free trade in ideas today is known as the marketplace of ideas, and it is linked squarely with much of modern free speech theory in the United States.<sup>147</sup> Two of the core tenets of the marketplace theory, as Harvard's Derek Bambauer observes, are that government "regulation is unnecessary, and undesirable" and that "governmental limits on communication are inherently suspect because they restrict the flow of competitive products into the marketplace and undercut valuable self-expression."<sup>148</sup>

Dissenting in *Norton*, Judge Daniel Manion bluntly rejected the notion that the marketplace of ideas provides a test for determining if a law is content based.<sup>149</sup> Instead, he turned directly to the Supreme Court's 2014 *McCullen* decision for guidance.<sup>150</sup> Manion wrote that *McCullen* "reminds us that a regulation is content-based if it draws 'content-based distinctions on its face,'" such that enforcement authorities must examine the content of a message to decide if a violation has occurred.<sup>151</sup>

To operationalize this test in *Norton*, Manion asserted that one "must temporarily step into the shoes of the City's enforcement authorities. A police officer seeking to enforce the City's ordinance must listen to what the speaker is saying in order to determine whether the speaker has violated the ordinance."<sup>152</sup> Specifically, an officer would need to listen to hear if the speech was:

•"a request for money (a violation) or "a request for the listener's time, signature, or labor (not a violation);"

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<sup>146</sup> *Id.*

<sup>147</sup> See Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 823–25 (2008) (observing that Justice Holmes' passage in *Abrams* "conceptualized the purpose of free speech so powerfully that he revolutionized not just First Amendment doctrine, but popular and academic understandings of free speech," and that "[n]ever before or since has a Justice conceived a metaphor that has done so much to change the way that courts, lawyers, and the public understand an entire area of constitutional law").

<sup>148</sup> Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649, 653 (2006).

<sup>149</sup> See *Norton v. City of Springfield*, 768 F.3d 713, 722 (7<sup>th</sup> Cir. 2014) (Manion, J., dissenting) (writing that, "[i]n its attempt to determine whether the ordinance is content-based, the court examines whether the ordinance strips a viewpoint from the marketplace of ideas. That is not the test for determining whether an ordinance is a content-based regulation of speech").

<sup>150</sup> *Id.* at 721.

<sup>151</sup> *Id.* (quoting *McCullen v. Coakley*, 134 S. Ct. 2518 (2014)).

<sup>152</sup> *Id.*



- “a request for an immediate transfer of money (potentially a violation) or merely a request for the transfer of money at a future date (not a violation)”;
- and
- “a request for a charitable donation (potentially a violation) or merely a request for a commercial transaction (not a violation).”<sup>153</sup>

Judge Manion thus concluded that because an “officer must listen to and understand the speech to determine if the ordinance has been violated means that the ordinance is content-based, unlike those laws which can be imposed based merely on the volume, location, or conduct accompanying the speech.”<sup>154</sup> In turn, as a content-based law, Springfield’s ordinance was subject to strict scrutiny, with Judge Manion noting that “the City all but concedes that it cannot satisfy this demanding standard.”<sup>155</sup> Manion thus called for an injunction stopping its enforcement.<sup>156</sup>

In summary, the majority and dissent took two very different approaches for resolving the question of content-neutrality and reached two very different results. Judge Manion followed *McCullen*’s straightforward does-it-make-a-difference-what-is-said approach. He did not need to delve into the legislative intent to make his decision. In contrast, Judge Easterbrook adopted a multi-layered approach that: 1) drew distinctions between subject-matter and content-based distinctions; 2) identified two types of content-based distinctions that might be subject to strict scrutiny; and 3) ultimately resorted to – or, more charitably put, turned to – the marketplace of ideas theory of free expression for support. Unfortunately, as of the writing of this article, *Norton* is the only post-*McCullen* case to address a begging ordinance, thus leaving it unclear if other lower courts will embrace Judge Manion’s use of the *McCullen* majority’s approach in similar cases.

#### B. *Thayer v. City of Worcester*<sup>157</sup>

In June 2014, the U.S. Court of Appeals for the First Circuit considered the constitutionality of two ordinances adopted by Worcester, Massachusetts, one of which focused on so-called “aggressive” panhandling and the other which addressed panhandling on roadways, intersections and traffic islands.<sup>158</sup> The appellate court, in an opinion authored by former U.S. Su-

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<sup>153</sup> *Id.*

<sup>154</sup> *Norton v. City of Springfield*, 768 F.3d 713, 722 (7<sup>th</sup> Cir. 2014).

<sup>155</sup> *Id.* at 723.

<sup>156</sup> *Id.*

<sup>157</sup> *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014).

<sup>158</sup> *See Thayer v. City of Worcester*, 755 F.3d 60, 64–65 (1st Cir. 2014) (describing the ordinances).

preme Court Associate Justice David Souter, reasoned that “[i]n determining whether a particular regulation is content-neutral, the *principal enquiry* is ‘whether the government has adopted a regulation of speech because of disagreement with the message it conveys.’”<sup>159</sup> In other words, the key test cuts directly to the legislative purpose of the regulation, not to the face of the statute. He added that the entire aim or point underlying the rule subjecting content-based laws to strict scrutiny “is to bar the government from suppressing speech because it disapproves the message.”<sup>160</sup> Thus, message disapproval is determinative.

Perhaps critically, *Thayer* was decided on June 19, 2014,<sup>161</sup> just one week before the Supreme Court issued its *McCullen* ruling. As noted earlier, Chief Justice Roberts wrote for the *McCullen* majority that the statute at issue there was content neutral because “the Act does not draw content-based distinctions on its face” and that it “would be content based if it required ‘enforcement authorities’ to ‘examine the content of the message that is conveyed to determine whether’ a violation has occurred.”<sup>162</sup> In other words, the first step of the analysis after *McCullen* seems to be to examine the face of the statute and to ask, as Judge Manion did in *Norton*, if enforcement authorities must listen to the message being conveyed to decide if it is content based or content neutral. Writing *Thayer* before *McCullen* was decided, however, Justice Souter did not have the benefit of this insight. Whether his analysis might have changed had *McCullen* come down first thus is speculative.

Worcester’s aggressive panhandling ordinance makes it “unlawful for any person to beg, panhandle or solicit any other person in an aggressive manner.”<sup>163</sup> Soliciting, in turn, is defined as “using the spoken, written, or printed word, bodily gestures, signs, or other means of communication with the purpose of obtaining an immediate donation of money or other thing of value.”<sup>164</sup> Aggressiveness encompasses both violent and threatening language, as well as location-based prohibitions such as soliciting a person within twenty feet of an automated teller machine or a sidewalk café.<sup>165</sup> In

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<sup>159</sup> *Id.* at 67 (emphasis added) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

<sup>160</sup> *Id.* at 68.

<sup>161</sup> *Id.* at 60.

<sup>162</sup> *McCullen v. Coakley*, 134 S. Ct. 2518, 2523 (2014).

<sup>163</sup> *Thayer v. City of Worcester*, 755 F.3d 60, 64 (1st Cir. 2014).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* (Aggressiveness is defined “at two levels. The definition included obviously threatening behavior, as by soliciting someone “in a manner . . . likely to cause a reasonable person to fear immediate bodily harm,” using “violent or threatening language,” or blocking a person’s right of way. It further covered a range of potentially coercive though not conventionally aggressive behaviors, including soliciting from someone waiting in line to buy tickets or enter a building; soliciting after dark, calculated as “the time

other words, geographically defined buffer zones consisting of supposed danger areas are used, in part, to define aggressiveness.

The First Circuit concluded this statute was content neutral after, as Justice Souter wrote, examining both the face of the law and the legislative intent behind it.<sup>166</sup> What seemed crucial for the appellate court was the statute's focus on *aggressive* panhandling, not all panhandling in general. As Souter wrote:

the text of the ordinances does not identify or affect speech except by reference to the behavior, time or location of its delivery, identifying circumstances that raise a risk to safety or that compromise the volition of a person addressed to avoid solicitation: it is aggressive, particularly obtrusive or alarming or risky solicitation, that is forbidden.<sup>167</sup>

It was also important for the appellate court that the law applied equally to all solicitors, regardless of the subject matter. “Girl Scout cookie sellers and Salvation Army bell-ringers are as much subject to the Aggressive Panhandling Ordinance as the homeless panhandler,” Souter observed.<sup>168</sup>

Souter acknowledged that the ban applied only “to solicitations for ‘immediate’ donations of money,” but found that this limitation did not render the statute “content-based *as First Amendment doctrine employs the term.*”<sup>169</sup> This last portion of italicized content is key because it acknowledges that “content based” is a legal term of art rather than a phrase to be taken literally. It suggests a regulation may, indeed, literally be content based, but may not be so as the term is deployed in First Amendment jurisprudence.

Thus, assuming *arguendo* “that the ban on immediate donations is a content distinction,” Justice Souter nonetheless wrote that such a “distinction alone does not render the ordinance content-based so long as it reflects a legitimate, non-censorial government interest.”<sup>170</sup> He reasoned that “[e]ven a statute that restricts only some expressive messages and not others may be considered content-neutral when the distinctions it draws are justified by a legitimate, non-censorial motive.”<sup>171</sup> In other words, the government’s al-

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from one-half hour before sunset to one-half hour after sunrise”; continuing to solicit from a person after the receipt of a negative response; and soliciting anyone within 20 feet of an entrance or parking area of a bank, automated teller machine, public transportation stop, pay phone, theater, or any outdoor commercial seating area like a sidewalk café.”).

<sup>166</sup> *Id.* at 67.

<sup>167</sup> *Id.* at 67–68.

<sup>168</sup> *Thayer v. City of Worcester*, 755 F.3d 60, 70 (1st Cir. 2014).

<sup>169</sup> *Id.* at 69 (emphasis added).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 68.

leged purpose, motive and intent are key, not whether or not the law singles out some types of expression from others.

In October 2014, the plaintiffs in *Thayer* filed a petition for a writ of certiorari with the U.S. Supreme Court.<sup>172</sup> A key part of their petition argument is that “the Court should vacate the decision below and remand for the First Circuit to reconsider its decision in light of *McCullen*.”<sup>173</sup> The petition specifically cites *McCullen*’s does-it-matter-what-is-being-said approach described in Part I, Section B, Subsection 1 of this article.<sup>174</sup> The petition then emphasizes that this test “contains no subjective intent requirement and is directly at odds with the First Circuit’s approach below.”<sup>175</sup>

### C. *ACLU of Idaho v. City of Boise*

In January 2014, U.S. District Judge Edward J. Lodge considered the constitutionality of a Boise, Idaho, statute prohibiting solicitation of money in certain public places.<sup>176</sup> The statute defined solicitation as:

to request, ask, or beg, whether by words, bodily gestures, signs, or other means, for an immediate donation of money or other thing of value, including the purchase of an item or service for an amount far exceeding its value, under circumstances where a reasonable person would understand that the purchase is a donation.<sup>177</sup>

Although the government argued the ordinance was content neutral, Judge Lodge ruled otherwise and concluded the plaintiffs were “likely to succeed on the merits of their claim that the ordinance is not content neutral” and that the City of Boise “has not carried its burden in establishing the ordinance is content neutral.”<sup>178</sup> To reach this result, Judge Lodge applied a disjunctive test under which a law is content based “if either the underlying purpose of the regulation is to suppress particular ideas *or* if the regulation, by its very terms, singles out particular content for differential

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<sup>172</sup> *Thayer*, 755 F.3d 60, *petition for cert. filed*, 83 U.S.L.W. 13 (U.S. Oct. 14, 2014) (No. 14-428).

<sup>173</sup> *Id.* at 4.

<sup>174</sup> *Id.* at 29.

<sup>175</sup> *Id.* at 29–30.

<sup>176</sup> *ACLU of Idaho v. Boise*, 998 F. Supp. 2d 908 (D. Idaho 2014). Specifically, solicitation is banned, among other places, in “an open public area while a person is waiting in line to be admitted to a commercial establishment, while on Boise’s public transportation systems, in open public areas within twenty (20) feet of an ATM or entrance to a banking establishment, sidewalk café, mobile or street vendor, any entrance or exit from a public toilet facility (including temporary port-a-potties), any bus stop, taxi stand or valet drop off/pickup station or stand, any parking pay box or station.” *Id.* at 915.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 916–17.

treatment.”<sup>179</sup> This is an interesting approach because the first part (“the underlying purpose”) entails examination of legislative intent, while the second part (“by its very terms”) requires no such examination of legislative intent and, instead, focuses on the face of the statute. The disjunctive “or” means that a judge has the power to find a law content based due *either* to its legislative intent or to its terms.

Apparently applying the second, facial part of this test in *City of Boise*, Judge Lodge reasoned that the ordinance suppresses:

particular speech related to seeking charitable donations and treats this speech content different than other solicitation speech. The ordinance does not restrict solicitation of signatures for petition on a matter of public concern, political support solicitation, religious solicitation, etc. in the same public areas. It only restricts solicitation speech for donations of money or property.<sup>180</sup>

In terms of comparing this analysis with the logic embraced by Judge Manion’s dissent in *Norton*,<sup>181</sup> it means that a law enforcement officer in Boise would need to listen to the nature of the solicitation to determine what it was for and, in turn, to determine if a violation of the Boise law occurred. Judge Lodge, perhaps hedging his judicial bet against a possible appeal that might later classify the ordinance as content neutral, added that even if the Boise law was content neutral, Boise still could not satisfy intermediate scrutiny.<sup>182</sup> Focusing on Boise’s interest in adopting the statute, Lodge drew a pivotal distinction between aggressive and non-aggressive panhandling, with only the latter at issue in the case.<sup>183</sup> He reasoned that “while the aggressive solicitation prohibition is clearly related to public safety, the restrictions on non-aggressive solicitation do not appear to raise the same public safety governmental interest. Business owners and residents simply not liking panhandlers in acknowledged public areas does not rise to a significant governmental interest.”<sup>184</sup> He also found that the means of carrying out this alleged interest were not sufficiently tailored, writing that “[w]hile the ordinance does leave open the ability to sit or stand passively in a very limited public area with a sign requesting money or proper-

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<sup>179</sup> *Id.* at 916 (quoting *Valle del Sol, Inc. v. Whiting*, 709 F.3d 808, 819 (9th Cir. 2013)) (emphasis added).

<sup>180</sup> *ACLU of Idaho v. Boise*, 998 F. Supp. 2d 908, 916 (D. Idaho 2014).

<sup>181</sup> *See supra* Part II.A.

<sup>182</sup> *ACLU of Idaho*, 998 F. Supp. 2d at 917.

<sup>183</sup> *See id.* (noting that “Plaintiffs are not challenging the aggressive solicitation portion of the ordinance”).

<sup>184</sup> *Id.*

ty, this is not an ample alternative channel for communication of the information.”<sup>185</sup>

#### D. Clatterbuck v. City of Charlottesville

In February 2013, the U.S. Court of Appeals for the Fourth Circuit considered the constitutionality of a Charlottesville, Virginia, ordinance prohibiting solicitations for immediate donations of money or other things of value near two streets running through the city’s Downtown Mall.<sup>186</sup> The ordinance was challenged by several financially strapped local men who claimed to rely, in part, on begging to sustain themselves and who asserted the ordinance was a “content-based regulation that criminalizes speech based on the content of the communication.”<sup>187</sup>

Initially, the Fourth Circuit found that “the speech and expressive conduct that comprise begging merit First Amendment protection” and, in turn, that the Downtown Mall where begging was regulated constitutes a “quintessential public forum over which the First Amendment’s shield is strongest.”<sup>188</sup> In brief, First Amendment rights were fully at stake.

The court then turned to the issue of whether the ordinance was content based or content neutral.<sup>189</sup> In doing so, it applied what it called “a pragmatic rather than formalistic approach to evaluating content neutrality.”<sup>190</sup> It explained that:

not every content distinction merits strict scrutiny; instead, a distinction is only content-based if it distinguishes content “with a censorial intent to value some forms of speech over others to distort public debate, to restrict expression because of its message, its ideas, its subject matter, or to prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>191</sup>

Under this approach, a content-based law is only subject to strict scrutiny if any one of three criteria – each of which requires an examination of legislative intent – exists. The Fourth Circuit readily found

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<sup>185</sup> *Id.*

<sup>186</sup> *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 551–52 (4th Cir. 2013).

<sup>187</sup> *Id.* at 552.

<sup>188</sup> *Id.* at 553, 555.

<sup>189</sup> *Id.* at 555–560.

<sup>190</sup> *Id.* at 556.

<sup>191</sup> *Clatterbuck*, 708 F.3d at 556 (quoting *Brown v. Town of Cary*, 706 F.3d 294, 301–02 (4th Cir. 2013) (internal citations and alterations omitted)).

that the Charlottesville ordinance was, indeed, content-based on its face, reasoning that it:

plainly distinguishes between types of solicitations on its face. Whether the Ordinance is violated turns solely on the nature or content of the solicitor's speech: it prohibits solicitations that request immediate donations of things of value, while allowing other types of solicitations, such as those that request future donations, or those that request things which may have no "value" – a signature or a kind word, perhaps.<sup>192</sup>

While such facial distinctions seemingly would have been sufficient for both Judge Manion in *Norton* and Judge Lodge in *City of Boise* to apply strict scrutiny to the Charlottesville ordinance, the Fourth Circuit delved further. "[W]e do not end our inquiry there," it wrote, turning then to the legislative purpose behind the law under its so-called "pragmatic approach."<sup>193</sup> Here, however, the Fourth Circuit found itself flummoxed and unable to reach a conclusion, dubbing itself "ill-equipped to reach a conclusion as to censorial purpose, based on the record before us, at this juncture."<sup>194</sup>

Specifically, at the motion to dismiss stage and considering only the pleadings before it, the Fourth Circuit observed that Charlottesville's ordinance included no official statement of purpose and "no evidence is properly before us to indicate the City's reason or reasons for enacting the ordinance."<sup>195</sup> In contrast, the plaintiffs had alleged in their complaint that Charlottesville adopted the ordinance specifically "to prevent their undesired presence on the Mall" and to stop them "from conveying their unwanted message."<sup>196</sup> This was sufficient for the Fourth Circuit to conclude that the district court had erred in dismissing the complaint, and it remanded the case back to the lower court.<sup>197</sup>

In summary, the Seventh Circuit's split decision in *Norton*, Justice Souter's ruling for the First Circuit in *Thayer*, Judge Lodge's opinion in *City of Boise* and the Fourth Circuit's decision in *Clatterbuck* demonstrate a range of different approaches and divergent results in cases involving anti-begging regulations and the larger question of whether they are to be treated as content based or content neutral. The next part

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<sup>192</sup> *Id.* at 556.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 556.

<sup>195</sup> *Id.* at 558.

<sup>196</sup> *Clatterbuck*, 708 F.3d at 559–60.

<sup>197</sup> *Id.* at 560.

suggests there could be a latent and lurking reason why some judges are reticent to find such laws content based.

### III. THE NEAR IMPOSSIBILITY OF BEGGING BANS SATISFYING STRICT SCRUTINY, AND JUDICIAL OPTIONS FOR ANALYZING SUCH REGULATIONS

One possible reason for some courts categorizing begging bans as content-neutral restrictions on expression may be judicial recognition that labeling them content based almost assuredly dooms them to failure. Strict scrutiny, as Justice Stephen Breyer recently wrote, subjects a speech regulation to “near-automatic condemnation”<sup>198</sup> and constitutes “a categorization that almost always proves fatal to the law in question.”<sup>199</sup>

Furthermore, Justice Antonin Scalia remarked in 2011 for the majority in the violent videogame case of *Brown v. Entertainment Merchants Association* that strict scrutiny “is a demanding standard.”<sup>200</sup> The U.S. Court of Appeals for the First Circuit concurred with this sentiment in October 2014, remarking that strict scrutiny “is exceedingly difficult, and the vast majority of such regulations are held to unconstitutionally inhibit speech.”<sup>201</sup> After the high court’s ruling in *United States v. Alvarez*, the standard became even more rigorous because the government now must prove there is “a direct causal link between the restriction imposed and the injury to be prevented.”<sup>202</sup>

In *Village of Schaumburg v. Citizens for a Better Environment*, the U.S. Supreme Court considered the constitutionality of an anti-solicitation ordinance.<sup>203</sup> In doing so, it recognized that prevention of “undue annoyance” and fraud allegedly caused by solicitors are “substantial” interests.<sup>204</sup> Similarly and much more recently, the U.S. Court of Appeals for the Sixth Circuit agreed, when considering a facial over-

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<sup>198</sup> *United States v. Alvarez*, 132 S. Ct. 2537, 2552 (2012) (Breyer, J., concurring).

<sup>199</sup> *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 366 (2009).

<sup>200</sup> 131 S. Ct. 2729, 2738 (2011).

<sup>201</sup> *Showtime Entm’t, LLC v. Town of Mendon*, 769 F.3d 61, 71 (1st Cir. 2014).

<sup>202</sup> *Alvarez*, 132 S. Ct. at 2549.

<sup>203</sup> 444 U.S. 620, 622 (1980) (writing that the ordinance in question prohibited “the solicitation of contributions by charitable organizations that do not use at least 75 percent of their receipts for ‘charitable purposes,’ those purposes being defined to exclude solicitation expenses, salaries, overhead, and other administrative expenses”).

<sup>204</sup> *Id.* at 636.



breadth challenge to a Michigan statute criminalizing begging, that “prevention of fraud and duress are substantial state interests.”<sup>205</sup>

Although a substantial interest may be sufficient to sustain a content-neutral regulation evaluated under intermediate scrutiny, it does not rise to the level of a compelling interest or an interest of the highest order necessary to satisfy the strict scrutiny standard of review.<sup>206</sup> Furthermore, the Court in *Schaumburg* found that a municipality’s “legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation.”<sup>207</sup> In other words, such a ban adopted in the interest of targeting fraud simply is not narrowly tailored and thus would fail strict scrutiny. As the Sixth Circuit recently suggested, the governmental “interest in preventing fraud can be better served by a statute that, instead of directly prohibiting begging, is more narrowly tailored to the specific conduct, such as fraud.”<sup>208</sup> Indeed, the U.S. Supreme Court in 2012 in *United States v. Alvarez* listed fraud as one of the few categories of speech not protected by the First Amendment.<sup>209</sup> In other words, the remedy is to target fraud specifically, not begging generally in hopes of sweeping up fraud in a vast purse seine net.

In *International Society for Krishna Consciousness, Inc. v. Lee*, Chief Justice William Rehnquist wrote that “face-to-face solicitation presents risks of duress that are an appropriate target of regulation. The skillful, and unprincipled, solicitor can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation.”<sup>210</sup> Yet to ban *all begging* because of the possibility that a few beggars might engage in duress-inducing speech directed at some individuals surely is, as the U.S. Supreme Court once put it, “to burn the house to roast the pig.”<sup>211</sup> Put more bluntly, it is legislative overkill and extreme overbreadth.

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<sup>205</sup> *Speet v. Schuette*, 726 F.3d 867, 879 (6th Cir. 2013).

<sup>206</sup> *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 662 (1994); see also *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011) (observing that under strict scrutiny, a regulation must be “justified by a compelling government interest”); *Swanner v. Anchorage Equal Rights Comm’n*, 513 U.S. 979, 982 (1994) (Thomas, J., dissenting) (equating a compelling interest to “a ‘paramount’ interest, an interest ‘of the highest order’”); Matthew D. Bunker et al., *Strict in Theory, But Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL’Y 349, 358 (2011) (observing that a “significant or important interest is lesser than a compelling interest under strict scrutiny”).

<sup>207</sup> *Village of Schaumburg*, 444 U.S. at 637.

<sup>208</sup> *Speet*, 726 F.3d at 880.

<sup>209</sup> *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012).

<sup>210</sup> *Int’l Soc’y for Krishna Consciousness, Inc., v. Lee*, 505 U.S. 672, 684 (1992).

<sup>211</sup> *Butler v. Michigan*, 352 U.S. 380, 383 (1957); see generally Clay Calvert, *Of Burning Houses and Roasting Pigs: Why Butler v. Michigan Remains a Key Free Speech Victory More than a Half-Century*

Furthermore, to the extent that begging occurs in public places like sidewalks, any discomfort experienced comes, literally, with the territory. As Chief Justice Roberts wrote in *McCullen*:

With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out. In light of the First Amendment's purpose "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail," *this aspect of traditional public fora is a virtue, not a vice.*<sup>212</sup>

Such public policy concerns, grounded in a venerated First Amendment theory like the marketplace of ideas,<sup>213</sup> militate in favor of the imposition of strict scrutiny when begging transpires on public sidewalks.

What, then, should the Court do? One option the Court can adopt when it comes to evaluating regulations that negatively affect begging for immediate donations of money or food in public places (but allow other types of solicitation) is simply to do what Justice Kennedy did in *Alameda Books* when it comes to the zoning of sexually oriented business.<sup>214</sup> Namely, openly admit that the regulations are content based, yet carve out an exception for them from the general rule of strict scrutiny and, instead, apply the more relaxed intermediate scrutiny standard, provided the government proves the regulations are aimed at so-called secondary effects of begging. This path forward avoids the somewhat dubious, if not disingenuous, judicial efforts to reason that regulations that, per *McCullen*, require law enforcement personnel to listen to the content of speech to determine if a violation occurs are nonetheless content neutral.

In other words, the Court could treat both sexually oriented businesses and the homeless who beg as, to borrow Kathleen Sullivan's fine phrase, "second-class First Amendment citizens"<sup>215</sup> and, in turn, give the government a judicial break when regulating them. As Sullivan, former dean of the Stanford Law School and currently named partner and chair of the national appellate practice at Quinn Emanuel Urquhart & Sullivan, puts it,

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*Later*, 64 FED. COMM. L.J. 247 (2012) (addressing this principle and the lasting importance of the case in which the U.S. Supreme Court articulated it).

<sup>212</sup> *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (emphasis added) (quoting *FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984)).

<sup>213</sup> See generally RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 6 (1992) (describing the marketplace of ideas as "perhaps the most powerful metaphor in the free speech tradition," and noting that its premise is that "humankind's search for truth is best advanced by a free trade in ideas").

<sup>214</sup> See *supra* note 121 and accompanying text.

<sup>215</sup> Kathleen M. Sullivan, *Free Speech Wars*, 48 SMU L. REV. 203, 206 (1994).

“the government nearly always wins”<sup>216</sup> when a regulation is treated as if it were content neutral.

Two immediate problems arise with such a categorical carve-out approach from the general rule of strict scrutiny. First and foremost, although the Supreme Court now treats corporations and humans – in this instance, SOBs and beggars – as if they are one in the same when it comes to First Amendment rights, it also holds that “the Government may commit a constitutional wrong when by law it identifies certain preferred speakers.”<sup>217</sup> As Justice Kennedy wrote for the majority in *Citizens United v. Federal Elections Commission*:

By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker’s voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.<sup>218</sup>

Treating SOBs and beggars as somehow less deserving of full First Amendment rights by making it easier for the government to regulate their speech directly violates this logic of speaker equality. Why, in other words, should these speakers be singled out from the otherwise established rule that content-based laws are subject to strict scrutiny?

The answer to that query may be found in the second problem with this approach. In particular, the Court increasingly seems to be moving away from a methodology that distinguishes between high value and low value expression originally instantiated in First Amendment jurisprudence by the fighting words case of *Chaplinsky v. New Hampshire*.<sup>219</sup> As Professor Ronald Collins recently wrote, the Roberts Court

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<sup>216</sup> See Kathleen M. Sullivan, Quinn Emanuel Urquhart & Sullivan, LLP, at 208, <http://www.quinnemanuel.com/attorneys/sullivan-kathleen-m.aspx> (last visited Jan. 25, 2015).

<sup>217</sup> See *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (reasoning that the First Amendment prohibits “restrictions distinguishing among different speakers, allowing speech by some but not others,” and finding that “[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content”); see also Elizabeth R. Sheyn, *The Humanization of the Corporate Entity: Changing Views of Corporate Criminal Liability in the Wake of Citizens United*, 65 U. MIAMI L. REV. 1, 2 (2010) (observing that the Court in *Citizens United* held that “corporations are equal to human beings, at least under the First Amendment’s Free Speech Clause”).

<sup>218</sup> 558 U.S. 310, 340–41 (2010).

<sup>219</sup> 315 U.S. 568, 571–72 (1942). In *Chaplinsky*, the Court wrote in dictum that “it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no

“has generally declined to expressly invoke *Chaplinsky’s* low-value speech prong as a rationale for enlarging the realm of unprotected expression.”<sup>220</sup> Furthermore, the Court made it clear in *Brown v. Entertainment Merchants Association* that the border separating political speech from entertainment fare is too blurry to draw clear doctrinal lines.<sup>221</sup> Violent video games therefore receive the full amount of First Amendment protection and regulations that target them in the name of protecting minors from alleged harm must be subjected to strict scrutiny.<sup>222</sup> It thus seems jurisprudentially jarring to hold that laws targeting violent video games produced by corporations for entertainment purposes are subjected to strict scrutiny, while laws negatively affecting humans’ ability to beg for life-sustaining food or money are only measured against intermediate scrutiny.

A second option is for the Court to admit that regulations that negatively affect begging for immediate donations of money or food in public places (but allow other types of solicitation) are content-based measures and subject them to strict scrutiny. In other words, unlike option one, the Court would not carve out an exception for them and, instead, would demand that the government demonstrate the existence of a compelling interest that cannot be served by an alternative regulation that restricts less speech.

As noted above, this standard would be very difficult to prove.<sup>223</sup> For example, to the extent the regulations are designed to prevent fraud, laws targeting fraud are more narrowly tailored to address that issue than are laws targeting begging.<sup>224</sup> Furthermore, to the extent that the laws are designed to protect businesses that might lose potential foot-traffic customers who don’t want to come into contact with beggars, it would seem like a difficult argument to make that a businesses’ ability to make more money should trump and take precedence over a homeless person’s right to ask for money in order to eat.

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essential part of any exposition of ideas, and 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.” *Id.*

<sup>220</sup> Ronald K. L. Collins, *Exceptional Freedom – The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 424 (2012).

<sup>221</sup> See 131 S. Ct. 2729, 2733 (2011) (writing that while “[t]he Free Speech Clause exists principally to protect discourse on public matters . . . we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try”).

<sup>222</sup> See *id.* at 2738 (observing that “video games qualify for First Amendment protection”).

<sup>223</sup> See *supra* notes 195–99 and accompanying text.

<sup>224</sup> See *supra* notes 205–06 and accompanying text

Importantly, after *Brown* and *Alvarez*, municipalities would also need to prove a direct causal link – not simply a correlation<sup>225</sup> – between the speech of beggars and the negative effects such speech allegedly causes for which “ambiguous proof will not suffice.”<sup>226</sup> This means that municipalities would need to conduct their own studies or offer some form of evidence regarding begging in their communities and its alleged deleterious effects before adopting regulations. Those studies would need to be conducted with sufficient rigor to prove a direct causal link between begging and its alleged harms. Furthermore, as Justice Scalia suggested in *Brown*, the real-world size of those effects would need to be considered.<sup>227</sup> All of this would seem very difficult for a municipality to demonstrate, further illustrating why strict scrutiny would be a very high hurdle for anti-begging regulations to clear.

#### IV. CONCLUSION

Begging ordinances are not likely to go away any time soon in the United States. As Professor Alafair Burke of Hofstra University recently observed, “in the name of community, cities have enacted or increased the enforcement of substantive criminal laws that are focused more on social compliance than traditional criminal punishment, such as prohibitions against public camping, panhandling, and loitering.”<sup>228</sup> A study of 188 municipalities conducted by the National Law Center on Homelessness and Poverty found there was “a seven percent increase in prohibitions on begging or panhandling between 2009 and 2011.”<sup>229</sup> The trend is not limited to a particular part of the country. For example, Sarasota, Florida, adopted an anti-begging ordinance in 2013,<sup>230</sup> East Hartford, Connecticut approved one in June, 2014<sup>231</sup> and lawmakers in Pittsburgh, Pennsylvania were considering a begging ordinance in late 2014.<sup>232</sup>

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<sup>225</sup> See JOANN KEYTON, COMMUNICATION RESEARCH: ASKING QUESTIONS, FINDING ANSWERS 231 (3d ed. 2011) (observing that “correlation does not necessarily equal causation,” and pointing out that “[t]he strength and direction of the correlation coefficient do not speak to the likelihood that one variable caused the other variable to increase or decrease in the way that it did”).

<sup>226</sup> *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2739 (2011).

<sup>227</sup> See *id.* (deriding California’s studies as demonstrating only “minuscule real-world effects,” and labeling those effects as “both small and indistinguishable from effects” caused by other sources).

<sup>228</sup> Alafair Burke, *Policing, Protestors, and Discretion*, 40 FORDHAM URB. L.J. 999, 1011 (2013).

<sup>229</sup> Dan Frosch, *Homeless are Fighting Back Against Panhandling Bans*, N.Y. TIMES, Oct. 6, 2012, at A12.

<sup>230</sup> Jessie Van Berkel, *Sarasota OKs a New Ban on Panhandling*, SARASOTA HERALD TRIB., Apr. 24, 2013, <http://www.heraldtribune.com/article/20130423/ARTICLE/130429855?p=1&tc=pg>.

<sup>231</sup> Hilda Muñoz, *Anti-Panhandling Ordinance Approved; Measure Modeled After Others in State, Prohibits Aggressive Behavior*, HARTFORD COURANT, June 4, 2014, <http://articles.courant.com/2014-06->

Furthermore, the implications of the content-based-versus-content-neutral issue addressed in this article extend beyond the realm of begging into other statutes targeting different forms of solicitation. For example, in 2011 the U.S. Court of Appeals for the Ninth Circuit fractured, in an *en banc* ruling, over whether an ordinance targeting solicitation by day laborers for employment was content based or content neutral.<sup>233</sup> The ordinance made it unlawful to “stand on a street or highway and solicit, or attempt to solicit, employment, business, or contributions from an occupant of any vehicle.”<sup>234</sup>

The majority applied the intermediate scrutiny test for time, place and manner regulations.<sup>235</sup> In contrast, a concurring opinion expressed the view that the ordinance “is a content-based, rather than content-neutral, restriction on speech. It restricts discussion of certain subject matters—namely, speech that requests employment, business, and contributions—while allowing free discussion about other subject matters.”<sup>236</sup>

Dissenting, Ninth Circuit Chief Judge Alex Kozinski even argued the statute targeted only conduct and not speech.<sup>237</sup> Assuming, *arguendo*, that speech was involved, Kozinski would have characterized the law as content neutral, reasoning that it “draws no distinctions based on content; it doesn’t favor one kind of speaker over another. What it does is to regulate a very narrow and finely drawn class of conduct: standing around on sidewalks and street corners in order to interact with passing motorists.”<sup>238</sup> Unfortunately, the U.S. Supreme Court passed on the opportunity to hear the case and resolve the issue.<sup>239</sup>

The problem is that the variety of tests described in Part I, Section B for distinguishing content-based laws from content-neutral ones provide courts with an array of options and choices that can lead to very different conclu-

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03/community/hc-east-hartford-panhandle-0604-20140603\_1\_your-town-news-new-ordinance-veterans-affairs-commission.

<sup>232</sup> Steve Hallock, *Panhandling in Pittsburgh: Bruce Kraus’ Proposed Ordinance Would Be Unconstitutional*, PITTSBURGH POST-GAZETTE, Oct. 20, 2014, <http://www.post-gazette.com/opinion/Op-Ed/2014/10/20/Panhandling-in-Pittsburgh-Bruce-Kraus-proposed-ordinance-would-be-unconstitutional/stories/201410200025>.

<sup>233</sup> *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 945 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1566 (2012).

<sup>234</sup> *Id.* at 941.

<sup>235</sup> *See id.* at 945.

<sup>236</sup> *Id.* at 954 (Smith, J., concurring).

<sup>237</sup> *Id.* at 958–59 (Kozinski, J., dissenting).

<sup>238</sup> *Comite de Jornaleros de Redondo Beach*, 657 F.3d at 958–59 (Kozinski, J., dissenting).

<sup>239</sup> *City of Redondo Beach v. Comite de Jornaleros de Redondo Beach*, 132 S. Ct. 1566 (2012), *denying cert. to* 657 F.3d 936.

sions regarding the same statute. Should courts consider only the face of a statute and ask if law enforcement officers must listen to what is being said to know if it has been violated? Should courts go beyond this facial approach and delve more deeply into the legislative purpose or purposes that gave rise to a statute? And should they consider if those interests are related to the direct impact of the speech on those who hear it – the primary effects of speech rather than the supposed secondary ones?

The Court has several possible routes it can adopt to clarify this muddle. The most concise and effective of these options, in the author's opinion and in terms of erring on the First Amendment side of maximizing free speech, involves three uncomplicated steps:

1. Initially, courts would adopt the straight-forward approach embraced most recently by the *McCullen* majority. They would simply ask whether or not a law enforcement officer must listen to what is being said – listen to the substantive content of the words being spoken – in order to determine if a violation has occurred.<sup>240</sup> If, on the face of the statute, it would make a difference what is being said – if, for example, it makes a difference whether someone is asking for money/food or, instead, whether they are asking someone to sign a petition, to join in a rally or get a ride to work – then the law is content based and subject to strict scrutiny.

There simply is no need to go into an examination of legislative intent at the threshold stage of deciding if a law is content based or content neutral if it is content based on its face. As Justice Kennedy wrote in 2002, “whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based.”<sup>241</sup> If, in turn, the legislative interest underlying a law is strong enough – if it is compelling – then it will be able to support a content-based law under a strict scrutiny analysis.<sup>242</sup>

2. If it is unclear after consideration of the first step whether a law is content based or content neutral, then courts should adopt Justice Breyer's suggestion that close cases should be decided under strict scrutiny rather than intermediate scrutiny.<sup>243</sup> In other words, the benefit of the doubt should go to the First Amendment interests, not to those of the government.

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<sup>240</sup> *Supra* Part I.B.1.

<sup>241</sup> *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring).

<sup>242</sup> *See supra* text accompanying note 4 (describing the strict scrutiny standard of review).

<sup>243</sup> *Supra* Part I.B.5.

3. Finally, only if a law is found facially content neutral under the first step should the individual or group challenging it be able to argue, per *McCullen*, that it nonetheless is content based because the legislative body that adopted it was “concerned with undesirable effects that arise from ‘the direct impact of speech on its audience’ or ‘[l]isteners’ reactions to speech.’”<sup>244</sup> In other words, an ordinance that bans all forms of solicitation – regardless of topic or request and not confined only to begging – in a specific geographic area of a municipality would nonetheless be held content based if government was concerned about the audience’s negative reaction to solicitation. As Justice Kennedy wrote in *Alameda Books*, the primary effects of speech are those related to the impact of the speech on its audience, such as changing minds and prompting people to act, and they “signify the power and the necessity of free speech.”<sup>245</sup>

Under this step governmental concerns that individuals who are solicited by beggars might be put in a state of discomfort, offense, fear or duress are primary effects of speech and make a regulation content based. Why? Because they represent the listeners’ reactions to the speech. They may prompt people to walk away quickly or to never visit an area of town again.

This three-step analysis scraps the secondary effects doctrine and, unless step three is necessary, spares courts from having to ferret out the legislative purpose of a law. Professor Ashutosh Bhagwat observed back in 1997 what he called the Court’s “renewed interest in the previously forbidden terrain of *purpose scrutiny*, including a new willingness to examine, and pass independent judgment on, the reasons why the state has chosen to burden individual rights.”<sup>246</sup> He contended then that “there is an inconsistent but recurring tendency in the Court’s content jurisprudence to define content-neutral laws as those ‘justified without reference to the content of the regulated speech’ – in other words, the question of whether a law is content-neutral or not depends on the *purpose* of the challenged law.”<sup>247</sup> Bhagwat asserted that this approach contributes to “extraordinary doctrinal confusion over the most basic questions underlying the Court’s content jurisprudence” and that “at least part of that confusion is related to the Court’s failure to develop an adequate framework to engage in purpose scrutiny.”<sup>248</sup> He ulti-

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<sup>244</sup> *McCullen v. Coakley*, 134 S. Ct. 2518, 2531–32 (2014) (quoting *Boos v. Berry*, 485 U.S. 312, 321 (1988)).

<sup>245</sup> *Alameda Books*, 535 U.S. at 444 (Kennedy, J., concurring).

<sup>246</sup> Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 312 (1997) (emphasis added).

<sup>247</sup> *Id.* at 316 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (emphasis added).

<sup>248</sup> *Id.* at 316–17.



mately called for the Court to abolish the distinction between content-based and content-neutral laws.<sup>249</sup>

Rather than completely jettison this dichotomy to the ash can of First Amendment jurisprudence's discarded doctrines, the three-step approach set forth above preserves it while mitigating the muddling that comes in the quest for legislative purposes. Ultimately, and particularly after its fractured 2014 ruling on the issue in *McCullen*, the high court must clarify the test that lower courts should use in deciding whether a law is content based. The quartet of anti-begging cases examined in this article bring both the importance and timeliness of this problem into high relief.

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<sup>249</sup> *Id.* at 362.

