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Speech Discrimination

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SPEECH DISCRIMINATION

JOHN FEE*

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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.¹

Any student of history who has been reprimanded for talking about the World Series during a class discussion of the First Amendment knows that it is incorrect to state that a time, place, or manner restriction may not be based upon either the content or subject matter of speech.²

INTRODUCTION

Over the past several decades, the Supreme Court has increasingly distinguished in its First Amendment jurisprudence between government actions that regulate the content of speech and those that are content-neutral. Under current law, content-based speech regulations are highly disfavored and are presumptively unconstitutional.³ The Supreme Court has said, “It is rare that a regulation restricting speech because of its content will ever be permissible.”⁴ According to the Court, content-based speech regulations represent the essence of “thought control” and of “official censorship,” and lie at the core of what the First Amendment prohibits.⁵

By contrast, content-neutral speech regulations are subject to a more lenient First Amendment standard.⁶ Any well-ordered society requires laws that control the time, place and manner of speech.⁷ As long as speech regulations do not discriminate on the basis of the speech itself, and leave open ample alternatives for expression, such laws are usually held to be constitutional.⁸

¹ Police Dep’t of Chi. v. Moseley, 408 U.S. 92, 95 (1971).
³ For cases expressing this principle, see infra note 74 and text accompanying notes 64-79.
⁵ See, e.g., Ashcroft v. ACLU, 124 S. Ct. 2783, 2788 (2004) (“Content-based prohibitions ... have the constant potential to be a repressive force in the lives and thoughts of a free people.”); Thomas v. Chi. Park Dist., 534 U.S. 316, 320-23 (2002).
⁶ See, e.g., Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (“Our cases make clear ... that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech ... “).
⁸ Id.
This article explores the mechanics, scope, and purposes of this fundamental distinction in First Amendment law. Why do content-based speech regulations undergo stricter scrutiny than content-neutral regulations? What is so dangerous about a government that favors certain communications over others and enacts those preferences into law, provided that all speakers are allowed ample means to communicate their views? How does one account for the numerous exceptions and limitations to the constitutional principle of content neutrality?

My answers are not conventional. Commentators and courts often explain the First Amendment's aversion to content-based speech discrimination, particularly viewpoint-based discrimination, by reference to some ideal of government impartiality. For example, it is often contended that the Speech Clause of the First Amendment requires government to act as a neutral arbitrator in the marketplace of ideas, neither distorting society's discussion of important issues nor favoring certain viewpoints or forms of expression. In other words, this perspective suggests that speech, like religion, is a private matter, and should largely remain free from biased interference by the state (subject only to narrow exceptions). According to this vision of a speech-impartial government, a distinction between content-based and content-neutral regulations serves either to identify government actions that are likely based on impermissible speech-biased motives or to identify government actions that would significantly distort the marketplace of ideas in favor of certain viewpoints or means of expression.

Consistent with most (although not all) writing on the subject, this article treats content discrimination as an over-arching concept that includes viewpoint discrimination, subject-matter discrimination, and other forms of speech discrimination. For a discussion of the various forms of content-based regulation, see infra Part II.A.

Leading articles that justify heightened scrutiny for content-based regulations by reference to impermissible motives or distortion include: Larry A. Alexander, Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory, 44 Hastings L.J. 921, 932-933, 939, 945 (1993) (contending that the First Amendment expresses as its primary value that the government should not make policy based on its evaluation of the communicative effects of speech); Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 414 (1996) ("First Amendment law...has as its primary, though unstated, object the discovery of improper governmental motives."); Jed Rubenfeld, The First Amendment's Purpose, 53 Stan. L. Rev. 767, 769 (2000) (asserting that the sole inquiry in First Amendment cases should be whether the government acted with an impermissible anti-speech motive); Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189, 197-233 (1983) (asserting that the content-based/content-neutral distinction rests upon concerns about equality, communicative impact, distortion and government motivation); and Susan H. Williams, Content Discrimination and the First Amendment, 139 U. Pa. L. Rev. 615, 672, 696-719 (1991) (arguing that the First Amendment should consider laws to be content-based if they are intentionally discriminatory or if they distort public debate through disparate impacts, whether intentional or not).
I disagree with such an explanation. In this article, I argue that the First Amendment does not require a government that is indifferent toward the communicative effects of speech. It does not require government to treat the expression of private viewpoints impartially. Nor does it prohibit government distortion of the marketplace of ideas. The First Amendment, even as an ideal, does not envision a government that is speech-neutral in any of these ways. To the extent that the First Amendment requires government to treat equally speech that it favors and disfavors, these circumstances are limited and are for more modest reasons than the overarching goal of government impartiality.

Impartiality theories do not explain well many aspects of current First Amendment doctrine. These theories do not account for the many ways in which governments regularly engage in speech-biased decisions that are calculated to distort the marketplace of ideas, and that are usually considered to be entirely permissible. Governments routinely impose speech preferences, for example, in the rules and curriculum of public schools and universities, in laws and policies affecting government-employee speech, in government speech subsidies, in radio and television regulations, in commercial speech regulations, and in anti-harassment laws— to name only a few of many examples. These and other accepted speech discrimination practices by government ought to factor more heavily into how we understand the freedom of speech and its ideals. We do not live under a system of constitutional law that requires government to be impartial toward communication, nor anything close to it. Moreover, it would be dangerous to seriously aspire to such an ideal.

The central guarantee of the freedom of speech is to secure for all citizens plentiful places and means to communicate their ideas to the public. Provided that this basic floor of expressive freedom requirement is protected, the Constitution does not prohibit government from using its remaining resources and forums to promote communication that the majority favors or to counter communication that the majority deems harmful, distasteful, or misguided. In other words, there is nothing inherently illegitimate about government-imposed speech discrimination—not even viewpoint discrimination. Speech discrimination only becomes a problem when it unduly burdens a speaker’s ability to communicate a particular message or when it occurs without public awareness.

At first glance, this theory appears to call into question any doctrinal distinction between content-based and content-neutral regulations because both have the potential to unduly burden speech. I argue, however, that it does not. Even without the ideal of government impartiality, there remain powerful reasons to subject certain content-based regulations to heightened scrutiny.

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11 See infra Part III.
12 See Police Dep’t of Chi. v. Moseley, 408 U.S. 92, 95 (1971).
13 See infra Part III.A.
One reason arises from the limitations of judicial review and the difficulty, in many cases, of determining what constitutes an unreasonable restriction on expression without comparing how the government has regulated other kinds of speech. A second reason involves political accountability, and the value of requiring elected officials to be open about their speech preferences when acting upon them, thereby including the public in decisions over which types of speech officially to favor and disfavor.

These reasons paint a more modest and comprehensive picture of why speech discrimination is only sometimes found to be unconstitutional. The reasons begin to explain why courts sometimes decide First Amendment cases by examining whether the government has singled out a particular type or category of speech for disfavored treatment, and why in other cases courts appear unbothered by speech discrimination. Although this framework does not purport to explain all aspects of First Amendment law, I believe that it provides a more accurate description of current First Amendment doctrine concerning speech discrimination than those theories that suggest a general norm of government impartiality or an undistorted speech market.

Part I of this article describes two competing views of the freedom of speech, as well as the trend toward recognizing the freedom of speech as an anti-discrimination principle. Part II explores definitional problems in the modern rule against content-based regulation. Part III explores exceptions and limitations to the rule. Part IV discusses leading theories of why content-based regulations are disfavored, and proposes an alternative framework based on the limitations of judicial review, political accountability, and the overarching goal of preserving plentiful means of expression for all people.

I. TWO COMPETING FIRST AMENDMENT VALUES

A. Laws that Restrict Too Much Speech and Laws that Do Not Restrict Enough

The current structure of First Amendment doctrine suggests, at least on the surface, that there are two conflicting values inherent in the freedom of speech. First is the value of preserving broad and meaningful opportunities for private speech of all types, or, in other words, maximizing the quantity and variety of speech in society. Second is the value of ensuring relative equality between different kinds of speech, or, in other words, avoiding speech discrimination.

The first value, which we might call the speech maximizing value, is rooted in several leading theories underlying the freedom of speech. These theories include that the freedom of speech aims to further society's search for knowledge, to facilitate self-government, to check abusive government, and to preserve and enhance the freedom of human expression. These include:

14 See, e.g., Abrams v. United States, 250 U.S. 616, 630 (Holmes, J., dissenting); John Stuart Mill, On Liberty ch. 2 (1859); William P. Marshall, In Defense of the Search for
and to allow individual fulfillment through self-expression. Of these aims are best served by a legal system that allows broad, meaningful speaking opportunities for speakers of differing perspectives on all topics, including perspectives that are potentially offensive or harmful.

Of course, the value of maximizing speech opportunities is outweighed in some situations by other legitimate social values. For example, it may make more sense for the government to build a police station, rather than a public forum, on a certain parcel of land—a decision which may adversely affect the quantity of public speech. Additionally, some messages or forms of communication might also be deemed so harmful and valueless that they may be prohibited, such as physical threats or false advertising. According to the speech-maximizing value, however, all speech restrictions impose potential informational costs. A primary goal of First Amendment doctrine, therefore, is to achieve a reasonable balance between the value of speech and other social interests. Within this balancing framework, the broader the speech restriction (and the more kinds of speech it prevents) the greater the potential informational cost.

The second potential First Amendment value, the anti-discrimination value, is independent of the first: It regards selective speech restrictions as worse than total speech restrictions, even though selective restrictions often allow more speech than generally applicable restrictions. According to this value, the particular problem with a law that restricts only some kinds of speech is the relative inequality it creates between two kinds of messages that are important for society to consider. For example, a law that allows pro-war speech but not anti-war speech on a particular parcel of government-owned land would create an unequal playing field between two competing ideas. The disparity would be solved either by allowing all speech at the given location or by restricting all speech. According to the anti-discrimination value, it does not matter whether a government is tolerant or intolerant toward speech, only that it is equally tolerant or intolerant toward all kinds of speech. While the anti-discrimination value might find some explanation in the same theories that underlie the speech-maximizing value, advocates for it tend to stress different

15 See, e.g., ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26 (1948); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 17 (1993).
18 See infra Part III.H.
19 Alexander, supra note 10, at 939.
20 For example, one might argue that speech discrimination "mutilate[es] the thinking
First Amendment goals. These include the importance of preventing government from skewing or distorting public debate, of preventing government-imposed orthodoxy or thought-control, and of preventing government from acting with certain illegitimate ideological motives.  

Modern First Amendment doctrine is commonly understood as relying upon both of these independent values. This is the conventional way to understand the distinction between content-based and content-neutral speech restrictions. As the Supreme Court has said, a law might be unconstitutional under the First Amendment because it "prohibits too much protected speech," or it might be unconstitutional because it "restricts too little speech." A law that restricts too much speech is unconstitutional, regardless of whether it discriminates among different kinds of messages, because it unduly burdens the ability of citizens to express potentially valuable messages to others. A law that restricts too little speech, on the other hand, is unconstitutional because it contains impermissible exceptions, thus putting some messages in a preferred position ahead of other messages. Supposedly, such a law would be constitutionally improved if the exceptions were eliminated and all speech was uniformly restricted.

Putting these elements together, one might describe current freedom of speech doctrine as involving two zones of protection: one for core speech rights that cannot be reduced, whether or not the government restricts all speech equally; and another zone of protection for additional means of communication, whose protection depends upon whether the government has equally restricted other kinds of speech. The relationship between these zones is shown in the following graphic:

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21 For discussion of these theories, see infra text accompanying notes 82-95.

22 See, e.g., Stone, supra note 10, at 197-233.


24 Id.

25 See id. at 53.

26 Id. at 51.

27 See id. at 50-51.
Two Potential Zones of Speech Protection

**Non-Discrimination Zone**

Comparative Speech Rights

Example: Picketing near a public school entrance.

**Strict Protection Zone**

Core Speech Rights

Example: Speaking and leafleting on a major city sidewalk.

The key to this drawing is the line in the center, which represents the minimum speech opportunities that the Constitution guarantees to all speakers. This delineates the zone of strict protection, defined not so much by message but by the method of speech. Government may not restrict expressive opportunities below this line, even if it restricts the expression of all messages equally. The line reflects that while no person has a right to communicate in every manner or place of his or her choosing, the First Amendment requires, at the least, that the government allow citizens sufficient means and places in which to express themselves, in order to ensure a society in which speech is "uninhibited, robust, and wide-open."\(^{28}\) Below this line, each speaker’s freedom of speech is independent and fixed.\(^{29}\)

Speech rights in the strict protection zone are protected by the doctrinal standard that applies in cases of content-neutral speech regulations. According to the Supreme Court, any restriction on speech (even a content-neutral restriction) is unconstitutional unless it is “narrowly tailored to serve a

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\(^{29}\) Core expressive freedoms, as protected in this zone, are sometimes more accurately described in general terms rather than by reference to specific expressive opportunities. For example, the right to distribute literature on a specific sidewalk at a specific time is not always protected, but may be affected by reasonable time, place, and manner regulations. However, the right to some meaningful opportunity to distribute literature to the public in person is fundamentally guaranteed by the freedom of speech, so that even private property laws cannot operate to prevent it. See Marsh v. Alabama, 326 U.S. 501, 509 (1946) (holding that a state may not apply its trespass law in a way that would deprive speakers of the freedom to distribute literature in a company-owned town).
significant governmental interest, and leave[s] open ample alternative channels for communication of the information." In applying this standard, the Supreme Court has been especially protective of traditional means of expression (such as vocal and written speech), of speech in traditional public forums (including public sidewalks and parks), of speech at home or involving the home, and it has disfavored laws that "foreclose an entire medium of expression." Thus, the Supreme Court has found protected a person's right to distribute leaflets on city sidewalks, to go door-to-door in support of a message, to place signs expressing political viewpoints at one's residence, and to associate selectively with others for purposes of furthering a common expressive cause - even in the absence of content discrimination. Presumably, the Court would also find protected a person's right to send and receive mail, to use the telephone, to use the internet, and to speak vocally in certain places. Fundamental speech rights such as these do not depend upon whether the relevant restriction is content-based.

Additional speaking rights are depicted above the line; this is the non-discrimination zone. In this zone, a person's freedom of speech is also protected, but in a different way. Here, government may curtail speech rights of various speakers partially or completely, as long as it restricts all speech equally. Whether a speaker of message A has a right to make use of a forum or means of communication in this zone, therefore, depends upon whether the government has also restricted messages B and C to the same extent. In this zone, the First Amendment operates as a non-discrimination rule.

Speech rights in the non-discrimination zone are protected only by the standard that the Supreme Court applies to content-based restrictions. Laws that impose different speech restrictions depending on the content of speech are constitutional only if they are "narrowly tailored to promote a compelling

31 See, e.g., United States v. Grace, 461 U.S. 171, 183 (1983) (holding that a statute that did not allow protestors to distribute leaflets in front of the Supreme Court building was unconstitutional when applied to sidewalks); Schneider v. New Jersey, 308 U.S. 147, 165 (1939) (allowing a person to distribute materials on a city street without a permit).
33 See Ladue, 512 U.S. at 55.
35 Watchtower Bible & Tract Society of N.Y., Inc. v. Village of Stratton, 536 U.S. 150, 166 (2002) (finding it constitutionally offensive that a "citizen must first inform the government of her desire to speak with her neighbors").
36 Ladue, 512 U.S. at 54-59.
37 Boy Scouts of America v. Dale, 530 U.S. 640, 644 (2000) (holding that the Boy Scouts have a First Amendment right to discriminate against gay men in selecting scoutmasters).
Government interest. As this standard is more rigorous than the standard for content-neutral regulations, it accordingly protects a broader range of expressive opportunities. Protected speech opportunities in this zone might include, for example, a speaker’s interest in placing signs on government-owned telephone poles, in distributing leaflets at a military base, in using a megaphone in a residential neighborhood, or in picketing near the entrance of a public school. While no speaker has a strict right to express a message in these specific ways, if the government allows such a privilege for one message, the First Amendment presumptively requires it to permit other messages to the same extent.

This framework is admittedly a simplification of First Amendment doctrine. Courts do not usually begin a case by asking whether the particular speaking opportunity is fundamental or not; a court’s first inquiry is usually whether the regulation is content-based. Courts will often find a content-based restriction unconstitutional without inquiring as to the importance of the speaking opportunity. Indeed, the line in the center of the chart, separating fundamental speech rights from those that depend upon non-discrimination, is exceedingly difficult to locate in practice; it is therefore more of a theoretical boundary than a decision-making device. Moreover, there are some categories of harmful speech (such as child pornography) that are entitled to no means of expression whatsoever, and some categories of speech that are entitled to less protection than other speech. The location of the center boundary, therefore, depends in some measure upon the content of the speech at issue.

This two-zone framework is also flawed in a more fundamental way. It suggests that equality is an independent First Amendment concern—that a person who admittedly has more expressive freedom than the constitutional minimum may find additional protection if the government treats some messages differently than others. In Part IV, I offer a different framework, one based solely on the value of maximizing and broadening speech opportunities. Indeed, it is precisely the difficulty of locating the center boundary in the context of judicial review that best explains heightened

40 Vincent, 466 U.S. at 816 (stating that crafting an exception for one category of speech would risk impermissible speech discrimination).
41 See, e.g., Police Dep’t of Chi. v. Moseley, 408 U.S. 92, 95 (1971) (striking down law due to content discrimination, without evaluating importance or necessity of speaking opportunity).
42 See infra Part III.H.
43 See, e.g., Stone, supra note 10, at 190-194.
44 See infra Part IV.D, including graphic on p. 1165.
scrutiny for content discrimination; it is not that anti-discrimination serves a purpose independent of maximizing speech.

Assuming for the moment that avoiding speech discrimination and preserving meaningful speech opportunities are indeed separate and competing values, this framework seems to reconcile them.

B. The Conflict Between the Speech Maximizing and Anti-Discrimination Values

In some situations, the goals of preserving meaningful expressive opportunities and of avoiding speech discrimination are consistent, even complimentary. For example, a law prohibiting all speech critical of the government would clearly violate both principles: it would violate the first by disallowing adequate means of expression for some potentially valuable messages, and it would violate the second by singling out only speech "critical of the government" for disfavored treatment. Moreover, a constitutional rule forbidding the government from discriminating on the basis of content would sometimes encourage the government to allow communication that it would otherwise prohibit (rather than restrict speech that it favors), thus increasing the total speech available to society. Such a rule would serve both the anti-discrimination and speech maximizing values.

The two values, however, are often in tension, both in practical application and in theory. The Supreme Court's own description of speech-discriminatory laws as those that "restrict too little speech"\(^{45}\) captures part of this tension. In a situation where government is required to tolerate all speech or none at all, it will sometimes choose the latter — to allow no speech at all. Thus a government might close a public forum entirely,\(^{46}\) eliminate a class of speech subsidies,\(^{47}\) or tighten restrictions on speech near schools or hospitals,\(^{48}\) rather


\(^{46}\) This phenomenon occurs, for example, when government privatizes a public sidewalk or park, or redeicates it to non-speech purposes. See, e.g., Virginia v. Hicks, 539 U.S. 113, 115-17 (2003) (describing Richmond's actions in closing a public forum to control drug trafficking); Utah Gospel Mission v. Salt Lake City Corp., 316 F. Supp. 2d 1201, 1208-17 (D. Utah 2004) (describing Salt Lake City's decision to vacate a public easement over a downtown plaza after litigation determined that the easement made the plaza a public forum).

\(^{47}\) In 1990, for example, some members of Congress proposed to eliminate the National Endowment for the Arts altogether after two offensive NEA-funded works stirred a public controversy. See NEA v. Finley, 524 U.S. 569, 575-76 (1998) (discussing the Crane Amendment, which would have "virtually eliminated the NEA"). It may be that the NEA survived only because Congress decided instead to modify its funding criteria in a way that disfavored offensive works. Id. Although the new standard plainly discriminated on the basis of content, the Supreme Court upheld it in Finley. Id. at 580-90.

than facilitate speech that many citizens find harmful or offensive. When this happens, the value of avoiding speech discrimination is preserved only at the expense of the value of maximizing speech opportunities. In essence, the goal of speech equality causes a reduction in speech rights for everyone. If speech maximization were the First Amendment’s primary value, we would do better in some settings to allow government to discriminate among messages, rather than encouraging it to prohibit all speech simply to avoid some objectionable speech.

The two principles also conflict at a more fundamental level. In order to give meaning to the First Amendment principle that citizens are entitled to plentiful means of expression for their ideas, courts and other government officers must necessarily make judgments that evaluate and distinguish among different kinds of speech. The very process of weighing the value of speech against other societal interests, or of deciding whether the availability of one means of expression is sufficient to allow the government to restrict another means of expression, inevitably entangles government officials (including judges) in the process of preferring some kinds of expression over others.\footnote{49} If, however, the First Amendment completely prohibits government from discriminating among different kinds of expression, or from evaluating the communicative effects of speech, there appears to be no principled way to draw the line between protected expression and non-protected expression.\footnote{50}

For example, in deciding what kinds of expression are protected by the freedom of speech, the Supreme Court has shown a preference for traditional forms of expression (including, most importantly, the spoken and written word) over non-traditional forms. Thus, the Court has ruled that door-to-door leafleting is a highly protected form of expression because of its usefulness to the poor, its powerful persuasive effect, and the lengthy tradition supporting it.\footnote{51} By contrast, the Court has not found document burning or sleeping in parks (even as part of a clear demonstration of a political viewpoint) to be so protected.\footnote{52} Some commentators have observed that the Court’s jurisprudence seems to protect high-brow art, such as painting or ballet, over low-brow entertainment, such as bar-room dancing or cock-fighting.\footnote{53} The Court also

\footnote{49} Thus, when the Supreme Court upheld various restrictions on campaign finance, based on the potential for election speech to facilitate political corruption, Justice Kennedy accused the majority of engaging in impermissible content discrimination. McConnell v. Fed. Election Comm’n, 540 U.S. 93, 328 (Kennedy, J., dissenting).

\footnote{50} Larry Alexander demonstrates this inconsistency at length in Alexander, supra note 10, at 931-45.

\footnote{51} Martin v. City of Struthers, 319 U.S. 141, 145-46 (1943).


\footnote{53} See, e.g., Stanley Ingber, Judging Without Judgment: Constitutional Irrelevancies and
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seems to prefer traditional art to new or experimental expressive forms. Similarly, the Supreme Court favors speech on "matters of public concern" over speech on matters of trivial or private concern—reserving for itself, of course, the power to decide what speech is important to society. Finally, the Court has identified several important categories of speech that are either completely unprotected, or are less protected, because the speech is either too harmful or too lacking in value to warrant full First Amendment protection.

These categories include commercial speech, obscenity, fighting words, fraud, threats, and false defamatory statements, among others.

The practice of measuring the value of expression and weighing it against other interests is not limited to the courts. Legislatures and executive agencies, when they make use of the various categories and balancing tests that the Supreme Court has established, also participate in this inherently discriminatory process. Take, for example, a state that requires the disclosure of information on product labeling, prohibits obscenity, or decides whether to provide funding for a particular theatrical production. Through such laws, the government is inherently evaluating speech and its communicative effects and deciding what kinds of speech to favor or disfavor. The government's activities are perfectly consistent with the goal of providing plentiful means of expression (assuming that government officials give sufficient value to the speech at issue); indeed, they are necessary to give meaning to that goal. Thus such laws reasonably preserve the speech maximization value. However, the same activities are difficult to reconcile with the First Amendment's anti-discrimination concern.

If the anti-discrimination principle rests on a core belief that government should not evaluate the communicative effects of speech or discriminate among messages, government can achieve this goal only by becoming indifferent toward speech. This, however, would require giving up the goal of ensuring adequate means of communication. The value of ensuring plentiful expressive opportunities and the value of avoiding speech discrimination are therefore in tension, if not outright conflict.

If the current structure of First Amendment protection is a mistake, it is a mistake that we must face. If we have allowed the current structure to develop, we have done so because we believed that it protected our core values. If the current structure is a mistake, we have a responsibility to fix it. We cannot simply dismiss the current structure as a mistake without considering the implications of that dismissal.

The degree of conflict depends upon how broadly one interprets the anti-


55 See Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 758-59 (1985) (plurality opinion) ("We have long recognized that not all speech is of equal First Amendment importance. It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection.'") (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978)).

56 See infra Part III.H.


58 The degree of conflict depends upon how broadly one interprets the anti-
Amendment law rests upon both of these values, each is necessarily compromised by the other.

C. The Trend Toward Anti-Discrimination

If the two values discussed above are in competition, then it is a competition in which the anti-discrimination value has been gaining ground. Over the past several decades, Supreme Court Justices and scholars have increasingly described the freedom of speech in anti-discrimination terms rather than in value-of-speech terms. Sometimes, these commentators even criticize the process of categorizing and balancing speech as constitutionally problematic. Whereas balancing and categorizing used to be the primary mode of First Amendment analysis, with the conscious aim of promoting valuable public speech, now achieving an unbiased government is offered as a competing First Amendment value, possibly even the dominant value. Accordingly, the rule against content discrimination today is often emphasized and made to do the bulk of the First Amendment’s work, while the rule that government must ensure adequate means of expression is often regarded as weak and possibly even constitutionally illegitimate.

The trend in Supreme Court cases began several decades ago. Prior to 1970, Supreme Court cases concerning the freedom of speech evinced little concern about speech discrimination. Although early isolated cases appeared to rest on an underlying problem of viewpoint discrimination or religious discrimination, there existed no clear rule or presumption against speech discrimination in general. Even in cases that could have been decided on anti-discrimination grounds, the Supreme Court typically explained in other terms, such as overbreadth. During this era, the Supreme Court regularly evaluated whether the speech in question (or category of speech in question) would contribute to the marketplace of ideas, whether it would injure the public interest, and whether it properly struck the balance between speech’s potential discrimination principle. If the anti-discrimination principle prohibits only viewpoint discrimination on the part of government, then only some of the distinctions discussed above conflict with this principle. If, however, there is something illegitimate about government preferring certain expressive formats over others (such as preferring high-brow art over low-brow entertainment), then the conflict runs far deeper.

See infra text accompanying notes 68-79.

E.g., Rubenfeld, supra note 10, at 779-81 (criticizing the use of balancing tests in First Amendment law).

E.g., Cox v. Louisiana, 379 U.S. 536, 557-558 (1965) (observing that unfettered discretion on the part of officials would allow them to favor some viewpoints over others); Fowler v. Rhode Island, 345 U.S. 67, 69 (1953) (finding religious discrimination in public park restrictions).

E.g., Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1968) (holding that Ohio syndicalism statute is overbroad in that it punishes mere advocacy, and not simply incitement).
value and speech’s potential harm. Thus, not only did the Court allow other branches to engage in speech discrimination, but its own decisions also reflected a process of speech discrimination.

In the early 1970s, however, the Supreme Court began to focus more directly on speech discrimination as an independent wrong. In Schacht v. United States, the Supreme Court held unconstitutional a federal law allowing civilians to wear military uniforms in theatrical and movie productions, provided that the portrayal did not “tend to discredit” the military. The Supreme Court held that although the government could have constitutionally prohibited all wearing of military uniforms by civilians, nonetheless Congress could not selectively allow the use of uniforms for expressive purposes according to the message conveyed. The following year, in Cohen v. California, the Supreme Court went further by protecting a speaker’s choice of offensive words directed to the public, referring to “the usual rule that governmental bodies may not prescribe the form or content of individual expression.”

The most influential early speech discrimination case, however, is Police Department of Chicago v. Moseley. In Moseley, the Court held unconstitutional a city ordinance that prohibited picketing near public schools. The constitutional flaw with the ordinance, according to the Court, was not that it unduly burdened the speech of picketers, but rather that it allowed an exception for labor picketing in the same zone, thus “describ[ing]

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63 For example, in New York Times v. Sullivan, the Court explicitly relied upon policy observations, including the value of speech regarding public figures on matters of public concern, and the chilling effects of libel law, to support broad (although not unlimited) protection of speech that falsely defames public figures. 376 U.S. 254, 269-83 (1964); see also Chaplin v. New Hampshire, 315 U.S. 568, 572 (1942) (recognizing certain categories of speech that “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”).

65 Id. at 60 (quoting 10 U.S.C. § 772(f)) (2000).
66 See id. at 61-63.
68 Id. at 24. The State convicted Cohen for “offensive conduct” based on his having walked through a public courthouse corridor wearing a jacket inscribed with the words, “Fuck the Draft.” Id. at 16. One might describe Cohen’s First Amendment victory as an undue burden case (on the grounds that no other words could adequately describe Cohen’s feelings about the draft), but it is more often cited for the principle that government may not selectively punish certain speech solely because it is offensive. E.g., Carey v. Population Servs., Int’l, 431 U.S. 678, 701 (1977); Erznoznik v. City of Jacksonville, 422 U.S. 205, 208-11 (1975).
69 408 U.S. 92 (1972).
70 Id. at 94.
permissible picketing in terms of its subject matter.\textsuperscript{71} Moseley is remarkable for its rhetoric as much as for its extension of the principle barring speech discrimination to subject-matter classifications. With emphatic words, the Court declared that imposing differing restrictions based on the topic of speech is wholly incompatible with the First Amendment:

[A]bove 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. . . . The essence of . . . forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."\textsuperscript{72}

The Moseley Court further emphasized that in a public forum the First Amendment requires "an equality of status in the field of ideas,"\textsuperscript{73} suggesting that government impartiality toward private opinions is a core element of the freedom of speech, if not its primary value.

Since Moseley, the Supreme Court has continued to emphasize equality and non-discrimination in many of its freedom of speech cases,\textsuperscript{74} often quoting Moseley's strong rhetoric, and emphasizing the importance of government

\textsuperscript{71} Id. at 95.

\textsuperscript{72} Id. at 95-96 (quoting N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964)) (citations omitted).

\textsuperscript{73} Id. at 96 (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1948)).

neutrality toward speech and the marketplace of ideas. It is possible that this has affected even the Court's own willingness to engage openly in speech discrimination. In contrast to the pre-1970 era, the Court has often been hesitant to mention balancing in its opinions (particularly when it is the value of speech that is being weighed), and the Court seems reluctant to find new categories of unprotected speech based on explicit policy analysis. Justices Scalia and Kennedy have been particularly vigilant (if somewhat inconsistent) in promoting the anti-discrimination method of free speech analysis, while suggesting that the Court should move further in this direction.

For example, Justice Scalia has suggested that in cases involving expressive conduct, the freedom of speech doctrine should mirror the anti-discrimination doctrine that he prescribed for the freedom of religion in Employment Division v. Smith.

In other words, he advocates eliminating the practice of judicial weighing of expressive interests altogether, rendering all generally applicable laws constitutional so long as they do not discriminate against expressive conduct on the basis of message. Justice Kennedy has further argued that it is unwise for the Court to recognize any compelling interest exception to the rule against

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75 For example, in United States v. Playboy Entertainment Group, Inc., the Court explained:

When a student first encounters our free speech jurisprudence, he or she might think it is influenced by the philosophy that one idea is as good as any other, and that in art and literature objective standards of style, taste, decorum, beauty, and esthetics are deemed by the Constitution to be inappropriate, indeed unattainable. Quite the opposite is true. . . . What the Constitution says is that these judgments are for the individual to make, not for Government to decree, even with the mandate or approval of a majority. Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.

529 U.S. at 818. See also Rosenberger, 515 U.S. at 828 (“It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.”); Ark. Writers’ Project, 481 U.S. at 230 (“Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.”) (quoting Regan v. Time, Inc., 468 U.S. 641, 649 (1983)); Erznoznik, 422 U.S. at 209 (“[W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power.”).

76 For example, Justice Kennedy or Justice Scalia authored the majority opinion in each of the first five cases cited supra note 74, including significant opinions in R.A.V. v. St. Paul and Rosenberger v. Rector of University of Virginia. Many of these Justices’ concurring and dissenting opinions also emphasize the theme of speech neutrality or content neutrality, typically more so than the opinions of other Justices.

77 494 U.S. 872, 878-79 (1990) (holding that the Free Exercise Clause generally does not require special religious accommodations for laws of general application, no matter how burdensome to religion).

speech discrimination. He would instead find all speech-discriminatory laws unconstitutional per se, except for those that fall within historically established exceptions.\textsuperscript{79}

As further indication of the shift in emphasis, in modern speech cases the Supreme Court usually asks first whether a law discriminates on the basis of content.\textsuperscript{80} If the law is content-based, then the Court proceeds to apply strict scrutiny, and usually finds the law unconstitutional. Only if a law is content-neutral will the Court typically ask whether it leaves the speaker adequate means of communication.\textsuperscript{81}

Current freedom of speech scholarship appears to be pressing in a similar direction, toward stronger recognition of the anti-discrimination value and away from consciously promoting the value of speech. Larry Alexander, for example, argues that "the First Amendment expresses as its primary value that government not preempt individuals’ evaluations of information... by privileging certain evaluations."\textsuperscript{82} In other words, as Alexander explains, government (including judges) should never make a judgment that speech has value, lacks value, or would cause positive or negative communicative effects.\textsuperscript{83} He concludes, among other things, that courts violate this principle when they evaluate the constitutionality of content-neutral laws, and that they should drop this line of First Amendment analysis altogether.\textsuperscript{84}

Similarly, Elena Kagan has written a detailed work claiming that "First Amendment law... has as its primary, though unstated, object the discovery of improper governmental motives."\textsuperscript{85} Central to her analysis is the claim that it is categorically improper for government to regulate speech with a motive of advancing ideas that the government believes are right or true ahead of other ideas that the government believes are wrong or false.\textsuperscript{86} Based on this definition of improper motive, Kagan describes the bulk of First Amendment law (including the content-neutral/content-based distinction) as seeking to preserve an unbiased decision-making process on the part of government,

\textsuperscript{79} Republican Party of Minn., 536 U.S. at 792-93 (Kennedy, J., concurring); Simon & Schuster, Inc., 502 U.S. at 124-28 (Kennedy, J., concurring).

\textsuperscript{80} See supra note 41 and accompanying text.

\textsuperscript{81} One notable exception is Ladue v. Gilleo, in which the Court found unconstitutional a city ordinance restricting signs, on the basis that the law unduly burdened political speech regardless of content discrimination. 512 U.S. 43, 53 (1994). The Court consciously avoided the question of whether certain exceptions in the ordinance made it a content-based regulation. Id.; but see id. at 59-60 (O'Connor, J., concurring) (suggesting that the Court should have addressed the content discrimination question first).

\textsuperscript{82} Alexander, supra note 10, at 939.

\textsuperscript{83} Id. at 945-48.

\textsuperscript{84} Id. at 945.

\textsuperscript{85} Kagan, supra note 10, at 414.

\textsuperscript{86} Id. at 428-32.
rather than as either protecting expressive opportunities for speakers or
allowing speech for the benefit of audiences.87

In this same vein, Jed Rubenfeld has recently proposed an overarching
theory of the freedom of speech called “purposivism.”88 His article, like
Alexander and Kagan’s works, focuses the constitutional inquiry on the
government’s reasons for regulating speech, rather than on whether a law
unduly burdens speech.89 Taking guidance from the Supreme Court’s freedom
of religion jurisprudence, Rubenfeld argues that all laws that restrict speech for
the purpose of suppressing opinion should be categorically unconstitutional,
and that all laws not infected with such a purpose are consistent with the
freedom of speech, no matter how much they happen to burden expression.90
According to Rubenfeld, judges should never use balancing tests or cost-
benefit analyses to define the freedom of speech,91 nor should judges make
exceptions to what he calls the anti-orthodoxy principle of the First
Amendment.92 Nor, contends Rubenfeld, does the First Amendment allow
speakers to violate generally applicable, speech-neutral laws in any
circumstances.93

Other leading scholars, including Geoffrey Stone and Susan Williams, argue
that an important function of the freedom of speech is to prevent distortion of
the marketplace of ideas, which occurs when the government regulates speech
in a way that favors some viewpoints over others (whether intentionally or
not).94 Although these scholars do not describe anti-distortion as the only First
Amendment value, their theories suggest that stricter and broader enforcement
of the rule against speech discrimination is in order, reaching even laws that
impose disparate impacts on the speech market, even if such laws are facially
neutral.95

Thus, freedom of speech dialogue has evolved in the last thirty-five years
toward an emphasis on neutrality and equality, and away from an emphasis on

87 Id. at 443-505.
88 Rubenfeld, supra note 10, at 768.
89 Id. at 769.
90 Id. at 769-70.
91 Id. at 778-93.
92 Id. at 818-32.
93 Id. at 778 (“When a person is prosecuted in the ordinary course for violating an
ordinary prohibitory law, he will have no First Amendment claim because he will not be
punished for his speaking, even if he was speaking (or trying to speak) through his illegal
conduct.”).
94 See Stone, supra note 10, at 198, 217-27; Williams, supra note 10, at 672-79.
95 See Stone, supra note 10, at 217-27 (discussing how de facto discriminatory effects of
content-neutral regulations play a legitimate role in First Amendment analysis); Williams,
supra note 10, at 672-79; id. at 710-19 (proposing that strict scrutiny should apply to laws
that impose disparate impacts on the speech market).
protecting speech primarily for the information it provides. Some leading scholars are pressing for the doctrine to move even farther in this direction. Of course, there are counter-examples, and it would be an exaggeration to say that anti-discrimination theories now control the freedom of speech. Indeed, there remain large areas of First Amendment law that do not match, even closely, the rhetoric just described. Additionally, there remain scholars who would interpret the freedom of speech in the traditional manner: by assessing the potential costs and benefits of different categories of speech, and by assessing whether a government's laws unduly restrict the flow of information. It appears, nonetheless, that traditional First Amendment analysis is under assault like never before, in part due to an overly aggressive reading of the supposed principle that the First Amendment prohibits content discrimination. If we understand the limited scope of this principle and the legitimate reasons behind it, we may avoid making some costly mistakes in interpreting the First Amendment.

II. PROBLEMS DEFINING SPEECH DISCRIMINATION

The Supreme Court has said: "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." This principle of constitutional law, though often exaggerated, has had profound influence. Nevertheless, the principle is more difficult to apply than it may initially appear. As the Supreme Court has stated more than once, "[d]eciding whether a particular regulation is content based or content neutral is not always a simple task." Indeed, even after more than three decades of applying the distinction, significant questions remain in the legal definition of content-based regulation. This section explores some of those questions, and suggests that they cannot be resolved sensibly without understanding why the Constitution sometimes disfavors content discrimination.

Whether a law is content-based for First Amendment purposes depends upon two primary questions. First, what aspects of speech are included within the meaning of "content"? Second, in what manner (motive or effect) is the government forbidden to discriminate? Each of these questions raises significant unresolved issues.

96 See, e.g., Williams, supra note 10, at 710-19.
97 See infra Part III.
A. Elements of Speech

1. Viewpoint and Subject Matter

The clearest example of impermissible speech discrimination occurs, as in *Schacht v. United States*,101 when the government selects one or more viewpoints on a given topic for disfavored treatment under the law. "If there is any bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."102 The rule against viewpoint discrimination even applies to government subsidies for speech,103 unless the government makes clear that its purpose in providing a subsidy is to promote a particular point of view,104 or unless the discrimination occurs in the context of a government program or function that inherently involves viewpoint discrimination.105 Putting aside these curious exceptions, the rule against viewpoint discrimination is a clear and powerful one, protecting even seditious and dangerous messages.106

The concept of content-based discrimination also clearly encompasses regulation on the basis of subject matter.107 Although some writers have questioned whether subject-matter classifications should warrant the same scrutiny as viewpoint discrimination,108 the Supreme Court has never overruled the line of authority disfavoring subject-matter classifications, and the Court continues to hold many such laws unconstitutional under the standard of strict scrutiny.109

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101 398 U.S. 58 (1970); see supra text accompanying notes 64-66 (recounting how *Schacht* prohibited the government from allowing civilian use of military uniforms for selective purposes according to the message conveyed).


104 See infra Part III.A.

105 See infra notes 199 and 294.

106 E.g., Texas v. Johnson, 491 U.S. 397, 399 (1989) (holding unconstitutional a law banning flag desecration on the basis that it is viewpoint-discriminatory).

107 Police Dep't of Chi. v. Moseley, 408 U.S. 92, 95 (1972).


109 E.g., Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002) (holding unconstitutional a rule restricting candidates for judicial office from discussing issues likely
The rule against subject-matter classifications is, however, limited. Notably, governments may create limited public forums and subsidy programs defined on the basis of subject matter without having to prove a compelling governmental interest. Moreover, even where heightened scrutiny does apply, the Supreme Court has appeared less rigorous in applying strict scrutiny when the exclusion involves only a subject-matter classification, rather than a viewpoint classification.

2. Words, Images, Volume, Format

It is also established that certain components of communication, including a speaker’s choice of words, symbols, and images, are protected by the rule against content discrimination. Consequently, the government engages in content-based discrimination when it undertakes to punish the use of profanity, to prohibit nudity at outdoor movie theatres, or to restrict sexual content on the internet. Although a speaker may be able to communicate his or her point of view in other ways, the speaker’s choice of how to communicate (at least in these ways) is a protected element of the message, even in situations where the manner of communication is likely to be highly offensive.

The Supreme Court, however, has limited this line of reasoning. The rule against content discrimination does not extend to a speaker’s choice of expressive conduct, even though demonstrations are often a powerful way to convey a message. Moreover, the rule does not even apply to a speaker’s choice of volume, even though volume (like words and images) is a fundamental element of expression, and is particularly useful for expressing emotion. A regulation limiting a rock band to playing no louder than mezzo piano in a public park, for example, is as much of a curtailment of the performer’s expressive abilities as a restriction on nudity in outdoor films or a restriction on profanity in public, yet the former is considered content-


110 See infra Part III.C.


113 See Cohen, 403 U.S. at 25.

114 See, e.g., Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 289 (1984) (holding that sleeping in park as part of demonstration against homelessness is not protected); United States v. O’Brien, 391 U.S. 367, 372 (1968) (ruling that burning draft cards as a form of protest is not protected under the First Amendment).
neutral.\footnote{See Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989) (holding a restriction on volume of outdoor music concerts to be content-neutral).} Of course, some limits on the concept of “content” are necessary to avoid subjecting all speech restrictions to strict scrutiny. After all, there is theoretically no limit to how a person might choose to express himself or herself, especially in the world of performance art. But perhaps this fact should cause us to question why certain elements of a speaker’s choice about how to communicate (as opposed to the choice of viewpoint or subject matter) should be protected by strict scrutiny while other expressive choices are left unprotected.

The Court’s uncritical approach leaves many questions unresolved. For example, would it be content discrimination for the government to prohibit public nudity generally, while making an exception for theatrical and ballet performances? Some have argued that such a distinction would constitute improper content discrimination, as it would privilege certain artistic forms over others.\footnote{See, e.g., Miller v. Civil City of South Bend, 904 F.2d 1081, 1098 (1990) (Posner, J., concurring) (“The Indiana statute with its judge-made exception for ‘expressive’ nudity discriminates between upper-class and lower-class non-obscene erotica. The First Amendment forbids this kind of discrimination.”), rev’d sub nom. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 572 (1991).} One might respond, however, that this law would only discriminate on the basis of speech format, rather than on the basis of content.\footnote{See, e.g., Barnes, 498 U.S. at 574 n.2 (Scalia, J., concurring) (“I am not sure that theater versus nontheater represents a distinction based on content rather than format . . . .”).}

Ultimately, whether the law discriminates in any sense that is improper under the First Amendment is not obvious from the word “content,” and should depend upon the reasons why content discrimination is sometimes disfavored.

3. Audience Reaction or Interest

According to existing doctrine, laws that punish speech on the basis of listeners’ reactions are generally classified as content-based. Thus, the Supreme has held unconstitutional laws that punish speech in breach of the peace.\footnote{See, e.g., Gooding v. Wilson, 405 U.S. 518, 527 (1972); Terminiello v. Chicago, 337 U.S. 1, 2 (1949).} Likewise, in *Forsyth County v. Nationalist Movement*,\footnote{505 U.S. 123 (1992).} the Court invalidated a law imposing a parade fee based on the anticipated cost of security, holding that “[l]isteners’ reaction to speech is not a content-neutral basis for regulation.”\footnote{Id. at 135. See also Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 57 (1988) (protecting offensive speech against the tort of intentional infliction of emotional distress).}
One reason for treating listener-reaction laws as content-based is that they effectively allow the public to punish less desirable speech. In practice, such laws encourage speakers to censor their own speech on the basis of content, even if the government’s purpose is only to protect public order. Indeed, restrictions based on audience reaction cause more than a disparate impact on select viewpoints; they are legally triggered by the communicative effects of speech. Treating such laws as content-based therefore makes sense if we accept that the prohibition against content discrimination has to do with preventing laws that target the communicative impact of speech. If it is improper for the government to burden the expression of certain viewpoints that are likely to offend or persuade the public, it should be equally improper for the government to punish speech based upon whether it actually does offend or persuade the public.

At the same time, the Supreme Court’s classification of audience-reaction laws as content-based raises an interesting contrast with other lines of authority that recognize a legitimate governmental interest in protecting unwilling audiences. For example, in *Hill v. Colorado*, the Supreme Court found to be content-neutral a restriction on sidewalk counseling near health clinics triggered, in part, by whether the intended listener had consented to the speech in question. The Court found that the law was content-neutral, because its purpose was to protect medical patients from unwanted speech. *Hill* therefore seems to suggest that the offensiveness or value of a speaker’s message to the audience, as determined by the audience, is a content-neutral basis for prohibiting speech.

Perhaps the best way to reconcile *Hill* and cases treating audience-reaction laws as content-based is to distinguish between single-member audiences and mass audiences: A law is impermissibly content-based if it is triggered by a mass audience reaction, but it is not content-based if it is triggered by a single listener’s reaction. Although the distinction has nothing to do with the word

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123 Id. at 734-735 (holding statute constitutional). Likewise, property laws and anti-harassment laws empower individual listeners to silence speech that they do not want to hear, including for reasons having to do with the communicative effects of speech. For more on the captive-audience problem, see infra Part III.G.

124 See *Hill*, 530 U.S. at 719-20, 723-25.

125 By this reasoning, the tort action in *Hustler Magazine v. Falwell* might be classified as content-neutral because it was triggered by the communicative effect on one listener. The result is justifiable, however, even under the scrutiny applicable to content-neutral regulations, on the grounds that the tort of intentional infliction of emotional distress (as applied in that case) unduly restricted the speaker’s ability to criticize a public figure.
“content,” it finds support in underlying First Amendment concerns. When a law allows an individual listener to avoid unwanted speech, there is generally less harm to the marketplace of ideas (because uninterested listeners are less likely to be persuaded), and a greater possibility that real harm (in the form of individual harassment, loss of privacy, or waste of time) may be avoided. By contrast, when a crowd of unwilling listeners is allowed to censor unwanted speech for a group, it begins to appear indistinguishable in effect from a direct government restriction based on viewpoint or subject matter.

4. Speech’s Purpose or Mode

_Hill v. Colorado_ also raises a problem of speech classifications based on the speaker’s general purpose. The Colorado statute in _Hill_ applied only to approaching others “for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person.”126 The Supreme Court held this to be a content-neutral provision, despite the fact that the law singled out certain categories of speech (protest, education, and counseling) for special restriction.127

In finding the law to be content-neutral, the Supreme Court emphasized that the statute applied to all possible subjects (not just abortion, but also topics such as the environment, animal rights and religion), and that it was viewpoint-neutral.128 But why should this be dispositive, given that one must necessarily examine the content of a person’s speech to determine if it constitutes “education, protest or counseling”?129

Perhaps the most persuasive reason for _Hill’s_ classification of the Colorado statute as content-neutral is the fact that the categories of speech it restricted were defined quite broadly, according to the speaker’s general purpose, and broad classifications generally seem less troubling than narrow classifications.130 As the Court noted, the statute “simply establishes a minor

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126 _Hill_, 530 U.S. at 707 (quoting COLO. REV. STAT. § 18-9-122(3) (1999)).
127 _Id._ By only requiring permission to approach a person for the purpose of protest, education or counseling, the law implicitly allowed other forms of potentially annoying or harassing speech near health care facilities, such as asking for money, selling a product, making sexual advances, or asking for directions.
128 _Id._ at 723.
129 The Colorado Attorney General argued that the categories of “protest, education or counseling” should be construed to mean “all communication” to avoid the problem of content discrimination, but the Supreme Court explicitly declined to decide the case on this basis. _Id._ at 720-21.
130 Part of the Court’s opinion suggests such a rationale. See _id._ at 723 (“[A] statute that restricts certain categories of speech only lends itself to invidious use if there is a significant number of communications, raising the same problem that the statute was enacted to solve,
place restriction on an extremely broad category of communications with unwilling listeners. If this is the basis, however, for holding the statute to be content-neutral, it raises for future cases an extremely difficult question of degree. It might also cause one to question whether some sufficiently broad subject-matter classifications should be considered content-neutral.

5. Information Source

Another puzzle in the definition of content-based regulations concerns restrictions based on the source of information. Consider a provision in the United States Code that prohibits the publication of information obtained by illegal wiretaps, and which was the subject of dispute in Bartnicki v. Vopper. From the lawmaker’s point of view, such a statute is obviously content-neutral, for it applies to any and all information that comes in a specified manner. But from the point of view of a publisher or broadcaster, such a law is obviously content-based: It tells the speaker that it cannot publish certain messages, although it can publish other messages. Moreover, the government’s reasons for imposing a restriction on intercepted communications certainly concern the communicative impact of speech. We might therefore conclude that such laws are content-based in application, similar to audience-reaction laws.

The Supreme Court, however, concluded otherwise. In Bartnicki, the Court found the federal wiretap statute to be a content-neutral law of general applicability, in part by looking to its purpose, which was “to protect the privacy of wire, electronic, and oral communications.” According to the Court, the protection of privacy is a content-neutral purpose even though it is directly related to communicative impact, because it does not distinguish among subjects or viewpoints. This suggests a narrow definition of the phrase “content-based,” and implies that even laws designed to limit the communicative impact of speech are content-neutral unless they distinguish among subject or viewpoint.

that fall outside the statute’s scope, while others fall inside.”).

131 Id.

132 Perhaps it should not be surprising that Hill seems to undermine the clarity of the term “content-based,” given that Justice Stevens, the author of the Court’s opinion, has often expressed disagreement with the Court’s broad disfavoring of content-based regulations, particularly with respect to subject-matter discrimination. See supra note 108.


135 Id. at 526 (internal quotations and brackets omitted).

136 Id.

137 The Court went on to find the statute unconstitutional, even though it was content-neutral. Id. at 535. The ruling is consistent with New York Times Co. v. United States, which upheld the New York Times’s right to publish information obtained from secret
6. Speaker-Based Discrimination

Closely related to the problem of content-based speech discrimination is the problem of speaker discrimination. A public school's decision concerning who may use its internal mail system,138 a public television station's choice of who may participate in a televised debate,139 and the FCC's requirement that cable television operators carry certain broadcast stations140 all involve discrimination among speakers, although not necessarily discrimination on the basis of the speech's content. Of course, if the government formally selects speakers on the basis of what they will say, or restricts what certain speakers are allowed to say, then the actions also constitute content discrimination and are subject to strict scrutiny.141 But what about cases in which the presence of intentional content discrimination is less certain?

The Supreme Court has sometimes suggested that the First Amendment disfavors discrimination among speakers in the same way that it disfavors content-based regulation.142 Accordingly, the Court has struck down laws that give government officials unbridled discretion to license who is allowed to speak on the streets, based on the mere possibility that such authority could be used to distinguish among messages.143 Similarly, in Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue,144 the Supreme Court held unconstitutional a special tax on the press, even though it was content-neutral on its face and even though there was no evidence of a speech biased motive, reasoning that such taxes could potentially become tools of content-based censorship.145

In other speaker discrimination cases, however, the Supreme Court has shown far greater deference to government actors. In Turner Broadcasting System, Inc. v. FCC,146 for example, the Court upheld federal requirements that

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Pentagon documents that were stolen by a third party. 403 U.S. 713, 714 (1971).


141 See Forbes, 523 U.S. at 682 (stating requirement of viewpoint neutrality in speaker selection).

142 See, e.g., Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 828 (1995) (stating that the First Amendment rule against content discrimination also means that "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another"); see also Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . .").

143 E.g., Cox v. Louisiana, 379 U.S. 536, 558 (1965); Lovell v. City of Griffin, 303 U.S. 444, 450-52 (1938).


145 Id. at 584-85, 591-92.

cable television operators carry the signal of local broadcast stations, holding that speaker-based preferences require strict scrutiny only "when they reflect the Government's preference for the substance of what the favored speakers have to say." Remarkably, the Court found the requirement that cable television operators carry broadcasters' signals to be content-neutral, even though broadcast stations are themselves regulated as to content (and in some cases subsidized as to content), and the explicit statutory purposes of the law included the promotion of educational television, public television, and programming diversity.

Accordingly, there appears to be no singular First Amendment approach to speaker discrimination in relation to content discrimination. Whether speaker discrimination is treated as content discrimination might be framed as a question of governmental motive, whereby the more closely a speaker is identified with a particular viewpoint the more likely a decision promoting or disabling that speaker will be seen as an exercise of content discrimination. But the level of deference courts are willing to accord to legislators in resolving this question seems to vary widely according to the medium of communication.

B. Modes of Discrimination

The meaning of content-based regulation becomes even murkier when one considers the role of governmental motive. Is forbidden content discrimination ultimately a matter of underlying governmental motive? Of statutory language alone? Or of some combination of the two? The Supreme Court has not fully resolved these questions.

1. The Question of Legislative Motive

It is fairly clear that a law is not content-based merely because it disproportionately affects speakers of a particular viewpoint. For example, a law restricting speech around abortion clinics may be content-neutral, even though its primary effect is to limit the speech of abortion protestors, and even if the government knew that this would be its primary effect.

In some cases, a disproportionate impact upon speakers of a particular viewpoint may serve as powerful evidence that the government specifically intended to burden speech of that viewpoint. If one can prove that a law was motivated by a viewpoint-biased purpose, this might suffice to classify the law

147 See id. at 657-59.


150 See, e.g., United States v. Eichman, 496 U.S. 310, 317-8 (1990) (concluding that a facially content-neutral restriction on flag burning can only be explained by reference to content of speech).
as content-based.151 The likelihood of labeling a law as content discriminatory depends upon whether, and to what extent, governmental motive is the determining factor in defining content discrimination.

The Supreme Court has given conflicting guidance on the relevance of legislative motive in measuring content discrimination. Sometimes the Court has suggested that legislative purpose is the primary measure of content-neutrality. The Court has emphasized that "[t]he principle inquiry in determining content neutrality... is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."152 Accordingly, "government regulation of expressive activity is 'content-neutral' if it is justified without reference to the content of regulated speech[,]"153 even if it facially discriminates according to content, as when government imposes special zoning requirements for adult movie theatres.154 Likewise, a facially content-neutral regulation is sometimes deemed "content-based" if its apparent purpose is to discriminate against an unpopular viewpoint, such as a law prohibiting flag burning.155

At other times, the Supreme Court has suggested that content-neutrality is measured solely by looking at the face of a statute or regulation. Consequently, the Court has held that a facially content-based law will not be excused or classified as content-neutral because it is supported by good motives.156 Nor will a facially content-neutral regulation be deemed content-discriminatory because of an apparent viewpoint-based motive, as when the United States banned the burning of draft cards during the Vietnam War.157

151 Id. (holding a restriction on flag burning to be content-based in purpose).
152 Hill, 530 U.S. at 719 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).
153 Id. at 720 (emphasis added); see also id. at 720-22 (finding Colorado’s regulation of “protest, education or counseling” around medical buildings to be content-neutral, though acknowledging that one must examine the speech’s content to determine if it is covered by the regulation).
154 See City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48-49 (1986) (treating the regulation of sexually oriented speech as content-neutral, because its purpose is to prevent the secondary effects of such speech).
155 See Eichman, 496 U.S. at 315 (holding a restriction on flag-burning to be content-based in purpose).
157 United States v. O’Brien, 391 U.S. 367, 383 (1968) (applying intermediate scrutiny to a restriction on burning of draft cards, despite indications that the law was purposely aimed at anti-war speech, stating that "under settled principles the purpose of Congress... is not a
According to this standard, it is the text of a regulation, not the motive behind it, that determines whether it is content-based.

Yet at other times, the Court has combined elements of both these standards, suggesting that either a discriminatory motive or a facially discriminatory classification will render a law content-based. Thus, the Supreme Court has said, "[i]n determining whether a regulation is content based or content neutral, we look to the purpose behind the regulation,"158 subject to the qualification that

while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary to such a showing in all cases. . . . Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content.159

In essence, the Supreme Court seems to reserve the right to apply either definition of content-based regulation, and to make exceptions to either definition, depending upon the circumstance.

It might be possible to reconcile some of the Court's cases by making fine distinctions between different types of motives: official statutory motive versus illicit governmental motive,160 primary motive versus secondary motive,161 or viewpoint-based motive versus a less troubling content-based motive.162 In this way, some of the tension between these apparently conflicting standards might be explained. But I think it would be reading too much into the law to reconcile all of the Supreme Court's cases into a singular framework based on these types of distinctions. The law, quite simply, has not consistently approached the issue of motive in speech discrimination cases, as most of the current Justices have noticed, at one time or another.163 Perhaps the most accurate way to describe the current doctrine, therefore, is to say that generally

basis for declaring . . . legislation unconstitutional."); see also City of Erie v. Pap's A.M., 529 U.S. 277, 292 (2000) (holding that the Court will not strike down a facially neutral statute simply because of an alleged illicit motive).


159 Bartnicki, 532 U.S. at 526 n.9 (quoting Turner, 512 U.S. at 642-43) (emphasis added).

160 See Erie, 529 U.S. at 292 (suggesting such a distinction).

161 See id. (suggesting that the "predominate" purpose of the statute matters most in determining the governmental interest); see also Renton, 475 U.S. at 47-48.

162 See Hill v. Colorado, 530 U.S. 703, 723 (2000) (suggesting that a viewpoint-discriminatory motive is more "obnoxious" than other content-based motives).

163 See, e.g., City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 448 (2002) (Kennedy, J., concurring); id. at 454-57 (Souter, J., dissenting); Hill, 530 U.S. at 741-49 (Scalia, J., dissenting); Turner, 512 U.S. at 676-80 (O'Connor, J., dissenting).
a regulation of speech is content-based if it is justified by reference to speech content, or if it facially discriminates on the basis of speech content, but that the Supreme Court has occasionally found exceptions to both principles.

2. The Secondary Effects Doctrine

One important exception is worth further comment. It is the so-called secondary effects doctrine, which the Court applied in *City of Renton v. Playtime Theatres, Inc.* In *Renton*, the Supreme Court found a city zoning ordinance restricting the location of "adult motion picture theatres" to be content-neutral, despite the fact that the ordinance plainly distinguished on its face between theaters according to the content of their movies. To classify it as content-neutral, the Supreme Court relied upon the broader purpose of the ordinance, which was to limit the secondary effects of sexually oriented businesses (including crime and property value losses in nearby neighborhoods), not to condemn the content of sexually explicit films. Accordingly, *Renton* holds that when the government acts for the predominate purpose of restraining the secondary effects of speech, it may single out certain speech for disfavored treatment without invoking strict scrutiny. So far, the Supreme Court has only applied the secondary effects doctrine to the regulation of sexually explicit speech.

Commentators have criticized the secondary effects doctrine for various reasons. Some argue that the secondary effects test allows government to regulate speech based on hidden content-based motives. Others argue that the secondary effects doctrine weakens and obscures the content-based/content-neutral distinction, and does not account for the distorting effects of facially content-based laws.

My criticism of the secondary effects doctrine rests on another basis. It is that the Supreme Court has not justified the doctrine’s central premise – that it is preferable for government to restrict speech based on its secondary effects rather than to restrict speech based on its communicative effects. Indeed, by excusing speech restrictions based on secondary effects, while condemning speech restrictions based on communicative effects, the doctrine creates a

165 *Id.* at 47-49.
166 *Id.* Sexually oriented businesses are sometimes referred to as SOBs.
167 In addition to *Renton*, the Court applied the secondary effects doctrine in *Alameda Books, Inc.*, 535 U.S. at 433-443 (plurality opinion) (upholding regulation of adult bookstores), and *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 302 (2000) (upholding a nude entertainment ordinance).
peculiar and unjustified distinction in the law.

An example shows the emptiness of this distinction. Suppose that there are two kinds of non-speech conduct (X and Y) that the government considers harmful to society, and that are closely associated with one another in practice. (An example might be illegal drug use and prostitution.) The government may, of course, prohibit people from doing X or doing Y, without any problem under the First Amendment. But it would run into the First Amendment's rule against content discrimination if it restricted speech advocating conduct X or advocating conduct Y, even if such a restriction would be effective in reducing the incidence of X or Y. This distinction makes sense because the First Amendment protects speech (not conduct), and because a rule allowing government to ban all speech encouraging illegal conduct would chill too much potentially valuable speech.

Assume, however, that conduct X and conduct Y are so closely associated that speech encouraging conduct X has the secondary effect of increasing conduct Y, and that speech encouraging conduct Y has the secondary effect of increasing conduct X. In this case, according to the secondary effects doctrine, government may restrict speech advocating X or Y, as long as it only intends the crossover secondary effects.

Here, then, is the problem. For constitutional purposes, the government has a legitimate purpose in preventing conduct X and in preventing conduct Y. Moreover, the secondary effects doctrine suggests that a legitimate means of accomplishing these purposes is to restrict speech advocating X or Y — as long as the purpose for restricting speech X is to reduce conduct Y, and the purpose for restricting speech Y is to reduce conduct X. What could possibly support such a rule? If neither the purpose of preventing conduct X nor the means of restricting speech X is constitutionally troubling by itself, why should the First Amendment prohibit the government from using the latter to accomplish the former? On the other hand, if restricting speech is an inappropriate means of preventing harmful conduct because valuable speech would be chilled, it should make no difference whether the causal link between speech and conduct is direct or indirect, communicative or non-communicative.

The secondary effects doctrine seems to be a contrived justification for allowing governments to regulate sexually explicit speech more heavily than other speech, without admitting that this is a content-based choice. We ought to do away with it. I do not mean that the negative secondary effects of sexually oriented businesses are imaginary, or that such effects are an illegitimate basis for regulating speech. I am arguing, instead, that the fact that certain effects are secondary harms, as opposed to primary communicative harms, ought to be irrelevant in deciding whether, and to what extent, sexually explicit speech (or any other kind of speech) is protected by the First

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Amendment.\textsuperscript{171}

The Supreme Court would be more candid to analyze the regulation of sexually oriented businesses within a framework that classifies pornography as low-value speech,\textsuperscript{172} recognizing the potential harms that such speech causes to society (including both primary and secondary effects).\textsuperscript{173} This might lead to a standard like the one we have today, which allows special zoning rules for adult businesses, provided that the local government allows a reasonable place for these businesses to locate. The advantage of this approach is that it would not charade as a speech-neutral doctrine, as Renton does, and would lead to a more principled legal evaluation. Whether or not one agrees with Renton and its progeny, the Renton doctrine is better understood as an exception to the First Amendment rule against content discrimination – based on the unique aspects of sexually oriented businesses – rather than as a faithful application of that rule.

In sum, the First Amendment rule against content-based discrimination raises many definitional questions, many of which have yet to be resolved. It is impossible to resolve these issues sensibly without a clear sense of why the First Amendment disfavors content-based regulation. Before turning to this issue, however, it is important to consider the many circumstances in which government is admittedly allowed to engage in content-based discrimination.

\textsuperscript{171} The protection of property values is especially unpersuasive when offered as a “content-neutral” reason for regulating SOBs. If SOBs tend to lower surrounding property values, it is almost certainly because many people do not want to live or shop where they will be exposed to offensive speech. For government to use this as a basis for regulating the location of SOBs, therefore, is akin to regulating speech on the basis of audience reaction, which courts have classified as a content-based criterion. See supra Part II.A.3. Certainly the same argument would never succeed as justification for zoning on the basis of race (even if one could prove that the presence of minorities in an area lowers property values) for purposes of the Fourteenth Amendment, and we should not pretend that it is a content-neutral justification for purposes of the First Amendment. If it is legal to regulate the location of SOBs differently than other businesses, it must be because the First Amendment’s rule against content discrimination is more limited in scope and strength than the Fourteenth Amendment’s rule against racial discrimination.

\textsuperscript{172} See Cass R. Sunstein, \textit{Words, Conduct, Caste}, 60 U. CHI. L. REV. 795, 807-13 (1993) (defending the position that pornography can be more heavily regulated than core First Amendment speech because of its minimal value to public discourse and its high potential for public harm); see also Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 70 (1976) (plurality opinion) (“[F]ew of us would march our sons and daughters off to war to preserve the citizen’s right to see ‘Specified Sexual Activities’ exhibited in the theaters of our choice.”).

\textsuperscript{173} Secondary effects include increased crime and loss of property values in neighborhoods where such businesses exist. Primary communicative effects include pornography addiction, psychological trauma to children, increased incidents of sexually transmitted diseases, potential increases in violence against women, and offense. For further discussion of pornography’s harms, see Sunstein, supra note 172, at 809-12.
Only in light of these exceptions can we accurately discern the reasoning behind the content-based/content-neutral distinction.

III. PUZZLING EXCEPTIONS

It is often said that the exceptions to the First Amendment's rule against content discrimination are "few" and "well-defined." I aim in this section to present a different perspective. There are many areas of law and public administration in which government actors regularly engage in content-based speech discrimination for a variety of purposes and with far-reaching effects. These might be described as exceptions to the rule against content discrimination, or they might be described as areas in which the rule simply does not apply. Either way, it is fair to say that government-imposed speech discrimination is well accepted in our constitutional system.

The areas of permissible speech discrimination vary widely in their justification and scope. Some are defined in terms of the medium of communication; others in terms of the government's operation or purpose; others in terms of the speech itself. In some fields of government activity, there are essentially no restraints on speech discrimination; in others, strict scrutiny is replaced with a more lenient set of First Amendment standards, thus prohibiting some speech discrimination but allowing much as well. In some areas, the standards of permissible speech discrimination are well defined; in others, the standards are sketchy at best.

It is worth exploring these puzzling exceptions, not only because they provide powerful clues as to the purposes of the First Amendment, but also because courts and commentators have often ignored or minimized their role in the analysis of content discrimination.

A. Government-Supported Viewpoints

When the government acts openly to promote a message of its choice, it is not subject to the rule against content discrimination. The government-speech exception includes the use of government property and employees to provide selective information to the public or to promote one side of a public debate. It also includes the government's sponsorship of private speech by giving money or special speaking privileges to those who would further the government's point of view.

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175 Id. at 358 (2003) (quoting Chaplinsky, 315 U.S. at 571-72).


177 The United States has sponsored some of the most memorable viewpoint-based media campaigns in American history through the Ad Council, a private public interest firm.
commission a private artist to build a pro-veteran memorial in a prime location of the Washington D.C. Mall; it may closely regulate the tone, subject matter, message, and offensiveness of the monument; and it may deny anti-war artists an equivalent opportunity to build their own monument in the park. Likewise, a public school may invite an outside visitor to speak to its student body on a topic such as drug use in a special assembly, and may choose the speaker based upon his or her viewpoint. Indeed, government in many settings may easily engage in what is thought to be the worst form of speech discrimination – viewpoint discrimination – as long as it makes clear that this is its intent.  

It is tempting to justify this gaping exception to the rule against speech discrimination as a mere practical necessity of government. True, it is impossible to administer any kind of government without speaking, and it is impossible for any administration to speak without making content-based choices. However, the practice of government speech extends well beyond that which is necessary for government administration. There are whole agencies and departments of government, as well as entire sections of the United States Code, whose sole purpose is to influence the public on a variety of topics ranging from tourism to science to politics to proper use of the flag. Museums, schools, scientific agencies, public zoos, and many grant programs (including the National Endowment for Democracy, education grants to encourage sexual abstinence among teenagers, and the Drug Free Media Campaign Act) depend, in whole or in part, upon this broad exclusion from the First Amendment’s requirement of speech neutrality. These kinds of government programs, and the censorship that occurs within them, are premised upon the well-accepted idea that government can and should make a positive difference in the world of ideas: Government is not merely an adjudicator of public discourse; it is also an active participant in almost every discussion of public importance. On many topics, and in many venues, it is the most important participant.


Of course, government may not entirely ban speech on the basis of viewpoint, nor unduly restrict a disfavored viewpoint, no matter how clear its intent. But this limitation arises not from the rule against content discrimination, but the more general principle (applicable also to content-neutral regulations) that government may not deprive speakers of an adequate means of expressing their views. See supra notes 30-37.


22 U.S.C. § 4411(b) (2000) (stating that the Endowment’s purpose is to encourage democracy abroad).


For a thorough treatment of the government speech exception in First Amendment
Nor can we justify this exception on the basis that government speech merely adds to public discourse and does not take away from it. To the contrary, the promotion of government viewpoints frequently entails restrictions on private speech. When government dedicates a place, resource, or program for the promotion of the government's official point of view, it typically prohibits the use of that resource by anyone who would promote a contrary point of view. For example, a public high school may, as part of its gay and lesbian awareness month, set aside a bulletin board for teachers and students to post articles promoting tolerance of gay lifestyles; it may simultaneously punish a teacher who uses the board to post articles critical of such lifestyles. The practice of government-promoted speech, therefore, allows the selective removal of disfavored viewpoints from public discourse in certain forums, even if it does not allow their removal from public discourse altogether. Were it not for the broader First Amendment principle that government must allow speakers ample means of communication, nothing (other than politics) would prevent government from dedicating all publicly owned places and resources for the communication of solely government-selected viewpoints.

B. Public Education

In the realm of public education, ranging from pre-schools to state universities and graduate schools, speech discrimination is both pervasive and well accepted. On a daily basis, government educational institutions around the nation control the speech content of millions of Americans in a variety of ways: prescribing educational curriculum for the citizenry; imposing tests measuring students' ability to say what is valued; teaching facts, theories, and moral values selected by the government; imposing restrictions upon student speech and upon teacher speech based on appropriateness and subject matter; rewarding certain ways of thinking and speaking; sponsoring debates or panel discussions among speakers whose viewpoints are carefully chosen; and evaluating the scholarship and artistic works of faculty and students based on merit. Certainly, the notion that the Constitution requires an "equality of status in the field of ideas" does not apply to public education. Even the most open-minded state university must necessarily elevate some subjects,
viewpoints, and forms of expression above others. Otherwise, it would have little reason to exist.

Much of the speech discrimination in public education may be fairly described as government speech, and for this reason alone it is exempted from the rule against content discrimination.\textsuperscript{186} But there are also many content-based decisions made by public school administrators and teachers that do not involve government-supported viewpoints, and yet are still exempted from strict scrutiny. For example, a public high school may censor a student newspaper article on the topic of teen pregnancy, for the purpose of avoiding embarrassment to subjects of the article or because the topic is sensitive, if the school treats the newspaper as an educational exercise.\textsuperscript{187} Similarly, a school may suspend a student for using offensive sexual innuendo during a school assembly, even when it is clear that the student was speaking on his own behalf.\textsuperscript{188} A state university may promote or dismiss scholars depending upon whether their published work is found to have substantial "merit," a determination which necessarily involves content-based evaluations of speech even if the government does not endorse any particular viewpoint related to a scholar's work.

According to the Supreme Court, governments have greater freedom to regulate the content of speech in the public educational context because the purposes of public education require it.\textsuperscript{189} One of these purposes is even to teach students the proper manner of speaking: "Public education must prepare pupils for citizenship in the Republic... It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."\textsuperscript{190} Accordingly, in its capacity as educator, government may censor not only speech that would directly interfere with its work, but also speech that is "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."\textsuperscript{191}

There are, of course, limits to government's ability to impose content-based controls in public education.\textsuperscript{192} Nonetheless, speech discrimination is

\textsuperscript{186} See discussion supra Part III.A.
\textsuperscript{188} Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986).
\textsuperscript{189} See Kuhlmeier, 484 U.S. at 266 ("A school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school."); see also Fraser, 478 U.S. at 681 (stating that the freedom to promote controversial views must be balanced against the need for students to be taught socially appropriate behavior).
\textsuperscript{190} Fraser, 478 U.S. at 681 (quoting C. BEARD & M. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).
\textsuperscript{191} Kuhlmeier, 484 U.S. at 271.
generally permissible as long as it does not occur within a designated public forum and is reasonably related to a legitimate educational objective. In the field of education, our society not only permits, but expects, government to impose a variety of speech preferences reflecting society's orthodox views of true and false, right and wrong, and accepted manners of speaking and writing.

C. Special Forums and Subsidies

Government may also dedicate its resources and facilities to promote speech that it believes is good for society, even if it is not promoting a particular viewpoint. It may establish programs or forums to encourage speech on certain topics, speech that has artistic or literary merit, speech that has scholarly merit, speech that serves a charitable purpose, or speech that provides a useful perspective. When the government selectively promotes high quality speech in this way, it necessarily engages in content discrimination and skews public discourse. This kind of content discrimination is generally acceptable as long as the speech classifications are reasonable and consistent with the program's defined purpose.

unconstitutional a school board order requiring the removal of select books from school libraries); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (upholding a student's right to wear an armband in protest of war, noting that students and teachers do not "shed their constitutional rights to freedom of speech at the schoolhouse gate").

Of course, this standard seems only to beg the question of what is a valid educational objective. If the First Amendment requires the government to be neutral as to all ideas (as it does with respect to religion) then the whole premise of public education is illegitimate. See Alexander, supra note 10, at 953-54 (arguing that an inherent conflict exists between the anti-orthodoxy principle of the First Amendment and public education). On the other hand, if the government is given total deference to define its educational mission, then this restriction has no bite. The Supreme Court has taken a vague middle course, applying popular notions of what education is for, including the teaching of certain kinds of moral values, but leaving room to find some educational purposes illegitimate. Compare Fraser, 478 U.S. at 680-81 (finding that teaching civility and avoiding offense are legitimate educational objectives), with Pico, 457 U.S. at 872 (holding that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion'") (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

For a powerful defense of government's role in teaching cultural and moral values in public schools, see Suzanna Sherry, Responsible Republicanism: Educating for Citizenship, 62 U. Chi. L. Rev. 131, 157-82 (1995). Also, for a good explanation of why the Supreme Court's famous statement in Barnette that government "may not prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion" should not be taken literally, see Steven D. Smith, Barnette's Big Blunder, 78 Chi.-K. L. Rev. 625 (2003).

See Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 806
Accordingly, the United States may selectively fund private art through the National Endowment for the Arts on the basis of artistic merit and decency.\(^{196}\) It may selectively subsidize family planning programs that do not engage in abortion counseling.\(^{197}\) It may selectively assist private solicitations for charities.\(^{198}\) Public libraries, government-owned television stations, education-based subsidies, scientific grants, forums devoted to certain topics, government-owned theatres and performing arts centers, and many other speech-promoting government programs engage in this kind of speech discrimination. Some of these merit-based programs even engage in viewpoint discrimination.\(^{199}\)

While the Constitution does impose some limits on the government's ability to selectively promote speech,\(^ {200}\) and while some content-based subsidies are controversial, few would argue that government should have no role in promoting art, literature, science and other valuable expression. Moreover, the constitutional limits in this area appear to be more disclosure-oriented than they are substantive. When it comes to the government's own spending and use of its property, the First Amendment does not bar any particular kind of speech discrimination (not even viewpoint discrimination), but rather serves the purpose of making the government's speech-biased decisions more open to the public.\(^ {201}\)

D. Government Employment and Secrets

First Amendment law also broadly permits content discrimination with respect to public employment. Federal and state governments regularly impose significant content-based restrictions on the speech of government employees, often for reasons that would not suffice if the same restrictions were imposed on others. These instances of speech discrimination are not subject to strict

\(^{199}\) \textit{Cornelius}, 473 U.S. at 811-13 (upholding executive order excluding legal defense funds from charity drive in a federal government workplace).
\(^{200}\) Evaluations of scholarly and scientific merit, for example, necessarily include some consideration of whether the speaker's viewpoint is reasonable. \textit{See also United States v. Am. Library Ass'n}, 539 U.S. 194, 206-08 (2003) (recognizing that public libraries must enjoy discretion to discriminate among viewpoints); \textit{Ark. Educ. Television Comm'n v. Forbes} 523 U.S. 666, 673-75 (1998) (recognizing that public television stations must necessarily make some viewpoint-based decisions when selecting programming, and that generally such decisions do not violate the First Amendment).
\(^{201}\) \textit{See infra} Part IV.D.2.
scrutiny, but are only subject to a form of intermediate scrutiny.\footnote{According to the Supreme Court, government may restrict an employee's speech on a matter of public concern if the government's interest outweighs the value of the speech to the employee and to the public, considering the totality of circumstances. Connick v. Myers, 461 U.S. 138, 149-154 (1982).} This lower level of scrutiny even applies to restrictions on employees' private off-the-job speech,\footnote{See U. S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548 (1973) (upholding restriction on government employees' participation in political campaigns).} and allows the government to punish the disclosure of truthful information that has been classified.\footnote{In 1993 alone, the United States classified over 14 million documents for national security reasons. See INFORMATION SECURITY OVERSIGHT OFFICE, REPORT TO THE PRESIDENT 5 (2003). These are only a fraction of the total number of confidential records and pieces of information that federal employees can be punished for revealing. For examples of federal employee disclosure laws, which are scattered throughout the U.S. Code, see 18 U.S.C. § 1902 (2000) (regarding crop information); id. at § 1905 (regarding confidential information generally); id. at § 1906 (regarding bank information); and id. at § 1907 (regarding farm credit examiner reports).} In some cases, the First Amendment even permits the government to review and restrict the speech of former or present employees prior to dissemination, contrary to the usual rule against prior restraints.\footnote{See Snepp v. United States, 444 U.S. 507, 516 (1980) (upholding the punishment of a former CIA agent who failed to submit a book describing his CIA experience for pre-publication review).}

It is tempting to justify more permissive treatment of content-based employment rules solely on the basis of compelling governmental interests, such as national security and privacy. But if the government can demonstrate compelling interests that justify such content-based employment rules, then strict scrutiny review would suffice. This theory, therefore, does not explain why the Supreme Court applies a lower level of scrutiny to speech restrictions in public employment. Moreover, under current law, governmental interests that often support punishing a public employee's disclosure of information (including privacy and national security) are generally insufficient to restrict a non-employee's disclosure of information once it has been leaked.\footnote{See N.Y. Times Co. v. United States, 403 U.S. 713, 718-19 (1971) (holding unconstitutional an injunction against the publication of Pentagon secrets that were illegally leaked to the press).}

This suggests that it is not solely the strength of the government's purpose for controlling employee speech, or the nature of its motive, that justifies more lenient standards in this context. The standard is also shaped by the fact that public employees have voluntarily waived a portion of their First Amendment freedoms: Those who want to avoid content-based restrictions may simply decline public employment. The First Amendment, at least in this context, reflects a primary concern with preserving an adequate range of expressive
freedom for individual speakers based on the voluntary choices that they make, and not with ensuring that the government's motives are neutral with respect to speech.

E. Television and Radio

Since almost the inception of broadcast communication, the Federal Government has controlled the content of television and radio programming—two of the most influential mediums of communication today—with the approval of most Americans and of the Supreme Court. These content controls take several forms. First, the FCC issues licenses to radio and television broadcasters according to a public interest standard,207 which may include examination of a broadcaster's programming content.208 Second, the FCC may fine radio and television broadcasters for indecent programming during daytime hours, including programs containing profanity or sexually explicit content.209 Third, federal law reserves some licenses and bandwidths specifically for educational programming, an obvious content-based classification.210 Fourth, federal law requires broadcasters to provide balanced coverage of political elections through application of the fairness doctrine.211

Although these controls leave broadcasters with significant discretion to

207 47 U.S.C. § 309(a) (2000) ("[T]he Commission shall determine ... whether the public interest, convenience, and necessity will be served by the granting of such application....").

208 See Nat'l Broad. Co. v. United States, 319 U.S. 190, 215-16 (1943) (The public interest standard of the Federal Communications Act "does not restrict the Commission merely to the supervision of [broadcast] traffic. It puts upon the Commission the burden of determining the composition of that traffic."). See also 47 U.S.C. § 308(d) (2000) (requiring applicants for licenses and license renewals to submit to the FCC copies of prior customer complaints regarding programming); FEDERAL COMMUNICATIONS COMMISSION, POLICY STATEMENT ON COMPARATIVE BROADCAST HEARINGS, 1 F.C.C.2d 393, 397-98 (1965) (describing programming as a factor used to resolve competing license applications).

209 See FCC v. Pacifica Found., 438 U.S. 726, 742-51 (1978) (plurality opinion) (stating that the government has the power to restrict indecent broadcasting); Action for Children's Television v. FCC, 58 F.3d 654, 669 (D.C. Cir. 1995) (en banc) (holding that the government may restrict speech to further a compelling state interest, such as "protecting young minds from the corrupting influences of indecent speech").


211 The FCC's fairness doctrine was once more comprehensive than it is today. See Red Lion Broad. Co. v. FCC, 395 U.S. 367, 369-71, 373-75 (1969) (describing the earlier doctrine); Syracuse Peach Council v. FCC, 867 F.2d 654, 656 (D.C. Cir. 1989) (describing the FCC's partial retreat from the fairness doctrine). Today, however, the fairness doctrine still significantly prohibits a station from providing airtime to any political candidate without providing equal airtime to all other candidates for the same office. See 47 U.S.C. § 315(a) (2000).
choose their own programming, and purport to avoid "censorship," they all constitute conscious speech discrimination on the part of the government, and would almost certainly be found unconstitutional if applied to other mediums of communication. According to the Supreme Court, content regulation is more tolerable in the broadcast medium for two reasons. First, the broadcast spectrum is a scarce resource, allowing only a limited number of stations, and therefore government may require broadcasters to act as proxies for the community. Second, radio and television broadcasts are "a uniquely pervasive presence in the lives of Americans," are intrusive into the privacy of home, and are easily accessible to children.

These justifications starkly conflict with anti-discrimination theory. If speech neutrality were a fundamental principle of good government, then it would seem that the scarcity of broadcast resources and pervasiveness of broadcast communication would cut against, rather than in favor of, content-based controls. It is perhaps ironic that the government may implement content-based policies in a medium of communication that is so pervasive and influential, precisely because it is so pervasive and influential.

The lesson of broadcast regulation, however, may be that (in the prevailing view, at least) speech neutrality is not a primary First Amendment value; it is only a means of achieving higher goals. If this is true, then the value of neutrality might vary from one medium of communication to another. Perhaps the freedom of speech is best served by a government that is content-neutral in some forums, partially neutral in others, and actively speech-biased in other forums. This makes sense within a First Amendment theory that is focused on preserving adequate means of communication for speakers, and which also recognizes the government's ability to make a positive difference in the marketplace of ideas through some content-based policies. It does not make sense from a perspective of the First Amendment that regards speech discrimination as inherently wrong.

F. Protection of the Political Process

Another significant exception to the rule against content discrimination exists for political campaign speech. Since the early twentieth century, federal law has acted "to purge national politics of what [is] conceived to be the

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212 See 47 U.S.C. § 326 (2000) ("Nothing in this chapter shall be understood or construed to give the Commission the power of censorship . . . .").

213 See, e.g., Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (holding unconstitutional a requirement analogous to the FCC's fairness doctrine that newspapers allow people who are criticized an equal opportunity to respond); Reno v. ACLU, 521 U.S. 844, 874 (1997) (holding unconstitutional restrictions on indecency on the internet).

214 Red Lion, 395 U.S. at 390-94.


216 See supra Part I, especially text accompanying notes 19-21 and Part I.C.
pernicious influence of ‘big money’ campaign contributions.” Federal law accomplishes this goal through several means, including by imposing caps on individual campaign contributions, by restricting campaign expenditures and “electioneering communications” of certain organizations, and by imposing detailed disclosure requirements on both contributions and expenditures.

We should not doubt that campaign finance laws regulate speech in a content-based way. Such laws burden private spending for speech on certain topics (political campaigns), or for referring to certain people (candidates), but do not apply to speech on other topics such as religion or business. Nevertheless, the Supreme Court has upheld significant restrictions of both campaign contributions and campaign expenditures under the First Amendment.

According to the Supreme Court, regulations of political campaign contributions are not subject to strict scrutiny, but instead are subject to a more deferential standard. The Court has called it “closely-drawn scrutiny.” This more deferential standard for campaign contribution is appropriate, says the Court, for three reasons: first, the government has a significant interest in preserving the integrity of political elections; second, contribution regulations impose an only modest limitation on speech and association; and third, Congress has particular expertise in this area. Moreover, even in areas of campaign finance law where strict scrutiny remains applicable (including restrictions on direct campaign expenditures), the Court has upheld some content-based restrictions that serve the compelling interest of combating corruption or avoiding undue influence.

219 Id. at § 441b (regulating contributions or expenditures by national banks, corporations, or labor organizations).
220 Id. at § 434.
221 See id. § 434(f)(3)(A) (defining “electioneering communication” to include any broadcast that refers to a candidate for federal office).
223 McConnell, 540 U.S. at 137.
224 Id. at 134-138.
Accordingly, even in politics, prevailing First Amendment law does not require government to be indifferent to the communicative effects of speech. The law holds that, at least in some ways, government can attempt to improve the society's discussion of politics and elections through active, content-based intervention.

G. Captive Audiences

The rule against content-based regulation also applies less strictly when the government's purpose is to protect a captive audience. For example, in *Lehman v. City of Shaker Heights*, the Supreme Court upheld a rule prohibiting political advertisements on city buses, while simultaneously allowing commercial advertisements. Although the rule was a clear example of speech discrimination (on the basis of subject matter), the Court did not even mention heightened scrutiny. Instead, Justices in the majority found that a bus was not a public forum and that the city had a legitimate interest in protecting captive bus passengers from intrusion into their privacy. Similarly, the Supreme Court has used the captive audience principle to justify regulations allowing homeowners to block sexually explicit mailings. Although the parameters of the captive-audience exception are far from clear, it is at least a factor that has influenced judicial decisions sometimes to excuse content-based regulations.

H. Low-Value/High-Harm Speech

Several important exceptions to the rule against content discrimination are defined by the speech itself, and are justified by the speech's lack of positive value or potential harm. These categories of less-protected speech include incitement, threats, fighting words, obscenity, child pornography, false statements of fact (including fraud, perjury and defamation), and to a lesser degree commercial speech. Each of these categories of First Amendment analysis raises its own peculiar set of definitions and standards (as well as problems), which I will not detail here. It is clear, however, that these exceptions recognize a legitimate governmental interest in banning some speech altogether, and heavily regulating other speech, precisely because of its communicative effect.

Two things are worth briefly noting about these categories of unprotected or less-protected speech. First, by no means do these categories represent small or insignificant exceptions to the rule against content discrimination. The
category of commercial speech alone accounts for huge fields of content-based government activity. Second, these categories are all defined by the content of speech. Thus, in order to recognize and delineate each of these exceptions, the Supreme Court must have engaged in its own content-based evaluation of speech, judging that certain kinds of speech are so potentially harmful or so inherently worthless that they should not be protected. The mere presence of these exceptions in First Amendment law shows that the rule against content discrimination does not always apply to courts.

I. Speech Beyond the First Amendment's Boundaries and Unresolved Issues

There remain many other areas of law that routinely regulate the content of private expression in specific contexts, which are not typically thought to infringe the First Amendment. These include antitrust law, securities law, labor law, workplace harassment law, rules of evidence, copyright and trademark law, panhandling restrictions, regulation of

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230 See, e.g., Chaplinsky, 315 U.S. at 572 ("It has been well observed that such utterances 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.").

231 For a general exploration of the many kinds of speech that the First Amendment typically ignores, see Frederick Schauer, The Boundaries of The First Amendment: A Preliminary Exploration of Constitutional Salience, 117 HARV. L. REV. 1765 (2004); see also Volokh, supra note 121, at 1336-46 (discussing the uncharted zones of First Amendment theory).


233 See Lowe v. SEC, 472 U.S. 181, 203-11 (1985) (discussing the First Amendment implications of regulating the speech of investment advisers); see also Aleta G. Estreicher, Securities Regulation and the First Amendment, 24 GA. L. REV. 223, 223 (1990) (observing that "[t]he received wisdom for fifty years has been that the first amendment is inapplicable to speech relating to the operation of securities markets," and arguing that securities speech should receive greater protection).

234 See NLRB v. Gissel, 395 U.S. 575, 616-20 (1969) (holding that it was an unfair labor practice under the NLRA for a company president to tell employees that unionization could result in closing of the plant, and that this speech prohibition does not violate the First Amendment).


236 For a thorough analysis of adjudicative speech (including courtroom speech) and its relative lack of protection under the First Amendment, see Christopher J. Peters, Adjudicative Speech and the First Amendment, 51 UCLA L. REV. 705 (2004).


238 See Robert C. Ellickson, Controlling Chronic Misconduct in City Spaces: Of
building architecture, court rules governing the citation of unpublished precedent, and rules of decorum in public meetings. In each of these fields, among others, government regulates private speech on the basis of its content precisely because of its potential communicative impact. Often, we may not recognize these examples of speech discrimination as raising serious First Amendment issues because they are so commonplace. Indeed, litigants rarely raise First Amendment arguments in these fields, usually with good reason.

These practices show, at a minimum, that our society is well accustomed to government-imposed speech discrimination. It pervasively surrounds us and infects many areas of law. As Frederick Schauer has correctly observed, "even the briefest glimpse at the vast universe of widely accepted content-based restrictions on communications reveals that the speech with which the First Amendment deals is the exception and the speech that may routinely be regulated is the rule."2

IV. THEORIES OF WRONGFUL SPEECH DISCRIMINATION

Given the number of ways in which society not only tolerates, but often expects, government to regulate speech content, courts and scholars should be more careful in how they describe the First Amendment's supposed aversion to content discrimination. The Supreme Court was embarrassingly wrong in Moseley to say that "above all else, the First Amendment means that

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239 See, e.g., Reid v. Architectural Bd. of Review of Cleveland Heights, 192 N.E.2d 74 (Ohio Ct. App. 1968) (rejecting First Amendment challenge to architectural regulations); Kenneth G. Gill, The First Amendment and the Language of Architecture, 30 HASTINGS CONST. L.Q. 395 (2003) (arguing that architecture is a form of expression that should be protected by the First Amendment).

240 See Peters, supra note 236, at 780-83 (arguing that no-citation rules should be found to violate the First Amendment).

241 For example, the Rules of Parliamentary Practice, drafted by Thomas Jefferson for use in the Senate, and which continue to govern House of Representatives proceedings, contain numerous provisions regulating the manner of permissible speech in Congress. These include that:

No one is to speak impertinently or beside the question, superfluous, or tediously....

No person is to use indecent language against the proceedings of the House...; nor to digress from the matter... by speaking reviling, nipping or unmannerly words against a particular Member.... No one is to disturb another in his speech by hissing, coughing, spitting, speaking or whispering to another.


242 Schauer, supra note 231, at 1768.
government has no power to restrict expression because of its . . . content." It is even misleading to say that most of the time content-based regulation is disfavored, or that the principle admits few exceptions. Yet courts and commentators continue to make statements like this uncritically, often using them as the starting point of First Amendment analysis.

Rather than ask why the Constitution so strongly disfavors content-based regulation, we would come closer to understanding current First Amendment law by asking why the Constitution sometimes disfavors it, and why often it does not. What are the underlying principles that separate wrongful speech discrimination on the part of government from the many instances of acceptable speech discrimination?

This section argues that the First Amendment's aversion to content-based regulation serves primarily to protect speech for its informational and expressive value; it does not represent a general ideal of government neutrality toward speech. The presumption forbidding government speech discrimination serves this speech-maximizing purpose in many settings, but not in all settings. Accordingly, the presumption does not apply to all government action. It does not even apply to all regulations of speech.

A. The Illusory Distinction Between Subsidies and Penalties

As a starting place for separating wrongful speech discrimination from acceptable discrimination, it might seem natural to distinguish between subsidies and penalties. If the First Amendment assumes that more speech is generally better for society, this suggests that government should generally be free to subsidize speech, or to add its own speech to the marketplace of ideas, even if in a discriminatory way. The only discriminatory speech laws that present difficulties, one might argue, are those that selectively restrict or burden private speech.

The distinction between speech subsidies (including all government actions that facilitate or reward speech) on the one hand, and speech penalties or restrictions on the other hand, seems appealing on the surface. It finds support in the text of the First Amendment, which addresses government actions "abridging" the freedom of speech, but which says nothing about government actions promoting speech. The subsidy/penalty distinction is also consistent with Supreme Court authority suggesting that the government should respond to speech that it disagrees with by persuasion and education, rather than by restricting the dangerous speech in question. As Justice Brandeis famously

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243 Police Dep't of Chi. v. Moseley, 408 U.S. 92, 95 (1971).
244 See, e.g., NEA v. Finley, 524 U.S. 569, 598-99 (1998) (Scalia, J., concurring) (arguing that the Speech Clause only prohibits laws "abridging" speech, and does not curtail the power of government to grant selective subsidies).
245 Va. Pharmacy Bd. v. Va. Citizens Consumer Council, 425 U.S. 748, 770 (1976) ("[P]eople will perceive their own best interests if only they are well enough informed, and
wrote, "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."246

The distinction is less useful, however, than it might first seem when it comes to identifying wrongful speech discrimination. The core problem is that the difference between a discriminatory subsidy and a discriminatory penalty is often a matter of perspective; many discriminatory government actions affecting speech may reasonably be described as either subsidies or penalties. Distinguishing between discriminatory subsidies and discriminatory penalties for First Amendment purposes is like trying to distinguish, for constitutional purposes, between laws that prevent harm and those that confer benefits.247 All discriminatory laws impose both relative burdens and relative benefits, and it is therefore misleading to try to distinguish in the abstract between laws that do one or the other.

Consider the following difficult cases:

- A state legislature imposes different sales tax rates for print publications, depending upon the subject of the publication. Publications on the subject of sports and recreation receive the most favorable tax rate.248

- A public school designates a bulletin board for teachers and students to post viewpoints expressing tolerance of gay and lesbian lifestyles, but does not allow contrary viewpoints to be posted on the board.249

- A city prohibits picketing near public schools during school hours, but allows an exception for peaceful labor picketing.250

All of these could be described as speech subsidies for those whose messages are advantaged, or alternatively as speech penalties for those whose messages are disadvantaged. The supposed distinction, without further definition, provides little help in distinguishing what is beneficial speech discrimination from what is improper speech discrimination.

This is not to say that the distinction between subsidies and penalties is necessarily meaningless or irrational. It has a tendency, however, to be conclusory and to hide the important underlying questions. When one calls a government action the denial of a subsidy or the imposition of a penalty, the

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247 For a similar analysis as to the harm/benefit distinction in regulatory takings law, see John E. Fee, The Takings Clause as a Comparative Right, 76 S. Cal. L. Rev. 1003, 1045-47 (2003).


249 E.g., Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1014 (9th Cir. 2000).

250 E.g., Police Dep’t of Chi. v. Moseley, 408 U.S. 92 (1972).
characterization generally implies a judgment about whether the affected speaker had an initial entitlement or reasonable expectation to the benefit in question. Most would say, for example, that a government’s refusal to pay someone for his or her speech (assuming there is no contract) is the denial of a subsidy, because one is not generally entitled to money in connection with speech. By contrast, a government’s refusal to allow someone to speak in a public park during daytime hours would more commonly be viewed as a restriction or penalty, because one is presumptively entitled to speak in a public forum. The implicit baseline separating entitlements from non-entitlements is what drives the distinction between subsidies and penalties.

Any distinction between subsidies and penalties depends upon some kind of entitlement baseline. If courts fail to recognize any such baseline, then the distinction is only semantic. On the other hand, if the law is capable of defining a speaker’s baseline speech entitlements, then it appears that the focus on speech discrimination is wholly unnecessary. Courts could protect a person’s speech entitlements directly without regard to whether there is speech discrimination.

For example, assume the underlying entitlement question depends upon such factors as tradition, property rights, and whether the speaker has sufficient expressive opportunities. In that event, we could just as easily apply those criteria to all content-based regulations and to all content-neutral regulations, no matter what the form. A city’s refusal to allow an artist to display an offensive painting at City Hall would be constitutional, not because it involves a requested subsidy, but because the artist has ample freedom to display the painting elsewhere and there is no tradition supporting a public right to display art in City buildings (i.e., the speaker has no entitlement). By contrast, the City’s refusal to allow the artist to display an offensive painting in the artist’s own home would be unconstitutional, not because it is a content-based restriction, but rather because it would deny an important and traditional medium of expression (thereby infringing upon a speech entitlement).

The distinction between subsidies and penalties, therefore, tends in the difficult cases be more illusory than it is helpful. It is at best a conclusory distinction based on an implied substantive standard that should be fleshed out. If the underlying policy of this distinction is to provide plentiful means of communication, then that standard should apply equally to all content-based regulations and to all content-neutral regulations. The distinction, by its own terms, does not explain why some content-based regulations are subject to heightened scrutiny, while content-neutral regulations usually are not. Moreover, the distinction does not explain why the Supreme Court has sometimes found unconstitutional content-based restrictions in programs admitted to be subsidies, such as monetary speech grants.251

This leads to the possibility that there are other values driving the distinction

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251 See infra Part IV.D.2.
between content-based and content-neutral regulations, such as the value of government impartiality.

B. The Limited Usefulness of Impartiality Theories

1. Impermissible Motives

Several leading First Amendment scholars have argued that a core function of the content-based/content-neutral distinction (if not all freedom of speech doctrine) is to prevent government from regulating speech for impermissible reasons. According to this view, the freedom of speech, at its core, bars government from imposing speech regulations that are motivated by hostility toward particular viewpoints, or that are otherwise supported by illegitimate purposes. Thus, one might argue that because content-based regulations are more likely the product of impermissible motives than content-neutral regulations (regardless of their effect), the former are subject to strict scrutiny while the latter are subject to a more deferential standard.

I do not believe that the concept of impermissible motive goes as far as suggested in explaining the basic structures of impermissible content discrimination. The concept of speech-biased motives does not well explain why courts sometimes disfavor content discrimination, particularly when one considers the many types of content discrimination that are routinely allowed. Taken as a whole, existing freedom of speech doctrine seems designed to limit the means and degree to which government may influence the speech market, but it does not bar the government from acting based on speech-biased motives, nor should it be radically restructured to do so.

To see this, let us consider some of the allegedly impermissible speech-biased motives that commentators and cases have purported to identify.

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252 See supra note 10.
253 See Kagan, supra note 10, at 414 (arguing that a primary aim of the First Amendment is to root out impermissible government motives).
254 Elena Kagan describes this theory in the most detail, not only as a justification for the content-neutral/content-based distinction, but also as a basis for many other First Amendment doctrines. See id. at 443-505.
255 See discussion supra Part III.
256 In addition to preventing speech-biased motives, commentators have also suggested that First Amendment doctrine serves to prevent government officials from acting based on their own personal or political self-interest. See Kagan, supra note 10, at 428; Stone, supra note 10, at 228. While I do not dispute that self-interest is an impermissible motive, it is one that may easily creep into any kind of government action, whether speech related or not. The principle that government actors should be motivated by the public interest, and not by their personal interests, is policed primarily by the political process and by the structure of government. To the extent that First Amendment doctrines serve to prevent selfishness by government officials, the relationship is quite indirect.
Stripped of any reference to means, some of the most commonly disfavored motives may be defined as follows:

- **Viewpoint hostility**: the motive of causing more citizens to agree with the government on some issue of opinion or fact, and of causing fewer people to agree with contrary positions.

- **Avoidance of offense**: the motive of causing fewer instances of offense through communication.

- **Paternalism**: the motive of causing more expression that will lead people to make good choices for themselves, and less expression that will lead to harmful choices.

- **Aesthetic or moral preference**: the motive of causing more expression that is artistic or pleasing, and less expression that is immoral or displeasing.

Putting aside what some cases say, current First Amendment law does not treat any of these motives as *per se* impermissible. Take any of these supposedly impermissible motives, and there are many contexts in which government is allowed to act for precisely such a purpose, with positive results for society. For example, government acts with a viewpoint-based motive anytime a public school teacher marks a student’s exam answer as correct or

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257 If a governmental motive is *per se* impermissible as a basis for affecting speech, it should be possible to define it without reference to the government’s means of acting on that motive. Otherwise, we should question whether it is the government’s means rather than the motive that makes such an action inherently wrong.

258 See FCC v. League of Women Voters of Cal., 468 U.S. 364, 383-84 (1984) (“A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a ‘law . . . abridging the freedom of speech, or of the press.’”) (quoting Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n, 447 U.S. 530, 546 (1980)); Kagan, *supra* note 10, at 428 (arguing that regulating speech based on its viewpoint is inherently impermissible); Stone, *supra* note 10, at 227-28 (arguing that prohibiting or permitting speech based on its viewpoint is an impermissible motive).

259 See Texas v. Johnson, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); Kagan, *supra* note 10, at 429 (stating that regulating speech simply because it may be offensive to some is also an impermissible motive); Stone, *supra* note 10, at 214-16 (recognizing that the Supreme Court has long held that regulations of speech may not be grounded on the fact that such speech is offensive to a group because this would create a heckler’s veto).


261 See, e.g., United States v. Playboy Entm’t Group, Inc., 529 U.S. 803, 818 (2000) (“What the Constitution says is that [moral and aesthetic] judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.”).
incorrect; whenever an agency edits a scientific report for accuracy before publishing it; and whenever government disciplines an employee for publishing lies or misguided opinions in an official capacity. Under current law the government is allowed, in many important contexts, to regulate and restrict speech precisely based upon whether it agrees or disagrees with the message. Otherwise, it could never correct a public school teacher for teaching that whites are superior to blacks, that murder is good, or that sex with strangers is safe and fun. Ideological bias is not a per se illegitimate motive for regulating speech. It is, in fact, a highly praiseworthy motive in many circumstances. It is only disfavored, if at all, in defined situations.262

The same kind of analysis disqualifies other allegedly per se wrongful motives, including the motives of avoiding offense, assisting people to make wise choices for themselves, and preventing people from being persuaded to do harm. The government routinely regulates speech for all of these reasons, as when a local school board chooses what to include or exclude in its education curriculum or when a government agency decides whether to publish offensive material on its website, and there are few who would argue that this is a bad thing. None of these motives are inherently unconstitutional reasons for regulating speech; they are troubling only when coupled with certain means of regulating speech.

One might try to preserve a theory of per se impermissible motives by drawing analytical boundaries between various government capacities. One might argue, for instance, that it is inherently unconstitutional for government to act with certain speech motives in its capacity as a sovereign (i.e., when it uses the police power to regulate the private speech of citizens), but not in its capacity as educator, speaker, or employer.263

I have two responses. First, it seems doubtful that the theory of impermissible motives can even consistently explain the current law of speech discrimination within the range of police power action. There are some categories of content-based regulations that do not seem to be infected at all by impermissible motives (such as the exception for labor picketing struck down in Moseley) yet which are still subject to strict scrutiny.264 And there are other categories of content-based regulations (such as obscenity laws, fraud regulations, defamation laws, and commercial speech regulations) that are

262 See discussion supra Part III.A.

263 Elena Kagan explicitly excludes government speech, government employment and public education from her motive-based analysis. See Kagan, supra note 10, at 432-33. Larry Alexander ventures briefly into these fields and observes that they present a “major problem” for the position that government is not supposed to act on the basis of its evaluations of speech, and concludes that “theoretical reconciliation” is needed. See Alexander, supra note 10, at 953-54.

264 Police Dep’t of Chi. v. Mosley, 408 U.S. 92, 102 (1971). Eugene Volokh describes this weakness of motive-based analysis at greater length in his article on speech as conduct. See Volokh, supra note 121, at 1301-03.
commonly supported by motives having to do with the falsity or offensiveness of a message, yet which are wholly or partially exempt from the rule against content discrimination.  

Secondly, and more fundamentally, if our purpose is to identify the normative underpinnings of the First Amendment, we should ask why it is that the rule against content discrimination applies to some government actions affecting speech, but not to all government actions affecting speech. If different First Amendment principles apply to government in its supposed capacity as sovereign than in other capacities, there must be some higher First Amendment principle to explain those boundaries. It is not enough to simply say "That's different because the government is acting as an educator." Certainly, we would not dream of carving out a government-as-educator exception to the Equal Protection Clause's prohibition against racial discrimination. Nor is there a government-as-educator exception to the Establishment Clause's rule against religious indoctrination, nor to the Free Exercise Clause's rule against religious discrimination. The fact that the Speech Clause's anti-discrimination principle contains large exceptions relating to the government's roles as educator, employer, and speech promoter, suggests that it is a very different kind of anti-discrimination principle than these others, and that it rests upon different normative grounds. This difference stands in need of an explanation, and no theory of impermissible motives can supply that explanation.

Once one concedes that an allegedly impermissible motive for regulating speech is not always impermissible, but is only sometimes impermissible, the concept loses much of its force as an overarching normative theory. If it is unconstitutional for government to enact statute A (say, a total ban on speech of a particular viewpoint) for the purpose of preventing the spreading of a dangerous idea, but is perfectly constitutional for it to enact statute B (say, an education curriculum change) to prevent the spreading of the same dangerous idea, the difference is one of means, not motive. The normative principle that drives this distinction must have something to do with the effects of government action on the interests of speakers and listeners in society, not with correcting the government’s basic intentions.

Focusing on the government’s motive, as applied to some carefully defined situations, might serve as a vehicle for accomplishing some higher First Amendment purpose, such as preserving plentiful opportunities for speech and securing a wide dissemination of information. But if we know that the ultimate aim of the First Amendment is to preserve speech opportunities, rather than to prevent all government action based on speech-biased motives, it seems that we would do better to discuss the content-neutral/content-based distinction directly in terms of how the distinction maximizes speech, rather than confuse

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265 Gertz v. Robert Welch, Inc., 418 U.S. 323, 329 (1974) (stating that, as regards defamation laws, "there is no constitutional value in false statements of fact").
the issue by speaking of impermissible motives (which, in any case, are only sometimes impermissible).

2. Distorting Effects

If the concept of impermissible motives does not explain why content-based regulations are only sometimes disfavored, then what about the distorting effects of such laws? Content-based laws have the obvious potential of distorting the speech market and skewing the presentation of viewpoints. Some have argued that the rule against content discrimination serves to prevent such distortion.\(^{266}\) As Alexander Meiklejohn argued, it "mutilates the thinking process of the community" for government to tip the scale in favor of one side of a public debate.\(^{267}\)

The anti-distortion argument assumes that it is the relative balance of ideas and viewpoints that the rule against content discrimination seeks to preserve, as distinct from preserving some minimal level of speech. Thus, it would sometimes be preferable for the government to eliminate a forum altogether, or to prohibit some means of communication altogether, rather than selectively allow speech in a way that gives one side an advantage in the debate. This value is therefore analytically distinct from the value of maximizing speech.

The anti-distortion argument, however, has several problems as a description for why heightened scrutiny applies to content-based regulation. First, the theory is even more difficult to reconcile with the exceptions to the rule against content discrimination than a theory of impermissible motives. As I have explained, government routinely influences the marketplace of ideas through content-based policies, including advertising campaigns, government reports, education, speech subsidies, and single-topic forums.\(^{268}\) These practices undoubtedly have a profound influence on the balance of opinions that are expressed and believed in society — that is their purpose. If government distortion is inherently wrong, then these practices ought to be per se unconstitutional.

Second, almost all laws, including content-neutral speech regulations and regulations of non-expressive conduct, cause distortions in the marketplace of ideas, even if that is not their intent.\(^{269}\) For example, the current speech market is influenced largely by existing distributions of property and wealth, which are the function of property laws, tax laws, employment laws and monetary policies.\(^{270}\) Because of the way such laws are structured, wealthy people and

\(^{266}\) See Stone, supra note 10, at 198, 217-27; Williams, supra note 10, at 677-79.

\(^{267}\) MEIKLEJOHN, supra note 15, at 27.

\(^{268}\) See supra Part III (discussing the many exceptions to the rule against content-based discrimination).

\(^{269}\) See Alexander, supra note 10, at 929-31 (arguing that essentially all laws have speech differential effects).

\(^{270}\) Id.
wealthy organizations have more money to spend on speech, and therefore their ideas have more influence in society. A true anti-distortion theory, therefore, should not only find a way to prevent the disparate impacts that content-neutral speech regulations impose (which are many), but also the general distorting influences that non-speech laws impose, such as tax laws.

Indeed, because of the many ways that government actions already distort the speech market, heightened scrutiny for content-based laws may serve to perpetuate such distortion as much as prevent it, by preventing corrective measures. If wealthy people have more influence in elections than poor people, and if society’s background laws are partly to blame for this, a sensible way to further the goal of expressive equality would be to impose spending limits in elections. Current law, however, flatly rejects this equality-of-speech justification for expenditure restrictions in elections. As the Court explained in Buckley v. Valeo, “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.” The anti-distortion argument, therefore, seems to provide little explanation for why the First Amendment disfavors some content-based speech policies and allows others.

The anti-distortion theory is also normatively troubling. Any workable theory of distortion must depend upon some concept of an ideal speech market without influence from the government. Whether one defines that ideal speech market according to the regulatory status quo (thus grandfathering in all of the distortions of the past), or according to some pre-governmental state of nature, there is little reason to believe that either of these “ideals” is the best our society can hope for in terms of public deliberation. Government can and does positively influence the marketplace of ideas in many profound ways, including through education, subsidies, regulation, and through adding its own voice. While some government influences might do more harm than good for the deliberative process, it is unreasonable to suppose that we would be better off without any governmental influence on society’s speech and ideas whatsoever, even if this were possible. The primary First Amendment question, therefore, ought not to be whether government has distorted the marketplace of ideas, but rather whether it has done so in a beneficial way.

C. The Informational Value of Speech Revisited

I have argued that heightened scrutiny for content-based regulations does not serve a primary purpose of requiring the government to be impartial toward expression, nor does it prevent government distortion of the marketplace of


273 See discussion supra Part III.
ideas.\textsuperscript{274} Equality and neutrality are not primary freedom of speech values. They are, at most, means to an end. If heightened scrutiny for (some) content-based regulations makes sense, it must be justified ultimately as a speech-maximizing measure for the purpose of improving public deliberation, not because the Constitution values speech equality for its own sake.

The speech maximizing value holds that more speech is generally better for society, even if some speech comes from biased government sources, and even if government is actively skewing the private speech market. Moreover, the principle recognizes that some speech is more valuable than other speech, and that ultimately the quality of speech in society matters as much as quantity. According to this view, the freedom of speech is primarily aimed at promoting quality public deliberation on topics of public importance. It is not, at the core, a content-neutral doctrine.

Of course, even in this framework, courts should be skeptical of laws that exclude messages from the speech market on the basis that they have no value. The Speech Clause presupposes that government and society often fail to appreciate a message's potential value at the time that it is expressed, and that some of the most valuable contributions to the speech market are messages that challenge society's prevailing views.

It does not follow, however, that unpopular viewpoints or low-minded speech must be given equal opportunities as speech that society seeks to promote, or that government should play no role in regulating speech on the basis of its speech preferences. Government and society are sometimes wrong about what messages and subjects have value, but they are often right. Indeed, many of our well-established institutions are premised on the ability of government to raise the quality of speech and education in society.\textsuperscript{275} It would do serious damage to the freedom of speech's ultimate goal -- that of promoting quality public deliberation for the sake of knowledge, enlightenment and informed decision-making\textsuperscript{276} -- for government institutions to ignore society's collective wisdom about what subjects, viewpoints and forms of speech are most enlightening. For those whose messages are not favored by the government, the essence of the freedom of speech is not that government be neutral toward their speech, but that there exist adequate expressive means to communicate those ideas.

Indeed, because speech is only as valuable as its content, and because biased forums allow certain views and topics to be analyzed more thoroughly, the speech market functions best when government imposes a mix of biased forums and unbiased forums, provided that the biased forums are calculated to

\textsuperscript{274} See discussion infra Parts IV.B.1 and IV.B.2.

\textsuperscript{275} Police Dep't of Chi. v. Moseley, 408 U.S. 92, 95 (1971) ("To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship.").

\textsuperscript{276} See, e.g., Police Dep't of Chi. v. Moseley, 408 U.S. 92, 95 (1971).
bring out the most valuable kinds of exchanges. The best example of this is the structure of public universities. At the typical university, there are settings in which certain viewpoints are privileged (a classroom lecture in which the instructor’s viewpoints are offered as fact), there are settings in which certain subjects are privileged (a sponsored debate or discussion), and there are open forums in which all subjects and viewpoints are treated equally. This kind of varied speech market allows those viewpoints and subjects that the government believes have highest value to receive critical attention, but it also allows members of the university community ample freedom to advance other subjects and viewpoints, including those that challenge the orthodox views of society.

This framework, based on the informational value of speech, explains many aspects of First Amendment law. It explains why content-based regulations in public education, in government speech, and in other government programs designed to promote valuable speech are usually constitutional (provided that speakers of contrary viewpoints have broad freedom outside of these settings to convey their views to society). Informational value of speech also explains why some harmful categories of speech, such as fraud, are entitled to no protection whatsoever, and may be banned by content-based regulations. And finally, it explains why some burdensome content-neutral regulations are unconstitutional, even though they are neutral, because they do not preserve ample means of expression.

What is most difficult to explain under the framework, however, is why First Amendment doctrine sometimes requires strict scrutiny of modest content-based regulations, while only requiring intermediate scrutiny of modest content-neutral regulations. Content-neutral regulations have the potential to prohibit as much valuable speech as content-based regulations. Why, then, should a limited and otherwise reasonable restriction on speech be considered problematic because it does not apply to all viewpoints, subjects or messages?

D. Two Reasons for the Content-Neutral/Content-Based Discrimination as a Means of Preserving Speech Opportunities

1. Limitations of Judicial Review

Imagine what free expression would be like if courts did away with the content-neutral/content-based distinction completely. Courts could in theory hold that the freedom of speech protects a guaranteed floor of expressive freedom, including expressive means such as the right to speak on major public sidewalks, the right to use the mail, the right to display signs, the right to use the internet, and the right to publish and distribute literature. But it would not

277 See discussion supra Part III.
278 See discussion supra Part III.
be concerned with government action that selectively gives certain speakers more opportunities than the minimum, such as the opportunity to speak at a public school assembly.

In theory, it appears that this system would advance the goal of maximizing valuable speech. The freedom of speech would guarantee that no idea or subject could be banned from public discussion or unduly burdened, but it would allow government to promote those ideas, subjects, and forms of expression that have particular educational value. The question in every freedom of speech case therefore would be whether the government has unduly burdened the speaker's ability to participate in the marketplace of ideas, or, in other words, whether it has allowed ample means of expression - not whether it has shown a preference for some kinds of speech.

In practice, however, this lack of distinction would be quite dangerous to the marketplace of ideas. One reason for concern is that the Supreme Court's cases involving content-neutral laws have often been highly deferential to government regulators, providing only weak protection for the freedom of speech. If this became the standard for content-based regulations as well, a great deal of valuable communication could be lost. This problem could in theory be solved by applying a more rigorous level of scrutiny to content-neutral regulations, instead of applying a lower level of scrutiny to content-based regulations. Indeed, it is even arguable that the Court's heightened concern with content-based regulations in recent decades is partly to blame for its lax scrutiny of content-neutral regulations. But there is nonetheless a strong chance that a unified standard would simply mean less protection for speech.

Second, content-based regulations seem to raise a greater risk of judicial bias than content-neutral regulations. In cases involving content-based regulations, judges generally know whose message is hurt the most by the law,

279 See Alexander, supra note 10, at 925-26 (arguing that because content-neutral laws receive such little scrutiny from the courts that they therefore provide almost no protection for speech); Volokh, supra note 121, at 1307-08 (arguing that the Supreme Court's record of under-enforcing the "ample means of communication" standard counsels against eliminating the content-based/content-neutral distinction).

280 See Martin Redish, The Content Distinction in First Amendment Analysis, 34 STAN. L. REV. 113, 142 (1981) (arguing that courts should abandon the content distinction and "subject all restrictions on expression to the same critical scrutiny traditionally reserved for regulations drawn in terms of content").

281 Justice Marshall argued in his dissenting opinion in Clark v. Community for Creative Non-Violence, that the content-based/content-neutral distinction (which, as the author of Moseley, he had championed), was being misused by the Court to excuse too many content-neutral regulations, rather than, as it was intended, to raise the level of scrutiny for content-based regulations. 468 U.S. 288, 313-14 (Marshall, J., dissenting). The rule of content-neutrality, Marshall complained, had become a ceiling instead of a floor. Id. at 313.

282 See Stone, supra note 10, at 225; Volokh, supra note 121, at 1308-10.
increasing the likelihood that the judges’ own evaluations of the message will lead them to under-enforce the freedom of speech when unorthodox viewpoints are the subject of litigation. Heightened scrutiny for content-based regulations, one might argue, protects against this risk.283

The most serious problem with equalizing the standards for content-neutral and content-based regulations, however, arises not from the theoretical substance of an “ample means” or “undue burden” standard, nor from the possibility of judicial bias, but from the inherent limitations of judicial review and the separation of powers. In many areas of First Amendment adjudication, courts are limited by a lack of judicially manageable standards. For this reason, courts cannot resolve every issue that is relevant to an “ample means” or “undue burden” standard (no matter how much they value the freedom of speech) without intruding upon other branches of government. This appropriately leads to a reliance on legislative judgments and a focus on whether laws are content-based.

Consider the kinds of challenging cases that a court might face while applying an undue burden test if it were to treat the presence of content discrimination as irrelevant:

- A city enacts an ordinance that prohibits marijuana legalization advocates from distributing literature within 200 feet of public school entrances, while allowing all other speakers to distribute literature within 100 feet of a public school entrance. A court would be forced to decide whether the First Amendment guarantees a right to express oneself closer than 200 feet to a public school entrance, ignoring what the government has allowed other speakers to do.
- A state imposes a sales tax on publications expressing opposition to the state’s education policy at a rate of 6%, while taxing all other publications at the rate of 4%. A court would ignore how other speakers are taxed, and would have to decide in isolation whether a 6% sales tax is an undue burden.
- A city council establishes a zone for movie theatres that do not show “political documentaries,” and another less favorable zone for theatres that do show such films. The sole question would be whether the city allows ample means of expression for political documentaries, without regard to the existence of a zone where

283 If this were the only problem with content-based regulations, it might seem an overreaction for courts to apply strict scrutiny. Judicial bias is a risk in many cases, including those involving content-neutral regulations. See Stone, supra note 10, at 225-26 (arguing that bias might impair the ability of judges to evaluate both content-based restrictions as well as content-neutral restrictions that have different impacts on specific viewpoints). The usual way for courts to guard against judicial bias is to adhere to bright-line rules and precedent, and consciously to apply justice even-handedly – not to impose strict scrutiny.
other films are allowed.

- A city issues a parade license to a white supremacist organization, but gives the organization a less visible parade route than it typically gives to other parade organizers. The sole constitutional question would be whether the route provided for white supremacists’ is visible enough for constitutional purposes, without regard to what the city has allowed for other parade organizers.

In all of these cases, a court would be forced to answer whether the speech opportunities given to those whose messages are disfavored are minimally sufficient, regardless of whether others have been given better opportunities. The answers to these questions, however, depend on the nature of the governmental interests at stake and factual circumstances that are likely to vary from one community to another – issues that courts are not always well equipped to resolve. Not only would this method of analysis increase the litigation burden of courts to attempt to resolve such detailed questions, but, more importantly, it would defy the appropriate judicial role. Elected officials are usually better situated, both practically and legally, to make the kinds of site-specific, community-specific, and number-specific policy judgments that are inherent in regulating the time, place, and manner of speech.

A legal regime without any regard for content discrimination would therefore force courts into one of two unacceptable modes of adjudication. Courts could either adopt a policy of deference to legislatures, in which case the tyranny of the majority could easily push unpopular speech to the fringes of society, limiting it to undesirable locations, overtaxing it, and generally giving it no real opportunity to be heard. Or courts could effectively take over the functions of legislatures and local zoning authorities, drafting tax policy directly, designing parade routes, zoning the location of bookstores and theatres, and deciding the details of where, when, and how people must minimally be allowed to speak. Neither alternative would be good for society. The first would compromise the freedom of speech; the second would compromise the separation of powers, popular sovereignty and the advantages of local government.

A First Amendment doctrine that disfavors content discrimination, while applying more lenient scrutiny to content-based regulations, provides a way for courts to avoid these extremes. It allows legislatures and other elected officials to exercise their comparative advantage in making initial policy judgments, while at the same time ensuring a meaningful range of expressive opportunity for all speakers, including for speakers of unpopular views. The presumption against content discrimination, one might say, reflects a judicial practice of adopting the legislature’s initial policy judgments in determining what are the minimal opportunities for expression that the First Amendment requires. The result is a rough presumption (applied to settings where deference is appropriate) that whatever level of freedom the government determines is appropriate for some speech, it can (and therefore constitutionally must)
provide for all speech.

For example, when the question arises whether it is an undue burden on a speaker’s expressive interests to be barred from distributing leaflets within 200 feet of a public school entrance, it would be both difficult and improper for a court to resolve that question in isolation. Instead, the court should consider it relevant how the legislature has regulated other speech: If the legislature prohibits all speakers, regardless of message, from distributing leaflets within this zone, this is a good indication to the court that the legislature’s policies supporting this restriction are relatively strong, and are presumptively entitled to deference. On the other hand, if the legislature allows other leaflets to be distributed within this zone, this should indicate to the court that the government could probably tolerate general leafleting without undermining significant governmental interests. Given this indication, courts might reasonably presume that for the legislature to impose the restriction on any speech in that zone constitutes an undue burden, and is therefore unconstitutional.

The same principle applies to a government’s parade policies, its sales tax rates, zoning codes, and countless other government decisions affecting the time, place and manner of speech. In any situation where it is unclear to a court, at the outset, where the constitutional line exists between protected speech entitlements and non-entitlements – and where, therefore, deference to elected officials is a legitimate factor – it is reasonable for courts to apply a presumption that whatever regulations or policies the government has established for speech that it favors are also feasible (and thus constitutionally required) for speech that it disfavors. Anything more burdensome should be presumed (subject to rebuttal) to impose an undue burden on speech. This system of limited deference allows legislatures to participate in the judgment of what is an undue burden on speech, without giving them too much ability to burden unpopular speech. It also allows a healthy variation among communities in how speech is zoned and regulated.

It is important to emphasize that this rationale for the content-based/content-neutral distinction does not depend on a normative view that it is wrong for government to have biased intentions against certain viewpoints or against offensive speech, nor does it depend on the view that it is wrong for government to grant or restrict speech opportunities in selective ways that influence the marketplace of ideas. Rather, the presumption against content discrimination is a rough way for courts to determine, in a world of imperfect information, limited judicial expertise, and local variation, what those minimum opportunities for expression are that the Constitution protects for all speakers, including those who express unpopular viewpoints. If courts were omniscient policy-makers and could exercise complete judgment without violating the separation of powers, there might be no need for a presumption against content discrimination. As it stands, in a world where many things are imperfect, the presumption against content discrimination is probably the best
available way of protecting a robust range of expressive freedom while respecting the limits of judicial review.

If the content-based/content-neutral distinction is a device for determining whether certain regulations unduly burden speech, this also explains why in some settings the existence of content discrimination is irrelevant. Although courts cannot competently make all of the detailed policy judgments that are inherent in an undue burden standard, they can certainly make some judgments with confidence. There are some speech opportunities that are so obviously above what the Constitution requires for any private speaker, such as the opportunity to speak to a captive public school audience, that government may regulate these opportunities according to content. This explains, for example, why government may regulate what teachers say in the public school classrooms according to both viewpoint and subject, because we know that no one is initially entitled by the First Amendment to this speaking opportunity.

Moreover, there are also some opportunities that courts can confidently recognize as protected, regardless of how the government has treated other speakers, such as the right to place a political sign in the window of one’s house. In these situations, even a content-neutral law restricting the opportunity should be held unconstitutional.

In between these categories, however, lies a vast range of uncertainty where the precise boundary between speech entitlements and non-entitlements is fuzzy, and which courts are not able to define by themselves. In these settings, the rule against content discrimination works as a reasonable proxy for determining whether a speaker has been given ample means of communication.

If this is accurate, then the normative framework proposed in Part I of this article is misleading. There are not two different zones of speech protection based on two separate First Amendment values (anti-discrimination and speech maximization). Instead, there are three zones of protection, and they are all based on the same underlying policy – maximizing the flow of valuable information within society by ensuring plentiful expressive opportunities for all speakers, while at the same time allowing government to provide additional expressive opportunities for certain subjects, viewpoints and modes of expression that it values the most.

The three zones of protection consist of: (1) a range of recognizable speech entitlements, which government may not restrict through any kind of regulation; (2) a range of recognizable non-entitlements, which government need not provide, and, if it does so, it may provide and regulate in a content-based way; and (3) a range in which speech entitlements are uncertain, and where the rule against content discrimination therefore operates as a

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284 See discussion supra Part III.B.

presumptive boundary between entitlements and non-entitlements. All three of these zones are large and are important to the marketplace of ideas. Their relationship is shown in the following graphic:

**Three Zones of Speech Protection**

- **Recognizable Non-Entitlements**
  - Speech Discrimination Allowed
  - Example: Speaking to a captive public school audience.

- **Range of Uncertain Entitlements and Limited Deference**
  - Only Non-discriminatory Regulations Allowed
  - Example: Holding a parade on a major city street.

- **Recognizable Speech Entitlements**
  - No Significant Restrictions Allowed
  - Example: Placing a political sign in one's window.

Admittedly, the presumption against content discrimination, as applied to the center zone, does not perfectly enforce the speech maximizing value. Like most rules, it is over- and under-inclusive to a degree. For example, it might in some circumstances encourage legislatures to tolerate less speech than they otherwise would tolerate in order to make their policies content-neutral. When this happens, rather than raising the bar, the rule against content discrimination causes a reduction in speech opportunity. Given the alternatives for enforcing a baseline of expressive freedom, however, and considering the limitations of judicial review, this downside risk to focusing on content discrimination seems a reasonable cost to incur, even from a pure speech-maximizing perspective. It is also offset by the encouragement that a presumption against content discrimination provides to government in other settings to tolerate more speech – especially speech expressing unpopular viewpoints.

This framework comes closer to explaining the hierarchy of standards in First Amendment law, including exceptions to those standards, than either a theory of impermissible motives or a theory of impermissible distortion. As a general organizing principle, it is consistent with the current structure of First
Amendment law, which in some settings requires heightened scrutiny for content-based regulations and only intermediate scrutiny for content-neutral regulations, while in other settings often allows content discrimination, including even viewpoint discrimination.

2. The Role of the Political Process

One important part of First Amendment doctrine is not explained by the foregoing analysis. It is the line of authority that limits government's ability to engage in speech discrimination with respect to subsidies (i.e., benefits that courts can confidently recognize as non-entitlements without resort to the presumption against speech discrimination). These include monetary incentives for speech, special speaking opportunities, public teaching privileges, limited public forums, access to government mail systems, and other benefits that are beyond what the Constitution minimally guarantees to speakers.

While current law allows government substantial leeway to engage in content discrimination in the provision of subsidies and special forums, it does not allow unlimited discrimination, as one might expect if the sole purpose of the Speech Clause were to preserve a minimum range of expressive freedom. For example, the Supreme Court has held unconstitutional a rule barring legal aid payments to lawyers who challenge the validity of welfare laws, even though the government could have terminated the entire legal aid program.\(^{286}\) Similarly, the Court held unconstitutional a rule barring recipients of public broadcasting grants from engaging in editorializing, even though the government is not required to subsidize any broadcasting.\(^{287}\)

One might explain some constitutional limits in this area as an application of the unconstitutional conditions doctrine, consistent with the goal of removing undue burdens on speech. The unconstitutional conditions doctrine recognizes that it sometimes amounts to an undue burden for government to force individuals to choose between benefits that they have come to expect and First Amendment freedoms – especially where the government does not have a good reason for imposing the choice.\(^{288}\) This partially explains why speech restrictions in government employment are subject to intermediate scrutiny.\(^{289}\) It also might explain cases that invalidate restrictions on government funds that excessively burdened speech in relation to the government's legitimate

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\(^{288}\) As the Supreme Court stated in *Perry v. Sinderman*: "[i]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.'" 408 U.S. 593, 597 (1972) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

\(^{289}\) See *supra* note 202.
Using the unconstitutional conditions doctrine, we might say that the First Amendment requires government to accommodate private speech where feasible, even in defining employment and benefit programs.

We should also consider the role of the political process in controlling speech discrimination. Existing freedom of speech doctrine, especially with respect to subsidies, depends to a large extent upon the political process to function and to make sense. This follows from the fact that courts measure the constitutionality of content-based subsidies in relation to the purposes of those subsidies, which are themselves defined initially by the government. If one is looking only for substantive limitations on government's power to discriminate, this might seem ironic. Where subsidies are at issue, however, the freedom of speech functions primarily as a disclosure rule, rather than as a substantive limit on speech discrimination.

Other than on the topic of religion, existing First Amendment doctrine generally allows government to engage in any kind of speech discrimination with the use of its resources, as long as it is open about its purposes. If the government wishes to use its spending power to support or oppose a particular viewpoint (or group of viewpoints), it may do so as long as it is makes clear that the program is an exercise of government speech. If it wishes to use a subsidy to support discussion of a single subject, it may engage in subject-matter discrimination, provided that it discloses that this is the program's purpose and does not engage in viewpoint discrimination. If it wishes to use a subsidy to promote only "quality" work within a particular discipline or field of study, it may engage in this kind of speech discrimination, as long as the discrimination is consistent with the program's merit-based standard. Thus, notwithstanding what some cases say about the impermissibility of viewpoint or content discrimination, freedom of speech doctrine does not prohibit any particular kind of speech discrimination by the government. Rather, it requires openness and consistency: Government may engage in content discrimination

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290 See Velazquez, 531 U.S. at 537; League of Women Voters, 468 U.S. at 374.
291 Government may not engage in religious viewpoint discrimination as an exercise of government speech because the Religion Clauses of the First Amendment prohibit government endorsement of religious views, not because the Speech Clause requires viewpoint neutrality. U.S. CONST. amend. I.
292 See supra Part III.A (discussing the government speech exception).
in programs that are explicitly designed for content-based purposes, but only to
the extent that such discrimination is consistent with the stated purposes of the
program.
A cynic might argue that this kind of rule only serves to encourage a
government that wishes to discriminate in the use of its funds to restructure or
redefine its spending programs in an explicitly speech-discriminatory fashion.
But this underestimates the power of the political process. Most voters would
be outraged to learn that their tax dollars were being used explicitly to support
an incumbent's reelection campaign, and for this reason we can expect that a
government spending program with such a purpose will never exist. Likewise,
voters expect public colleges to be open-minded and neutral on political topics,
and therefore would be outraged if a state legislature created a new kind of
college explicitly designed to promote the Republican Party platform. The
general public knows that there are certain viewpoints and subjects that are
appropriate subjects of government subsidies and viewpoint discrimination
(including whether democracy is better than dictatorship, whether racism is
good for society, and whether cocaine is healthy), and that there are other
subjects on which government generally should remain neutral (including
controversial social issues, religion, and partisan political issues). The line
between appropriate and inappropriate cases of speech discrimination is real,
but it is always changing and varies from one community to another and from
one program to another.
Current freedom of speech doctrine recognizes that the question of how
neutral or biased government should be, and in what settings it should be
biased, is primarily a political choice that courts are unqualified to make.295
First Amendment rules concerning subsidies are structured to facilitate this
political choice, not to control it. There is nothing wrong, in principle, with
government using public money to support certain viewpoints, topics or forms
of expression to the exclusion of others, when its preferences are open to the
public. But there is good reason for concern when government creates a
program that purports to be neutral in a particular way, and then implements it
in a way that reflects a narrower bias.
Because the stakes of speech discrimination are high, it is reasonable for
First Amendment law to require government to inform the public clearly when
it uses public resources for speech discriminatory purposes. The freedom of
speech therefore presumptively requires neutrality in government spending
programs and in special forums, but government may overcome this
presumption if it adequately discloses that the program is designed to

295 As the Supreme Court has stated: "When the government speaks . . . to promote its
own policies or to advance a particular idea, it is, in the end, accountable to the electorate
and the political process for its advocacy. If the citizenry objects, newly elected officials
later could espouse some different or contrary position.
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implement a content-based policy. In this manner, the voting public remains well informed of the ways in which their government is affirmatively using the spending power to influence the speech market, keeping this extraordinary power within its proper political bounds.

CONCLUSION

The principle of the First Amendment that disfavors content discrimination is one of the most important in constitutional law. It is also poorly understood and often exaggerated. There are many settings in which the requirement of neutrality does not apply. Even where it does apply, there are significant exceptions, and there are often disputes about what it means. We cannot resolve the many challenging questions concerning the relevancy and meaning of content discrimination in First Amendment law unless we first understand why the law sometimes disfavors content discrimination.

I have argued that heightened scrutiny for content-based regulations serves a primary purpose of preserving plentiful means of communication for all citizens, toward the end of promoting speech for its informational and expressive value. This is the same purpose that scrutiny of content-neutral regulations serves. The distinction between content-based and content-neutral regulations arises in certain settings from the limitations of judicial review and in order to facilitate the political process. It does not represent a normative judgment that government should be impartial toward speech. As long as all speakers are given ample means of communication, and the public is well informed of the government’s purposes, there is nothing inherently wrong with governmentally imposed speech discrimination.

Although the theory of content discrimination I have proposed is consistent with the general structure of First Amendment law, there is plenty of room within this framework to challenge individual aspects of current doctrine. For example, one might argue that the rule disfavoring content discrimination should apply with full force to radio and broadcast television, that the obscenity exception should be eliminated, that public school students should have more expressive freedom, or that restrictions on campaign contributions should be unconstitutional. It is quite possible that current freedom of law tolerates too many content-based regulations. It is also arguable that courts should recognize some additional categories of permissible content-based regulation.

In deciding what types of content-based regulations are acceptable, courts should be guided by the goal of protecting speech for its ultimate value to society. The analysis should recognize, among other things, the significant value of unpopular and offensive speech, the importance of bright-line rules, and the danger of slippery slopes. What is unhelpful to the analysis, however, are general First Amendment pronouncements condemning content discrimination as inherently wrong, such as the famous quote from Moseley: “[A]bove 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."\textsuperscript{296} Such statements are incorrect as a description of current First Amendment law, misguided as to the purposes of the freedom of speech and, if taken seriously, would do more harm than good for the quality of speech in society.

\textsuperscript{296} Police Dep’t of Chi. v. Moseley, 408 U.S. 92, 95 (1972).