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THE FIRST AMENDMENT AND THE POSTAL SERVICE'S SUBSCRIBER REQUIREMENT: CONSTITUTIONAL PROBLEMS WITH DENYING EQUAL ACCESS TO THE POSTAL SYSTEM

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INTRODUCTION

Second-class mail has long enjoyed the most favorable postage rates offered by the Postal Service for the transportation and delivery of mail.[1] These low rates are made available to second-class mail, which includes most newspapers and periodicals, for the purpose of encouraging public dissemination of information and ideas.[2] However, second-class mail rates are available only to pub-

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1. *See* Hannegan v. Esquire, Inc., 327 U.S. 146, 151, 154 (1946) (discussion of low rates for second-class mail); United States *ex rel.* Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 410 (1921) (justification for second-class rates). A classification system for mailable matter was first instituted with the Act of Mar. 3, 1863, ch. 71, § 19, 12 Stat. 701, 704-05. The classification system was revised in § 7 of the Act of Mar. 3, 1879, ch. 180, 20 Stat. 355, 358. With the Postal Service Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719 (codified as amended at 39 U.S.C. §§ 101 - 5605 (1982 & Supp. III 1985)), Congress delegated its classification and ratemaking authority to the Postal Service. *See* 39 U.S.C. § 3621 (1982). Congress also established the Postal Rate Commission to recommend proposed rate and classification changes to the Postal Service's Board of Governors. *See id.* §§ 3601, 3622. Current effective classifications and rates are set forth in the UNITED STATES POSTAL SERVICE DOMESTIC MAIL MANUAL, which is incorporated into the Postal Service regulations by reference at 39 C.F.R. § 111.1 (1986).

2. The purpose of encouraging public dissemination of information and ideas was not evident in the original legislation instituting the lower second-class mailing rate. Section 20 of the 1863 Act accorded second-class privileges to "all mailable matter exclusively in print, and regularly issued at stated periods, without addition by writing, mark, or sign." Act of Mar. 3, 1863, ch. 71, § 20, 12 Stat. 705. The 1879 Act, however, restricted second-class privileges to publications "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts or some special industry." Act of Mar. 3, 1879, ch. 180, § 14, 20 Stat. 359.

During the debates preceding the passage of the 1879 Act, several members of Congress indicated that the lower second-class rates were to be made available with the goal of benefitting the public by encouraging the communication of news and ideas. 8 CONG. REC. 696-97 (1879); 7 CONG. REC. 4025-27 (1878). One member of the House Postal Committee explained that "the reason for which papers are allowed to go at a low rate of postage . . . is because they are the most efficient educators of our people. It is because they go into general circulation and are intended for dissemination of useful knowledge such as will promote the prosperity and the best interests of the people . . . ." 8 CONG. REC. 2135 (1879) (statement of

lications that distribute one-half or more of all circulated copies either to paying subscribers[3] or to persons who have requested that the publication be sent to them.[4] A publication that distributes

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Rep. Money). In interpreting the 1879 Act, the Supreme Court expressly recognized that Congress intended the lower second-class rates to provide an incentive for the distribution of periodicals conveying educational information and ideas. *See Hannegan*, 327 U.S. at 154-55; *Burleson*, 255 U.S. at 410. That purpose was carried over into the mail classification system established by the Postal Service Reorganization Act of 1970.

In § 8(c) of the 1970 Act, the Postal Commission's recommendations concerning changes in the mail classification schedule are directed to be made in accordance with several specified factors. 39 U.S.C. § 3623(c) (1982). One of those factors is "the relative value to the people of the kind of mail matter entered into the postal system." *Id.* Exercising its authority under the statute, the Postal Service has promulgated regulations providing that all general publications eligible for second-class rates "must be originated and published for the purpose of disseminating information of a public character or they must be devoted to literature, the sciences, art, or some special industry." UNITED STATES POSTAL SERVICE DOMESTIC MAIL MANUAL § 422.21 (1985) (incorporated by reference at 39 C.F.R. § 111.1 (1986)) [hereinafter DOMESTIC MAIL MANUAL]. The language of the regulation is almost identical to that of § 14 of the 1879 statute. Act of Mar. 3, 1879, ch. 180, § 14, 20 Stat. 359.

3. Section 422.221 of the DOMESTIC MAIL MANUAL, *supra* note 2, provides in relevant part:

> *List of Subscribers.* General publications must have a legitimate list of subscribers who have paid or promised to pay, at a rate above a nominal rate, for copies to be received during a stated time. Persons whose subscriptions are obtained at a nominal rate shall not be included as a part of the legitimate list of subscribers. Copies sent in fulfillment of subscriptions obtained at a nominal rate must be charged with postage at regular rates . . . .

Section 422.223 of the DOMESTIC MAIL MANUAL, *supra* note 2, provides:

> *Free or Nominal Rate Circulation.* Publications primarily designed for free circulation and/or circulation at nominal rates may not qualify for the general publications category. Publications are considered primarily designed for free circulation and/or circulation at nominal rates when one-half or more of all copies circulated are provided free of charge to the ultimate recipients, or are paid for at nominal rates by the ultimate recipients, or when other evidence indicates that the intent of the publisher is to circulate the publication free and/or at nominal rates. The distribution of all copies of a publication is considered, whether circulated in the mails or otherwise.

4. Section 422.6 of the DOMESTIC MAIL MANUAL, *supra* note 2, provides in relevant part:

> *Requester Publications.* A publication . . . is eligible for authorization to mail at [second-class rates] if it meets . . . all of the following requirements:
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> a. Each issue must contain at least 24 pages . . .
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> b. No issue may contain more than 75 percent advertising . . .
>
> c. The publication must not be owned or controlled by one or more individuals or business concerns . . . for the advancement of the main business or calling of those who own or control it; and
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> d. [T]he publication must have a legitimate list of persons who request the publication, and 50 percent or more of the copies of the publication must be distributed to persons making such requests. Subscription copies paid for or promised to be paid for . . . may be included in the determination of whether the 50 percent request requirement is met. Persons will not be deemed to have requested the publication if their request is induced by a premium offer or by receipt of material consideration. Requests which are more than three years old will not be considered to meet this requirement.

Hereinafter, all three regulations will be referred to together as the "subscriber require-

more than half of its copies free of charge to persons who have not specifically requested copies is not eligible for the second-class rate and must pay the higher third-class rate.[5] Because of these requirements, many local weekly newspapers that are delivered by mail to all the members of a community are denied the lower second-class rates. Groups hoping to win converts to a political cause or religious faith are also barred from using the subsidized rate to mail unsolicited publications.

In determining whether the postal regulations containing the subscriber requirement infringe first amendment rights, two constitutional questions must be examined: (1) the existence of a right of access to government property for expressive purposes; and (2) the appropriate standard for denying access to that property. While the national postal system is a medium of communication, it is also a form of property consisting of a complex web of facilities and services. Arguably, the denial of a second-class mailing rate violates the first amendment because the first amendment gives to every member of the public what is essentially a form of property right—the right to use the facilities and services of the postal system to increase the reach of his or her speech.[6] The contrary view,

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ment." These regulations continue and amplify the subscriber requirement included in § 14 of the 1879 Act, which provided that second-class mailing status would be available only to publications "having a legitimate list of subscribers. Nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed . . . for free circulation, or for circulation at nominal rates." Act of Mar. 3, 1879, ch. 180, § 14, 20 Stat. 359.

5. DOMESTIC MAIL MANUAL, *supra* note 2, at § 422.6(d).

6. *See infra* notes 10-53 and accompanying text. Like other provisions of the Constitution, the first amendment defines what are in essence property rights. By protecting freedoms which are exercised through the use of property, the first amendment protects the freedom to use one's property as one chooses, provided the use is expressive. Thus, in Wooley v. Maynard, the Supreme Court held that the first amendment protected an individual's right to cover up the state motto printed on his automobile license plates. 430 U.S. 705 (1977). Effectively, the decision constitutionalized the individual's right, as a property owner, to control the use of his license plate—at least insofar as his use of the license plate involved speech. Similarly, in Spence v. Washington, the Court held that the first amendment protected a flag owner's right to display a peace symbol taped to his flag, emphasizing that "this was a privately owned flag . . . displayed . . . on private property." 418 U.S. 405, 408-09 (1974). Again, the decision preserved the owner's dominion over his flag against state attempts to alter his property rights.

In two cases, the Supreme Court held that the first amendment protected a private property owner's right to exclude others from his property. In Miami Herald Publishing Co. v. Tornillo, the Court struck down a state law requiring newspaper publishers to provide space for political candidates to respond to the newspaper's criticisms as a violation of the first amendment. 418 U.S. 241 (1974). More recently, in Pacific & Elec. Co. v. Public Util. Comm'n., the Court invalidated a California Public Utilities Commission order which re-

that the denial of a reduced rate merely involves a discretionary decision allocating government largesse, denies the existence of such an access right.

This article argues that the postal regulations that contain the subscriber requirement do indeed infringe upon the constitutionally protected rights of publications that are distributed through the mails to nonsubscribing recipients. Part I argues that the subscriber requirement implicates the first amendment because the first amendment creates a right to use the postal system that is restricted by the imposition of higher rates for certain categories of mail.[7] Part II argues that a demanding standard of judicial scrutiny should be applied to the regulations because they create a content-based distinction.[8] Part III applies this higher standard of review and concludes that the regulations fail to meet that standard.[9]

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quired a private utility to include messages from a consumer organization in its billing envelopes. 106 S. Ct. 903 (1986). The decision effectively gave constitutional protection to the utility's interest in excluding others from its property. The Court made it clear, however, in PruneYard Shopping Center v. Robins that the first amendment permits a property owner to exclude others from his property only where the use of the property by others would hinder the property owner's speech or expression. 447 U.S. 74 (1980). In *PruneYard*, the Court refused to invalidate a provision of the California Constitution which had been interpreted by the California Supreme Court to require shopping center owners to permit peaceful expressive activity by others in the open areas of the shopping center. The Supreme Court reached this decision because there was no showing that such expressive activity interfered with the property owner's speech. *Id.* at 85-88.

Prior to the decision in *PruneYard*, the Court had interpreted the first amendment to defeat a private property owner's right to exclude others by creating a right in the public to use privately owned shopping center property for speech purposes. *See* Amalgamated Food Employees' Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968). However, in a short period of time the Court changed its mind and rejected the idea of a first amendment "easement" on shopping center property. *See* Hudgens v. NLRB, 424 U.S. 507, 517-21 (1976) (expressly overruling *Logan Valley*). For further discussion of the first amendment as the source of constitutionally defined property rights, see Dorsen & Gora, *Free Speech, Property and the Burger Court: Old Values, New Balances*, 1982 SUP. CT. REV. 195 (1983); Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981); Oakes, *"Property Rights" in Constitutional Analysis Today*, 56 WASH. L. REV. 583 (1981); Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982); Van Alstyne, *The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties*, 43 LAW & CONTEMP. PROBS. 66 (1980).

7. *See infra* notes 10-53 and accompanying text.

8. *See infra* notes 54-86 and accompanying text.

9. *See infra* notes 87-111 and accompanying text.

I. The Implication of First Amendment Rights: The Subscriber Requirement Restricts Access to a Public Forum

In analyzing the denial of second-class rates to publications without subscribers, the threshold question is whether that denial presents a first amendment issue. This question is important because its answer determines the level of judicial scrutiny to which the postal regulations must be subjected. If the regulations restrict the first amendment rights of nonsubscriber publications, the regulations must be evaluated according to one of a variety of levels of heightened scrutiny.[10]

The Postal Service's subscriber requirement for second-class postage rates denies a government benefit, i.e., access to the postal system, to publications which do not meet the requirement and thus must pay the higher third-class rate. Unlike measures which directly restrain or prohibit the exercise of a constitutionally protected freedom through the imposition of sanctions, measures which inhibit the exercise of constitutional freedoms through the denial of government benefits do not always amount to restrictions calling for judicial scrutiny. The courts have developed two doc-

10. First amendment jurisprudence is complicated by the fact that a number of different standards of review have evolved on a case by case basis to deal with particular categories of speech. If a restriction merely limits the time, place, or manner of speech without regard to its content, the restriction will be upheld if it is narrowly drawn to serve a "significant" government interest and leaves open ample alternative channels of communication. Clark v. Community for Creative Non-violence, 468 U.S. 288, 293 (1984); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983). If a restriction distinguishes some forms of speech from others on the basis of content, the restriction is evaluated according to the particular standard developed for the appropriate category of content, such as commercial speech, obscenity, or speech intended to induce illegal conduct. If no particular standard has evolved for the content category at issue, the restriction will be upheld only if it is narrowly tailored to serve a compelling government interest. *Perry Educ. Ass'n*, 460 U.S. at 45; Carey v. Brown, 477 U.S. 455, 464-65 (1979); *see infra* notes 73-76 and accompanying text.

If first amendment rights are not implicated, the only alternative basis for judicial review of the regulations is the equal protection component of the fifth amendment due process clause. Because the regulations do not establish a suspect classification, review under the equal protection clause is limited to the deferential "rational basis" standard. Absent a suspect classification, inequalities in the distribution of government benefits will be reviewed under the equal protection clause only for rationality. Regan v. Taxation With Representation, 461 U.S. 540, 547-50 (1983) (applying rationality review to an Internal Revenue Code provision that granted a tax benefit to some charitable organizations engaged in political lobbying while denying the benefit to other charitable organizations); Harris v. McRae, 448 U.S. 297, 322-24 (1980) (applying rationality review to law providing Medicaid funding for childbirth but not for abortion). Because the rationality standard is easier to satisfy than a higher level of scrutiny, the postal regulations are much more likely to survive an equal protection challenge than an attack on first amendment grounds.

trines under which the denial of government benefits can amount to a violation of constitutional rights: the penalty doctrine and the public forum doctrine.

A. *The Inapplicability of the Penalty Doctrine*

The denial of a government benefit infringes upon constitutionally protected rights when the denial penalizes the exercise of those rights.[11] The government may not condition the receipt of a benefit upon the relinquishment of a constitutionally protected freedom[12] because such a denial effectually imposes a sanction on the exercise of the freedom, just as if the law imposed a fine or imprisonment for its exercise.[13] Thus, it is unconstitutional for the government to deny public employment[14] or property tax exemptions[15] to individuals who express disfavored views, or welfare benefits to persons who have exercised their protected right to travel to a new state,[16] or unemployment benefits to persons who practice their religion by refusing to work on Saturdays.[17]

However, the Supreme Court has stated that the denial of a government benefit is not a penalty on the exercise of a constitutional right when the denied benefit merely subsidizes the exercise of the right.[18] The denial of a benefit only constitutes a penalty when the

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11. Perry v. Sinderman, 408 U.S. 593, 597 (1972).

12. The penalty doctrine has also been called the doctrine of unconstitutional conditions because the denial of benefits occurs as a condition of the individual's exercise of a constitutionally protected freedom. *See* Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 592-94 (1926); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-8, at 510 (1978).

13. In *Perry*, the Court explained that:

> even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.

408 U.S. at 597.

14. *Id.*; Pickering v. Board of Educ., 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961).

15. Speiser v. Randall, 357 U.S. 513 (1958).

16. Shapiro v. Thompson, 394 U.S. 618 (1969).

17. Sherbert v. Verner, 374 U.S. 398 (1963).

18. "A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." Harris v. McRae, 448 U.S. 297, 317 n.19 (1980); *see also* Regan v. Taxation With Representation, 461 U.S. 540, 543 (1983) (no penalty where "Congress has merely refused to pay for [the protected activity] out of public moneys"); Maher v. Roe, 432 U.S. 464, 475 n.8 (1977) (rejecting "the claim . . . that the State 'penal-

denied benefit is broader than the resources needed to exercise the right.[19] For example, neither the denial of tax deductions for expenses incurred[20] or contributions made[21] to influence the enactment of legislation nor the denial of federal financing for political campaigns[22] constitutes a penalty on first amendment rights. Similarly, the Court has held that a federal statute barring Medicaid funding for abortions was not a penalty on the exercise of a constitutional right,[23] although the Court noted that a denial of all Medi-

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izes' the woman's decision to have an abortion by refusing to pay for it."). In *Regan*, for example, the Court held that there is no first amendment right to government subsidization of political lobbying efforts. 461 U.S. at 545-46. The Court explained that "[t]his Court has never held that Congress must grant a benefit . . . to a person who wishes to exercise a constitutional right . . . . We again reject the 'notion that first amendment rights are somehow not fully realized unless they are subsidized by the State.' " *Id.* (quoting Cammarano v. United States, 358 U.S. 498, 515 (1959) (Douglas, J., concurring).

The Court has made the same point in the context of other constitutionally protected freedoms. In *McRae*, the Court held that the denial of Medicaid funding for abortions does not impinge on the "liberty" protected by the due process clause of the fifth amendment, although that liberty concededly includes the freedom to terminate a pregnancy. 448 U.S. at 312-18. The Court observed that:

> it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices . . . . [A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category.

Id. at 316.

The one exception to this rule appears in the context of access to the judicial process. The Supreme Court has held that the right to procedural due process is violated when the government refuses to pay for counsel for indigent criminal defendants, Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963), or for a trial transcript that is necessary to pursue a criminal appeal, Griffin v. Illinois, 351 U.S. 12 (1956). The requirement that the government subsidize certain court-related costs was extended to civil litigation in Boddie v. Connecticut, 401 U.S. 371 (1971). In *Boddie*, the Court found that Connecticut violated the due process clause when it denied judicial access to indigents who were unable to pay the court fees required to obtain a divorce.

However, later cases have largely limited *Boddie* to its facts. *See* Ortwein v. Schwab, 410 U.S. 656 (1973); United States v. Kras, 409 U.S. 434 (1973). The Supreme Court has refused to recognize a general right to government subsidization of the costs of civil process. Instead, the Court has limited the right to government payment of litigation costs to cases which bear on a distinct, substantive fundamental right, such as marriage or divorce, and where adjudication provides the only available means of resolving the dispute. *See Ortwein*, 410 U.S. 656; *Kras*, 409 U.S. 434.

19. For example, in *Maher*, 432 U.S. at 475 n.8, the Court explained that a state's refusal to pay the bus fares of indigent travelers would not penalize the right of interstate travel. However, in Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), and Shapiro v. Thompson, 394 U.S. 618 (1969), the Court held that a state's denial of all welfare benefits to persons who had recently traveled across state lines penalized the exercise of that right.

20. *See* Cammarano v. United States, 358 U.S. 498, 512-13 (1959).

21. *See Regan*, 461 U.S. at 545.

22. *See* Buckley v. Valeo, 424 U.S. 1, 92-93 (1976).

23. *McRae*, 448 U.S. at 312-18.

caid benefits to women who chose to have an abortion would constitute such a penalty.[24] In the first amendment context, then, as a general rule, if the denial of a benefit simply involves a refusal to subsidize expression and does not sweep more broadly to take away other benefits, the denial does not raise a constitutional issue.[25]

The implicit rationale for the Court's distinction between a penalty and a refusal to subsidize seems to be that by taking away a benefit that the individual otherwise would have possessed had he not exercised his constitutionally protected freedom, the government imposes a penalty on that freedom. The penalty is similar in nature, if not always in degree, to the levying of a fine or the deprivation of personal liberty by imprisonment. Alternatively, the government's refusal to subsidize the exercise of a protected freedom does not take anything away from the individual that he otherwise would have possessed. Instead, the government simply declines to give the individual something "more."[26]

By denying second-class postage rates to publications without

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24. *Id.* at 317 n.19.

25. This general rule appears to be true even if a refusal to subsidize speech is based on the content of the speech. *See* Advocates for the Arts v. Thomson, 532 F.2d 792 (1st Cir.) (no first amendment violation in state arts commission's decision to deny grant to literary magazine based on offensive nature of magazine's content), *cert. denied*, 429 U.S. 894 (1976). Yet potential dangers inhere in allowing the government unbridled discretion to discriminate on the basis of content in the public funding of speech. Government-funded ideas and viewpoints could become more widely publicized and more readily accepted than other ideas and viewpoints. Thus, competing ideas effectively could be drowned out. Aspects of this problem are discussed in Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795 (1981); Gottlieb, *Government Allocation of First Amendment Resources*, 41 U. PITT. L. REV. 205 (1980); Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863 (1979).

26. Viewed in that light, the Court's distinction conforms with its traditional attitude toward the nature of constitutionally protected freedoms. Freedom of expression, like all freedoms, may be viewed in two ways. In negative terms, it can be thought of as freedom from government-imposed restraints on private speech. This view of freedom of expression assumes that the speaker has access to private means of communication. But the negative view of freedom is an empty one to persons who lack such private means and consequently are unable to communicate effectively even in the absence of government restraints. The second view of freedom of expression encompasses the notion of an affirmative government obligation to provide a means of communication to those who lack the private resources necessary to express themselves. Under this view, freedom of speech only exists in a meaningful way when an effective medium of expression is available to those who lack private methods of communication. Therefore, the government's obligation to protect freedom of speech must include the furnishing of such a medium.

This second view has never been accepted by the Supreme Court. It is clear that, at least as the law now stands, there is no general first amendment right to government-provided means of communication or to government subsidization of the costs of expression.

subscribers, the Postal Service has simply refused to subsidize those publications' expressive activities.[27] Because the publications suffer no broader consequences, the subscriber requirement embodied in the Postal Service's regulations does not impose a penalty on protected speech. In the absence of some other constitutional doctrine, the Postal Service's subscriber requirement for subsidized mailing rates would not implicate first amendment concerns.

B. *The Postal System As a Public Forum*

In cases which develop the public forum doctrine, the denial of what is in fact a subsidy for the exercise of free speech has been held to impinge upon first amendment rights. The public forum doctrine establishes a type of constitutional property right: the right to use certain government-owned property under certain circumstances for the purpose of expression.[28] The public forum doctrine thus defines the circumstances in which the government has an affirmative obligation under the first amendment to make available the means of communication.[29] The government has an affirmative obligation to make available property to the public that is characterized as a public forum; [30] it has no obligation to provide property that is not a public forum.[31]

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27. An exemption from, or reduction in, a fee or tax is the equivalent of a cash subsidy. *See Regan*, 461 U.S. at 544 ("Both tax exemptions and tax deductability are a form of subsidy . . . . A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income."); Follett v. Town of McCormick, 321 U.S. 573, 580-81 (1944) (Roberts, Frankfurter, & Jackson, JJ., dissenting) (a tax exemption is a "subsidy" which allows the taxpayer to "save the contribution for the cost of government which everyone else will have to pay.").

28. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981) (student religious groups could not be excluded from use of university facilities); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (rule requiring that solicitation be restricted to certain areas did not deprive group of public forum); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (because municipal theaters were public forums dedicated to expressive activities, city could not prevent theatrical production company from using theaters without first following certain procedural safeguards designed to prevent censorship); Grayned v. City of Rockford. 408 U.S. 104 (1972) (upholding use of public streets for peaceful demonstrations); Schneider v. New Jersey, 308 U.S. 147 (1939) (distribution of hand bills allowed on public streets); Hague v. Committee for Indus. Org., 307 U.S. 496 (1939) (right to peaceful assembly on public streets); *see also supra* note 6 (discussion of property rights that arise from constitutional freedoms).

29. In Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., the Court explained that it has "adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." 105 S. Ct. 3439, 3448 (1985).

30. *See supra* note 28.

31. *See, e.g.*, *Cornelius*, 105 S. Ct. 3439; Perry Educ. Ass'n v. Perry Local Educators

The system of mail transportation and delivery operated by the United States Postal Service can be characterized as a public forum. Although no Supreme Court decision has squarely addressed the issue, the public character of the postal system is assumed implicitly in several Supreme Court cases.[32] In these cases, the Court applied levels of scrutiny that are appropriate where the use of a public forum is restricted, but are not warranted where the government property at issue is not a public forum.[33] Lower courts confronting the issue have treated the postal system as a public forum.[34]

The postal system also falls neatly within the description of "public forum" as developed in Supreme Court decisions. First, the postal system clearly constitutes a "forum." The Supreme Court recently held in *Cornelius v. NAACP Legal and Educational Defense Fund, Inc.*[35] that the category of forums is not limited to physical places or things, but extends to any activity or organization that serves as a channel of communication. In *Cornelius*, the Court held that the Combined Federal Campaign, a charitable fund-raising drive carried on among federal employees, qualified as a "forum."[36] The postal system would seem to fit even more comfortably within the meaning of a "channel of communication."[37]

If the postal system is a forum, there can be little doubt that it is a *public* forum. The Supreme Court has identified two kinds of

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Ass'n, 460 U.S. 37 (1983); Greer v. Spock, 424 U.S. 828 (1976); Adderly v. Florida, 385 U.S. 39 (1966).

32. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983) (considering validity under first amendment of federal statute prohibiting mailing of unsolicited advertisements for contraceptives); Blount v. Rizzi, 400 U.S. 410 (1971) (considering validity under first amendment of federal statute authorizing Postmaster General to halt delivery of letters containing payment for obscene materials); Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970) (considering validity under first amendment of federal statute permitting individuals to request Postmaster General to halt delivery of erotic materials); Lamont v. Postmaster General, 381 U.S. 301 (1965) (considering validity under first amendment of federal statute authorizing Postmaster General to detain mail containing "communist political propaganda").

33. *See* cases cited *supra* note 32.

34. *See, e.g.*, Spencer v. Herdesty, 571 F. Supp. 444, 453 (S.D. Ohio 1983); Greengberg v. Bolger, 497 F. Supp. 756, 776 (E.D.N.Y. 1980).

35. 105 S. Ct. 3439, 3448-49 (1985).

36. *Id.*

37. In *Perry Educ. Ass'n*, the Supreme Court treated a public school's internal mail system as a forum, although not a public one. 460 U.S. 37.

public forums. Traditional public forums, such as streets and parks, have historically been dedicated to public use for assembly and communication.[38] Nontraditional public forums include other government facilities and services which have been opened to the public for expressive activity.[39] The first kind of forum gains its public character from long historical practice,[40] while the second gains its public character from a deliberate government decision to make its facilities available for public use.[41] It seems indisputable that the postal system falls within the second category of public forum, because the government clearly has opened the postal system to all members of the public for the purpose of communication. The postal system may fall within the first category of public forum as well.[42] Indeed, several Supreme Court justices have recognized that the postal system is a public forum.[43]

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38. *See id.* at 45; *Schneider*, 308 U.S. 147; *Hague*, 307 U.S. 496.

39. *See Perry Educ. Ass'n*, 460 U.S. 37; *Widmar*, 454 U.S. 263 (university meeting facilities); *Southeastern Promotions*, 420 U.S. 546 (municipal theater).

40. In *Hague*, the Court explained that streets and parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." 307 U.S. at 515.

41. *See Perry Educ. Ass'n*, 406 U.S. at 45.

42. The Supreme Court noted the long history of the postal system as a means of communication in United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 120-22 (1981). In his dissent in United States *ex. rel.* Milwaukee Social Democratic Publishing Co. v. Burleson, Justice Holmes observed that "[t]he United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues." 255 U.S. 407, 437 (1921) (Holmes, J., dissenting).

43. United States Postal Serv. v. Council of Greenburgh Civic Ass'ns., 453 U.S. 114 (1981). In his concurring opinion, Justice Brennan stated that "the mails . . . are specifically used for the communication of information and ideas, and thus surely constitute a public forum." *Id.* at 137-38 (Brennan, J., concurring). Justice White, also concurring, noted that "[t]here is no doubt that the postal system is a massive, Government-operated communications facility open to all forms of written expression protected by the First Amendment." *Id.* at 141 (White, J., concurring). Justice Marshall, in a dissenting opinion, observed that "[g]iven its pervasive and traditional use as a purveyor of written communication, the Postal Service . . . may properly be viewed as a public forum." *Id.* at 148 (Marshall, J., dissenting).

The fact that the Postal Service charges a fee for the use of the postal system does not alter its character as a public forum. The plurality opinion in Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), does not change the foregoing conclusion. In *Lehman*, a politician attacked the constitutionality of a municipal policy which refused to sell advertising space on city buses for political advertising. 419 U.S. at 300. Four of the justices held that the advertising space was not a public forum but was part of a commercial venture. *Id.* at 303. However, that analysis is inapplicable to the postal system because the postal system is not primarily a commercial venture. The primary purpose of the postal system is to provide the public service of transporting and delivering mail—a purpose which cannot be characterized as commercial. By contrast, a municipality's sale of advertising space on its buses is

C. *Postage Rates Restrict the Use of a Public Forum*

The requirement that a fee be paid to use the postal system for communication amounts to a restriction on the use of a public forum for expression. The imposition of a fee or a tax on expression constitutes a restriction on that expression. In *Murdock v. Pennsylvania*, the Supreme Court observed that "[t]he power to tax the exercise of a privilege is the power to control or supress its enjoyment. Those who can tax the exercise of . . . [a privilege] can make its exercise so costly as to deprive it of the resources necessary for its maintenance."[44] While the potentially restrictive character of fees or taxes is less obvious when they are set at reasonable levels, the constitutional characterization of a fee or tax does not depend upon the level at which it is set.[45] A valid fee or tax can be increased to the point where it significantly restricts the exercise of the constitutionally protected freedom on which it is imposed.[46] Thus, a license tax on newspapers has been treated as a restriction on freedom of speech,[47] and a tax on the sale of religious books and pamphlets has been treated as a restriction on the free exercise of religion.[48] By limiting access to the postal system,[49]

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wholly commercial because the sole purpose of such action is to bring in money for the municipality. Postage rates, on the other hand, are not a revenue-raising mechanism but are user fees which help defray the costs of the public service provided.

It should be noted, however, that it is unclear whether a majority of the Court in *Lehman* thought that the advertising space was not a public forum. Justice Douglas' concurrence relies more heavily on the interests of a captive audience as a rationale for upholding the city ordinance than on the absence of a public forum. *Id.* at 305-08 (Douglas, J., concurring). Moreover, at the time of this case, the Court had not yet fully developed public forum analysis. Thus, the *Lehman* plurality apparently did not view the absence of a public forum as all but dispositive on the issue of a first amendment violation, as the Court would do in later cases. *See Cornelius*, 105 S. Ct. 3439; *Perry Educ. Ass'n*, 460 U.S. 37; *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114. Instead, the plurality went on to analyze the city's justifications for its ordinance. *Lehman*, 418 U.S. at 304. Because the concept of the public forum has been refined over the past decade, it is not clear that the Court today would hold, were it writing on a clean slate, that advertising space on public buses is not a public forum.

44. 319 U.S. 105, 112 (1943); *cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 326 (1819) ("An unlimited power to tax involves, necessarily, the power to destroy . . . .").

45. *See* Grosjean v. American Press Co., 297 U.S. 233, 245 (1936).

46. *Id.*

47. *Id.* at 235.

48. *Murdock*, 319 U.S. at 112.

49. In a concurring opinion in United States Postal Serv. v. Council of Greenburgh Civic Ass'ns., Justice White observed that the requirement of a fee for access to the postal system "measurably reduces the ability of various persons or organizations to communicate with others." 453 U.S. 114, 141-42 (1981) (White, J., concurring); *see also* Spencer v. Herdesty, 571 F. Supp. 444, 452-53 (S.D. Ohio 1983) (Postage rates operate to "constrict the flow of information [and] ideas.").

postage rates similarly restrict the exercise of a constitutional right, because access to the postal system is such a right under the public forum doctrine.[50]

The foregoing analysis does not indicate that the Postal Service violates the first amendment when it charges a fee for the use of its services, but merely asserts that the imposition of such fees is subject to first amendment scrutiny. The requirement that postage be paid is a content-neutral restriction that seems justified by the government's need to raise revenues to support the system and by the reasonableness of collecting those revenues from persons who use the system.[51]

However, the postal regulations under examination[52] are discriminatory because they establish different postage rates for publications with subscribers than for publications without subscribers. As a result, access to the postal system is more limited for one class of publications than for the other. Because the postal system is a public forum, the discriminatory aspect of these regulations must be evaluated according to one of the heightened standards of first amendment review rather than by the more lenient equal protection standard.[53]

II. Determining the Applicable Standard of Review: The Content-Orientation of the Subscriber Requirement

A. *The Effect of Public Forum Status on the Standard of Review*

In the first amendment context, selecting the appropriate standard of review is a difficult task because the Supreme Court has not articulated a clear principle for determining which of several standards apply in any given case. At least one preliminary point seems to be clear: the applicable standard of review is not affected

50. *See supra* notes 28-43 and accompanying text for a discussion of the postal system as a public forum.

51. Justice White reached exactly this conclusion in his concurrence in *Council of Greenburgh Civic Ass'ns.* 453 U.S. at 141 (White, J., concurring). Because the appellees in *Council of Greenburgh Civic Ass'ns* sought to deposit material in letterboxes without paying postage fees, Justice White viewed the case as a challenge to the requirement that postage be paid to gain access to any part of the postal system. He concluded that the requirement was constitutionally valid based on the "self-evident justification . . . that the Government may insist that those who use the mails contribute to the expense of maintaining and operating the facility." *Id.*

52. *See supra* notes 3-4.

53. *See supra* note 10 and accompanying text.

by the fact that the restriction on speech is effectuated through the use of a public forum. The Supreme Court has explained that restrictions on access to or use of nontraditional public forums are governed by the same constitutional standards that are applied to restrictions on access to or use of traditional public forums.[54] The standards that govern restrictions on access to or use of traditional public forums, such as streets and parks, are also those that govern restrictions on speech in general, whether effectuated through public or private means.[55] Thus, a restriction on the use of the postal system for purposes of speech must be evaluated under the same standard as an equivalent restriction on the use of a street or park.

B. *The Content Orientation of the Restriction Triggers the Applicable Standard of Review*

The difficulty in determining the applicable standard of review for the Postal Service's subscriber requirement stems from the Supreme Court's failure to articulate a clear principle for making such a determination. The Court has not clearly identified a single factor whose presence or absence triggers a certain standard of review in first amendment cases. Instead, the Court has identified two separate distinctions that must be considered in determining the proper standard. First, the Court has drawn a distinction between government actions that discriminate against a particular category of speech because of its content and government actions that regulate speech without regard to its content.[56] Second, the Court has drawn a distinction between government actions that completely prohibit expression and those that merely restrict the time, place, and manner of expression.[57] It is not clear which of these two distinctions determines the applicable standard of review.

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54. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983) (describing identical standards for the two types of forum).

55. *See, e.g.*, Clark v. Community for Creative Non-violence, 468 U.S. 288, 294-95 (1984) (applying general content-neutral standard to restriction of speech in public park); Carey v. Brown, 447 U.S. 455, 460-63 (1980) (applying general content-based standard to restriction of speech in public street).

56. *See* Carey v. Brown, 447 U.S. 455, 462-63 (1980); Erznoznik v. City of Jacksonville, 422 U.S. 205, 209, 215 (1975); Police Dep't of Chicago v. Mosley, 408 U.S 92, 95-97 (1972); Cox v. Louisiana, 379 U.S. 536, 581 (1965) (Black, J., concurring).

57. *See Community for Creative Non-violence*, 468 U.S. at 294-95 (1984); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647-48 (1981); Cox v. New Hampshire, 312 U.S. 569, 574 (1941).

The Court has tended to assume that the two distinctions are necessarily correlated. It has assumed that content discrimination goes hand in hand with a flat prohibition on expression, and that content-neutrality goes hand in hand with a time, place, and manner restriction. Thus, in *Perry Education Association v. Perry Local Educators' Association*,[58] the Court explained that a "content-based exclusion" is governed by a strict standard of review, while "regulations of the time, place, and manner of expression which are content-neutral" are governed by a more lenient standard.[59]

The problem with the Supreme Court's assumption is that the two distinctions are not always correlated. Logically, a content-neutral regulation must always be a time, place, and manner restriction. A content-neutral total prohibition would be absurd, because it would ban all speech. However, the reverse proposition is not necessarily true. A time, place, and manner restriction need not be content-neutral. It is possible for a legislature or agency to frame a time, place, and manner restriction that focuses on speech with a particular content. Likewise, a content-based restriction need not be a total prohibition, although a total prohibition necessarily must be content-based. Because of the Supreme Court's faulty assumption, courts that have been confronted with content-based time, place, and manner restrictions have exhibited some confusion as to how to choose the appropriate standard of review.[60]

Despite the Court's failure to articulate a clear principle, the analysis used by the Court in several cases suggests that the applicable standard of review is determined by the content-orientation of the restriction.[61] In several cases, the Court has been faced with time, place, and manner restrictions that focused on particular content-based categories of speech. In each case, the Court ana-

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58. 460 U.S. 37 (1983).

59. *Id.* at 45-46.

60. *See, e.g.*, American Future Sys., Inc. v. Pennsylvania State Univ., 752 F.2d 854, 860-63, 867-71 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 3537 (1985); John Donnelly & Sons v. Campbell, 639 F.2d 6, 8 (1st Cir. 1980), *aff'd*, 453 U.S. 916 (1981); *see also* Note, *Time, Place, and Manner Restrictions on Commercial Speech*, 52 GEO. WASH. L. REV. 127 (1983).

61. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983) (statute prohibiting mailing of advertisements for contraceptives treated as content-based commercial speech restriction); Widmar v. Vincent, 454 U.S. 263 (1981) (state university rule barring use of university facilities by religious groups treated as content-based restriction); Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) (plurality opinion) (city ordinance restricting use of billboards for commercial messages treated as content-based commercial speech restriction); *Carey v. Brown*, 447 U.S. 455 (state statute prohibiting picketing near residences, except labor-dispute picketing, treated as content-based restriction).

lyzed the restriction according to the standards appropriate for content-based regulations.[62] The fact that no flat prohibitions were involved did not alter the Court's analysis. Lower courts[63] and commentators[64] also have adopted the view that the content-orientation of a restriction is the factor that triggers the appropriate level of scrutiny. This approach makes sense in light of the basic values underlying the first amendment. Any government discrimination on the basis of content is a matter of concern, whether it involves a flat prohibition or a lesser restriction, because it places a burden only on particular disfavored ideas or viewpoints. Such a burden tends to impede the search for truth and the public's capacity for self-government by restraining the free flow of ideas and information.[65] Therefore, all content-based restrictions should be

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62. *See* cases cited *supra* note 61.

63. *See e.g., American Future Sys.*, 752 F.2d at 863 (treating restriction on product sales presentations in dormitories as content-based commercial speech restriction); Ad World, Inc. v. Township of Doylestown, 510 F. Supp. 851 (E.D. Pa. 1981) (treating restriction on home delivery of advertising publication as content-based commercial speech restriction), *rev'd on other grounds*, 672 F.2d 1136 (3d Cir. 1982).

64. *See* J. ELY, DEMOCRACY AND DISTRUST 105-16 (1980); Stone, *Restrictions on Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 82 (1978); Note, *supra* note 60. According to one view, the content-based/content-neutral distinction is important, not because content-based restrictions should receive more searching scrutiny than content-neutral ones, but because scrutiny of content-based restrictions should take a different form. *See* J. ELY, *supra*, at 105-16. Because content-based abridgments of speech are much more likely than content-neutral abridgments to be the product of panic over a perceived threat, it is preferable to deal with content-based abridgments through rigid "per se" constitutional rules that can withstand onslaughts of hysteria. *Id.* For content-neutral restrictions, a more traditional ad hoc balancing approach is adequate and, indeed, probably necessary to allow courts to respond to a wide variety of factual situations. *Id.* at 110-16. The first part of this analysis echoes a view expressed by Justice Learned Hand in a letter to Zechariah Chafee, Jr. Justice Hand wrote that

> Once you admit that the matter is one of degree, you so obvioulsy make it a matter of administration . . . that the jig is at once up . . . . [W]hat seems "immediate and direct" to-day may seem very remote next year even though the circumstances surrounding the utterance be unchanged. I own I should prefer a qualitative formula, hard, conventional, difficult to evade. If it could become sacred by incrustations of time and precedent it might be made to serve just a little to withhold the torrents of passion to which . . . democracies [are] subject.

Letter from Justice Learned Hand to Zechariah Chafee, Jr. (Jan. 21, 1921), *quoted in* Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 749-50 (1975).

65. One of the primary justifications for constitutional protection of freedom of expression is the belief that uninhibited debate on public issues will bring a society closer to the ultimate truth. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."); J. MILL, ON LIBERTY (1859). Another important justification for this constitutional protection is that freedom of public discussion will improve the public's ability to govern itself, because free speech will produce an electorate that is better

evaluated according to more rigorous standards than content-neutral restrictions.

C. *The Content-Orientation of Sections 422.6, 422.221 and 422.223 of the* Domestic Mail Manual

Sections 422.6, 422.221, and 422.223 of the *Domestic Mail Manual*, which embody the subscriber requirement for reduced mailing rates, are facially content-neutral.[66] Those regulations do not expressly identify a particular category of speech defined by its content in order to subject the speech to special burdens or benefits. Nevertheless, the regulations do identify a category of speech which is accorded special treatment. This category comprises publications which distribute at least half of their circulated copies to paying subscribers or persons who have requested the publication. Publications in this category are able to obtain a subsidized second-class mailing rate. Thus, the critical inquiry is whether the regulations, which appear on their face to be content-neutral, nevertheless may be adjudged content-based if their purpose or effect is to discriminate on the basis of content.[67] No Supreme Court decision has addressed the proposition that the content-orientation of a restriction may be determined on the basis of factors other than the plain language of the restriction. Accordingly, it is unclear whether the Court would permit such a determination and, if so, what factors the Court would consider.[68]

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informed and more thoughtful. *See* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATIONS TO SELF-GOVERNMENT (1948), *reprinted in* A. MEIKLEJOHN, POLITICAL FREEDOM 3-89 (1960).

66. *See supra* notes 3-4.

67. *See* L. TRIBE, *supra* note 12, at §§ 12-5 to -6 (courts should inquire into the legislative motivations underlying facially neutral restrictions).

68. There is little help to be gleaned from the implicit holdings of the Supreme Court in cases involving restrictions that arguably discriminated on the basis of content even though the restrictions were facially content-neutral. In Martin v. City of Struthers, 319 U.S. 141 (1943), and Kovacs v. Cooper, 336 U.S. 78 (1949), the Court was confronted with facially content-neutral city ordinances that restricted the manner of expression. In *Martin*, the ordinance prohibited door-to-door canvassing. 319 U.S. at 141. In *Kovacs*, the ordinance restricted the use of loudspeakers and sound trucks on city streets. 336 U.S. at 78. In both cases, the Court considered the contention that the ordinances restricted the expression of ideas and viewpoints held by poorer people because both door-to-door convassing and the use of sound trucks were relatively inexpensive methods of communication. *Martin*, 319 U.S. at 146; *Kovacs*, 336 U.S. at 88-89. To the extent poorer people may be expected to hold ideas and viewpoints with a specific content, this restriction arguably could be a kind of content discrimination.

However, the Court's response differed in the two cases. In *Martin*, the Court subjected the ordinance to searching scrutiny but did not explain its reason for doing so. 319 U.S. at 146. In *Kovacs*, the plurality opinion applied a form of rationality review, explaining that

1. The Analogy to Equal Protection Analysis

One approach that may be used to deterimine whether a facially content-neutral restriction may be adjudged content-based is to examine the method used to deal with a similar analytical problem in the equal protection area. In determining whether a law violates the equal protection clause, it is necessary to decide whether the law is discriminatory, or, in other words, whether it creates a classification that leads to a difference in rights or privileges. A content-based restriction is one that discriminates between categories of speech on the basis of their content. Deciding whether a facially neutral speech restriction in fact discriminates on the basis of content is thus analogous to deciding whether a facially neutral measure in fact discriminates on the basis of race or sex.[69]

In the equal protection context, the Court has held that a regulation may be considered to establish a suspect classification, and therefore may be subjected to heightened scrutiny, even if it is neutral on its face.[70] The existence of the implicit classification must be established by showing that the provision has a differential impact on a particular group and that it was adopted by the responsible government body for a discriminatory purpose.[71]

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the fact "[t]hat more people may be more easily and cheaply reached by sound trucks . . . is not enough to call forth constitutional protection for what those charged with the public welfare reasonably think is a nuisance when easy [alternative] means of publicity are open." 336 U.S. at 88-89.

69. Professor Tribe has used the analogy to argue that the constitutional inquiry into legislative motivation should be the same in both contexts. *See* L. TRIBE, *supra* note 12.

70. *See* Massachusetts Personnel Adm'r v. Feeney, 445 U.S. 901 (1980); Washington v. Davis, 426 U.S. 229 (1976); Palmer v. Thompson, 403 U.S. 217 (1971); Griffin v. County School Bd., 377 U.S. 218 (1964); Gomillion v. Lightfoot, 344 U.S. 339 (1960).

71. *Feeney*, 445 U.S. 901; *Davis*, 426 U.S. 229. The Court has vacillated on the relevance of legislative motivation to the determination of constitutional validity under the equal protection clause. In *Griffin*, 377 U.S. at 231-32, and *Gomillion*, 344 U.S. at 341-42, 347-48, the Court emphasized the importance of motivation, warning that acts which would otherwise be lawful may become unlawful when done for certain impermissible purposes. In *Palmer*, however, the Court appeared to take a different view. In that case, the Court suggested that legislative motivation is irrelevant to the equal protection decision. *Palmer*, 403 U.S. at 224-26. Yet the statements in *Palmer* must be viewed in the context of the case as a whole. A municipality's closing of its public pools to blacks and whites alike was upheld against a constitutional challenge primarily because the action was not discriminatory in *effect*. The action did not create a suspect classification because it affected persons of both races in the same way. *Id.* at 226. Where a law does not have a differential impact, the underlying governmental motivation is correctly viewed as irrelevant. Essentially, *Palmer* stands for the proposition that discriminatory purpose alone is not enough to violate the equal protection clause; there must be a disparate effect as well. In later cases, the Court was faced with government measures which had a disparate effect, but whose purposes were innocent. *See*

Transferred to the first amendment context, this analysis suggests that a facially neutral regulation should be found to create a content-based classification only if both its effect and its purpose are to distinguish on the basis of content.

However, it is arguable that government motivation should not play the same role in first amendment analysis that it does in equal protection analysis. In the first amendment context, ideas rather than people are the targets of distinctions and classifications. Thus, first amendment analysis implicates concerns that are different from the interests involved in equal protection analysis. The interests underlying the first amendment protection of freedom of speech are undermined by all government actions that restrict the expression of particular ideas regardless of the government's purpose. Even when innocently motivated, such restrictions impede the functioning of the "marketplace of ideas."[72] Additionally, such restrictions hinder the progress toward greater knowledge that comes from the clashing of opposing views and diminish the public's capacity for self-government by depriving it of information.[73]

Moreover, invidious government motivation serves as an important limiting factor in equal protection analysis in a way that is unnecessary in first amendment analysis. Equal protection jurisprudence focuses on the distribution of economic and social benefits among the members of society. Arguably, every law that permits that distribution to be unequal has a discriminatory effect upon groups that, for reasons unrelated to the law, receive a smaller share of social and economic goods.[74] If a discriminatory effect alone triggered heightened scrutiny, equal protection jurisprudence would cause a drastic reordering of American society. A vast number of laws that merely permit the unequal distribution of resources among different ethnic, sexual, or religious groups would be invalid. In the absence of compelling reasons to do otherwise,

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Feeney, 445 U.S. 901; *Davis*, 426 U.S. 229. The Court found it necessary to reassert the importance of motivation in order to avoid the necessity of applying strict scrutiny to countless laws which coincidentally have a differential impact on members of protected groups.

72. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

73. See *supra* note 65 for a discussion of the purposes underlying the constitutional guarantee of freedom of speech.

74. For example, even Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000ee (17) (1982), has a discriminatory effect insofar as it permits employers to hire or promote more qualified candidates over members of protected groups, and, for unrelated cultural and educational reasons, those more qualified candidates tend to be white males.

the courts would be required to enforce redistribution of goods and privileges. The courts so far have been unwilling to undertake such massive social restructuring. Instead, they have searched for a principle that will allow them to invalidate only the most objectionable of discriminatory laws. Improper legislative purpose has been chosen as that principle.[75]

Finally, many of the reasons for special judicial hostility to discriminatory legislative purpose in equal protection analysis do not apply in first amendment analysis. A legislative preference for one group of people over another typically involves a desire by the majority of legislators to reserve benefits or privileges for particular private interests. In contrast, a legislative preference for one form of speech over another usually involves a legislative judgment that one form of speech is more likely than the other to promote the welfare of society as a whole. Thus, discriminatory legislative motivation in the speech context, while it may be misguided, usually represents an effort to achieve the public good rather than an effort to benefit a particular private group. Moreover, even if a legislature were bent on discriminating against a particular group, it would be difficult for the legislature to use a speech restriction to do so. Particular ideas are rarely so closely linked to a specific racial, sexual, religious, or economic group that a legislative preference for the idea necessarily translates into a preference for the group.[76]

These concerns underlying the emphasis on discriminatory purpose in equal protection analysis are not present in the first amendment context. Content-based speech restrictions discriminate against ideas rather than groups of people. In the absence of a government-enforced restructuring of society, scarcity of resources compels inequality among people; no practical limitations compel the inequality of ideas. The government can treat all ideas equally

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75. Scholars disagree concerning the kind of legislative purpose that should be considered improper. According to one view, legislators violate the equal protection guarantee when their motive for enacting legislation is a simple preference for members of their own group, instead of a desire to benefit the public as a whole. *See* Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984). Under another view, legislators may permissibly seek to benefit special groups, as long as they refrain from harming members of groups who lack effective access to the political process. *See* J. ELY, *supra* note 64, at 73-179.

76. The exception to this generalization is a legislative preference for speech aimed at defaming or harming a particular group. An enacted preference for speech that defames a group over other forms of speech, e.g., a reduced postage rate for anti-Semitic publications, would involve a preference for one group over another. *See* Sunstein, *supra* note 75 (discussing the relevance of discriminatory legislative motivation in constitutional adjudication).

without engaging in social reorganization. Accordingly, it is unnecessary in first amendment analysis to limit judicial scrutiny to laws passed with an improper governmental purpose. Instead, any law that effectively prefers one set of ideas over another should be subjected to judicial inquiry regardless of the government's motivation in enacting that law.[77]

The discriminatory effect of the subscriber requirement for second-class mailing rates is twofold. First, the subscriber requirement denies the low rate to publications designed primarily for advertising purposes. Second, the subscriber requirement makes the low rate available to publications whose recipients voluntarily request, and in many cases pay for, mailed copies. These effects arguably constitute content discrimination against commercial speech and against a category of speech whose content is defined derivatively based upon the preferences of publication readers, or, in other words, reader-disfavored speech. Commercial speech is a content category with its own analysis and standard of review.[78] Whether the discriminatory effect on reader-disfavored speech is based on the content of that speech is a more difficult question.

2. Reader-Disfavored Publications as a Content-Based Category

The distinction created by the regulations between reader-preferred and reader-disfavored publications is a content-based distinction. The central criterion for favored postal rate treatment is reader valuation of or preference for a publication as expressed through readers' subscriptions to that publication. Presumably, readers value or prefer certain publications because of the content of those publications. Therefore, the category of publications that readers disfavor is actually a content-based category. This category differs from more easily recognized content-based categories only because the content accorded special treatment is defined derivatively by the preferences of readers.

The category of speech defined here, reader-disfavored speech, is

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77. The purpose of the government action is relevant at a later stage of first amendment analysis. Once the appropriate standard of review is selected and applied, the government purpose must be identified and evaluated for its importance. *See infra* notes 88-93, 95-98 and accompanying text. The chosen means must also be evaluated for their effectiveness in furthering that purpose. *See infra* notes 89-94 and accompanying text. However, in determining whether a restriction is content-based or content-neutral, the initial stage in first amendment analysis, government purpose should not be of great significance.

78. *See infra* notes 81-89 and accompanying text.

akin to "offensive speech." "Offensive speech" is speech that does not meet the legal standard for obscenity but is restricted because it is offensive to most members of society.[79] Supreme Court cases dealing with offensive speech treat it as a distinct content category, subject to its own standard of review.[80] Certainly, some publications that readers do not subscribe to or request are unpopular because readers find them offensive. Because speech that is offensive to its audience is treated as a content category, the broader category of speech which is unappealing to its audience for a variety of reasons is also a content category.

However, there is a significant difference between offensive speech and reader-disfavored speech. The category of reader-disfavored publications is defined wholly by the actual preferences of readers, whatever those preferences may be. Yet offensive speech is not defined wholly by the reaction of a particular audience. Instead, it is defined by general norms which are presumed to be widely socially acceptable by the government body imposing the restriction.[81] For example, in *Federal Communications Commission v. Pacifica Foundation*,[82] the Federal Communications Commission issued an order declaring that a particular broadcast was "indecent" and "profane", although the agency did not conduct a survey of listeners to determine whether the majority had actually been offended.

This difference could be used to support an argument that the heightened scrutiny given to content-based restrictions is appropriate only when the restriction applies to speech whose content is targeted by the government itself and not when the restriction merely recognizes content choices made by the public without government interference. Under this view, the targeting of a particular

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79. "Offensive speech" includes coarse language and movies with sexual content. *See, e.g.*, F.C.C. v. Pacifica Found., 438 U.S. 726 (1978); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Cohen v. California, 403 U.S. 15 (1971).

80. *See* cases cited *supra* note 79.

81. For example, in affirming the conviction of an individual based on the written message displayed on his jacket, the Court of Appeals of California concluded that "[i]t was certainly reasonably foreseeable that such conduct might cause others to rise up to commit a violent act against the person of the defendant or attempt to forceably remove his jacket." People v. Cohen, 1 Cal. App. 3d 94, 99-100, 81 Cal. Rptr. 503, 506 (1969), *rev'd*, 403 U.S. 15 (1971). The California court did not inquire whether on-lookers were actually offended. Rather, it applied its own standard of offensiveness to the speech in question and assumed that that standard was shared by a majority of those affected by the defendant's speech.

82. 438 U.S. 726, 739 (1978).

content category by the government itself raises special first amendment concerns. The Court has lent support to this position by explaining that the "government may not grant the use of a forum to people whose views it finds acceptable, but deny its use to less favored . . . views. And it may not select which issues are worth discussing or debating in public facilities."[83] Where the government leaves the selection to the intended audience of the speech, it is arguably only facilitating the natural functioning of the "marketplace of ideas."

The problem with the preceding argument is that it assumes a world of static ideas and beliefs. If it were safe to assume that the relative popularity of beliefs would never change, even without government interference, then it would not be troublesome for the government to benefit popular views and burden unpopular ones. However, the premise of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"[84] is that public acceptance of ideas does change[85] and should be allowed to change freely. Government-imposed restrictions on speech that reflect current public acceptance of ideas handicap the important process of change. They hinder the dissemination of ideas that might eventually gain widespread acceptance in the absence of government restrictions. Therefore, speech restrictions which discriminate between popular and unpopular speech, as these postal regulations do, should be treated as content-based. Consequently, they should be subject to a heightened standard of scrutiny.[86]

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83. Police Dep't v. Moseley, 408 U.S. 92, 96 (1972).

84. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

85. Justice Holmes observed that "time has upset many fighting faiths." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

86. Three lower courts, confronting speech restrictions which established similar distinctions between popular and unpopular speech, concluded that such restrictions must be treated as content-based and therefore evaluated under exacting standards. *See* Rhode Island Nat'l Women's Political Caucus v. Rhode Island Lottery Comm'n, 609 F. Supp. 1403, 1412-13 (D.R.I. 1985) (state statute permitting use of lotteries for political fund raising only by political parties whose gubernatorial candidate received at least five percent of the vote in the last general election); Spencer v. Herdesty, 571 F. Supp. 444 (S.D. Ohio 1983) (federal statute granting special third-class bulk mailing rate to statewide political parties but not to local parties); Greenberg v. Bolger, 497 F. Supp. 756 (E.D.N.Y. 1980) (federal statute granting third-class bulk mailing rate only to political parties whose presidential candidate received more than five percent of the popular vote in the last election). In *Greenberg*, the court explained:

> To suggest that a regulation that confers benefits on the basis of popularity is not content-based would require the court to draw an artificial distinction between the popularity and the substance of an idea . . . . To handicap the mailing of campaign

III. Applying the Standard of Review

Because the regulations create a content-based distinction, the next step is to identify and apply the appropriate standard of review. While content-based restrictions generally receive stricter scrutiny than content-neutral restrictions,[87] the standard of review for content-based restrictions depends upon the particular content category involved.[88] For example, the standard of review for obscenity is different from the standard applicable to commercial speech or speech that induces illegal conduct.[89] Two standards of review are applicable to the postal regulations. The subscriber requirement must be evaluated under the standard appropriate for commercial speech restrictions because it discriminates against commercial speech. Because the subscriber requirement also discriminates against unpopular or reader-disfavored speech, it must be reviewed under the standard appropriate for that category.

A. *Commercial Speech*

In *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*,[90] the Supreme Court established that the first amendment protects commercial speech from unwarranted governmental regulation.[91] Constitutional protection for commercial speech is needed because commercial expression does not merely serve the economic interest of the speaker, but it provides information that

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literature because a political party has not achieved a required level of acceptance is not different from censoring speech because of its substance.

Id. at 775-76.

87. *See* Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45-46 (1983).

88. *See* Stone, *supra* note 64, at 82 n.6 ("The Court has not articulated a single all-embracing standard, but rather has employed several different standards and approaches, including categorization, clear and present danger, and variations of the compelling-interest test.").

89. *Compare* Miller v. California, 413 U.S. 15 (1973) (obscenity) *with* Central Hudson Gas & Electric Co. v. Public Serv. Comm'n, 447 U.S. 557 (1980) (commercial speech) *and* Brandenburg v. Ohio, 395 U.S. 444 (1969) (speech inducing illegal conduct).

90. 425 U.S. 748 (1976).

91. *Id.* at 758-70. In prior cases, the Court had indicated that commercial speech received no first amendment protection. *See, e.g.*, Breard v. Alexandria, 341 U.S. 622 (1951) (upholding a conviction for violation of an ordinance prohibiting door-to-door solicitation of magazine subscriptions); Valentine v. Chrestensen, 316 U.S. 52 (1942) (upholding a New York statute that prohibited the distribution of advertising handbills on city streets). The Court's shift in position was heralded by the decision in Bigelow v. Virginia, 421 U.S. 809 (1975), which reversed a conviction under a Virginia statute banning the circulation of any publication advertising the availability of abortions. The Court rejected the argument that the publication at issue was unprotected because it was commercial. *Id.* at 819.

helps the public to make important consumer decisions and to understand the economic functioning of their society.[92] The Court rejected the view underlying most restrictions on commercial speech, which is that members of the public should be shielded from certain forms of commercial speech because they are unable to perceive their own best interests and will be swayed by such messages to act to their own detriment. The Court found that view incompatible with the fundamental premises of the first amendment, noting that constitutional protection for free debate necessarily assumes that the nation's citizens are, on the whole, capable of sorting out the useful from the harmful and the wise from the foolish.[93] The Court also recognized, however, that commercial speech is speech proposing a commercial transaction.[94] Therefore, commercial speech may be restricted by legitimate governmental regulation of commercial activity.[95] To accommodate such regulation, the Constitution affords a lesser degree of protection to commercial speech than to other forms of protected expression.[96]

The standard established by the Court for evaluating restrictions on commercial speech is straightforward. First, commercial messages are wholly unprotected if they are deceptive[97] or relate to illegal activity.[98] Second, if a commercial communication does not fall into either of those categories, the government must assert a substantial interest to be achieved by its restriction.[99] Last, the re-

92. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561-62 (1980); *Virginia Pharmacy Bd.*, 425 U.S. at 763-65.

93. In *Virginia Pharmacy Bd.*, the Court explained that "people will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them." 425 U.S. at 770. The Court restated this idea in Bates v. State Bar, 433 U.S. 350 (1977):

> [I]t seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision. The alternative—the prohibition of advertising—serves only to restrict the information that flows to consumers. Moreover, the argument assumes that the public is not sophisticated enough to realize the limits of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any argument that is based on the benefits of public ignorance.

Id. at 374-75 (footnote omitted); *see also* Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85, 92 (1977).

94. *Virginia Pharmacy Bd.*, 425 U.S. at 762.

95. Bolger v. Youngs Drug Prods. Corp., 468 U.S. 60, 64 (1982).

96. *Id.* at 64-65; *Central Hudson*, 447 U.S. at 562-63.

97. Friedman v. Rogers, 440 U.S. 1, 13, 15-16 (1979); Ohralik v. State Bar Ass'n, 436 U.S. 447, 464-65 (1978).

98. Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 383 (1973).

99. *Bolger*, 468 U.S. at 68-69; *Central Hudson*, 447 U.S. at 564-66. Legislative purpose

striction must be narrowly tailored to further the asserted governmental interest. It must directly and effectively promote the government's goal, and it must not be broader than necessary to promote that goal.[100]

The Postal Service's subscriber requirement for reduced rates is not limited to deceptive communications or to communications proposing an illegal transaction. Therefore, the subscriber requirement cannot be upheld on the ground that it affects only unprotected speech.

Determining whether the governmental interest underlying the subscriber requirement is substantial raises an interesting issue. The purpose of the requirement is to promote and encourage the dissemination of noncommercial information and ideas[101]—a purpose that amounts to an undisguised preference for noncommercial over commercial speech.[102] The notion that a simple legislative preference for one form of speech over another could constitute a substantial government purpose under the Court's commercial

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should not be a consideration in determining whether a facially neutral speech restriction is in fact content-based. *See supra* notes 72-77 and accompanying text. Legislative purpose should be unimportant in deciding which standard of review to apply. Once the appropriate standard has been selected, however, the application of that standard usually requires a judicial evaluation of the importance of the legislative purpose. At this stage of the analysis, rather than earlier, a court should inquire into the possibility that the legislature intentionally discriminated between different content categories of speech.

100. *Bolger*, 468 U.S. at 68-69; *Central Hudson*, 447 U.S. at 564-65.

101. Congress, in the 1970 Postal Service Reorganization Act, and the Postal Service, in regulations issued pursuant to that Act, established lower second class mailing rates with the goal of encouraging the dissemination of useful and educational information and ideas. *See supra* notes 1-2 and accompanying text. The Postal Service regulations defining the second class of mailable matter are designed to define the class so that it reflects the category of publications which convey such information and ideas. The subscriber requirement is one of those regulations. *See supra* notes 3-4. From its first appearance in the Act of 1879, the subscriber requirement has been thought to exclude publications from the second-class that do not contain useful ideas and information.

It cannot be argued that the purpose of the subscriber requirement is the conservation of government resources or the sound fiscal management of the Postal Service. Such purposes would require only that the availability of the reduced mailing rate be limited in some fashion. These motives do not determine how the limit should be drawn. Indeed, in the absence of some other purpose, the pursuit of these goals would lead to the elimination of the subsidized rate entirely, not merely to its limitation to a certain category of publications.

102. Congress made that preference clear in the language and legislative history of the Act of Mar. 3, 1879, ch. 180, 20 Stat. 355. Section 14 of the 1879 Act expressly provided that "publications designed for advertising purposes" were to be excluded from the second-class. *Id.* at 359. During the debates prior to the enactment of the legislation, one Congressman commented that the Act would "keep from the mails a vast bulk of matter . . . which is made up simply of advertising concerns not intended for public education." 8 CONG. REC. 2135 (1879) (statement of Rep. Money).

speech test is somewhat troublesome at first. However, by granting a lesser degree of constitutional protection to commercial speech, the Supreme Court has made it clear that commercial speech occupies a "subordinate position in the scale of first amendment values."[103] Moreover, as the Court has noted, commercial speech, as "the offspring of economic self-interest," is less likely than other forms of speech to be deterred or chilled by government regulation.[104] Presumably then, legislatures and agencies, as well as courts, are entitled to prefer noncommercial expression over commercial expression.

However, the subscriber requirement is not narrowly drawn to further the purpose of preferring noncommercial speech over commercial speech. The regulations do not impose a disparate burden on advertising publications alone. The subscriber requirement is overinclusive, bringing within its reach local newspapers and political and religious publications. It is also underinclusive because by its terms the second-class rate is available for many commercial publications, such as mail-away catalogues, which are requested by recipients. Indeed, a more closely tailored regulation already exists. A separate Postal Service regulation denies the reduced mailing rate to publications that are primarily designed for advertising purposes.[105] Because that regulation excludes advertising circulars, mail-away catalogues, and other commercial junk mail from the

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103. *Ohralik*, 436 U.S. at 456.

104. Bates v. State Bar, 433 U.S. 350, 381 (1977).

105. Section 422.231 of the DOMESTIC MAIL MANUAL, *supra* note 2, which applies to "general publications," provides:

> *Publications Designed for Advertising Purposes.* General publications primarily designed for advertising purposes may not qualify for second-class privileges. These include, but are not limited to:
>
> a. Publications which contain more than 75% advertising in more than half of the issues published during any twelve-month period.
>
> b. Publications owned or controlled by individuals and business concerns and conducted as an auxiliary to and essentially for the advancement of any other business or calling of those who own or control them.
>
> c. Publications that consist principally of advertising and articles about advertisers in the publication.
>
> d. Publications that have only a token list of subscribers and that print advertisements free for advertisers who pay for copies to be sent to a list of persons furnished by the advertisers.
>
> e. Publications published under a license from individuals or organizations and that feature other businesses of the licensor.

Id. The regulation concerning "requester publications," contains similar explicit restrictions on the commercial purposes and the amount of advertising permissible in publications qualifying for second-class privileges in that category. *See* DOMESTIC MAIL MANUAL, *supra* note 2, at § 422.6.

second-class rate, the subscriber requirement is simply unnecessary.

B. *Reader-Disfavored Publications*

The subscriber requirement's effect of discriminating against a content category defined on the basis of reader preference[106] cannot be classified in any previously recognized content category. Where no special standard has evolved for a particular category of content, the Supreme Court has required that the restriction be narrowly tailored to serve a compelling government interest.[107] Under the compelling interest standard, the Court conducts a searching inquiry into the importance of the asserted government interest in restricting speech and the closeness of the fit between that interest and the means chosen to accomplish it. The government bears a heavy burden of justification for its restriction.[108] In view of the potential dangers inherent in government discrimination between popular and unpopular speech,[109] this is the appropriate standard to apply to the subscriber requirement.

Sections 422.6, 422.221, and 422.223 of the *Domestic Mail Manual*, which contain the subscriber requirement for second-class postage rates, fall short of this exacting standard. The purpose of the subscriber requirement—to encourage the dissemination of ideas and information[110]—may qualify as compelling.[111] However, the subscriber requirement is not narrowly tailored to serve that purpose. Publications containing ideas and information of the kind that Congress and the Postal Service intended to encourage are excluded from the second-class mailing rate when they appear in publications distributed to persons who have not paid for or specifically requested their copies.

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106. *See supra* notes 80-86 and accompanying text.

107. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983); Carey v. Brown, 447 U.S. 455, 464-65 (1979). Adhoc balancing tests of this sort have been criticized by some commentators as inappropriate for content-based restrictions. *See supra* note 64.

108. *See* Elrod v. Burns, 427 U.S. 347, 362 (1975) ("The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest.").

109. *See supra* notes 84-86 and accompanying text.

110. *See supra* note 101.

111. However, the government's implicit value judgment on the relative merits of various categories of speech may be troubling. *See supra* notes 101-104 and accompanying text.

CONCLUSION

This article has argued that the Postal Service's subscriber requirement for access to the postal system at reduced second-class rates violates the first amendment. Because postage fees restrict access to a public forum, a first amendment issue is raised. A strict level of scrutiny must be applied because the postage rate regulations discriminate on the basis of content. The regulations do not survive that scrutiny. The result is that the first amendment protects what is in essence a property right held by publishers of publications that are distributed free of charge to nonsubscribers. The first amendment entitles them to access to the mails at the same favorable rates accorded to publications that are distributed to subscribers.