1983

Content Regulation and the First Amendment

Geoffrey R. Stone

Follow this and additional works at: http://chicagounbound.uchicago.edu/journal_articles

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
CONTENT REGULATION AND THE FIRST AMENDMENT*

GEOFFREY R. STONE**

INTRODUCTION

Perhaps the most intriguing feature of contemporary first amendment doctrine is the increasingly invoked distinction between content-based and content-neutral restrictions on expression. Although the distinction has its roots in decisions of the 1930’s and 1940’s, and began gradually to emerge as a central premise of the Court’s analysis in the 1950’s and 1960’s, it was not until the last decade that the distinction attained its present prominence.1 It is, indeed, the Burger Court’s foremost contribution to first amendment analysis, and it is, today, the most pervasively employed doctrine in the jurisprudence of free expression.2

Content-neutral restrictions limit communication without regard to the message conveyed. Laws that prohibit noisy speeches near a
hospital, ban billboards in residential communities, impose license fees for parades and demonstrations, or forbid the distribution of leaflets in public places are examples of content-neutral restrictions. Content-based restrictions, on the other hand, limit communication because of the message conveyed. Laws that prohibit seditious libel, ban the publication of confidential information, forbid the hiring of teachers who advocate the violent overthrow of government, or outlaw the display of the swastika in certain neighborhoods illustrate this type of restriction. The Court employs two quite distinct modes of analysis to assess the constitutionality of content-based and content-neutral restrictions. This dichotomy has come under attack in recent years. In this Article, I will explore the merits and limitations of the content-based/content-neutral distinction.

I. CONTENT-NEUTRAL ANALYSIS

The Supreme Court tests the constitutionality of content-neutral restrictions with an essentially open-ended form of balancing. That is, in each case the Court considers the extent to which the restriction limits communication, "the substantiality of the government interests" served by the restriction, and "whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment." The burden on government to demonstrate the substantiality of its interests and the absence of less restrictive alternatives varies from case to case, depending upon the extent to which the restriction actually interferes with the opportunities for effective communication. The greater the interference with effective communication, the greater the burden on government to justify the restriction.


Button, 371 U.S. 415 (1963); and Schneider v. State, 308 U.S. 147 (1939), in which the Court invalidated such restrictions.

In Greenburgh, Heffron, and O’Brien, the Court considered the constitutionality of content-neutral restrictions that did not appreciably limit the ability of individuals to communicate their views effectively to others. In Greenburgh, the Court upheld a federal statute that prohibited the deposit of unstamped “mailable matter” in any letterbox, as applied to civic associations that had engaged in the practice of placing unstamped notices in the letterboxes of private homes. At trial, the government presented evidence that the prohibited practice was only marginally more effective than such permitted alternatives as paying postage, hanging notices on doorknobs, and placing notices under doors. Moreover, in sustaining the restriction, the Court emphasized the difference between letterboxes and such traditional first amendment fora as public streets and parks, and found no historical “support for the characterization of a letterbox as a public forum.” 453 U.S. at 128. The Court thus sustained the statute because it was reasonable and content-neutral. Id. at 131 n.7.

In Heffron, the Court upheld a Minnesota State Fair rule prohibiting the distribution of any merchandise, including written materials, except from a licensed booth, as applied to a religious organization that wished to distribute written material in a peripatetic manner at the fair. Although characterizing the fair as a “limited public forum,” the Court emphasized that the challenged rule left open ample alternative channels of communication. Individuals remained free to distribute literature outside the fairgrounds, to mingle with the crowd and to propagate their views orally, and to acquire booths from which they could distribute literature on the fairgrounds itself. The Court thus concluded that the state’s interest in avoiding congestion and maintaining orderly movement of fair patrons was “sufficient to satisfy the requirement [that the restriction] serve a substantial state interest,” and rejected the religious organization’s argument that the restriction was unnecessary because the state could protect its interest by less restrictive means—such as penalizing actual disruption, limiting the number of distributors, or putting more narrowly drawn restrictions on the location and movement of distributors. The Court found “quite improbable” the assertion that such alternatives “would deal adequately with the problems.” 452 U.S. at 654.

In O’Brien, the Court upheld a federal statute that prohibited any person from knowingly destroying a draft card. The government prosecuted O’Brien for publicly burning his draft card as a symbolic expression of protest against the draft and the Vietnam war. Although O’Brien’s act surely had dramatic appeal, the statute did not limit more conventional means of voicing opposition to government policy. The restriction thus did not impair significantly O’Brien’s ability to communicate his message effectively to the public. Although the Court stated that, to withstand constitutional attack, the statute must further a “substantial governmental interest” and must be no more intrusive on first amendment rights “than is essential to furtherance of that interest,” 391 U.S. at 377, the Court actually applied a “no gratuitous inhibition” approach, sustaining the statute because it rationally furthered a legitimate governmental interest and did not needlessly inhibit O’Brien’s expression. See Alfange, Free Speech and Symbolic Conduct: The Draft-Card Burning Case, 1968 Sup. Cr. Rev. 1, 23-26; Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1488-89 (1975). For a discussion of the substantiality of the restriction in O’Brien, see L. Tribe, AMERICAN CONSTITUTIONAL LAW 686 (1978); Alfange, supra, at 27; Ely, supra, at 1489-90 & n.29; Redish, supra note 3, at 147-49; Velvel, Draft Card Burning Cases, 16 U. Kan. L. Rev. 149, 153 (1968).

In each of these cases, then, the challenged restriction did not significantly impair effective communication. In each case, the Court applied a highly deferential standard, sustaining the restriction with little, if any, scrutiny of the substantiality of the government’s
The Court's primary concern in the content-neutral realm is interest and without insisting that the government attempt to achieve its interest through less restrictive means.

In Schad, Button, and Schneider, the Court considered the constitutionality of content-neutral restrictions that significantly impaired effective communication. In each case, the Court employed a relatively stringent form of balancing. In Schad, the Court held that a zoning ordinance that prohibited all live entertainment in the borough was unconstitutional. The Court emphasized that the ordinance constituted a "substantial restriction of protected activity [and failed to] leave open adequate alternative channels of communication." 452 U.S. at 72, 76. Although the borough argued that the restriction was necessary to avoid the problems associated with live entertainment—such as parking, trash, and police protection—the Court observed that the borough had failed to present evidence "that live entertainment poses problems of this nature more significant than those associated with various permitted" activities, and that the borough had failed to establish "that its interests could not be met by restrictions that are less intrusive on protected forms of expression." Id. at 73, 74.

In Button, the Court held that a Virginia statute unconstitutionally restricted the solicitation of legal business, as applied to the activities of the NAACP, which routinely solicited plaintiffs for its civil rights litigation. The Court explained that, in the context of NAACP objectives, litigation is a form of "political expression [that may be] the sole practicable avenue" to effective political change. 371 U.S. at 429, 430, 438. The Court thus held that "only a compelling state interest" could justify limiting such first amendment freedoms. After carefully scrutinizing the state's interests in regulating "the traditionally illegal practices of barratry, maintenance and champerty," the Court concluded that the NAACP activities did not pose the dangers that "rules against solicitation frequently seek to prevent." Id. at 439, 443.

In Schneider, the Court held unconstitutional a municipal ordinance prohibiting the distribution of leaflets in or upon any street, sidewalk, or park. The municipality defended the ordinance on the ground that it was designed to reduce litter. In rejecting this argument, the Court explained that, in the context of such traditional public fora as streets and parks, "the purpose to keep the streets clean and of good appearance is insufficient to justify" the ordinance's restriction on free expression. 308 U.S. at 162. Moreover, the Court observed that "obvious methods of preventing littering" were available that would be less restrictive of first amendment rights, such as "the punishment of those who actually throw papers on the streets." Id.

As these decisions suggest, in assessing the extent to which a restriction substantially limits the opportunities for effective communication in the context of content-neutral balancing, the Court considers several factors not directly related to the substantiality of the restriction. It gives considerable weight, for example, to whether the speech takes place in a public forum, presumably because the preservation of such public fora ensures at least minimal opportunities for expression for those without access to more conventional means of expression. See generally Kalven, The Concept of The Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1; Stone, Fora Americana: Speech in Public Places, 1974 Sup. Ct. Rev. 233. Similarly, the Court gives less weight to idiosyncratic means of expression than to traditional ones. In effect, the Court is more concerned with preserving the widespread availability of conventional means of communication than with protecting the use of unusual, but effective, alternatives. See, e.g., Ely, supra, at 1489-90.

6. At least two secondary concerns—disparate impact and improper motivation—also af-
that such restrictions, by limiting the availability of particular means of communication, can significantly impair the ability of individuals to communicate their views to others. This is, of course, a central first amendment concern, for to the extent that content-neutral restrictions actually reduce the total quantity of expression, they necessarily undermine the "search for truth," impede meaningful participation in "self-governance," and frustrate individual "self-fulfillment."8

The Court's content-neutral balancing is a sensible response to this concern. Unlike a consistently deferential approach, which would uphold every content-neutral restriction thatrationally furthers legitimate governmental interests, the Court's approach critically examines restrictions that seriously threaten significant first amendment interests. And unlike a rigid "clear and present danger" or "compelling interest" approach, which would invalidate almost all content-neutral restrictions, the Court's analysis does not sacrifice legitimate governmental interests when significant first amendment interests are not at issue. Thus, by assuring the availability of ample opportunities and outlets for expression, without needlessly undermining competing governmental interests, the Court has achieved a reasonable accommodation. One might quarrel with some of the Court's results,9 but the overall mode of analysis is defensible.

---


9. Heffron and Greenburgh, for example, apply too deferential a standard. See supra note 5.
II. CONTENT-BASED ANALYSIS

In the content-based realm, the Court employs a markedly different mode of analysis. At the outset, the Court determines whether the restricted speech is of only "low" first amendment value, and thus deserving of only limited constitutional protection. The "low" value theory first appeared in the famous dictum of Chaplinsky v. New Hampshire,\textsuperscript{10} in which the Court observed that "certain well-defined and narrowly limited classes of speech . . . are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."\textsuperscript{11}

The precise factors that the Court considers in determining whether a particular class of speech occupies only a "subordinate position in the scale of First Amendment values"\textsuperscript{12} remain somewhat obscure. The Court apparently focuses, however, on the extent to which the speech furthers the historical, political, and philosophical purposes that underlie the first amendment. In making this determination, the Court applies a "defining out" approach.\textsuperscript{13} That is, the Court begins with the presumption that the first amendment protects all communication and then creates areas of nonprotection only after it affirmatively finds that a particular class of speech does not sufficiently further the underlying purposes of the first amendment. The Court, applying this approach, has held that several classes of speech have only low first amendment value, including express incitement,\textsuperscript{14} false statements of fact,\textsuperscript{15} obscenity,\textsuperscript{16} commercial speech,\textsuperscript{17} fighting words,\textsuperscript{18} and child...
The conclusion that a particular class of speech has only low first amendment value does not mean that the speech is wholly without constitutional protection or that the government may suppress it at will. Rather, the low value determination is merely the first step in the Court's analysis, for once the Court concludes that a particular class of speech is deserving of only limited first amendment protection, it then employs a form of categorical balancing, through which it defines the precise circumstances in which the speech may be restricted. In attempting to strike an appropriate "balance" for each class of low value speech, the Court considers a number of factors, including the relative value of the speech and the risk of inadvertently chilling "high" value expression. Applying this approach, the Court has articulated quite different standards for different classes of low value speech. Express incitement, for example, may be suppressed only if it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Commercial speech, on the other hand, may be suppressed if it is false or misleading, or if the restriction "directly advances [a] substantial" governmental interest and is "not more extensive than is necessary" to achieve that interest. And obscenity, which is perhaps the least protected class of low value expression, may be suppressed whenever a relatively undemanding scienter requirement is satisfied.

Whatever the merits of the low value theory, this theory is not...

20. See supra notes 14-19.
24. The low value theory necessarily involves the Court in the often controversial task of assigning relative values to different classes of expression. This task, one commentator has asserted, is foreclosed "by the basic theory of the First Amendment." T. Emerson, supra note 8, at 326. I do not agree. The low value theory, or some variant thereof, is an essential concomitant of an effective system of free expression, for unless we are prepared to apply the same standards to private blackmail, for example, that we apply to public political debate, some distinctions in terms of constitutional value are inevitable. Stephan, supra note 1, at 211-14. Moreover, the low value theory acts as a safety valve, enabling the Court to deal sensibly with potentially harmful but relatively "unimportant" speech without diluting...
the focus of the content-based/content-neutral distinction. The puzzling quality of the distinction arises not from the Court's analysis of low value speech, but from its treatment of high value expression. For in dealing with high value speech, the Court employs, not a balancing approach akin to its content-neutral balancing, but a far more speech-protective analysis. Indeed, in assessing the constitutionality of content-based restrictions on high value expression, the Court employs a standard that approaches absolute protection. In an oft-quoted declaration, for example, the Court announced in Police Department v. Mosley\(^8\) that, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."\(^9\) Although this declaration has proved to be somewhat overstated,\(^7\) the Court has been remarkably true to its word, for except when low value speech is at issue, the Court has invalidated almost every content-based restriction that it has considered in the past quarter-century.\(^8\) Thus, whether the Court evaluates such restrictions by an "absolute protection" approach, a "clear-and-present-danger" test, a "compelling government interest" standard, or some other formulation, it clearly applies a differ-

---

the protection accorded expression at the very heart of the guarantee. See Schauer, supra note 13, at 285-88; Stephan, supra note 1, at 211-14. Thus, although the low value theory poses dangers, and the Court's determinations of constitutional value must be scrutinized carefully and critically, the theory is, on balance, a salutary one. The theory justifiably plays a central role in the jurisprudence of the first amendment. See Stone, Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions, 46 U. Cm. L. Rev. 81, 82 n.5 (1978).


26. Id. at 95.

27. The overstatement, however, does not derive from the continued vitality of the low value theory. Although some Justices and commentators have mistakenly viewed the low value theory as inconsistent with Mosley, see, e.g., Young v. American Mini Theatres, 427 U.S. 50, 67-70 (1976) (Stevens, J.); Stephan, supra note 1, at 236, neither Mosley nor the Court's commitment to content-neutrality was intended to extend to low value expression.

28. The exceptions tend to fall within two categories. First, the Court has upheld some laws that distinguish on the basis of subject-matter. See infra notes 160-79 and accompanying text; see generally Stone, supra note 24. Second, the Court occasionally has upheld content-based laws in special contexts. See Branti v. Finkel, 445 U.S. 507 (1980) (public employment); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977) (prisons); Greer v. Spock, 424 U.S. 828 (1976) (military base). Even in these contexts, however, the Court indicated that it would test content-based restrictions by more stringent standards than content-neutral restrictions.
ent and more stringent standard to content-based than to content-neutral restrictions.

It has been suggested that the "most puzzling aspect of the distinction between content-based and content-neutral restrictions is that either restriction reduces the sum total of information or opinion disseminated." Indeed, in many instances a content-neutral restriction may more substantially reduce "the sum total of information or opinion disseminated" than a related content-based restriction. For example, a law banning all billboards restricts more speech than a law banning Nazi billboards, and a law limiting the political activities of public employees restricts more speech than a law limiting the Socialist political activities of public employees. Under current doctrine, however, the Court subjects the content-based restrictions to a more stringent standard of justification than the more suppressive content-neutral restrictions. Why?

In addressing this question, I shall focus first, in Parts III and IV, on viewpoint-based restrictions—that is, laws that expressly restrict the communication of particular ideas, viewpoints, or items of information—for such restrictions are at the very core of the content-based/content-neutral distinction. I shall then turn, in Part V, to more peripheral forms of content-based restrictions, such as laws that are neutral on their face but are applied on the basis of "communicative impact," laws that restrict speech because of its "subject matter," and other laws that restrict expression in a "viewpoint-neutral" manner.

III. VIEWPOINT-BASED RESTRICTIONS

Consider two hypothetical statutes. First, suppose State X enacts a law prohibiting all billboards. Second, suppose State X enacts a law prohibiting all criticism of the antibillboard law. From the standpoint of total reduction in expression, the two statutes appear quite similar. The antibillboard law is content-neutral,

29. Redish, supra note 3, at 128.
30. Indeed, in invalidating content-based restrictions, the Court has suggested that "broader," content-neutral restrictions might be permissible. E.g., Carey v. Brown, 447 U.S. 455, 470-71 (1980); Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 n.9 (1975).
31. Users of billboards often may be able to shift to alternative means of communication, whereas critics of the antibillboard law may find expression of their views difficult without violating the anticriticism statute. But the antibillboard law, unlike the anticriticism stat-
however, and thus will be tested by a relatively moderate standard of review; the anticriticism law is content-based, and thus will be tested by a more stringent standard of justification.

The explanation is that the first amendment is concerned, not only with the extent to which a law reduces the total quantity of communication, but also—and perhaps even more fundamentally—with the extent to which the law distorts public debate. Although the anticriticism statute may produce only a small reduction in the total quantity of communication, the reduction falls entirely on one side of the debate. Moreover, the potential distorting effect of the statute is dramatic, for it subjects critics of the antibillboard law not to a mere marginal competitive disadvantage, but to an effective prohibition on the expression of their view. Any law that substantially prevents the communication of a particular idea, viewpoint, or item of information violates the first amendment except, perhaps, in the most extraordinary of circumstances. This is so, not because such a law restricts “a lot” of speech, but because by effectively excising a specific message from public debate, it mutilates “the thinking process of the community” and is thus incompatible with the central precepts of the first amendment. 32

My hypothetical anticriticism statute is not wholly hypothetical. It is, rather, but one example of a broad range of content-based

32. A. Meiklejohn, Political Freedom 27 (1960). A law that significantly distorts “the thinking process of the community” is obviously incompatible with the self-governance and search for truth rationales, but the threat to the self-fulfillment rationale is less obvious. Unlike the self-governance and search for truth theories, the self-fulfillment theory does not turn on a competition among ideas. Nonetheless, a law that substantially restricts the expression of a particular idea, viewpoint, or item of information undermines the self-fulfillment rationale because it effectively prevents individuals from expressing their views. This does not, of course, distinguish content-based restrictions from content-neutral restrictions that restrict expression to the same degree. The similarity is illusory, however, because content-neutral restrictions never significantly prevent the communication of all ideas, viewpoints, and items of information. If they did, the restrictions undoubtedly would be held unconstitutional under ordinary content-neutral balancing. Thus, laws that substantially prevent the expression of a particular message undermine the self-fulfillment rationale, not because they distort public debate, but because they severely limit the opportunities for self-expression.
restrictions that attempt substantially to prevent the communication of a particular idea, viewpoint, or item of information. These include, for example, the Espionage Act of 1917, which prohibited expression critical of the war and the draft;\textsuperscript{33} state statutes, such as those enacted in the early twentieth century, which prohibited the advocacy of criminal anarchy and criminal syndicalism;\textsuperscript{34} the Smith Act, which prohibited the advocacy of violent overthrow of the government;\textsuperscript{35} laws and judicial orders prohibiting contumacious criticism of judicial decisions or other judicial conduct;\textsuperscript{36} laws and judicial orders prohibiting the publication of “confidential” information, ranging from the Pentagon Papers to inculpatory facts about a criminal defendant to the identity of a juvenile offender or rape victim;\textsuperscript{37} and laws or judicial decisions prohibiting “invasions of privacy” through public disclosure of “embarrassing” information.\textsuperscript{38} In these and other instances, content-based restrictions attempt substantially to eliminate particular ideas, viewpoints, or items of information from public debate and thus undermine the values and purposes underlying the first amendment.

It is true, of course, that content-neutral restrictions may also have content-differential effects, for such restrictions may impair the communication of some messages more than others.\textsuperscript{39} For example, the antibillboard statute may have a disproportionate impact upon those groups or individuals who tended previously to use billboards. By their very nature, however, content-neutral restrictions limit the availability of only particular means of commu-

\begin{footnotesize}

\textsuperscript{34} See Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1926).


\textsuperscript{36} See Wood v. Georgia, 370 U.S. 375 (1962); Bridges v. California, 314 U.S. 252 (1941).


\textsuperscript{38} See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

\textsuperscript{39} See infra notes 108-29 and accompanying text.
\end{footnotesize}
They thus leave speakers free to shift to other means of expression. As a result, content-neutral restrictions do not distort public debate to the same degree as content-based restrictions that substantially prevent the communication of particular ideas, viewpoints, or items of information by all means. The uniquely powerful distorting effect of such content-based restrictions thus goes a long way towards explaining the content-based/content-neutral distinction.

IV. MODEST VIEWPOINT-BASED RESTRICTIONS

The distorting effect, however, does not explain the distinction in its entirety, for not every law that restricts the communication of a particular idea, viewpoint, or item of information substantially prevents the message from being communicated. To the contrary, such restrictions are often limited in scope, restricting expression in only narrowly defined circumstances. For example, laws that prohibit the public destruction of a draft card as an expression of opposition to the draft, the display of the swastika within 100 feet of a synagogue on Yom Kippur, or the advocacy of homosexuality on any billboard are viewpoint-based, but restrict expression only in terms of time, place, or manner. They are thus unlikely to distort public debate to the same degree as viewpoint-based restrictions that more pervasively restrict the communication of particular messages. One might expect, therefore, that the Court would test these more modest viewpoint-based restrictions by less stringent standards, similar to the standards applied in the content-neutral context. The Court, however, has applied the content-based/content-neutral distinction, and the stringent standards of content-based analysis, even to these more modest viewpoint-based restrictions.

Consider, for example, Schacht v. United States, Linmark Associates v. Township of Willingboro, and Nebraska Press Association v. Stuart. In Schacht, the Court held unconstitutional a federal statute permitting actors to wear the uniform of an armed force of the United States in a theatrical or motion-picture produc-

42. 427 U.S. 539 (1976).
tion only "if the portrayal does not tend to discredit that armed force." Although the statute imposed only a modest restriction on the ability of individuals to oppose governmental policy, and although the government could constitutionally make "it an offense to wear our military uniforms without authority," the Court held the statute invalid because it restricted expression on the basis of content. In Linmark, the Court held unconstitutional an ordinance that attempted to stem the flight of white homeowners from racially integrated neighborhoods by prohibiting the posting of real estate "For Sale" signs. Although conceding that the ordinance "restrict[ed] only one method of communication," the Court emphasized that the ordinance "proscribed particular types of signs based on their content" and thus held that it must be tested, not as a content-neutral "'time, place, or manner'" restriction, but "on the basis of the township's interest in regulating the content of the communication." In Nebraska Press Association, the Court held unconstitutional a state court order restraining the press from publishing or broadcasting accounts of confessions or other facts strongly implicative of a murder defendant. Although noting that the order expired by its own terms when the jury was impaneled, and that it thus merely postponed and did not prohibit publication, the Court nonetheless employed the demanding standards of content-based analysis.

Thus, in these and other decisions, the Court has consistently applied the stringent standards of content-based analysis even to relatively modest viewpoint-based restrictions. Why? At least four possible explanations come to mind.

A. Equality

It has been suggested that the concept of equality "lies at the heart of the first amendment's protections against government reg-

43. 398 U.S. at 61.
44. 431 U.S. at 93-94.
45. See 427 U.S. at 560.
ulation of the content of speech."\textsuperscript{47} Indeed, it has been argued that, "[j]ust as the prohibition of government-imposed discrimination on the basis of race is central to equal protection analysis, protection against governmental discrimination on the basis of speech content is central among first amendment values."\textsuperscript{48} There is, indeed, a seemingly obvious connection between the content-based/content-neutral distinction and the concept of equality. When government restricts only certain ideas, viewpoints, or items of information, people wishing to express the restricted messages receive "unequal" treatment. When government restricts speech in a content-neutral manner, however, everyone is treated "equally." Moreover, an equality-based theory of the content-based/content-neutral distinction might explain the Court's use of the same standards of justification for all viewpoint-based restrictions, regardless of their potential to distort public debate. For just as we "strictly scrutinize" any law that discriminates on the basis of race, whether it denies an important or trivial benefit, so too must we "strictly scrutinize" any law that discriminates on the basis of content, whether it has a substantial or only a modest impact on public debate. It is the fact of discrimination, not the impact on public debate, that warrants "strict scrutiny."

It is not, however, that simple. In fact, the Court employs at least two quite distinct modes of content-based analysis, only one of which focuses explicitly on "equality." In the more traditional mode of analysis, the Court asks only whether the restricted speech is sufficiently harmful to justify the restriction. The Court does not concern itself with whether other speech is similarly restricted. In \textit{Schenck v. United States},\textsuperscript{49} for example, the Court asked whether the restricted speech created a "clear and present danger." The Court did not ask whether the Espionage Act embodied an impermissible "inequality" because it failed to restrict other, perhaps equally dangerous, messages. Similarly, in \textit{Whitney v. California},\textsuperscript{50} the Court, in upholding California's criminal syndicalism statute, focused only on the dangers of the restricted speech


\footnotesize{\textsuperscript{48} Karst, \textit{supra} note 47, at 35.}

\footnotesize{\textsuperscript{49} 249 U.S. 47 (1919).}

\footnotesize{\textsuperscript{50} 274 U.S. 357 (1927).}
and rather cavalierly rejected an assertion that the Act unconstit-
utionally distinguished between those who advocated “a resort to
violent and unlawful methods as a means of changing industrial
and political conditions” and those who advocated “a resort to
those methods as a means of maintaining such conditions.” More
recently, in such cases as the Pentagon Papers Case, Nebraska
Press Association v. Stuart, and Landmark Communications v. Virginia the Court has routinely applied the “compelling inter-
est” and “clear and present danger” standards without asking the
logically preliminary question whether the challenged restrictions
embodied impermissible “inequalities” because they prohibited the
publication of only specific types of “confidential” information.
What these cases suggest, then, is that although a concern with
inequality may underlie the content-based/content-neutral distinc-
tion, the concern is often submerged, and there exists a traditional
and well-founded mode of content-based analysis that pays no ex-
licit attention to the equality issue.

The second mode of content-based analysis focuses explicitly on
“equality.” This mode of analysis, which has come to the fore only
recently, emphasizes underinclusion as a basis for invalidation.
The key issue is not whether the restricted speech is sufficiently
harmful to justify its restriction, but whether the government may
constitutionally restrict only the speech restricted. Police Depart-
ment v. Mosley, Erznoznik v. Jacksonville, and Widmar v. Vin-
cent are illustrative.

In Mosley, the Court considered the constitutionality of a Chi-
cago ordinance that prohibited picketing or demonstrating on a

51. Id. at 369.
55. See Farber, supra note 3, at 748 n.100; Karst, supra note 47, at 65-68.
56. Although the Court referred to equality in several early opinions, see, e.g., Fowler v.
Rhode Island, 345 U.S. 67 (1953); Niemotko v. Maryland, 340 U.S. 268, 272 (1951), and
equality was the basis of an oft-cited concurring opinion, Cox v. Louisiana, 379 U.S. 536, 581
(1965) (Black, J., concurring), the Court did not fully enunciate the principle until 1972. See
57. 408 U.S. 92 (1972).
58. 422 U.S. 205 (1975).
public way within 150 feet of a school building while the school was in session. The ordinance was not content-neutral, however, for it expressly exempted "peaceful picketing of any school involved in a labor dispute." Without deciding whether the ordinance, absent the labor-picketing exemption, would be a permissible content-neutral restriction, the Court invalidated the ordinance because it described prohibited picketing, "not in terms of time, place, and manner," but in terms of content. Although conceding that cities may have a substantial interest in prohibiting picketing that disrupts a school, the Court held that Chicago may not ban nonlabor picketing "unless that picketing is clearly more disruptive than the picketing Chicago . . . permits."

In Erznoznik, the Court held unconstitutional an ordinance that prohibited the exhibition of films containing nudity by drive-in movie theaters if the screen was visible from a public street or public place. Without deciding whether "a narrowly drawn non-discriminatory traffic regulation" requiring the screening of all drive-in theaters from the view of motorists would "be a reasonable exercise of police power," the Court held that "even a traffic regulation cannot discriminate on the basis of content unless there are clear reasons for the distinctions." The ordinance, the Court held, was "strikingly underinclusive," for there was "no reason to think that a wide variety of other scenes in the customary screen diet, ranging from soap opera to violence, would be any less distracting to the passing motorist."

And in Widmar, the Court held unconstitutional a policy of the University of Missouri that allowed registered student groups to use university facilities, but that prohibited such groups from using the facilities "for purposes of religious worship or religious teaching." The Court explained that the "Constitution forbids a State to enforce certain exclusions from a forum generally open to

---

60. 408 U.S. at 93 (quoting CHICAGO, ILL., MUNICIPAL CODE ch. 193-1(i) (1968)).
61. 408 U.S. at 99.
62. Id. at 100.
63. 422 U.S. at 217.
64. Id. at 215 n.13.
65. Id. at 215.
66. Id. at 214-15.
67. 454 U.S. at 263 (citation omitted).
the public, even if it was not required to create the forum in the first place.\textsuperscript{68} Here, the Court reasoned, the university had voluntarily created such a forum, and to justify "discriminatory exclusion" because of the "content of a group's intended speech," the university would have to "show that its regulation [was] necessary to serve a compelling state interest and that it [was] narrowly drawn to achieve that end."\textsuperscript{69} The Court held that the university had not met that standard.\textsuperscript{70}

The Court's express recognition in the Mosley line of cases of the nexus between free expression and equality has had a generally salutary effect, for as Justice Jackson recognized in his celebrated concurrence in \textit{Railway Express Agency v. New York},\textsuperscript{71} there is no more effective way "to assure that laws will be just than to require that laws be equal in operation."\textsuperscript{72} There are dangers in the emphasis on equality, however, and those dangers should not be overlooked. By focusing on equality, the Court may invite government to "equalize," not by permitting more speech, but by adopting even more "suppressive" content-neutral restrictions. This result, one might argue, is hardly consistent with the first amendment. As Justice Rehnquist has observed, under the Court's approach, "the State would fare better by adopting more restrictive means, a judicial incentive I had thought this Court would hesitate to afford."\textsuperscript{73} Moreover, an undue emphasis on equality may lead the Court to sustain "equal" restrictions on expression without sufficient consideration of the other dangers such restrictions might pose. This tendency is evident in several recent decisions in which the Court, in upholding a number of potentially troublesome content-neutral restrictions, stressed repeatedly that the restrictions were, after all, "content-neutral."\textsuperscript{74} Finally, in several recent decisions, the Court

\textsuperscript{68} \textit{Id.} at 267-68.
\textsuperscript{69} \textit{Id.} at 269-70.
\textsuperscript{70} The Court has not invalidated all content-based restrictions on the basis of inequality. Occasionally, the Court has sustained subject matter restrictions. See \textit{infra} notes 160-79 and accompanying text.
\textsuperscript{71} 336 U.S. 106, 111 (1949) (Jackson, J., concurring).
\textsuperscript{72} \textit{Id.} at 113.
has relied explicitly on the equal protection clause as well as, and even instead of, the first amendment. The degree of scrutiny that is appropriate in testing the constitutionality of content-based restrictions, however, is fundamentally a first amendment issue. Invocation of the equal protection clause adds nothing constructive to the analysis. It may, however, by appearing to "simplify" matters, deflect attention from the central constitutional issue.

These caveats aside, the question remains whether the equality concept justifies the use of especially stringent standards of review to test the constitutionality of viewpoint-based restrictions that do not substantially prevent the communication of particular ideas, viewpoints, or items of information. In addressing this question, it is important to note that the Court's reliance on equality affects its analysis in two quite distinct ways.

First, recognition that a restriction is underinclusive may effectively undercut the asserted importance of the government interest said to support the restriction. In Mosley, for example, the governmental interest in preventing the disruption of schools may be sufficient to justify a content-neutral restriction, but it loses force when the government creates an exemption. Similarly, in Erznoznik, the governmental interest in promoting traffic safety may justify a content-neutral restriction, but loses force when the government applies the restriction only to some speech that poses the danger. In such circumstances, content-based restrictions may be unconstitutional, not because they are more "dangerous" than content-neutral restrictions, but because they are more difficult to justify. This "impeaching" effect, it should be noted, is not always present. In Widmar, for example, the university's interest in excluding religious organizations—maintaining a strict separation of church and state—is tied specifically to the particular speech restricted, and the content-based nature of the restriction does not significantly undermine the strength of the state's interest. When the impeaching effect is present, however, it is clearly sensible for

75. E.g., Carey v. Brown, 447 U.S. 455 (1980); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Police Dep't v. Mosley, 408 U.S. 92 (1972). In other cases, however, the Court has eschewed reliance on the equal protection clause. E.g., Widmar v. Vincent, 454 U.S. 263 (1981); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980).

the Court to take it into account, and this may explain why some content-based restrictions must be invalidated even though more “suppressive” content-neutral restrictions might be sustained. It does not, however, explain why content-based restrictions are tested by especially stringent standards of justification.

Second, the Court uses the equality concept to determine the appropriate standard of review. That is, once the Court characterizes the restriction as “content-based,” it shifts immediately to the more stringent content-based standard of justification. This, of course, is the rub of the issue. Does the concern with equality explain this shift? The answer, I submit, is “no.”

The problem, quite simply, is that restrictions on expression are rife with “inequalities,” many of which have nothing whatever to do with content. The ordinance at issue in Mosley, for example, restricted picketing near schools, but left unrestricted picketing near hospitals, libraries, courthouses, and private homes. The ordinance at issue in Erznoznik restricted drive-in theaters that are visible from a public street, but did not restrict billboards. And the policy at issue in Widmar permitted students to use university facilities for speech purposes, but did not grant similar access to other members of the community. Whatever the effect of these content-neutral inequalities on first amendment analysis, they are not scrutinized in the same way as content-based inequalities. Not all inequalities, in other words, are equal. And although the concern with equality may support the content-based/content-neutral distinction, it does not in itself have much explanatory power. To determine why some inequalities are more bothersome than others, we must look elsewhere.77

B. Communicative Impact

A second possible explanation for the content-based/content-neutral distinction derives from the notion that the government ordinarily may not restrict speech because of its communicative impact—that is, because of “a fear of how people will react to what the speaker is saying.”78

78. J. Ely, Democracy and Distrust 111 (1980); see also L. Tribe, supra note 5, at 580; Ely, supra note 5, at 1497; The Supreme Court, 1980 Term, 95 Harv. L. Rev. 17, 235 (1981)
Most laws that are content-neutral on their face do not turn on communicative impact. For example, the government may restrict the distribution of leaflets to reduce litter, the use of loudspeakers to reduce noise, and the size and location of billboards to improve the aesthetics of the community. Most content-based laws, on the other hand, do turn on communicative impact. For example, the government may ban the advocacy of the violent overthrow of government because such advocacy might persuade individuals to engage in unlawful acts, it may restrict the display of the swastika in predominantly Jewish communities because such displays might offend the sensibilities of residents and trigger a violent response, and it may prohibit the wearing of "Ban the Bomb" buttons in schools because such buttons might distract students from their schoolwork.

The content-neutral and content-based concepts do not, however, coincide perfectly with communicative impact. Some laws that are content-neutral on their face are applied on the basis of communicative impact. For example, a law prohibiting any person from making any speech that may provoke a breach of the peace is content-neutral on its face, but turns in application on the reaction of individuals "to what the speaker is saying." Similarly, some laws are content-based on their face but do not turn in application on communicative impact. For example, a law excluding communists from employment in defense facilities might be based on a concern that communists would perform their duties in an undesirable manner, and a law prohibiting the display of partisan political messages in certain public facilities might be based on a concern that the display of such messages would involve the government in especially troublesome "administrative" problems.

To what extent, if any, does the communicative impact concept explain the content-based/content-neutral distinction? There are several formulations of the communicative impact theory. The first formulation treats as content-based any law that is either content-based on its face or turns in application on communicative impact.

[hereinafter cited as The Supreme Court].

79. E.g., United States v. Robel, 389 U.S. 258 (1967); American Communications Ass'n v. Douds, 339 U.S. 382 (1950); see also Police Dep't v. Mosley, 408 U.S. 92 (1972).

This formulation assumes that laws that are content-based on their face require strict scrutiny whether they turn on communicative impact and thus employs the communicative impact concept to expand the class of content-based restrictions. Although I shall return later to this formulation, it is of no concern here, for it does not rely on communicative impact to justify the use of stringent standards of review for laws that are content-based on their face.

The second formulation also treats as content-based any law that is either content-based on its face or turns in application on communicative impact but, unlike the first formulation, assumes that the communicative impact concept justifies the use of stringent standards of review for all restrictions that it treats as content-based. This formulation is obviously unsatisfactory, for as we have already seen, not all laws that are content-based on their face turn on communicative impact. This formulation thus puts more weight on the communicative impact concept than it can logically bear.

The third formulation treats as content-based any restriction that turns on communicative impact. This formulation uses communicative impact to define the category of content-based restrictions, and thus excludes from this category all laws that do not turn on communicative impact, even if they are content-based on their face. Whatever the merits of this formulation, it does not comport with the Court's own understanding of the content-based/content-neutral distinction. There are, quite simply, too many

81. For further discussion of this formulation, see infra notes 149-59 and accompanying text.
82. See infra notes 180-86 and accompanying text.
83. Although these three formulations are analytically distinct, they are often confused. For various statements of the communicative impact theory, see J. Ely, supra note 78, at 111; L. Tribe, supra note 5, at 580, 679, 683; Brudney, Business Corporations and Stockholders' Rights Under the First Amendment, 91 Yale L.J. 235, 250-51 (1981); Ely, supra note 5, at 1497; Farber, supra note 3, at 743-46; Redish, supra note 3, at 116-17; The Supreme Court, supra note 78, at 237-39.
84. On several occasions, the Court has invoked the communicative impact theory in a manner consistent with the third formulation. This has occurred in three types of cases. First, in several decisions invalidating laws that were content-based on their face, the Court expressly noted that the challenged law turned directly on communicative impact. In Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977), for example, the Court observed that the township had "proscribed particular types of signs based on their con-
decisions to the contrary. To cite just three of many possible examples, in Police Department v. Mosley, perhaps the seminal content-based/content-neutral decision, the Court treated as content-based an ordinance prohibiting all picketing within 150 feet of a school, except peaceful picketing of any school involved in a labor dispute, even though the city sought to defend the ordinance, not in terms of communicative impact, but on the ground that nonlabor picketers were themselves more prone to violence than labor picketers. Similarly, in City of Madison Joint School District No.
8 v. Wisconsin Employment Relations Commission,\textsuperscript{87} the Court treated as content-based a Commission order prohibiting the board of education from hearing nonunion teachers on matters subject to collective bargaining, even though the Commission defended its order, not in terms of communicative impact, but on the ground that the order was necessary to prevent "'chaos in labor management relations.'"\textsuperscript{88} And in New York v. Ferber,\textsuperscript{89} the Court treated as content-based a law prohibiting "child pornography," even though the state defended the law, not in terms of communicative impact, but on the ground that the law was necessary to protect children who participated in "sexual performances."\textsuperscript{90} Thus, the third formulation of the communicative impact theory offers a definition of the content-based/content-neutral distinction quite different from the Court's own conception, for the Court routinely treats laws that are content-based on their face as content-based whether or not the state's justification turns on communicative impact.

The final formulation of the communicative impact theory provides that any governmental effort to justify a restriction on speech in terms of the communicative impact of the restricted expression must be tested by stringent standards of review.\textsuperscript{91} This formulation treats communicative impact as a sufficient, but not a necessary, condition for the invocation of content-based analysis. This formulation does not explain the content-based/content-neutral distinction in its entirety, for as we have seen, some content-based restrictions are not based on communicative impact. Most content-based restrictions are based on communicative impact, however, and if this formulation is supportable it would explain much of the distinction.

Of course, the question remains: should a law that is content-based on its face be tested by stringent standards of review, even if

\begin{itemize}
  \item \textsuperscript{87} 429 U.S. 167 (1976).
  \item \textsuperscript{88} Id. at 173 (quoting City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 69 Wis. 2d 200, 212, 231 N.W.2d 206, 213 (1975), rev'd, 429 U.S. 167 (1976)).
  \item \textsuperscript{89} 458 U.S. 747 (1982).
  \item \textsuperscript{91} The application of this formulation to laws that are facially content-neutral is examined infra notes 149-59 and accompanying text.
\end{itemize}
it will not substantially distort public debate, because the government attempts to justify it on the basis of "a fear of how people will react to what the speaker is saying"? Should government efforts to justify restrictions of speech in terms of communicative impact be viewed differently from other justifications for restricting expression? To explore this line of inquiry, we must examine the dynamic of communicative impact. That is, we must determine what we mean when we say "how people will react to what the speaker is saying." As we shall see, there are essentially three such "reactions," and an analysis of these reactions sheds considerable light on the nature of the communicative impact concern.

In the most common communicative impact situation, the government attempts to restrict expression because the expression may persuade individuals to act in an undesirable or unlawful manner. For example, the government might prohibit any person from distributing antiwar leaflets within 100 feet of an enlistment center in order to prevent persons from being persuaded not to enlist in the armed forces. Is such a law, despite its modest suppressive effect, unconstitutional? May government legitimately restrict speech for this reason?

The Court has long embraced an "antipaternalistic" understanding of the first amendment. It has observed, for example, that the first amendment assumes that ideas and information are not in themselves "harmful, that people will perceive their own best in-

92. One commentator has suggested that "where messages are proscribed because they are too dangerous, balancing tests inevitably become intertwined with the ideological predispositions of those doing the balancing," Ely, supra note 5, at 1501, and that "the hazards of political distortion and judicial acquiescence" are thus "at their peak [when] the evil the state is seeking to avert is one that is thought to arise from the particular dangers of the message being conveyed." J. Ely, supra note 78, at 111. See also L. Tribe, supra note 5, at 584 n.27; Scanlon, Freedom of Expression and Categories of Expression, 40 U. Pa. L. Rev. 519, 534-35, 541-42 (1979); The Supreme Court, supra note 78, at 237-39. Although, "the hazards of political distortion and judicial acquiescence" may help to explain the distinction between content-based and content-neutral restrictions generally, see infra notes 108-48 and accompanying text, they do not justify special concern with communicative impact within the realm of laws that are content-based on their face. Within that realm, the hazards flow, not from the government's attempt to justify the restriction in terms of communicative impact, but from the very fact that the restriction expressly distinguishes on the basis of content. See Farber, supra note 3, at 745 n.94. It is noteworthy that even content-neutral restrictions may involve some "hazards of political distortion." See infra notes 108-29 and accompanying text.
terests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them."\(^{93}\) "The people in our democracy," the Court has explained, "are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments,"\(^{94}\) and "if there be any danger that the people cannot evaluate the information and arguments advanced [during the course of public debate], it is a danger contemplated by the Framers of the First Amendment."\(^{95}\)

The point, of course, is not that the government may not restrict expression that individuals might find useful in making personal or political decisions, for that concern, although central to the first amendment, clearly implicates content-neutral as well as content-based restrictions on expression. The point, rather, is that the government ordinarily may not restrict the expression of particular ideas, viewpoints, or items of information because it does not trust its citizens to make wise or desirable decisions if they are exposed to such expression. This "highly paternalistic" view, as the Court has recognized,\(^{96}\) is at odds with the notion of free expression. The Court's antipaternalistic understanding of the first amendment, therefore, seems well-founded in the philosophical and historical underpinnings of the constitutional guarantee.\(^{97}\)

---

95. Id. at 792. See also Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 97 (1977); Thornhill v. Alabama, 310 U.S. 88, 104-05 (1940); Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).
97. See generally, Scanlon, supra note 8; Wellington, supra note 8, at 1135-36; Stone, supra note 24, at 103-04. The Court has invoked this antipaternalistic understanding on several occasions to invalidate content-based restrictions. In Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684 (1959), for example, the Court overturned a New York statute that required the denial of a license to exhibit any motion picture that presented adultery "as being right and desirable." The Court explained that by preventing "the exhibition of a motion picture because that picture advocates an idea, [New York] has thus struck at the very heart of constitutionally protected liberty." Id. at 688. The first amendment's "guarantee is not confined to the expression of ideas that are conventional or shared by a majority." Id. at 689. Moreover, the Court declared that even where, as in Kingsley, the speech advocated "conduct proscribed by law" and the restriction was limited to a single medium of expression, the speech could not constitutionally be suppressed
This antipaternalistic understanding of the first amendment explains, at least in part, the Court's use of stringent standards of review to test the constitutionality of content-based restrictions that the government attempts to justify in paternalistic terms. Because paternalistic justifications are constitutionally disfavored, the government may restrict expression for paternalistic reasons in only the most compelling circumstances, if ever. And this is so even if the restriction does not substantially prevent the communication of a particular idea, viewpoint, or item of information, for the Court's use of stringent standards of review in such cases derives, not from a concern about the potential distorting effects of the restriction, but from the disfavored status of the government's justification.

In the second, and next most common, communicative impact situation, government attempts to restrict expression because the ideas or information communicated may offend others or may induce those who are offended to react in a hostile or disruptive manner. For example, to avoid offense to passersby and to prevent possible violent retaliation, a city might prohibit any person from displaying a swastika within 100 feet of a synagogue on Yom Kippur. Is such a law, despite its modest suppressive effect, unconstitutional? May government legitimately restrict speech for this reason?

The Court has long maintained that the first amendment does

"'where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.'" Id. (quoting Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring)).

Similarly, in Linmark Assoc's. v. Township of Willingboro, 431 U.S. 85 (1977), the Court held that a township could not prohibit the posting of real estate "For Sale" signs. The township maintained that this restriction was necessary to prevent homeowners from panicking and leaving town contrary to their self-interest and the corporate interest of the township. The Court rejected this "'highly paternalistic'" argument, and explained that it "'is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.'" Id. at 97 (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 770 (1976)). Thus, even where, as in Linmark, the speech was essentially commercial and the restriction was limited to only a single medium of expression, the government could not constitutionally "'enable its citizens to find their self-interest'" by denying them access to truthful information. Id. at 97. See also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978).
not permit government to prohibit the public expression of views merely because they are offensive or unpopular. As the Court has observed, "[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." Indeed, the Court has consistently held that "[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." "Any broader view of this authority," the Court has explained, "would effectively empower a majority to silence dissidents simply as a matter of personal predilections." Moreover, the Court has embraced a similarly critical view of governmental efforts to restrict speech because the ideas or information expressed might trigger a hostile audience response. In fact, the Court has not sustained a restriction on this basis since its decision in Feiner v. New York.

The Court's reluctance to accept the "heckler's veto," and its refusal to permit one group of citizens effectively to "censor" the expression of others because they dislike or are prepared violently to oppose their ideas, seem well-grounded in the central precepts of


102. 340 U.S. 315 (1951). In Edwards v. South Carolina, 372 U.S. 229 (1963), and Cox v. Louisiana, 379 U.S. 536 (1965), the Court held that the leaders of civil rights demonstrations could not constitutionally be convicted of breach of the peace even though the demonstrations had at least the potential to trigger violent responses from hostile onlookers. The Court found that the Constitution protected speech against restriction in such circumstances "unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." 372 U.S. at 237 (quoting Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949)). See also Gregory v. Chicago, 394 U.S. 111 (1969); Village of Skokie v. National Socialist Party of Am., 69 Ill. 2d 605, 373 N.E.2d 21 (1978).
the first amendment. Thus, "intolerance-based" justifications for restricting expression, like paternalistic justifications, are constitutionally disfavored, even if the restriction does not substantially prevent the communication of a particular idea, viewpoint, or item of information.

The third, and least common, communicative impact situation involves government efforts to restrict expression because the ideas or information restricted may have unusual "distracting" or "attracting" effects. For example, a city whose residents are predominantly Jewish may ban the display of the swastika on any billboard because of its special distracting effect upon motorists, a school may prohibit students from wearing "Ban the Bomb" buttons in school because of their especially distracting effect upon other students, or a city may forbid any person from making anti-abortion speeches in public parks because such speeches have tended in the past to attract unusually large crowds that require special policing. Are such laws, despite their modest suppressive effects, unconstitutional because they turn on "communicative impact"?

The critical issue is whether the government's interest in restricting speech because its message is especially "distracting" or "attracting" has the same constitutionally disfavored status as paternalistic and intolerance-based justifications. In many instances, of course, the extraordinary attracting or distracting quality of speech may stem from its offensiveness, and to that extent, the Court should treat the government's justification as intolerance-based. In other instances, however, the special attracting or distracting effects may have nothing to do with offensiveness, but may derive instead from the unusually interesting or provocative nature of the speech. Although the matter is not without doubt, I do not think it inherently illegitimate for government to restrict speech because the ideas or information have undesirable at-

tracting or distracting effects, where those effects are not due to the offensiveness of the speech. Indeed, unlike paternalistic and intolerance-based justifications, this justification for restricting speech does not seem any less legitimate than those justifications that are wholly unrelated to communicative impact.¹⁰⁷

What, then, has this inquiry into the “dynamic of communicative impact” accomplished? For one thing, we have discovered why communicative impact matters. We care about communicative impact, not because government is attempting to restrict speech because of “a fear of how people will react to what the speaker is saying,” but because, when government does so, it almost invariably relies upon constitutionally disfavored justifications to support the restriction. Moreover, we have identified an explanation for at least part of the content-based/content-neutral distinction. For when government attempts to justify a content-based restriction on paternalistic or intolerance-based grounds, the restriction must be tested by stringent standards of review, whether or not it significantly distorts public debate. This does not, of course, explain the content-based/content-neutral distinction in its entirety. It does, however, unravel at least part of the puzzle.

C. Distortion of Public Debate

A third possible explanation for the content-based/content-neutral distinction derives from the fact that content-based restrictions, by their very nature, restrict the communication of only some messages and thus affect public debate in a content-differential manner. Indeed, as we have seen, some content-based restrictions so substantially impair the communication of particular ideas, viewpoints, or items of information that, for that reason alone, they are presumptively invalid.¹⁰⁸ We are concerned here, however, with viewpoint-based restrictions that do not substantially impair the communication of particular messages. Because these more modest viewpoint-based restrictions leave open alternative channels of communication, they do not as dramatically skew the thought processes of the community. The question, then, is

¹⁰⁷. As a practical matter, the issue borders on the trivial, for the number of cases likely to fall within this category seems vanishingly small.
¹⁰⁸. See supra notes 31-39 and accompanying text.
whether the disparate effects of these more modest viewpoint-based restrictions can explain the content-based/content-neutral distinction.

There are two elements to this inquiry. First, do the relatively limited content-differential effects of modest viewpoint-based restrictions distinguish them from content-neutral restrictions? And second, is the difference, if one exists, sufficiently important to explain the doctrinal distinction?

Although neutral on their face, content-neutral restrictions often have "unequal effects on various types of messages." For example, a law banning all street demonstrations may have a disproportionate impact upon those who rely on such demonstrations to communicate their views; a law banning the distribution of leaflets in welfare offices may have a disproportionate impact upon those who rely on leaflets to communicate with welfare recipients; and a content-neutral disclosure requirement may have a disproportionate impact upon those with controversial or unpopular views. Indeed, most content-neutral restrictions have at least some de facto content-differential effects, and although such effects may be less severe than those associated with content-based restrictions that substantially prevent the communication of particular ideas, viewpoints, or items of information, they are at least arguably analogous to the content-differential effects associated with more modest viewpoint-based restrictions. Thus, in assessing the extent to which the content-differential effects of modest viewpoint-based restrictions might explain the Court's use of stringent standards of justification to test the constitutionality of such restrictions, it may be useful to examine the Court's analysis of the content-differential effects of content-neutral restrictions. For if the Court considers the content-differential effects of content-neutral restrictions to be a serious first amendment problem, that would help explain the Court's approach to viewpoint-based restrictions.

There are two means by which the Court might manifest a concern with the de facto content-differential effects of content-neutral restrictions as well. First, when evaluating the constitutionality of content-neutral restrictions, the Court might focus on the differential impact that such restrictions have on the ability of individuals to communicate their views. For example, a law banning the distribution of leaflets in welfare offices may have a disproportionate impact upon those who rely on leaflets to communicate with welfare recipients; and a content-neutral disclosure requirement may have a disproportionate impact upon those with controversial or unpopular views. Indeed, most content-neutral restrictions have at least some de facto content-differential effects, and although such effects may be less severe than those associated with content-based restrictions that substantially prevent the communication of particular ideas, viewpoints, or items of information, they are at least arguably analogous to the content-differential effects associated with more modest viewpoint-based restrictions. Thus, in assessing the extent to which the content-differential effects of modest viewpoint-based restrictions might explain the Court's use of stringent standards of justification to test the constitutionality of such restrictions, it may be useful to examine the Court's analysis of the content-differential effects of content-neutral restrictions. For if the Court considers the content-differential effects of content-neutral restrictions to be a serious first amendment problem, that would help explain the Court's approach to viewpoint-based restrictions.

There are two means by which the Court might manifest a concern with the de facto content-differential effects of content-neutral restrictions as well. First, when evaluating the constitutionality of content-neutral restrictions, the Court might focus on the differential impact that such restrictions have on the ability of individuals to communicate their views. For example, a law banning the distribution of leaflets in welfare offices may have a disproportionate impact upon those who rely on leaflets to communicate with welfare recipients; and a content-neutral disclosure requirement may have a disproportionate impact upon those with controversial or unpopular views. Indeed, most content-neutral restrictions have at least some de facto content-differential effects, and although such effects may be less severe than those associated with content-based restrictions that substantially prevent the communication of particular ideas, viewpoints, or items of information, they are at least arguably analogous to the content-differential effects associated with more modest viewpoint-based restrictions. Thus, in assessing the extent to which the content-differential effects of modest viewpoint-based restrictions might explain the Court's use of stringent standards of justification to test the constitutionality of such restrictions, it may be useful to examine the Court's analysis of the content-differential effects of content-neutral restrictions. For if the Court considers the content-differential effects of content-neutral restrictions to be a serious first amendment problem, that would help explain the Court's approach to viewpoint-based restrictions.

109. Karst, supra note 47, at 36; see also Stone, supra note 24, at 102-03; Redish, supra note 3, at 131. Content-neutral restrictions also may have de facto content-differential effects insofar as they are enforced selectively in a content-differential manner. See Stone, supra note 24, at 102.
tral restrictions. First, the Court might use an especially stringent standard of review for content-neutral restrictions that have content-differential effects. Second, it might hold that groups or individuals who are disproportionately disadvantaged by a particular content-neutral restriction are constitutionally entitled to an exemption from the ordinary operation of that restriction.

In two quite distinct situations, the Court has demonstrated a concern with the de facto content-differential effects of content-neutral restrictions. First, in the public forum context, the Court has recognized that restrictions on the distribution of leaflets and similar means of communication may have a disproportionate effect upon those who, for reasons of finances or ideology, do not have ready access to more conventional means of communication. In such circumstances, the Court has reviewed restrictions on such traditional but unconventional means of communication by a more stringent standard than other content-neutral restrictions. Indeed, the public forum doctrine is in part a reflection of this concern.

Second, in the disclosure context, the Court has recognized that content-neutral disclosure requirements may have especially harsh consequences for groups or individuals with controversial or unpopular views and that such requirements may thus be unconstitutional as applied to such groups or individuals. In *Bates v. City of Little Rock*, for example, the Court considered the constitutionality of several ordinances requiring all organizations operating within the city to disclose their membership lists to municipal authorities in order to facilitate the enforcement of the tax laws. The Court held that the disclosure requirement was unconstitutional as applied to the NAACP. Noting that there was substantial evidence that "public identification of persons in the community as mem-


111. *See L. Tribe*, supra note 5, at 683; *Karst*, supra note 47, at 40-41; *Stone*, supra note 5. Thus, the public forum concept may be a means of ensuring at least a minimum opportunity for effective expression for those individuals who lack access to more conventional means of communication.

bers of the [NAACP] had been followed by harassment and threats of bodily harm, and that "fear of community hostility and economic reprisals . . . had discouraged new members from joining . . . and induced former members to withdraw," the Court concluded that the compulsory disclosure of NAACP membership lists would work a significant interference with the freedom of association of NAACP members. The Court held that, in such circumstances, "the State may prevail only upon showing a subordinating interest which is compelling."

Although the Court's concern with the de facto content-differential effects of content-neutral restrictions in the public forum and disclosure contexts might suggest that such content-differential effects play a significant role in the Court's analysis of content-neutral restrictions, this is not in fact the case. Indeed, these are the only situations in which the Court has emphasized the content-differential effects of content-neutral restrictions. In other situations, it has essentially ignored the issue.

In upholding content-neutral restrictions governing expression in publicly owned facilities that do not constitute public fora, for example, the Court has generally disregarded content-differential effects. In Heffron v. International Society for Krishna Consciousness, the Court upheld a Minnesota State Fair rule prohibiting any group or individual from distributing materials, including written matter, except from a fixed, rented location, without giving any

113. Id. at 524, 523.
114. Id. at 524. See also Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293 (1961); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958). Similarly, in Brown v. Socialist Workers '74 Campaign Comm., 103 S. Ct. 416 (1982), the Court held that Ohio could not apply the disclosure provisions of the Ohio Campaign Expense Reporting Law to the Socialist Workers Party, a minor political party that had historically been harassed by private individuals and government officials. The law required every candidate for political office to report the names of contributors and recipients of campaign disbursements. The Court explained that the disclosure requirements potentially impaired first amendment interests in a manner substantially greater when applied to the Socialist Workers Party, because "fears of reprisals may deter contributions to the point where the movement cannot survive, resulting in a reduction in the free circulation of ideas." Id. at 420 (quoting Buckley v. Valeo, 424 U.S. 1, 71 (1976)). See also Anderson v. Celebrezze, 103 S. Ct. 1564 (1983). The issue of constitutionally compelled exemptions is explored in Stone & Marshall, Brown v. Socialist Workers: Inequality as a Command of the First Amendment, 1983 Sup. Ct. Rev.

weight to the fact that, like restrictions on the distribution of leaflets in more traditional fora, the rule would have clear content-differential effects. In *Greer v. Spock*, the Court upheld a regulation prohibiting all political speeches and demonstrations on a military base, without addressing the Third Circuit’s contention that the regulation was hardly neutral in practice, for it prevented exposure only “to the political ideas of those minor candidates whose campaigns [were] neither prominent enough nor sufficiently well-financed to attract media coverage,” and who were thus compelled to “make do with the more old-fashioned face-to-face style of campaigning.” And in *Perry Education Association v. Perry Local Educators’ Association*, the Court upheld a board of education policy granting the exclusive bargaining representative for the district’s teachers, but not rival unions, access to the interschool mail system and teacher mailboxes, despite the contention of the Court of Appeals and the four dissenting Justices that “the exclusive access policy discriminates on the basis of viewpoint [because] ‘the teachers inevitably will receive from [the exclusive bargaining representative] self-laudatory descriptions . . . and will be denied the critical perspective offered by [the rival unions].’"

The Court’s indifference to the de facto content-differential effects of content-neutral restrictions is not limited to restrictions governing the use of non-public forum public property. *United States v. O’Brien*, for example, one of the more dramatic illustrations of this indifference, did not involve public property at all. In *O’Brien*, the Court upheld a federal statute that prohibited any person from knowingly destroying a draft card, as applied to an individual who publicly burned his draft card as a symbolic expression of protest against the war and the draft. As applied to expression, the statute had an obvious disparate impact on those who opposed government policy, for who would destroy a draft card as

118. 103 S. Ct. 948 (1983).
120. 391 U.S. 367 (1968).
an expression of support for government policy? Thus, in practical effect, the statute had essentially the same content-differential effect as a law prohibiting any person from destroying a draft card "as a symbolic expression of protest against government policy." The Court, however, paid no attention to this aspect of the case.

What conclusions can one draw from the Court's analysis of the de facto content-differential effects of content-neutral restrictions? Can one reconcile the cases in which the Court takes account of these effects with those in which it disregards them? There is, I think, a revealing basis of reconciliation. In Heffron, Greer, Perry, O'Brien, and similar cases, alternative means of communication were readily available to the groups and individuals who were disproportionately disadvantaged by the restrictions. Thus, the effects of the restrictions were disparate, but not substantial. In the public forum and disclosure cases, however, the restrictions not only had a disparate impact, they also posed a substantial threat to the ability of the disproportionately disadvantaged groups and individuals to communicate their ideas effectively. Denial of the opportunity to distribute leaflets in public streets and parks, for example, could seriously impair the communicative ability of those who do not have access to more conventional means of communication, and denial of the opportunity to associate for political purposes could seriously impair the communicative ability of those who do not have the resources to communicate effectively on their own. As the Court has suggested, such restrictions may significantly reduce "the free circulation of ideas." The lesson of these cases, then, is that the Court considers the de facto content-differential effects of content-neutral restrictions only when the impact of the restriction

---

121. See supra notes 115-20 and accompanying text.
122. See supra notes 110-14 and accompanying text.
123. Brown v. Socialist Workers '74 Campaign Comm., 103 S. Ct. 416, 423 (1982). Although both the public forum and disclosure cases involve substantial restrictions on the ability of disproportionately disadvantaged groups and individuals to communicate their views effectively, the restrictions operate in distinct ways. In the public forum context, all people are denied the means of communication equally, but the denial matters more to some speakers than to others because of their greater dependence on the restricted means of communication. In the disclosure context, all people are subject to disclosure, but only some speakers are effectively denied the means of communication. This difference may explain why the Court merely raises the burden of justification in the public forum context, but actually creates exemptions in the disclosure context.
is not only disparate, but substantial.\footnote{124 See generally Stone & Marshall, supra note 114.}

This, then, brings me back to the central inquiry—is the Court’s use of an especially stringent standard of review to test the constitutionality of modest viewpoint-based restrictions explainable on the ground that such restrictions have content-differential effects? The preceding analysis would seem to suggest a negative answer, for the content-differential effects of most modest viewpoint-based restrictions are no more substantial than the content-differential effects in \textit{Heffron, Perry, Greer, and O’Brien}. Since the content-differential effects in those cases were not sufficient to trigger a stringent standard of justification, it would seem to follow that the arguably analogous content-differential effects of most modest viewpoint-based restrictions should likewise be insufficient to justify the use of stringent standards of review. The remaining question, of course, is whether the content-differential effects of modest viewpoint-based restrictions really are analogous to the content-differential effects of content-neutral restrictions. For several reasons, the analogy may not hold.

At the outset, it should be noted that the content-differential effects of most content-neutral restrictions are more erratic, and thus less specifically viewpoint-based, than the content-differential effects of most viewpoint-based restrictions. Compare, for example, a law banning all distributions of leaflets at a state fair with a law banning all distributions of leaflets by socialists at a state fair. The content-neutral ban will, of course, have content-differential effects that disproportionately disadvantage those who would otherwise employ this means of communication. Moreover, the content-neutral ban will restrict the expression of socialists to the same degree as the viewpoint-based ban. But the viewpoint-based ban has greater potential to distort public debate, for it disadvantages only a single viewpoint whereas the content-neutral ban disadvantages a range of viewpoints, many of which would no doubt be inconsistent with those of the socialists. Thus, the content-differential effects of even most modest viewpoint-based restrictions are more likely than the content-differential effects of most content-neutral restrictions to skew the thought processes of the community in a specifically viewpoint-based manner. They are thus at least poten-
tially more threatening to the interests underlying the first amendment.125

Moreover, up to this point, I have simply assumed that viewpoint-based restrictions can be neatly divided into two distinct categories: restrictions that substantially prevent the communication of a particular idea, viewpoint, or item of information, thus significantly distorting public debate; and restrictions that leave speakers free to express the message with equal effectiveness through alternative means, thus leaving the content of public debate essentially intact. In reality, of course, the distinction is not so neat. At one extreme, there are viewpoint-based restrictions that prohibit the communication of a particular message at all times, in all places, and in all manners. Such restrictions severely distort the thought processes of the community and are thus, for that reason alone, presumptively unconstitutional. At the other extreme, there are viewpoint-based restrictions that prohibit the communication of a particular message in only a narrowly defined time, place, and manner, and thus leave available ample alternative channels of communication. Many viewpoint-based restrictions, however, fall between these extremes.

In some instances, for example, the restriction may limit only the time of communication. In *Nebraska Press Association v. Stuart*,126 the gag order restrained the publication of facts “implicative” of the accused only until a jury was impaneled. In *Bridges v. California*,127 the restriction on comment about judicial proceedings lasted only while the proceedings were pending. And in the *Pentagon Papers Case*,128 the injunction against publication presumably would have expired once the Vietnam war ended. If a sharp line is to be drawn between the two different types of viewpoint-based restrictions, how is that line to be drawn? At what point does a time limitation change a restriction that substantially prevents the communication of a particular idea, viewpoint, or item of information into a mere modest viewpoint-based

125. Moreover, the fact that viewpoint-based restrictions have more consistent and more predictable viewpoint-differential effects increases the likelihood that they were motivated by improper considerations. See infra notes 130-48 and accompanying text.
127. 314 U.S. 252 (1941).
restriction?

In other instances, the restriction may limit only the circumstances of communication. Compare, for example, a law prohibiting the distribution of leaflets criticizing the war to persons entering an induction center, with a law prohibiting criticism of the war to any person known to be considering enlistment, with a law prohibiting criticism of the war. At what point does a modest viewpoint-based restriction become a restriction that substantially prevents the communication of a particular idea, viewpoint, or item of information?

How should we deal with this problem? On the one hand, one might argue that whatever the difficulties of line-drawing at the margin, there are some restrictions that clearly fall within the category of modest viewpoint-based restrictions, and so long as we can confidently determine that a particular restriction does not substantially prevent the communication of a particular idea, viewpoint, or item of information, and thus does not significantly distort public debate, there is no reason to apply stringent standards of review merely because the restriction has some viewpoint-differential effects.

On the other hand, there is in fact reason to doubt that we can confidently delineate a category of viewpoint-based restrictions that do not significantly distort public debate. As history teaches, judicial evaluations of viewpoint-based restrictions are especially likely to "become involved with the ideological predispositions of those doing the evaluating." There is a danger, in other words, that judges and jurors may be influenced by conscious or unconscious biases that may undermine their ability to evaluate accurately and impartially the extent to which particular viewpoint-based restrictions actually impair the communication of specific, often disfavored, messages. Thus, the safest and most sensible course may be to test all viewpoint-based restrictions by the same stringent standards of review that we would apply to restrictions that substantially prevent the communication of particular ideas.

129. J. Ely, supra note 78, at 112. See Z. Chafee, Free Speech in the United States 70 (1941); J. Ely, supra note 78, at 107-12; L. Tribe, supra note 5, at 584; Ely, supra note 5, at 1501; Monaghan, First Amendment "Due Process," 83 Harv. L. Rev. 518, 529 (1970); Scanlon, supra note 92, at 534-35, 541-42.
viewpoints, or items of information.

Before we embrace that conclusion, however, we should consider the risk of judicial misevaluation of the content-differential effects of content-neutral restrictions. For if the risks in the viewpoint-based context are no different than in the content-neutral context, this consideration may be insufficient to justify the special treatment of viewpoint-based restrictions. In most instances, courts are less likely to be influenced by impermissible biases in assessing the constitutionality of content-neutral restrictions than in assessing the constitutionality of viewpoint-based restrictions, for content-neutral restrictions are not keyed to particular ideas, viewpoints, or items of information and thus are less likely to trigger either hostility or favoritism on the part of the trier. But when a content-neutral restriction is challenged on the express ground that it has impermissible viewpoint-differential effects, the potential for bias exists and may, indeed, be quite similar to that in the context of viewpoint-based restrictions. And if the risk of judicial misevaluation is insufficient to trigger stringent standards of review in the content-neutral context, why should it lead to a different conclusion in the context of viewpoint-based restrictions?

The answer, I think, is that the cost of judicial misevaluation is less in the content-neutral context. As we have seen, it is quite rare that a law will survive content-neutral balancing and still have a disparate and substantial restrictive effect on a particular idea, viewpoint, or item of information. Indeed, the disclosure and public forum cases may well exhaust the set. Moreover, even in such cases, the harm is limited, for content-neutral restrictions necessarily limit the availability of only particular means of communication and thus are unlikely to prevent substantially the communication of a particular message. At worst, as in the public forum and disclosure cases, they may impose a significant disadvantage on a particular message in a particular context, but they will not block the message entirely. Thus, we may be more willing to accept the risk of judicial misevaluation of the distorting effects of content-neutral restrictions because error is less likely and, when it occurs, it is less costly.

In sum then, if the content-differential effects of modest viewpoint-based restrictions justify the use of stringent standards of review, it is not because the effects themselves are sufficiently threat-
Censure to warrant such standards, but because it is difficult to
distinguish between modest and dangerous viewpoint-based re-
strictions, the cost of error is high, and there is reason to doubt the
ability of our legal system objectively and accurately to draw the
line. And although similar problems exist in the content-neutral
context, they do not exist to the same degree.

D. Motivation

A fourth possible explanation for the content-based/content-
neutral distinction derives from the notion, apparently embraced
by the Court, that "when regulation is based on the content of
speech, governmental action must be scrutinized more carefully to
ensure that communication has not been prohibited ‘merely be-
cause public officials disapprove the speaker’s views.’"130 This con-
cern with ferreting out "improper" motivation reflects a general
shift in constitutional jurisprudence, for although the Warren
Court tended to shy away from motivation as a central feature of
constitutional analysis,131 the Burger Court has tended increasingly
to emphasize motivation as a paramount constitutional concern.132

In the first amendment context, the concept of improper govern-
mental motivation consists chiefly of the precept that the govern-
ment may not restrict expression simply because it disagrees with
the speaker’s views.133 This precept has two significant corollaries:

Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring)). Accord
131. See, e.g., O’Brien v. United States, 391 U.S. 367 (1968). For a general discussion of
the motivation issue, see Brest, Palmer v. Thompson: An Approach to the Problem of Un-
constitutional Legislative Motivation, 1971 Sup. Cr. Rev. 95. See also L. Tribe, supra note
5, at 591-98; Alfange, supra note 5; Ely, Legislative and Administrative Motivation in Con-
stitutional Law, 79 Yale L.J. 1205 (1970); Symposium, Legislative Motivation, 15 San Di-
U.S. 39 (1980); Bell v. Wolfish, 441 U.S. 228 (1979); Washington v. Davis, 426 U.S. 229
(1976).
133. See, e.g., Perry Education Ass’n v. Perry Local Educators’ Ass’n, 103 S. Ct. 948, 960
(1983); Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853,
872 (1982) (Brennan, J.); id. at 879 (Blackmun, J., concurring); Metromedia, Inc. v. San
Diego, 453 U.S. 490, 553 (1981) (Stevens, J., dissenting); id. at 561 (Burger, C.J., dissenting);
the government may not exempt expression from an otherwise gen-

eral restriction because it agrees with the speaker's views;134 and
the government may not restrict expression because it might be
embarrassed by publication of the information disclosed.135 This
precept and its corollaries are central to our first amendment juris-
prudence, for any effort of government to restrict speech because it
conveys a "false" or "bad" idea is inconsistent with the three basic
first amendment assumptions: in the long run, the best test of
truth is "the power of the thought to get itself accepted in the
competition of the market;"136 in a self-governing system, the peo-
ple, not the government "are entrusted with the responsibility for
judging and evaluating the relative merits of conflicting argu-
ments;"137 and, in our constitutional system, the protection of free
expression is designed to enhance personal growth, self-realization,
and the development of individual autonomy.138

To clarify the precise role of improper governmental motivation
in first amendment theory, it may be useful to contrast the im-
proper motive of restricting expression because government dis-
agrees with the speaker's views with the related problem of patern-
alistic justifications. In examining the communicative impact
concept, we saw that governmental efforts to restrict the expres-
sion of particular ideas, viewpoints, or items of information be-
cause the government does not trust its citizens to make wise or
desirable decisions if they are exposed to such expression are "con-
stitutionally disfavored," and that the government may thus re-
strict expression for such paternalistic reasons in only the most
compelling of circumstances.139

United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 132 (1981);
Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980); id. at 546 (Ste-
vens, J., concurring); First Nat'l Bank v. Bellotti, 435 U.S. 765, 791 n.31 (1978); Linmark
Assocs. v. Township of Willingboro, 431 U.S. 85, 97 (1977); Young v. American Mini Thea-
tres, 427 U.S. 50, 63 (1976). See also L. Tram, supra note 5, at 591; Bogen, The Supreme
Court's Interpretation of the Guarantee of Freedom of Speech, 35 Md. L. Rev. 555, 557
(1976); Stone, supra note 24, at 103-04.

134. See Ely, supra note 5, at 1507.
135. See Blasi, supra note 8.
analysis of these basic assumptions, see the authorities cited supra note 8.
139. See supra notes 78-107 and accompanying text.
Although the improper motivation and paternalistic justification concepts are in many respects similar, there are important and enlightening differences. First, the improper motivation concept focuses on the government's disagreement with the speaker's views, whereas the paternalistic justification concept focuses on the government's concern with the consequences that might result if others accept the speaker's views. In many instances, both concerns will be present. For example, if the government restricts expression advocating that one's moral duty is to refuse induction into the army, the government may have both an improper motive—a desire to suppress the "bad" idea that people have a moral duty to refuse induction—and a paternalistic justification—concern that people will be persuaded to refuse induction. In other instances, only one of the concerns may be present. For example, if the government restricts expression deploring the brutality of war because such speech might cause people to refuse induction, the government will have a paternalistic justification—concern that people will be induced to refuse induction—but not necessarily an improper motive—it may agree that war is deplorably brutal. Alternatively, if the government refuses to employ in its defense plants people who oppose the war, it may have an improper motivation—a desire to suppress the "bad" idea that the war is unjust—but a nonpaternalistic justification. Moreover, as this last example illustrates, the concept of improper motivation is wholly independent of communicative impact, for there may be an improper motivation whether or not the restriction involves communicative impact.

Second, although paternalistic justifications are constitutionally disfavored, they are not per se illegitimate. In compelling circumstances, as where there is a clear and present danger of some serious evil, a paternalistic justification may be sufficient to sustain a restriction on expression. An improper motivation, however, is by definition per se illegitimate. The government can never justify a restriction on otherwise protected expression merely because it disagrees with the speaker's views.

141. Some special circumstances may arise, however, in which the government may act
Third, although the paternalistic justification concept ordinarily precludes the government from justifying content-based restrictions on paternalistic grounds, the existence of a possible paternalistic justification does not preclude the government from justifying such restrictions on alternative, nonpaternalistic grounds. The existence of a possible paternalistic justification, in other words, does not taint the restriction. The improper motivation concept, however, clearly operates as a taint. That is, if an improper motivation played a substantial role in the government's decision to restrict expression, the restriction must be invalidated even if alternative, proper justifications are available. The improper motivation concept thus demands an effort to ferret out improper motivations and to eliminate their impact on governmental decisions to restrict expression.

The problem, of course, is to devise some effective means to ferret out these improper motivations. It is at this point that the content-based/content-neutral distinction enters the picture, for the probability that an improper motivation has tainted a decision to restrict expression is far greater when the restriction is directed at a particular idea, viewpoint, or item of information than when it is content-neutral. Indeed, in the content-neutral context the risk of improper motivation is quite low, for such restrictions necessarily apply to all ideas, viewpoints, and items of information, and are thus unlikely to reflect a specific intent on the part of those who adopted the restriction to suppress any particular message. In such circumstances, it seems sensible to presume the absence of improper motivation and to put the burden of proving such a motiva-
tion on the party challenging the restriction on motivational grounds.\textsuperscript{144}

When a restriction is directed at a particular idea, viewpoint, or item of information, however, the risk of improper motivation is quite high, for government officials considering the adoption of such a restriction will almost invariably have their own opinions about the merits of the restricted speech and there is thus a substantial risk that, in deciding whether to adopt the restriction, they will be affected, either consciously or unconsciously, by an improper motive. The officials, in other words, may be more inclined to adopt the restriction, and to pursue the competing governmental interest at the expense of "free speech," when they disapprove, rather than approve, of the ideas expressed.\textsuperscript{145} In such circumstances, the most sensible course might be simply to presume improper motivation and to put the burden of proving the absence of improper motivation on the government. The government could meet this burden by proving, for example, that the challenged restriction was the least restrictive means of achieving a compelling governmental interest, for such proof would effectively demonstrate that the government would have adopted the restriction even in the absence of improper motivation.\textsuperscript{146} Thus, the need to ferret out improper motivations may help to explain both the content-based/content-neutral distinction and the Court's use of stringent standards of review to test the constitutionality of even modest viewpoint-based restrictions.

But is all this really persuasive? Can the concern with improper motivation fairly support the doctrinal structure? After all, even proof of an actual improper motive requires the invalidation of an otherwise constitutional restriction; the need to guard against the mere possibility of improper motivation does not necessarily justify the invalidation of all viewpoint-based restrictions that are not demonstrably necessary to further compelling governmental interests. Although such a standard may ensure that the government

\textsuperscript{144} On the difficulties of proving motivation, see L. Tribe, \textit{supra} note 5, at 594-98; Brest, \textit{supra} note 131; Ely, \textit{supra} note 131; Symposium, \textit{supra} note 131.

\textsuperscript{145} See Stone, \textit{supra} note 24, at 105-06.

\textsuperscript{146} See Clark, \textit{Legislative Motivation and Fundamental Rights in Constitutional Law}, \textit{15 San Diego L. Rev.} 953, 990-96 (1978); Stone, \textit{supra} note 24, at 104-09; see also J. Ely, \textit{supra} note 78, at 145-48; Symposium, \textit{supra} note 131.
would have adopted the viewpoint-based restrictions even in the absence of improper motivation, this standard also has substantial costs, for it would invalidate not only viewpoint-based restrictions that were in fact improperly motivated, but also those viewpoint-based restrictions that further significant governmental interests, and that the government might reasonably have adopted even in the absence of improper motivation. One might question, then, whether the need to assure motivational purity is sufficiently weighty to justify so substantial a sacrifice of legitimate governmental interests. Indeed, one might argue that a more sensible approach would be to presume proper motivation, in the absence of specific proof to the contrary, whenever a viewpoint-based restriction reasonably furthers a significant governmental interest.

The answer, I think, is that the critical motivational inquiry is not whether the government officials would have adopted the restriction even if they did not disfavor the restricted speech, but whether they would have adopted it even if it had been directed at speech that they themselves supported. The concern, in other words, is not only that government officials should not affirmatively attempt to suppress ideas with which they disagree, but also that they should act in an even-handed manner and thus treat disfavored ideas with the same respect they would accord to the ideas that they support. Viewed in this light, the more stringent standard of review seems sensible, for government officials are unlikely to disadvantage the ideas that they themselves support except in the most compelling circumstances.

Another aspect of the improper motivation issue lends further support to the content-based/content-neutral distinction. For just as there is a danger of improper motivation in the formulation and adoption of viewpoint-based restrictions in the legislative and administrative processes, so too is there a danger of improper motivation in the interpretation and application of such restrictions in the judicial process. Indeed, as noted earlier, ideological predispositions may influence judges and jurors called upon to implement content-based restrictions directed at specific ideas, viewpoints, or items of information. To minimize the impact of such biases, and to protect against potential manipulation of the judicial

147. See supra notes 108-29 and accompanying text.
process, it may be sensible to test such restrictions with especially stringent standards of review, thus leaving little room for ideological distortion.\textsuperscript{148}

Content-neutral restrictions, on the other hand, do not pose these dangers to the same degree. There is, of course, a risk of distortion whenever judges and jurors are called upon to determine, as a matter of fact, whether a particular speaker actually violated a restriction on expression, for the biases of the fact finder inherently threaten the integrity of the fact finding process. But there is likely to be relatively little distortion in the more fundamental determination of whether the content-neutral restriction is itself constitutional, for this determination will necessarily affect, not only the particular speaker involved in the litigation, but other speakers as well, regardless of their viewpoint or message. The very breadth of application of the determination will thus tend to reduce the incentive for manipulation.

In light of these four considerations—equality, communicative impact, distortion, and motivation—there is, I think, a sound basis for the Court’s content-based/content-neutral distinction and for its use of especially stringent standards of review to test the constitutionality of even modest viewpoint-based restrictions. Although particular content-neutral restrictions may limit as much or even more total expression than particular viewpoint-based restrictions, the latter pose special, quite distinct dangers to the system of free expression. And although no one of these four considerations may independently explain the distinction in its entirety, in combination they both explain and justify the Court’s heightened scrutiny of viewpoint-based restrictions.

\textbf{V. AMBIGUOUS RESTRICTIONS: CONTENT-NEUTRAL OR VIEWPOINT-BASED?}

This does not end our inquiry, however, for up to this point, I have focused on only those content-based restrictions that are directed at the communication of particular ideas, viewpoints, or

\textsuperscript{148} See J. Ely, supra note 78, at 107-112; L. Tribe, supra note 5, at 583-84; Ely, supra note 5, at 1501; Farber, supra note 3, at 749; Monaghan, supra note 129, at 529; Scanlon, supra note 92, at 534-35; Van Alstyne, A Graphic Review of the Free Speech Clause, 70 Calif. L. Rev. 107, 109 (1982).
items of information. As we have seen, there are sensible reasons for distinguishing such viewpoint-based restrictions from content-neutral restrictions and for testing such viewpoint-based restrictions by especially stringent standards of review. In this Part, I shall consider four types of restrictions that cannot clearly be characterized as either content-neutral or viewpoint-based: restrictions that are content-neutral on their face, but are justified in terms of communicative impact; restrictions that are directed at a particular subject-matter; restrictions that are directed at the use of profanity, nudity, or other arguably viewpoint-neutral forms of "content"; and "speaker-based" restrictions.

A. Content-Neutral Restrictions That Turn On Communicative Impact

In most instances, the government defends content-neutral restrictions in terms that are unrelated to the communicative impact of the particular ideas expressed. For example, the government might defend a restriction on the distribution of leaflets on the ground that such distribution produces litter; it might defend a restriction on loudspeakers on the ground that loudspeakers create noise; and it might defend a restriction on parades on the ground that parades obstruct traffic. In some instances, however, the government defends content-neutral restrictions in terms of communicative impact. To what extent, if any, should the Court treat such restrictions as content-based? There are several variations.

First, suppose that, to protect its citizens against unwanted exposure to "offensive" messages, the government bans all billboards.149 In effect, the government argues that billboards are especially obtrusive and that it should be permitted to protect the interests of the "captive audience" in this situation so long as it acts in a content-neutral manner.150 Because this restriction is facially content-neutral, it would not seem to pose appreciably greater risks of inequality, distortion, or improper motivation than other content-neutral restrictions.151 But the restriction is designed

149. Cf. Farber, supra note 3, at 745-47.
150. On the captive audience, see Stone, supra note 5, at 262-80.
151. A slightly greater risk of improper motivation may exist in this context than in the context of other facially content-neutral restrictions because the government's attention is
to limit expression because ideas may be offensive and, as we have seen, such intolerance-based justifications for restricting expression are constitutionally disfavored and, hence, presumptively invalid. How, then, should we analyze this restriction—by content-neutral balancing, the more stringent standards of content-based review, or some other standard?

At the outset, it should be noted that, for the reasons discussed earlier, any effort of the government to defend a restriction on expression in terms of a constitutionally disfavored justification automatically triggers a stringent standard of review, and this is so even in the absence of any concern about equality, distortion, or motivation. It is not clear, however, that this situation implicates a constitutionally disfavored justification, for the government’s interest in protecting its citizens against exposure to offensive messages does not seem as threatening to first amendment concerns when government restricts all messages equally as when it restricts only those messages that give the greatest “offense.” Indeed, the censorial and “heckler’s veto” aspects of intolerance-based justifications seem much reduced when the government attempts to protect this interest in a content-neutral manner.

This suggests, then, that this type of restriction should be tested by less stringent standards than viewpoint-based restrictions, such as, for example, a law banning only Nazi messages from billboards, but perhaps by more stringent standards than content-neutral restrictions that are defended on grounds unrelated to communicative impact. Indeed, the Court appears to have embraced precisely this analysis, for the Court has held that the “ability of government . . . to shut off discourse solely to protect others from hearing it,” even in the form of a viewpoint-neutral restriction, is “dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner,” a standard

directed specifically to offensiveness. The government thus may be more aware of the type of speech likely to be affected by the restriction on billboards.

152. See supra notes 78-107 and accompanying text.
153. Id.
that falls somewhere between content-neutral balancing and the more demanding standards of content-based review.

A second variation on the communicative impact issue is illustrated by a law prohibiting the display of any message on any billboard if a specified number of individuals complain that the message offends them. In defense of this law, the government might argue that the restriction is analytically similar to the first variation, for like the first variation, this law turns on communicative impact, but is clearly content-neutral on its face. Moreover, the government might argue that, because this law defines prohibited expression entirely in terms of prohibited effects, and does not single-out any particular message for restriction, there is less likelihood of improper governmental motivation than when a law is expressly viewpoint-based. Thus, this law, like the first variation, should arguably be governed by an intermediate standard of review.

The analogy, however, is unpersuasive, for this type of restriction is significantly more threatening to first amendment interests than the first variation. This is so for several reasons. First, unlike the first variation, this law does not restrict all messages. Rather, although the law is neutral on its face, it restricts, and is intended to restrict, only some messages. This type of restriction, therefore, implicates equality and distortion concerns to a greater degree than the first variation. Moreover, the content-differential effects of the second variation are quite different from the de facto content-differential effects usually associated with content-neutral restrictions. In most content-neutral situations, the content-differential effects are incidental. They occur because the restriction disproportionately disadvantages those speakers who would otherwise disproportionately use the restricted means of expression. Here, however, the content-differential effects are anticipated and more severe, for this type of restriction, like most viewpoint-based restrictions, prohibits some speakers from using the restricted means of expression while permitting others to do so.

Second, although the risk of improper motivation may be less here than when a restriction is viewpoint-based, there is a greater risk of improper motivation in this context than in either the first variation or the more usual content-neutral situation. This is so because government officials in this context know that the restric-
tion will limit only some messages—most likely only those messages that are most offensive or controversial. Thus, official hostility to, or lack of sympathy for, speech is more likely in this context than in the more conventional content-neutral context.

Finally, restrictions of this type involve a more troublesome form of intolerance-based justification than the first variation, for restrictions of this second type enable individuals effectively to suppress those views with which they disagree without limiting the ideas they support. In practical effect, this type of restriction simply delegates to private citizens the power to "enact" what amount in operation to viewpoint-based restrictions. The censorial and heckler's veto concerns in this context are thus virtually identical to the concerns that render intolerance-based justifications constitutionally disfavored in the context of restrictions that are expressly viewpoint-based.

For these reasons, then, the second variation has much in common with viewpoint-based restrictions, and is clearly more threatening than the first variation to the interests underlying the content-based/content-neutral distinction. Restrictions of this type should thus be governed by content-based standards of review.155

A third variation on the communicative impact issue is illustrated by the problem of the hostile audience. Suppose, for example, that a soapbox orator's speech triggers a hostile audience response and that the orator thereafter is charged with provoking a breach of the peace. Breach of the peace statutes do not usually single-out particular messages for restriction. Rather, such laws usually define prohibited speech in terms of prohibited effects. They are facially content-neutral. One might think, therefore, that such laws should be treated no differently than any other content-neutral law that regulates the time, place, and manner of expression. Such laws turn in application on communicative impact, however, and are closely analogous to the second variation. Indeed, like the second variation, breach of the peace statutes have distinct viewpoint-differential effects, raise serious concerns about govern-

155. This proposition should not apply, however, when the government individuates the decision whether to receive the communication—that is, when the government enables individuals who do not wish to receive the communication to avoid exposure without interfering with the right of individuals who wish to receive the communication to do so. See Stone, supra note 5, at 262-66.
mental motivation, and are defended in terms of a clearly intolerance-based justification.

There is, however, at least one difference between the second and third variations. In the second variation, opposition to a particular message results in continued restriction, whereas in the third variation, opposition results in restriction only at the particular time and place of opposition. That is, in the second variation, the law bans future expression once a threshold of past opposition has been attained; in the third variation, the law bans future expression only when the expression may trigger a further breach of the peace. The third variation would thus seem to have a less severe suppressive effect. This distinction, however, is more apparent than real, for unless stringent standards of review are applied to the third variation, the mere possibility of opposition might be sufficient to restrict even future expression, thus merging the second and third variations. In any event, this difference, although perhaps relevant to the degree of potential distortion of public debate, does not affect the motivational and intolerance-based concerns.

Thus, although the hostile audience issue may not pose all the problems of expressly viewpoint-based restrictions, the concerns are quite similar, and the hostile audience issue, like the second variation, should be governed by the standards of content-based review.156

As a final variation, suppose the managers of a state fair enact a rule prohibiting all peripatetic distributions of leaflets on the grounds of the fair, and a court upholds the rule as a reasonable content-neutral restriction designed to prevent interference with the movement of persons within the fair.157 Suppose also, however, that an extreme political group can prove that it was the only group engaged in peripatetic distribution of leaflets on a regular


basis prior to the enactment of the rule, and that the managers adopted the rule in substantial part because of their hostility to the group's views. In such circumstances, the rule presumably would be invalidated as the product of improper motivation. 158

Suppose now, however, that the group can prove that the managers were affected not by a personal desire to suppress the group's views, but by a flood of complaints from fairgoers who were "offended" by the group's leaflets. How should we deal with this situation? Because we are concerned here with a disfavored justification rather than an improper motivation, at least three resolutions exist. First, we might treat the rule as viewpoint-based. Second, we might treat the rule like the first variation, and test it by an intermediate standard because, like the first variation, it restricts all messages without regard to the communicative impact of any particular message. And third, we might treat the rule as content-neutral.

The answer, I think, lies in the notion, explored earlier, 159 that a critical factor differentiating an improper motive from a disfavored justification is that the presence of the former requires automatic invalidation, whereas the presence of the latter does not affect the analysis if alternative, nondisfavored justifications are available. Here, the rule is defended as a reasonable means of protecting the free movement of people within the fair, as well as on the ground that it protects fairgoers from offensive messages. Because the free movement rationale is an available, nondisfavored justification, the rule should be analyzed as an ordinary content-neutral restriction. The existence of an alternative, disfavored justification does not affect the analysis.

B. Subject-Matter Restrictions

The second type of restriction that does not fit neatly within the Court's content-based/content-neutral distinction consists of subject-matter restrictions. Such restrictions are directed, not at particular ideas, viewpoints, or items of information, but at entire subjects of expression. Police Department v. Mosley, 160 for example,

158. See supra notes 130-48 and accompanying text.
159. See supra notes 140-43 and accompanying text.
160. 408 U.S. 92 (1972).
concerned the constitutionality of a Chicago ordinance that prohibited picketing near a school building, but that expressly exempted peaceful labor picketing. *Lehman v. City of Shaker Heights*¹⁶¹ concerned the constitutionality of a city policy that permitted individuals to lease the interior advertising spaces of city transit vehicles for the display of commercial, but not public issues or political, messages. *Consolidated Edison Co. v. Public Services Commission*¹⁶² concerned the constitutionality of a Commission order prohibiting public utility companies from including in their monthly bills inserts addressing controversial issues of public policy. *Greer v. Spock*¹⁶³ concerned the constitutionality of a policy of the Fort Dix Military Reservation permitting civilian speakers to address military personnel on subjects ranging from business management to drug abuse, but prohibiting any speech or demonstration of a partisan political nature. *Widmar v. Vincent*¹⁶⁴ concerned the constitutionality of a state university policy making university facilities available for the activities of student groups, but expressly prohibiting religious activities. And *Young v. American Mini Theatres*¹⁶⁵ concerned the constitutionality of a Detroit zoning ordinance that required the dispersion of motion picture theaters exhibiting nonobscene but sexually explicit movies.¹⁶⁶

The subject-matter issue has baffled the Court.¹⁶⁷ In *Mosley, Consolidated Edison, and Widmar*, the Court treated subject-matter restrictions as essentially viewpoint-based, and tested the restrictions by the stringent standards of content-based review.¹⁶⁸ In *Lehman, Greer, and Young*, the Court treated subject-matter restrictions as essentially content-neutral, and tested them by the

---

more flexible standards of content-neutral balancing.\textsuperscript{169}

The Court has failed to address this inconsistency in its analysis. It has suggested, for example, that subject-matter restrictions must be tested by stringent standards of review when they limit expression in a public forum,\textsuperscript{170} but it has not explained why the nature of the public property should control the content-based/content-neutral distinction when subject-matter, but not viewpoint-based, restrictions are at issue. Similarly, in finding that the government has created a public forum, the Court sometimes has relied on the fact that the government has voluntarily permitted the discussion of certain subjects\textsuperscript{171} but in other cases it has failed, without explanation, to apply the same principle.\textsuperscript{172} And in its analysis of subject-matter restrictions that do not involve public property, the Court's distinctions remain wholly obscure.\textsuperscript{173}

The confusion generated by subject-matter restrictions is hardly surprising, for such restrictions fall between viewpoint-based and content-neutral restrictions, sharing some of the characteristics of each.\textsuperscript{174} On the one hand, subject-matter restrictions are directed, not at particular ideas, viewpoints, or items of information, but at entire subjects of expression. They are thus less likely than viewpoint-based restrictions to distort public debate in a viewpoint-differential manner, to implicate constitutionally disfavored justifications, or to be the product of improper motivation. On the other hand, subject-matter restrictions are expressly directed at particu-


\textsuperscript{174} See Farber, supra note 3, at 738; Schauer, supra note 13, at 283-85; Stone, supra note 24, at 108-15.
lar subjects. They are thus narrower than content-neutral restrictions, and more likely than content-neutral restrictions to threaten the concerns underlying the content-based/content-neutral distinction.

The problem, then, is how to characterize subject-matter restrictions. Are they content-based, or content-neutral? There are several possibilities. First, if we find that the content-neutral characteristics predominate, we might classify such restrictions as content-neutral and test them by the ordinary standards of content-neutral balancing. Second, if we find that the content-based characteristics predominate, we might classify such restrictions as content-based and test them by the more stringent standards of content-based review. Third, we might conclude that subject-matter restrictions constitute a distinct and independent category, and test them by some intermediate standard of review. Fourth, we might test subject-matter restrictions by different standards of review, depending upon the context in which the issue arises. Finally, as I have argued elsewhere, we might distinguish between different types of subject-matter restrictions, depending upon the extent to which they implicate the concerns underlying the content-based/content-neutral distinction, treating some subject-matter restrictions as content-based and others as content-neutral.

C. Profanity

The third type of restriction that does not fit neatly within the Court's content-based/content-neutral distinction concerns restrictions on the use of profanity. The profanity issue, like the subject-matter issue, has generated much conflict and confusion among Justices and commentators alike. The Court first directly consid-

175. See Schauer, supra note 13, at 284-85; The Supreme Court, supra note 78, at 238-39 & n.42.
176. See Farber, supra note 3, at 729-30.
179. Regardless of the approach adopted for subject-matter restrictions generally, any law that substantially prevents speech about a particular subject should be presumptively invalid because such a law would seriously distort public debate and reinforce the status quo. The cases, to date, have involved only modest subject-matter restrictions.
erected the profanity issue in *Cohen v. California.* In *Cohen,* the defendant was convicted of disturbing the peace for wearing a jacket bearing the words "Fuck the Draft." The Court, in an eloquent opinion by Justice Harlan, reversed the conviction. Harlan emphasized that the use of profanity may be an extremely effective means for individuals to convey otherwise inexpressible emotions—emotions that may be as important a part of communication as the cognitive ideas themselves.

Several years later, however, in *Federal Communications Commission v. Pacifica,* the Court sustained the constitutionality of a rule prohibiting broadcasters from airing "patently offensive" language when children might be listening. The Court assumed that the challenged order was content-based, but divided sharply over whether profanity, like obscenity, was of only low first amendment value, and thus entitled to only limited constitutional protection.

This formulation of the issue misses the point. Although restrictions on the use of profanity are content-based in the most literal sense, such restrictions do not pose the dangers that underlie the Court’s use of stringent standards of review to test the constitutionality of content-based restrictions. Restrictions on the use of profanity might thus more sensibly be analogized to content-neutral restrictions on the manner of expression than to viewpoint-based restrictions on the substantive content of expression.

It is true, of course, that restrictions on the use of profanity may affect some speakers more than others and thus may have de facto viewpoint-differential effects. But, as we have seen, this is also true of most content-neutral restrictions. And restrictions on the use of profanity are no more likely to significantly distort public debate in a viewpoint-differential manner than other content-neu-

---

181. 403 U.S. at 26.
183. Id. at 744-48; id. at 761-62 (Powell, J., concurring in part).
185. See *supra* notes 108-29 and accompanying text.
Moreover, although restrictions on the use of profanity are often defended on the ground that profane speech is offensive, not all governmental efforts to restrict expression because it is offensive are constitutionally disfavored. Governmental efforts to limit speech because it is offensively noisy, for example, do not implicate the same kind of censorial or heckler’s veto concerns as governmental efforts to limit speech because the ideas are offensive. Analytically, offense at language is more like offense at noise than offense at ideas. And restrictions on the use of profanity are no more likely to involve improper governmental motivation, in the form of official disapproval of ideas, than most content-neutral restrictions. Thus, although restrictions on offensive language may seem at first glance to be content-based, they are more appropriately analyzed as content-neutral.

This conclusion does not suggest that it is now open season on profanity. To the contrary, the concerns that shaped Justice Harlan’s opinion in *Cohen* remain equally relevant to content-neutral balancing. The use of profanity, as Harlan recognized, is often an effective means for individuals to convey dramatically otherwise inexpressible emotions, and any effort of government to limit the use of this means of expression should be tested by a relatively demanding standard of justification. Content-neutral balancing, fairly applied, demands no less.

**D. Speaker-Based Restrictions**

The fourth type of restriction that does not fit neatly within the Court’s content-based/content-neutral distinction consists of speaker-based restrictions. Such restrictions treat some speakers differently than others, but define the distinction in terms other than content. In *First National Bank v. Bellotti*, for example, a state statute prohibited business corporations, but not other speakers, from expending funds to affect the vote in particular

---


types of referenda. In Consolidated Edison Co. v. Public Service Commission, a Commission order prohibited public utility companies, but not other speakers, from inserting certain types of communications in their bills. And in Village of Schaumburg v. Citizens for a Better Environment, a municipal ordinance prohibited charitable organizations that did not use at least seventy-five percent of their receipts for "charitable purposes," but not other organizations, from soliciting contributions from the public by certain means. To what extent, if any, should such speaker-based inequalities affect constitutional analysis?

Although, as these cases suggest, speaker-based restrictions are not uncommon, the Court has given the issue scant attention. In Bellotti, Consolidated Edison, and Schaumburg, the Court invalidated the challenged restrictions without addressing the speaker-based inequalities. Recently, however, in Regan v. Taxation With Representation and Perry Education Association v. Perry Local Educators' Association, the Court squarely confronted the issue.

In Taxation With Representation, the Court unanimously sustained the constitutionality of a federal statute providing that contributions to an otherwise tax exempt organization, other than a tax exempt veterans' organization, may not be deducted on the contributor's income tax return if a substantial part of the organization's activities consist of attempts to influence legislation. At the outset, the Court made clear that "Congress is not required by the First Amendment to subsidize lobbying." The Court then turned to the speaker-based distinction between veterans' and other organizations. The Court examined the question as an equal protection issue and noted that, as a general rule, "statutory classifications are valid if they bear a rational relation to a legitimate governmental purpose." Although recognizing that statutes may be "subjected to a higher level of scrutiny if they interfere with the exercise of a fundamental right, such as freedom of speech," the

188. 447 U.S. 530 (1980).
193. Id. at 2001-02.
194. Id. at 2002.
Court explained that “a legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny.” The Court emphasized that “[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to ‘[aim] at the suppression of dangerous ideas,’ but concluded that, under the challenged provisions, veterans’ organizations were “entitled to receive tax-deductible contributions regardless of the content” of their speech.

In *Perry*, the Court narrowly sustained the constitutionality of a collective bargaining agreement between a local board of education and the duly elected exclusive bargaining representative for the teachers. The agreement provided that the exclusive bargaining representative, but no other union, would have access to the interschool mail system. Noting that the policy applied “to all unions other than the recognized bargaining representative,” and finding “no indication in the record that the policy was motivated by a desire to suppress” the views of rival unions, the Court concluded that the policy did not constitute “viewpoint discrimination barred by the First Amendment.” Moreover, after explaining that the interschool mail system was not a public forum, the Court analogized speaker-based restrictions to subject-matter restrictions and declared that although speaker-based restrictions “may be impermissible in a public forum,” they are permissible in a nonpublic forum if “they are reasonable in light of the purpose which the forum at issue serves.” The Court held that that standard was readily satisfied in *Perry* in light of “the special responsibilities of an exclusive bargaining representative.” Finally, on the equal protection issue, the Court concluded that because the rival unions “did not have a First Amendment or other right of access to the interschool mail system,” the grant of access to the exclusive bargaining representative did not burden any fundamental right of

---

195. *Id.* at 2003.
196. *Id.* at 2002 (quoting Cammarano v. United States, 358 U.S. 498, 513 (1959)).
197. 103 S. Ct. at 2002.
198. 103 S. Ct. at 957 n.9.
199. *Id.* at 957.
200. *Id.*
201. *Id.* at 960.
the rival unions, and the decision to grant access to the exclusive bargaining representative "need not be tested by the strict scrutiny applied when government action impinges upon a fundamental right."\textsuperscript{2}

In these cases, then, the Court sharply distinguished speaker-based from viewpoint-based restrictions and, at least in the subsidy and nonpublic forum contexts\textsuperscript{203} tested speaker-based restrictions by a standard of reasonableness. Is this approach defensible? There are at least two perspectives from which we might approach the question.

First, there is the perspective of equality. Assuming that speaker-based restrictions are merely a variant of content-neutral restrictions, to what extent, if any, does the first amendment or equal protection clause require that speaker-based restrictions be tested by more stringent standards than other content-neutral restrictions because speaker-based restrictions involve express inequalities? Assuming that speaker-based inequalities are content-neutral, it is not clear to me that such restrictions implicate the concerns and values underlying the first amendment more seriously than other content-neutral restrictions.\textsuperscript{204} Under the equal

\textsuperscript{202} Id. at 959-60.

\textsuperscript{203} The speaker-based issue may arise, not only in the subsidy and nonpublic forum contexts, but in other contexts as well. \textit{Schaumburg} involved a speaker-based restriction in a public forum, for example, and \textit{Bellotti} and \textit{Consolidated Edison} involved speaker-based restrictions that were wholly unrelated to the use of public property. Moreover, in some instances, as in \textit{Taxation With Representation} and \textit{Perry}, the speaker-based restrictions may take the form of special exemptions from otherwise constitutional content-neutral restrictions; in other instances, as in \textit{Schaumburg}, speaker-based restrictions may take the form of special limitations on particular speakers where broader, nonspeaker-based restrictions would be invalid. Thus, in \textit{Taxation With Representation} and \textit{Perry}, the government was under no duty to grant anyone a subsidy or access to the mail system, but chose voluntarily to create the inequality by establishing special preferences for selected speakers. In \textit{Schaumburg}, on the other hand, a complete ban on solicitation in public places clearly would be unconstitutional, but the \textit{Schaumburg} ordinance attempted to define a class of speakers who, because of their special characteristics, arguably should be subject to special restrictions.

\textsuperscript{204} Speaker-based inequalities, however, are not irrelevant to first amendment analysis. Rather, even if such inequalities are treated as content-neutral, they may affect the outcome of content-neutral balancing. In some cases, the very existence of the inequality may undermine the asserted justification for the restriction. Suppose, for example, that the government may constitutionally ban all peripatetic distribution of leaflets on the grounds of a state fair because the government has a substantial interest in maintaining the orderly movement of people within the fair and there are adequate alternative means of communi-
protection clause, however, the inequalities may assume added significance, for as the Court has recognized, the concerns and values underlying the equal protection clause are especially implicated by inequalities that burden "the exercise of a fundamental right, such as freedom of speech." \textsuperscript{205} The problem, then, is to define the circumstances in which the equal protection clause requires invalidation of a law that burdens free speech but does not independently violate the first amendment.

The Court has not come to grips with this problem. In \textit{Perry}, for example, the Court stated that because the rival unions had no first amendment right of access to the interschool mail system, the speaker-based restriction did not burden a fundamental right. \textsuperscript{206} That formulation reads the fundamental rights doctrine out of our jurisprudence. To make sense of the doctrine, the Court must offer some formulation that recognizes three categories of inequalities: inequalities that violate the first amendment; inequalities that do not violate the first amendment but sufficiently burden free speech to trigger fundamental rights analysis under the equal protection clause; and inequalities that neither violate the first amendment nor sufficiently burden free speech to trigger fundamental rights analysis. \textsuperscript{207} That task, which raises central questions of equal protection jurisprudence, is beyond the scope of this paper.

The second perspective from which one might approach speaker-based restrictions turns on the content-based/content-neutral distinction. Up to this point, I have assumed that speaker-based restrictions are content-neutral. It may not be that simple. Although

---


\textsuperscript{207} This problem is not unique to the first amendment, but exists whenever the Constitution protects a fundamental right. According to the Court, to be "fundamental," a right must be "explicitly or implicitly guaranteed by the Constitution." \textit{San Antonio Indep. School Dist. v. Rodriguez}, 411 U.S. 1, 33-34 (1973). The problem thus goes to the very core of the doctrine.
speaker-based restrictions are facially content-neutral, there is often a close correlation between speaker identity and viewpoint, and speaker-based restrictions thus may have clear viewpoint-differential effects. In *Taxation With Representation*, for example, the challenged policy unquestionably favored some viewpoints over others, for veterans' organizations often take consistent and predictable positions on particular issues. Similarly, in *Perry*, as the four dissenting Justices noted, the challenged policy favored "'a particular viewpoint on labor relations in the Perry schools, [for] the teachers inevitably will receive from [the exclusive bargaining representative] self-laudatory descriptions of its activities [and] will be denied the critical perspective offered by [rival unions].' "208

Indeed, in some instances speaker-based restrictions may correlate almost perfectly with viewpoint. Consider, for example, laws prohibiting members of the Communist Party from working in defense plants or denying tax deductions to individuals who contribute to the Nazi Party.209

It is true, of course, that content-neutral restrictions that are not speaker-based also have de facto viewpoint-differential effects and, as we have seen, the Court generally disregards such effects unless they substantially distort public debate.210 The de facto viewpoint differential effects of speaker-based restrictions, however, are often more specific and more direct than the effects of other content-neutral restrictions. They thus may be more analogous to the viewpoint-differential effects of modest viewpoint-based restrictions.211 Moreover, speaker-based restrictions are often more likely than other content-neutral restrictions to be the product of improper motivation, for the more predictable the de facto viewpoint-differential effects, the greater the likelihood that those effects were intended.

The hybrid nature of speaker-based restrictions is evident in the Court's decisions. In *Anderson v. Celebrezze*,212 for example, the

---

208. 103 S. Ct. at 965 (Brennan, J., dissenting) (quoting Perry Local Educators' Ass'n v. Hohlt, 652 F.2d 1286, 1296 (7th Cir. 1981), rev'd sub nom. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S. Ct. 948 (1983)).
210. See supra notes 108-29 and accompanying text.
211. See id.
212. 103 S. Ct. 1564 (1983).
Court held that a special filing deadline for independent candidates violated the first amendment. The Court emphasized that "[b]y limiting the opportunities of independent-minded voters . . . such restrictions threaten to reduce diversity and competition in the marketplace of ideas [and discriminate against] those voters whose political preferences lie outside the existing political parties." Applying a general balancing test, the Court observed that "it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status." Moreover, in Perry, the four dissenting Justices, emphasizing the specificity of the viewpoint-differential effects, argued that the speaker-based restriction should be characterized as viewpoint-based. Although the majority rejected this characterization, they expressly analogized speaker-based restrictions to subject-matter restrictions and suggested that, in the public forum context, speaker-based restrictions might be analyzed differently from other content-neutral restrictions.

How, then, should we deal with speaker-based restrictions? As with subject-matter restrictions, there are several possibilities. First, for the sake of simplicity, we might treat all speaker-based restrictions as either content-based or content-neutral. Second, we might treat such restrictions as content-based if they correlate "closely" with specific, identifiable viewpoints. Third, we might

213. Id. at 1572.
215. See 103 S. Ct. at 960-64.
216. See 103 S. Ct. at 957. Lower courts also have been puzzled by speaker-based restrictions. See, e.g., Henrico Professional Firefighters Ass'n v. Board of Supervisors, 649 F.2d 237 (4th Cir. 1981) (treating speaker-based restriction as triggering strict scrutiny under equal protection clause); Greenburg v. Bolger, 497 F. Supp. 756 (E.D.N.Y. 1980) (treating speaker-based restriction as content-based); Dayan v. Board of Regents, 491 F. Supp. 139 (M.D. Ga. 1979) (treating speaker-based restriction as content-neutral), aff'd, 620 F.2d 107 (5th Cir. 1980).
217. As a variation on this approach, we might treat speaker-based restrictions as content-based if the primary factor that defines speaker-identity is agreement on a particular view. Under this approach, a distinction between political parties and the distinction in
treat such restrictions as content-based if they are likely to distort public debate substantially in a viewpoint-differential manner. Fourth, we might treat such restrictions as content-neutral in some contexts, such as subsidies and nonpublic fora, but as content-based in other contexts, such as public fora. And fifth, we might test such restrictions by an intermediate standard of review. The critical point, however, is that to analyze these restrictions in a principled manner, we must first understand the extent to which they threaten core first amendment concerns.218

VI. Conclusion

Properly defined and understood, the content-based/content-neutral distinction makes sense. The distinction has powerful intuitive appeal and is consistent with core first amendment values. Although criticism of the distinction is not wholly without merit,219 it is not persuasive. An understanding of the first amendment that fails to distinguish between content-neutral and viewpoint-based restrictions would treat problems that are different as if they were alike. It would meld existing first amendment standards into a single, unified approach. This would have a leveling effect. It would unduly enhance the protection accorded to content-neutral restrictions, at the expense of competing governmental interests, and it would dilute the protection accorded to viewpoint-based restrictions, at the expense of core first amendment values.

The distinction, however, is more subtle and complex than might at first appear. The content-based and content-neutral concepts are not self-defining. Taken literally, they do not comport precisely with the concerns underlying the distinction. Moreover, several types of ambiguous restrictions do not fit neatly within either the content-based or the content-neutral category. Careful scrutiny of these ambiguous restrictions reveals an almost bewildering array of easily masked analytic refinements and distinctions. These ambiguous restrictions pose a central jurisprudential conflict between

---

Perry would be content-based, whereas laws like those in Taxation With Representation and Schaumburg would be content-neutral.

218. For analysis of another form of ambiguous restriction, see Stone & Marshall, supra note 114.

219. See Redish, supra note 3; Note, supra note 3.
precision of analysis and clarity of doctrine.\(^{220}\) To what extent should we tolerate miscategorization for the sake of clarity? To what extent should we sacrifice clarity for the sake of analytic consistency? I have attempted in this Article, less to resolve this conflict, than to expose the puzzles and to bring the conflict to light. Only by understanding the nature of the problems can we begin thoughtfully to seek solutions.

\(^{220}\) For a thoughtful analysis of the conflict, see Schauer, supra note 13. For a discussion of the conflict in the specific context of subject-matter restrictions, see Stone, supra note 24, at 108-15.