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Clarifying the Content-Based/Content Neutral and Content/ Viewpoint Determinations

Leslie Gielow Jacobs
Pacific McGeorge School of Law

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* Professor of Law, University of the Pacific, McGeorge School of Law. Thanks to David Richards for his helpful research assistance.

I. INTRODUCTION

The distinction between content-based and content neutral government actions is fundamental to free speech doctrine. A content-based government speech restriction receives the most rigorous scrutiny,[1] which is almost always fatal.[2] By contrast, a content neutral speech restriction receives much more lenient intermediate review.

Within a more narrow, but still substantial, realm, the further distinction between content-based and viewpoint-based government actions[3] is crucial to free speech doctrine as well. When the government assists private speakers, by funding their speech or providing them access to government property to speak, the government may define the boundaries of its support on any reasonable grounds that are not viewpoint-based.[4]

Despite the centrality of these two inquiries to free speech doctrine, the means of making the determinations remains murky.[5] One problem is that the Court frequently merges the inquiries into whether a government action is content- and/or viewpoint-based.[6] The result in the content-based/content neutral inquiry is that the determination often seems driven solely by viewpoint discrimination concerns. This emphasis in the content-based/content neutral inquiry does not particularly matter, because both content and viewpoint discrimination result in the same level of review. When the Court needs to, it can reiterate that subject matter discrimination, like viewpoint discrimination, is

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1. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) ("Our precedents . . . apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.").

2. *Id.* at 641 ("[T]he First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals."). *But see* Burson v. Freedman, 504 U.S. 191, 200 (1992) ("While we readily acknowledge that a law rarely survives [strict] scrutiny, an examination of the evolution of election reform, both in this country and abroad, demonstrates the necessity of restricted areas in or around polling places.").

3. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 59 (1983) (Brennan, J., dissenting) ("[U]nlike the viewpoint-discrimination concept, which is used to strike down government restrictions on speech by particular speakers, the content neutrality principle is invoked when the government has imposed restrictions on speech related to an entire subject area.").

4. *Id.* at 46 (Government "may reserve [a] forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.").

5. Courts and commentators have noted the inconsistency of these determinations. Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles, 288 F.3d 610, 623 n.11 (4th Cir. 2002) ("As the Ninth Circuit has noted, the 'coherence of the distinction between "content discrimination" and "viewpoint discrimination" may be seen as "tenuous."'") (quoting Giebel v. Sylvester, 244 F.3d 1182, 1188 n.10 (9th Cir. 2001)); *see, e.g.*, Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1265 (1995) ("Whatever the ultimate merits of a First Amendment focus on content neutrality, the Court's doctrinal elaboration of [it] has been haphazard, internally incoherent, and for these reasons inconsistent with any possible principled concern for content neutrality.").

6. *Turner Broad. Sys., Inc.*, 512 U.S. at 643 (distinguishing content-based from content neutral speech restrictions by whether they "distinguish favored speech from disfavored speech on the basis of the ideas or views expressed").

problematic.[7] The primary problem with the merger in the content-based/content neutral inquiry is that when the Court must make the content/viewpoint determination, it has left itself no principled basis upon which to tell the different types of government action apart.[8] The result is fractured opinions, differently stated tests, and holdings that can be criticized as outcome-driven.

Another problem is that, even when the Court agrees upon a test to make one of the determinations, the Justices have trouble fitting the particular government action within the rule. With respect to the content-based/content neutral inquiry, the majority and dissenting Justices in *Turner Broadcasting System, Inc. v. FCC*[9] agreed to inquire whether a cable television must-carry provision was justified by the content of the regulated speech.[10] The Justices then disagreed on the application of the facts to the law; the majority characterized Congress's desire to preserve local stations as economic[11] while the dissenters characterized it as aimed at preserving diversity in the television speech market.[12]

With respect to the content/viewpoint inquiry, the Court has perceived viewpoint discrimination where the government excludes religious speech from more broad-based aid.[13] In these instances, the Court defines viewpoint discrimination as occurring when the government eliminates some perspectives on a permitted subject matter of discussion.[14] In other instances, however, where the government's access rules seem to result in the same type of favoritism, the Court has not perceived viewpoint discrimination as occurring.[15]

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7. *Burson*, 504 U.S. at 197 ("This Court has held that the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic.").

8. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 831 (1995) ("[T]he distinction [between content and viewpoint discrimination] is not a precise one.").

9. 512 U.S. 622 (1994).

10. *Id.* at 645 (looking beyond the face of the statute to whether "its manifest purpose is to regulate speech because of the message it conveys"); *id.* at 676 (O'Connor, J., concurring in part and dissenting in part) ("I agree with the Court that some speaker-based restrictions—those genuinely justified without reference to content—need not be subject to strict scrutiny.").

11. *Id.* at 646 ("Congress' [sic] overriding objective in enacting must-carry was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free television programming for the [forty] percent of Americans without cable.").

12. *Id.* at 677 (O'Connor, J., concurring in part and dissenting in part) ("Preferences for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make reference to content.").

13. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 107 (2001) (school's exclusion of Christian club from meeting after hours at school was viewpoint discrimination); *Rosenberger*, 515 U.S. 819, 832 (university's exclusion of religious publication from funding was viewpoint based); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393 (1993) (school district's exclusion of religious group from use of facilities was viewpoint based); Widmar v. Vincent, 454 U.S. 263, 269 (1981) (university's exclusion of religious group from use of school facilities was viewpoint based).

14. *Rosenberger*, 515 U.S. at 831 ("The prohibited perspective, not the general subject matter, resulted in the [challenged government action], for the subjects discussed were otherwise within the approved category of publications.").

15. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 682-83 (1998) (exclusion of independent candidate from political debate was based on lack of popular support, not on "objections or opposition to his

The resulting doctrine is confused and can appear outcome-driven.[16] It neither corresponds well with free speech values, nor provides guidance to the lower courts that must struggle to make the crucial doctrinal determinations.

II. JUSTIFICATIONS FOR THE CRUCIAL DETERMINATIONS

The content-based/content neutral distinction is crucial in determining the suspicion with which the Court will view a speech restriction. The entire class of content-based restrictions—whether or not they also discriminate according to viewpoint—receive strict scrutiny.[17] Content neutral speech restrictions receive an intermediate level of review.[18]

That the broad category of content-based speech restrictions identifies a more constitutionally dangerous category of government actions than the category of content neutral speech restrictions is not entirely clear.[19] Because they apply to a subject matter or mode of speaking, content-based laws do not skew public debate in an explicitly message-sensitive way, which is the primary free speech clause danger.[20] They limit the absolute volume of speech available, but so do content neutral speech restrictions.[21] Sometimes content-based government actions

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views"); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983) (granting access to union representing school employees and denying it to rival union "is more accurate[ly] . . . characterize[d] . . . as based on the *status* of the respective unions rather than their views.").

16. Hill v. Colorado, 530 U.S. 703, 741 (2000) (Scalia, J., dissenting) ("[A] speech regulation directed against the opponents of abortion . . . enjoys the benefit of the 'ad hoc nullification machine' that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice.").

17. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."); Carey v. Brown, 447 U.S. 455, 462 n.6 (1980) ("It is, of course, no answer to assert that the Illinois statute does not discriminate on the basis of the speaker's viewpoint, but only on the basis of the subject matter of his message. 'The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.'"); *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."); Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 537 (1980) ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.").

18. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) ("[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny. . . .") (citation omitted).

19. *Compare* Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 285 (1981) ("If the [F]irst [A]mendment is in fact designed in theory to protect discussion over a wide area, a subject matter restriction is no more justifiable than a viewpoint restriction."), *with* Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 113 (1981) (content distinction is "theoretically questionable").

20. *Hill*, 530 U.S. at 723 ("Regulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation."); *Turner Broad. Sys., Inc.*, 512 U.S. at 641 ("Government action that stifles speech on account of its message . . . contravenes th[e] essential right [of self-determination that lies '[a]t the heart of the First Amendment'].''); *Rosenberger*, 515 U.S. at 829 ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.").

21. *See, e.g.*, Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 54 n.35 (1987) (pointing out that content neutral restrictions may in fact limit more speech than content discriminatory restrictions).

can hide viewpoint discriminatory motivation[22] or come with strong viewpoint discriminatory effects.[23] The same is true, however, of content neutral laws.[24]

The best explanation for the centrality of the content-based/content neutral distinction to free speech doctrine is a combination of the greater viewpoint discrimination dangers posed by content discrimination[25] plus the political process check that content neutrality provides.[26] To the extent that content-based restrictions are more likely than content neutral restrictions to pose viewpoint discrimination dangers, the distinction identifies the animating principle of the free speech clause: the government may not favor or disfavor particular messages in the private marketplace of ideas.[27] When it does so, it unconstitutionally skews private discussion.[28] This governmental skewing adversely impacts all of the

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22. *See, e.g.*, Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 241 (1983) (content discriminatory regulations are more likely than content neutral regulations "to be the product of improper motivation.").

23. R.A.V. v. City of St. Paul, 505 U.S. 377, 431 (1992) (Stevens, J., concurring in judgment) ("[A] regulation that on its face regulates speech by subject matter may in some instances effectively suppress particular viewpoints . . . .") (citing Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 546-47 (1980) (Stevens, J., concurring in judgment)); Cox v. Louisiana, 379 U.S. 536, 581 (1965) (Black, J., concurring) (statute that generally prohibits picketing, except that which is labor-related, denies "use of the streets [for the expression of] views against racial discrimination"); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 56 n.1 (1986) (Brennan, J., dissenting) ("[R]estrictions [on sexually explicit speech] . . . have a potent viewpoint-differential impact" suppressing messages "in favor of more relaxed sexual mores.") (quoting Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 111-112 (1978)); FCC v. Pacifica Found., 438 U.S. 726, 777 (1978) (Brennan, J., dissenting) (decision of Court to allow FCC to sanction station for broadcast of dirty words is "another of the dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking.").

24. *Hill*, 530 U.S. at 767 (Kennedy, J., dissenting) ("We would close our eyes to reality were we to deny that 'oral protest, education, or counseling' outside the entrances to medical facilities concern a narrow range of topics—indeed, one topic in particular."); *see* Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests*, 29 U.C. DAVIS L. REV. 553, 596 (1996) ("Standing alone, carefully crafted but facially neutral time, place, and manner restrictions may be almost as effective as narrowly stated content-discriminatory laws in unfairly influencing public debate.").

25. *Turner Broad. Sys., Inc.*, 512 U.S. at 642 ("[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny . . . because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.").

26. *Id.* at 676 (O'Connor, J., concurring in part and dissenting in part) ("Laws that treat all speakers equally are relatively poor tools for controlling public debate, and their very generality creates a substantial political check that prevents them from being unduly burdensome.").

27. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 59 (1983) (Brennan, J., dissenting) ("The content neutrality principle can be seen as an outgrowth of the core First Amendment prohibition against viewpoint discrimination.").

28. *R.A.V.*, 505 U.S. at 430 (Stevens, J., concurring in judgment) ("[Viewpoint discrimination] requires particular scrutiny, in part because such regulation often indicates a legislative effort to skew public debate on an issue.") (citing Schacht v. United States, 398 U.S. 58, 63 (1970)); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 894 (1995) (Souter, J., dissenting) ("[T]he prohibition on viewpoint discrimination serves that important purpose of the Free Speech Clause, which is to bar the government from skewing public debate."); *Cox*, 379 U.S. at 581 (Black, J., concurring)

> [B]y specifically permitting picketing for the publication of labor union views [and not political views, such as protests against racial discrimination], Louisiana is attempting to pick

values that underpin the free speech guarantee. It thwarts the free search for truth[29] and political self-determination[30] by the polity; it undermines the autonomy interests of both speakers and listeners;[31] and it fails to promote tolerance,[32] as most viewpoint discriminatory government actions result from the majority's hostility toward a minority point of view.

The political process check occurs because of the broad applicability of content neutral restrictions to all topics. First, government bodies are less likely to enact content neutral speech restrictions because of the broad burdens they impose.[33] Content-based restrictions, after all, can be crafted to preserve the speech rights of particularly strong constituencies.[34] Second, that content neutral speech restrictions apply broadly also makes their nonspeech justifications more worthy of respect when the government chooses to enact them.[35] It is thus the combination of justifications—the suspicions of viewpoint discrimination plus the political process check—that best explains the centrality of the content-based/content neutral determination to free speech doctrine.

It is not necessary to search for the justification for the distinction between viewpoint discriminatory and all other speech restrictions. Viewpoint discrimination by the government is the primary free speech clause danger.[36] The government

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> and choose among the views it is willing to have discussed on its streets. It thus is trying to prescribe by law what matters of public interest people whom it allows to assemble on its streets may and may not discuss. This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments.

Id.

29. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

30. Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 534 (1980) ("Freedom of speech is 'indispensible to the discovery and spread of political truth . . . .'" (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)); Lehman v. City of Shaker Heights, 418 U.S. 298, 311 (1974) (Brennan, J., dissenting) ("For speech concerning public affairs is more than self-expression; it is the essence of self-government." (quoting Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964))).

31. *Consol. Edison Co. of N.Y.*, 447 U.S. at 534 n.2 ("Freedom of speech also protects the individual's interest in self-expression.").

32. LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 107 (1986) (asserting that a purpose of free speech is to develop individuals' capacities for tolerance and self-restraint).

33. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 676 (1994) (O'Connor, J., concurring part and dissenting in part) ("Laws that treat all speakers equally are relatively poor tools for controlling public debate, and their very generality creates a substantial political check that prevents them from being unduly burdensome.").

34. Police Dep't of Chi. v. Mosley, 408 U.S. 92 (1972) (considering an ordinance that exempted labor picketing from general picketing exclusion); Carey v. Brown, 447 U.S. 455, 466 (1980) (rejecting state's asserted interest in "providing special protection for labor protests.").

35. Brownstein, *supra* note 24, at 609 ("The broader coverage of the content-neutral law not only makes it more difficult to enact, it also suggests that the legislature's evaluation of the costs and benefits that allegedly justify the law's enactment are more worthy of respect.").

36. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is . . . an egregious form of content discrimination."); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 785-86 (1978) ("Especially where . . . the legislature's suppression of speech suggests an attempt to

can almost never justify this type of speech restriction. By contrast, as noted above, content-based speech restrictions do not necessarily pose the same certainty or degree of free speech clause danger. While the danger they pose is sufficient to group them with viewpoint-based speech restrictions, free speech doctrine distinguishes content-based from viewpoint-based government assistance to private speakers.

It is in evaluating the government's administration of a private speech forum[37] that the content/viewpoint discrimination distinction is crucial.[38] The government need not spend funds or devote its property to assist private speakers.[39] Because assistance to private speakers is valuable, and a potentially revocable government choice, the rigorous rules that limit government influence

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give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended."); City of Madison Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm'n, 429 U.S. 167, 175-76 (1976) ("To permit one side of a debatable public question to have a monopoly in expressing its views . . . is the antithesis of constitutional guarantees."); *Consol. Edison Co. of N.Y.*, 447 U.S. at 546 (Stevens, J., concurring) ("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.'").

37. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998).

> "The Court [has] identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 . . . (1985). Traditional public fora are defined by the objective characteristics of the property, such as whether, "by long tradition or by government fiat," the property has been "devoted to assembly and debate." [Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)]. The government can exclude a speaker from a traditional public forum "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius*, [473 U.S. at 800].

Designated public fora, in contrast, are created by purposeful governmental action.

> "The government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional public forum for public discourse." [*Cornelius*, 473 U.S. at 802]; *accord*, [Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678] (1992) (ISKCON) (designated public forum is "property that the State has opened for expressive activity by all or part of the public"). Hence, "the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." *Cornelius*, 473 U.S. at 802. If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny. [*Id.*]; United States v. Kokinda, 497 U.S. 720, 726-727 . . . (1990) (plurality opinion of O'Connor, J.).

Forbes, 523 U.S. at 677.

38. *Rosenberger*, 515 U.S. at 829-30.

> [I]n determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

Id.

39. *Forbes*, 523 U.S. at 680 ("[W]ith the exception of traditional public fora, the government retains the choice of whether to designate its property as a forum for specified classes of speakers.").

in the private speech market do not apply.[40] Rather, a balance of interests defines the rules of government-created private speech forums. Because of the government's legitimate interest in defining its own programs and effectively carrying out nonspeech-promoting functions with its funds and property, it may limit its assistance to private speakers according to the content of the assisted speech so long as the limitation is reasonable.[41] It may not, however, discriminate according to viewpoint.[42] Even where the government's assistance makes private speech possible, it may not engage in this highly dangerous activity.[43] The validity of the government's administration of a private speech forum thus crucially hinges on the content/viewpoint determination. A content discriminatory forum is almost certainly valid,[44] whereas a viewpoint discriminatory forum, equally as surely, is not.[45]

III. LINE-DRAWING PROBLEMS

Although the content-based/content neutral and content/viewpoint discrimination determinations are central to free speech doctrine, the Court has experienced increasing difficulty in making them, and in making them consistently. The Court has acknowledged that "[d]eciding whether a particular regulation is content-based or content neutral is not always a simple task,"[46] and that the content/viewpoint distinction "is not a precise one."[47] Confusion is evident at a number of different levels.

A. *Mixed up Statements and Applications*

The Court confuses the content-based/content neutral and the content/viewpoint inquiries both when stating and applying them. The Court frequently describes the

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40. *Id.* ("By recognizing the distinction [between forums where strict scrutiny governs the access and rules and other forums where a lesser standard applies], we encourage the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all.").

41. *Perry Educ. Ass'n*, 460 U.S. at 46 ("[Where] [p]ublic property . . . is not by tradition or designation a forum for public communication . . . the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.").

42. *Rosenberger*, 515 U.S. at 829 (stating that in a private speech forum government may not "discriminate against speech on the basis of its viewpoint").

43. *Id.* ("Once it has opened a limited forum . . . the State must respect the lawful boundaries it has itself set.").

44. *Id.* ("The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.").

45. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001) ("The State's power to restrict speech [in a limited or nonpublic forum] . . . is not without limits. The restriction must not discriminate against speech on the basis of viewpoint . . . .").

46. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994).

47. *Rosenberger*, 515 U.S. at 831.

content-based/content neutral inquiry as hinging on the presence of viewpoint discrimination.[48] The Court's often repeated test for content neutrality is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[49] The Court frequently acknowledges, however, that the content-based category extends to subject matter distinctions.[50] It has also found content-based government actions that restrict categories of speech that do not depend upon either subject matter or viewpoint, such as signs that bring their targets into "public odium" or "disrepute,"[51] nudity[52] and indecency[53] restrictions, and restrictions on the use of certain symbols[54] or words.[55] These statements render the scope of the "content" category ambiguous.

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48. *Turner Broad. Sys., Inc.*, 512 U.S. at 643 ("As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based."); *id.* (citing and contrasting Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) ("ordinance prohibiting the posting of signs on public property 'is neutral–indeed it is silent–concerning any speaker's point of view'")); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 59 (1983) (Brennan, J., dissenting) ("The content-neutrality cases frequently refer to the prohibition against viewpoint discrimination and both concepts have their roots in the First Amendment's bar against censorship."); Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 536 (1980) ("[W]hen regulation is based on the content of speech, governmental action must be scrutinized . . . carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views.'" (quoting Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring in the result))); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48-49 (1986) (determining that an ordinance that zones movie theaters according to their adult content "does not contravene the fundamental principle that underlies our concern about 'content-based' speech regulations: that 'government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.'").

49. *Turner Broad. Sys., Inc.*, 512 U.S. at 642 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 295 (1984); *see Turner Broad. Sys., Inc.*, 512 U.S. at 643 ("As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.").

50. Hill v. Colorado, 530 U.S. 703, 723 (2000) ("Regulation of . . . subject matter of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation."); *Consol. Edison Co. of N.Y.*, 447 U.S. at 538; *Rosenberger*, 515 U.S. at 829 ("Viewpoint discrimination is thus an egregious form of content discrimination.").

51. Boos v. Barry, 485 U.S. 312, 316 (1988).

52. Erznoznik v. City of Jacksonville, 422 U.S. 205, 211 (1975) (stating that an ordinance prohibiting certain types of nudity in films "discriminates among movies solely on the basis of content.").

53. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 811 (2000) ("The speech in question [("sexually explicit adult programming or other programming that is indecent")] is defined by its content; and the statute which seeks to restrict it is content based."); FCC v. Pacifica Found., 438 U.S. 726, 744 (1978) ("It is equally clear that the Commission's objections to the [indecent] broadcast were based in part on its content."); *see* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 572-73 (1998) (addressing provision that required National Endowment for the Arts to consider decency in awarding grants and finding it not to be unconstitutionally viewpoint-based).

54. Virginia v. Black, 123 S. Ct. 1536, 1549-50 (2003) (determining that prohibition of cross-burning with intent to intimidate is content-based but justified); United States v. Eichman, 496 U.S. 310, 317-18 (1990) (determining that a statute that prohibits knowing flag desecration is content-based); Spence v. Washington, 418 U.S. 405, 414 nn.8, 9 (1974) (stating that statute that declares "*nothing* may be affixed to or superimposed on a United States flag" is content-based).

55. Cohen v. California, 403 U.S. 15, 26 (1971) (stating that forbidding particular words "run[s] a substantial risk of suppressing ideas in the process.").

Also ambiguous is what evidence demonstrates that a government action is content-based. Here, too, the Court's statements and applications vary. A statement used often by the Court to describe the content-based/content neutral inquiry is that a speech restriction is content neutral "so long as it is '*justified* without reference to the content of the regulated speech.'"[56] The Court has explained that "[t]he purpose, or justification, of a regulation will often be evident on its face."[57] It has also said, however, that demonstrating an "illicit legislative intent" is not "necessary . . . in all cases."[58] And, "the mere assertion of a content-neutral purpose [will not] be enough to save a law which, on its face, discriminates based on content."[59] These statements suggest that both the lines drawn on the face of a government action and its underlying justifications are relevant to determining its content neutrality, without clarifying their relative significance when the two conflict.

One variation of the conflict is where the lines on the face of the government action are content neutral, but the government purpose may be content-based. The Court has emphasized that mere impact on a particular content of speech does not make the content neutral action content-based;[60] neither does the fact that some lawmakers may have been motivated by the conduct of particular speakers to take the action.[61] The Court has recently stated that, even were "[a] statute making it a misdemeanor to sit at a lunch counter for an hour without ordering any food . . . enacted by a racist legislature that hated civil rights protesters," the statute would be content neutral.[62] The circumstances of its enactment might then bear upon the legitimacy of the government's asserted interest in the intermediate scrutiny that applies to content neutral government actions.[63]

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56. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)) (emphasis added); *see also* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981) (quoting Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)).

57. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994).

58. *Id.* (citing Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 177 (1991)).

59. *Id.* at 642-43.

60. *Ward*, 491 U.S. at 791 ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.").

61. Hill v. Colorado, 530 U.S. 703, 724 (2000) ("A statute prohibiting solicitation in airports that was motivated by the aggressive approaches of Hare Krishnas does not become content based solely because its application is confined to airports—'the specific locations where [that] discourse occurs.'") (alteration in original); *id.* at 724-25 ("The antipicketing ordinance upheld in *Frisby v. Schultz*, 487 U.S. 474 . . . (1988), . . . was obviously enacted in response to the activities of antiabortion protesters who wanted to protest at the home of a particular doctor to persuade him and others that they viewed his practice of performing abortions to be murder."); United States v. O'Brien, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.").

62. *Hill*, 530 U.S. at 724.

63. *Id.*

Although the lunch counter example is a strong one, the Court has also stated there is a limit to the protection that a facially neutral government action may provide. Specifically, "facially neutral and valid justifications" for a government action "cannot save an exclusion that is in fact based on the desire to suppress a particular point of view."[64] In *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, the Court noted that the excluded speakers had introduced some evidence "to cast doubt on [the] genuineness" of the government's facially neutral grounds for distinguishing among groups to participate in its fundraising campaign, and directed the lower court to resolve the question of government motivation.[65] So, in this variation, where the lines drawn on the face of the government action are content neutral, the facial determination is almost always, but not certainly, dispositive.

The other variation exists where lines on the face of the government action are content-based, but the government asserts content neutral purposes for its action. Here, the Court has introduced the "secondary effects" doctrine as a means by which the government may, in certain instances, sanitize a facially content-based action. In a line of cases dealing with sexual speech, the Court has focused on the definition of content neutral speech regulations as "*justified* without reference to the content of the regulated speech"[66] to look beyond the content discriminatory face of a speech restriction and characterize its justification as content neutral. In *City of Renton v. Playtime Theatres, Inc.*,[67] the city enacted an ordinance prohibiting adult theaters in specified areas. The Court found that the ordinance was "aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community."[68] Others have criticized the "secondary effects" test as hiding the viewpoint discrimination that the "on the face" content discrimination test is designed to detect.[69] The Court has since extended the "secondary effects" rationale beyond zoning restrictions to absolute restrictions on nude dancing.[70] It has thus far refused to apply the secondary effects rationale beyond the context of sexual speech.[71] In other instances, however, the Court has

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64. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 812 (1985).

65. *Id.*

66. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) (quoting Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)).

67. *Id.* at 41.

68. *Id.* at 47.

69. Boos v. Barry, 485 U.S. 312, 336 (1988) (Brennan, J., concurring) ("[T]he inherently ill-defined nature of the *Renton* analysis . . . exacerbates the risk that many laws designed to suppress disfavored speech will go undetected.").

70. City of Erie v. Pap's A.M., 529 U.S. 277, 296-97 (2000) (determining that public nudity ordinance that bars nude dancing, requiring dancers to wear pasties and G-strings, is content neutral because it is aimed at secondary effects of nude dancing establishments).

71. *Boos*, 485 U.S. at 321 (concluding that international law obligation to shield diplomats from speech that offends their dignity is not justified by secondary effects because the "justification focuses *only* on the content of the speech and the direct impact that speech has on its listeners."); City of Cincinnati v. Discovery

implied that nonspeech justifications can render a government action content neutral even though application of the restriction depends, in part, on the content of the speech.[72] Lower courts have explicitly used the secondary effects language outside the context of sexual speech.[73] So, it is unclear the extent to which the "justified without reference to the content of regulated speech" test can immunize a facially content discriminatory government action.

With respect to the content/viewpoint determination, the Court's statements and applications have been similarly mixed. In *Boos v. Barry*, the Court examined a statute that prohibited displays close to foreign embassies "designed . . . to . . . bring [the foreign government, its agencies or officials] into public odium . . . or . . . disrepute."[74] The Court found the restriction to be content, but not viewpoint, based.[75] Although the statute allowed some viewpoints, but not others, to be expressed about the same subject matter, the Court found it viewpoint neutral because it "determine[d] which viewpoint [was] acceptable in a neutral fashion by looking to the policies of foreign governments."[76] The restriction was content-based because it prohibited "an entire category of speech—signs or displays critical of foreign governments . . ."[77] The Court has also found exclusions of "political" speech from a private speech forum to be viewpoint neutral.[78]

By contrast to the category of "critical" or "political" speech, the Court has been quick to perceive viewpoint discrimination when the government excises

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Network, Inc., 507 U.S. 410, 430 (1993) ("In contrast to the speech at issue in *Renton*, there are no secondary effects attributable to . . . newsracks [containing commercial handbills, which are restricted] that distinguish them from the newsracks Cincinnati permits to remain on its sidewalks.").

72. Hill v. Colorado, 530 U.S. 703, 719-20 (2000) (stating that Colorado statute prohibiting unconsented-to approach for purposes of protest, education or counseling is content neutral in part because "the State's interests in protecting access and privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators' speech."); *id.* at 746-47 (Scalia, J., dissenting) ("The Court makes too much of [the purpose inquiry in determining content neutrality]. . . . Our very first use of the 'justified by reference to content' language made clear that it is a prohibition *in addition to*, rather than in place of, the prohibition of facially content-based restrictions."); United States v. Kokinda, 497 U.S. 720, 736 (1990) (concluding that prohibition of solicitation on sidewalk outside post office "[c]learly . . . does not discriminate on the basis of content or viewpoint."); *id.* at 753 (Brennan, J., dissenting) ("[T]he regulation is not content neutral; indeed, it is tied explicitly to the content of speech. . . . [A speaker's] punishment depends entirely on what he says.").

73. McGuire v. Reilly, 260 F.3d 36, 44 (1st Cir. 2001) (stating that the legislature was legitimately aiming at "the deleterious secondary effects of anti-abortion protests" when it prohibited certain speech around abortion clinics so the fact that it targeted speech around abortion clinics does not make the statute content-based).

74. *Boos*, 485 U.S. at 316 (quoting D.C. Code § 22-1115 (1981)).

75. *Id.* at 319.

76. *Id.*

77. *Id.*

78. Greer v. Spock, 424 U.S. 828, 839 (1976) (considering a regulation that prohibits political speeches on military base); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 812 (1985) (involving the exclusion of political activity or advocacy groups from fundraising drive); Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (upholding the exclusion of political messages from transit system advertising).

religious speech from a private speech forum.[79] In this context, the Court's reasoning is that the government engages in viewpoint discrimination when it excludes a viewpoint or set of viewpoints on an otherwise includable subject.[80] In these cases, the Court has rejected the government's interest in avoiding an Establishment Clause violation as a neutral justification for the exclusion.[81]

Sometimes, in describing the content/viewpoint line that determines the validity of private speech forum and government subsidy boundaries, the Court and individual Justices implicitly or explicitly change the viewpoint discrimination test to require particularly egregious government efforts to suppress a particular viewpoint to invalidate the access limitation.[82] In evaluating a National Endowment for the Arts consideration that funded art be "decent," the Court noted that, while the provision was susceptible to viewpoint discriminatory application, it did not constitute the type of "directed viewpoint discrimination that would prompt th[e] Court to invalidate a statute on its face."[83] The Court emphasized that "invidious viewpoint discrimination"[84] occurs when the government "aim[s] at the suppression of dangerous ideas,"[85] or "manipulate[s]" a subsidy "to have a coercive effect"[86] or imposes "a disproportionate burden calculated to drive 'certain ideas or viewpoints from the marketplace.'"[87] Applying these tests, the Court refused to label the funding consideration as certainly viewpoint discriminatory.[88]

Justice Scalia labeled the provision viewpoint discriminatory,[89] but, relying on the fact that the government action was a subsidy rather than a speech restriction, which calls for a different test, opined that the funding condition was

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79. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Widmar v. Vincent, 454 U.S. 263 (1981); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).

80. *Good News Club*, 533 U.S. at 109 ("Like the church in *Lamb's Chapel*, the Club seeks to address a subject otherwise permitted under the rule, the teaching of morals and character, from a religious standpoint.").

81. *Id.* at 113 ("We rejected Establishment Clause defenses similar to Milford's in two previous free speech cases, *Lamb's Chapel* and *Widmar*.").

82. *Cornelius*, 473 U.S. at 806 ("[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.").

83. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 583 (1998).

84. *Id.* at 587.

85. *Id.* (quoting Regan v. Taxation With Representation of Wash., 461 U.S. 540, 550 (1983)).

86. *Id.* (quoting Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting)).

87. *Id.* (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991)).

88. *Id.* ("Unless and until [the funding restriction] is applied in a manner that raises concern about the suppression of disfavored viewpoints . . . we uphold the constitutionality of the provision.").

89. *Id.* at 593 (Scalia, J., concurring) ("[The funding condition] unquestionably constitutes viewpoint discrimination."). *But see id.* at 593 n.1 (Scalia, J., concurring) (noting that any uncertainty hinges on whether the condition is content or viewpoint discriminatory, declining to resolve the issue, and, because it does not matter to his resolution, "assum[ing] the worst.").

constitutional despite the reality that it was viewpoint-based.[90] Justice Souter, relying on the generally applicable viewpoint discrimination test that looks to the government's viewpoint conscious purpose,[91] labeled the condition "quintessentially viewpoint based"[92] and unconstitutional for this reason.[93]

A similar difference in characterization that relates to the form of the government action appears in *Legal Services Corp. v. Velazquez*.[94] In that case, the majority held that Legal Services Corporation funding that prohibited government attorneys from challenging existing welfare laws was viewpoint discriminatory because it "define[d] the scope of the litigation it funds to exclude certain vital theories and ideas."[95] Justice Scalia, however, found the provision not to "discriminate on the basis of viewpoint, since it funds neither challenges to nor defenses of existing welfare law."[96] Crucial to him was that the act at issue was "a federal subsidy program, not a federal regulatory program," and so could not "directly restrict speech."[97]

B. *The Relevance of Neutral Distinctions with Discriminatory Effects*

In both the content-based/content neutral and the content/viewpoint inquiries, the Court and individual Justices have noticed the discriminatory effects of a number of content neutral distinctions that determine the application of a government action. It remains unclear where these effects enter into the constitutional analysis, if at all, and what weight they should have when they enter.

1. *Location Restrictions*

It has been the general rule that a location restriction on speech is, by itself, content neutral.[98] It has also been the rule that where a location restriction is

90. *Id.* at 596 (Scalia, J., concurring) ("It is preposterous to equate the denial of taxpayer subsidy with measures 'aimed at the *suppression* of dangerous ideas.'") (quoting *Regan*, 461 U.S. at 550).

91. *Id.* at 603 (Souter, J., dissenting) ("The government's purpose is the controlling consideration.") (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

92. *Id.* at 605 (Souter, J., dissenting) ("Because 'the normal definition of "indecent" . . . refers to nonconformance with accepted standards of morality,' . . . restrictions turning on decency, especially those couched in terms of 'general standards of decency,' are quintessentially viewpoint based . . .") (quoting FCC v. Pacifica Found., 438 U.S. 726, 740 (1978)).

93. *Id.* at 610 (Souter, J., dissenting) ("[A] statute that mandates the consideration of viewpoint is quite obviously unconstitutional.").

94. 531 U.S. 533 (2001).

95. *Id.* at 548.

96. *Id.* at 553 (Scalia, J., dissenting).

97. *Id.* at 552 (Scalia, J., dissenting).

98. Thomas v. Chi. Park Dist., 534 U.S. 316, 323 (2002) (referring to a "content-neutral time, place and manner restriction[]").

combined with a content-based distinction, the government action is content-based.[99] Neither of these rules stands now firm and unchallenged.

A location restriction can have strong content or viewpoint discriminatory effects. For example, a rule restricting speech outside a medical facility disproportionately impacts abortion protesters. That does not, however, render the rule content-based.[100] Justice Kennedy has recently challenged this assumption, arguing that the locational restriction combined with its obvious effect should change the constitutional analysis at the critical content-based/content neutral juncture.[101] The majority disagreed, emphasizing the established rule that the content neutral face of a government action, rather than its content- or viewpoint-based motivation, is controlling.[102] The majority found the location restriction to enhance the constitutionality of the government action by limiting its impact.[103] Justice Scalia found it to cut the other way: "A proper regard for the 'place' involved in this case should result in, if anything, a commitment by this Court to adhere to and rigorously enforce our speech-protective standards."[104]

2. *Speaker Restrictions*

Sometimes the Court has indicated that speech restrictions that distinguish among speakers are highly dangerous.[105] Other times, the Court has emphasized that distinctions based on speaker status are not necessarily either content-[106] or

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99. Boos v. Barry, 485 U.S. 312, 318-19 (1988) (determining that the restriction on displaying signs critical of foreign governments around embassies is content-based); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) (stating that a city ordinance prohibiting picketing around school, except for labor picketing, is content-based).

100. Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 374 n.6 (1997) ("[T]he injunction was issued not because of the content of [the protesters'] expression, . . . but because of their prior unlawful conduct.") (alteration in original) (quoting Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 764 n.2 (1994)).

101. Hill v. Colorado, 530 U.S. 703, 767 (2000) (Kennedy, J., dissenting) ("By confining the law's application to the specific locations where the prohibited discourse occurs, the State has made a content-based determination. . . . Clever content-based restrictions are no less offensive than censoring on the basis of content.").

102. *Id.* at 724.

> A statute prohibiting solicitation in airports that was motivated by the aggressive approaches of Hare Krishnas does not become content-based solely because its application is confined to airports. . . . A statute making it a misdemeanor to sit at a lunch counter for an hour without ordering any food would also not be "content based" even if it were enacted by a racist legislature that hated civil rights protesters . . . .

103. *Id.* at 723 ("The Colorado statute's regulation of the location of protests, education, and counseling . . . simply establishes a minor place restriction on an extremely broad category of communications with unwilling listeners.").

104. *Id.* at 763 (Scalia, J., dissenting).

105. United States v. Playboy Entm't Group, 529 U.S. 803, 812 (2000) ("Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles.").

106. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 657-58 (1994) ("[T]he view that all regulations distinguishing between speakers warrant strict scrutiny . . . is mistaken. . . . [L]aws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference.").

viewpoint-[107] based. In a number of circumstances, it has characterized such distinctions as neutral, even when the speaker status correlated to the content or viewpoint of speech.

For example, in *Turner Broadcasting System, Inc. v. FCC*, the majority of the Court concluded that the must-carry provisions it was reviewing were "not designed to favor or disadvantage speech of any particular content."[108] Instead, they were economically based, specifically "to protect broadcast television from what Congress determined to be unfair competition by cable systems."[109] The dissenters, however, noted that the reason Congress wanted broadcasters to remain economically viable was related to the content of their speech.[110]

In *Perry Education Ass'n v. Perry Local Educators' Ass'n*, the Court characterized a rule barring a rival union's access to the school mail system as based on speaker identity—only the union with the official role of representing the school's teachers gained access.[111] According to the Court, "We believe it is more accurate to characterize the access policy as based on the *status* of the respective unions rather than their views."[112] In *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, the Court found that a line between direct service organizations and those that engaged in political advocacy was not, on its face, viewpoint-based.[113] In *Regan v. Taxation With Representation of Washington*, the Court found a tax benefit for lobbying by veterans' groups to be based on speaker identity rather than viewpoint.[114]

With some types of speech restrictions, the Court equates the government's purpose to restrict speech because of its effect on others with content discrimination. The government cannot silence speakers because their speech

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107. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 682 (1998) (stating that speaker status distinction is not viewpoint-based); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983) (same).

108. *Turner Broad. Sys., Inc.*, 512 U.S. at 652.

109. *Id.*

110. *Id.* at 678 (O'Connor, J., concurring in part and dissenting in part) ("The interest in ensuring access to a multiplicity of diverse and antagonistic sources of information, no matter how praiseworthy, is directly tied to the content of what the speakers will likely say.").

111. *Perry Educ. Ass'n*, 460 U.S. at 50-51.

> The differential access provided [the two unions] is reasonable because it is wholly consistent with the District's legitimate interest in "preserv[ing] the property . . . for the use to which it is lawfully dedicated." . . . [The rival union] does not have any official responsibility in connection with the School District and need not be entitled to the same rights of access to school mailboxes.

Id. (quoting U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129-30 (1981)).

112. *Id.* at 49.

113. 473 U.S. 788, 812-13 (1985) (accepting exclusion of advocacy groups as "facially neutral and valid justifications for exclusion from the nonpublic forum," although remanding to the lower court to determine "whether the exclusion of respondents was impermissibly motivated by a desire to suppress a particular point of view.").

114. 461 U.S. 540, 548 (1983); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 834 (1995) ("*Regan* relied on a distinction based on preferential treatment of certain speakers–veterans' organizations–and not a distinction based on the content or messages of those groups' speech.").

will offend listeners or otherwise render their audience "hostile."[115] The Court has repeatedly cautioned that "when 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."[116] In a recent context, however, the Court accepted a popularity distinction as neutral. In *Arkansas Educational Television Commission v. Forbes*,[117] the Court characterized a public television station's decision to exclude an independent candidate from a debate as based on his status rather than his views. According to the Court, "It is, in short, beyond dispute that Forbes was excluded not because of his viewpoint but because he had generated no appreciable public interest."[118] Despite the fact that public interest must logically be based, at least in part,[119] on a candidate's views, the Court characterized the "lack of support" ground for exclusion as "objective" rather than viewpoint-based.[120]

3. *Type of Activity Restrictions*

The Court has found some types of activity restrictions to be content-based. In *FCC v. League of Women Voters of California*, it found a ban on "editorializing" by government funded television stations to be "defined solely on the basis of the content of the suppressed speech."[121] To determine whether the ban applied, it was crucial to examine the content of a station's communication.[122]

The Court has found a number of other types of activity restrictions to be content neutral. These have, for a long time, included picketing and leafleting.[123]

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115. Gregory v. City of Chicago, 394 U.S. 111, 117-18 (1969) (stating that the government cannot arrest protesters as means of preventing hostile audience reaction); Cox v. Louisiana, 379 U.S. 536, 551 (1965) (same); Edwards v. South Carolina, 372 U.S. 229, 237 (1963) (same).

116. Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975); *id.* at 210-11 ("[T]he burden normally falls upon the [offended] viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.'" (quoting Cohen v. California, 403 U.S. 15, 21 (1971))); Boos v. Barry, 485 U.S. 312, 322 (1988) (noting the "longstanding refusal to [punish speech] because the speech in question may have an adverse emotional impact on the audience." (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988))) (alteration in original).

117. 523 U.S. 666 (1998).

118. *Id.* at 682.

119. *But see id.* at 683 ("A candidate with unconventional views might well enjoy broad support by virtue of a compelling personality or an exemplary campaign organization. By the same token, a candidate with a traditional platform might enjoy little support due to an inept campaign or any number of other reasons.").

120. *Id.*

121. 468 U.S. 364, 383 (1984).

122. *Id.* ("[I]n order to determine whether a particular statement by station management constitutes an 'editorial' proscribed by [the statute], enforcement authorities must necessarily examine the content of the message that is conveyed to determine whether the views expressed concern 'controversial issues of public importance.'" (quoting *In re* Accuracy in Media, Inc., 45 F.C.C.2d 297, 302 (1973))).

123. Hill v. Colorado, 530 U.S. 703, 722 n.30 (2000). ("In *United States v. Grace*, 461 U.S. 171 . . . (1983), after examining a federal statute that was '[i]nterpreted and applied' as 'prohibit[ing] picketing and leafleting, but not other expressive conduct' within the Supreme Court building and grounds, we concluded that 'it is clear that the prohibition is facially content-neutral.' *Id.* at 181, n.10.") (alteration in original).

They have been extended to include lobbying,[124] soliciting,[125] demonstrating,[126] and most recently, approaching another "for the purpose of . . . engaging in oral protest, education, or counseling."[127] The rationale for treating all of these types of activity restrictions as content neutral is that their application does not depend upon either the viewpoint or subject matter of the communication. Some of them, however, require examination of the communication, and even understanding of its meaning, to determine whether the speech restriction applies.

Recently, members of the Court have differed sharply as to whether this type of speech restriction should be analyzed as content neutral. In *Hill v. Colorado*, the majority held that a restriction on approaching another "for the purpose of . . . engaging in oral protest, education, or counseling"[128] is content neutral. Crucial to the majority was that the restriction discriminated neither upon the basis of viewpoint or subject matter,[129] but rather "establishe[d] a minor place restriction on an extremely broad category of communications with unwilling listeners."[130] Although the Court acknowledged that sometimes it might be necessary to examine the content of a speaker's communication to determine whether it is covered by the restriction, it reasoned that "the kind of cursory examination that might be required" to make the determination, which was similar to that required to distinguish other content neutral types of speech, did not render the restriction content-based.[131] Justice Souter, joined by Justices O'Connor, Ginsburg and Breyer, emphasized that the *Hill* statute merely regulated the "manner of speaking" in a "perfectly valid" way.[132]

Other Justices viewed the type of speech restriction as content-based and invalid. According to Justice Scalia, the Court "ha[s] never held that the universe of content-based regulations is limited to those [that discriminate according to subject matter or viewpoint]."[133] He hypothesized about a theoretical restriction

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124. Regan v. Taxation With Representation of Wash., 461 U.S. 540, 548 (1983) (stating that veterans' groups that qualify under the statute "are entitled to receive tax-deductible contributions regardless of the content of any speech they may use, including lobbying.").

125. United States v. Kokinda, 497 U.S. 720, 736 (1990) (arguing that solicitation is "a content-neutral ground"); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 653 (1981) (discussing appropriate limitations on soliciting at fairgrounds).

126. *Hill*, 530 U.S. at 722 n.30 ("[O]ur decisions in *Schenck* and *Madsen* both upheld injunctions that also prohibited 'demonstrating.'").

127. *Id.* at 707.

128. *Id.*

129. *Id.* at 722 (explaining the holding in *Carey v. Brown*, 447 U.S. 452, 462 (1980), as hinging on "the fact that the statute placed a prohibition on discussion of particular topics"); *id.* at 736 (Souter, J., concurring) ("Unless regulation limited to the details of a speaker's delivery results in removing a subject or viewpoint from effective discourse . . . , a reasonable restriction intended to affect only the time, place, or manner of speaking is perfectly valid.").

130. *Id.* at 723 (noting that the provision "applies equally to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries").

131. *Id.* at 722.

132. *Id.* at 736 (Souter, J., concurring).

133. *Id.* at 742-43 (Scalia, J., dissenting).

on the writing or recitation of poetry and opined that "[s]urely this Court would consider such [a] regulation[] to be 'content based.'"[134] According to Justice Scalia, the restriction at issue posed the danger of "invidious . . . thought control" that justified treating it as content-based.[135]

Justice Kennedy agreed, emphasizing that, unlike restrictions on picketing or leafleting, "the State must review content to determine whether a person has engaged in criminal 'protest, education or counseling.'"[136] Like Justice Scalia, he found free speech danger that justified content-based review even though the restriction on its face did not limit viewpoints or subject matters. According to Justice Kennedy, "the [subject matter] evenhandedness the Court finds so satisfying . . . is but a disguise for a glaring First Amendment violation";[137] casual speech is permissible but controversial speech, particularly about the morality of abortion, is not.[138]

The debate among the Justices in *Hill* echoes an earlier debate, in *United States v. Kokinda*, in which the Court upheld as content neutral the United States Postal Service's ban on "solicitation" in front of its buildings.[139] The plurality emphasized the disruptive effects of solicitation[140] and the absence of evidence to suggest that the Postal Service intended to discourage or advance a point of view.[141] Justice Kennedy concurred, labeling the restriction a reasonable "time, place, and manner restriction[]" and noting that "[t]he regulation . . . expressly permits the respondents and all others to engage in political speech on topics of their choice."[142] Despite its subject matter and viewpoint neutrality, four Justices in dissent found the solicitation exclusion to be content-based, reasoning that "[a]ny restriction on speech, the application of which turns on the substance of the speech, is content based no matter what the Government's interest may be."[143]

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134. *Id.* at 743 (Scalia, J., dissenting).

135. *Id.* at 743-44 (Scalia, J., dissenting) (quoting Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 794 (1994)) ("A restriction that operates only on speech that communicates a message of protest, education, or counseling presents exactly this risk. When applied, as it is here, at the entrance to medical facilities, it is a means of impeding speech against abortion.").

136. *Id.* at 766 (Kennedy, J., dissenting).

137. *Id.* at 768 (Kennedy, J., dissenting).

138. *Id.* (Kennedy, J., dissenting).

> To say that one citizen can approach another to ask the time or the weather forecast or the directions to Main Street but not to initiate discussion on one of the most basic moral and political issues in all of contemporary discourse, a question touching profound ideas in philosophy and theology, is an astonishing view of the First Amendment. For the majority to examine the statute under rules applicable to content-neutral regulations is an affront to First Amendment teachings.

Id.

139. 497 U.S. 720, 736-37 (1990).

140. *Id.* at 733-34 (noting that solicitation "impedes the normal flow of traffic," "requires action by those who would respond," and "is more intrusive and intimidating than an encounter with a person giving out information.").

141. *Id.* at 736.

142. *Id.* at 738-39.

143. *Id.* at 754 (Brennan, J., dissenting).

In other instances as well, the Court has found the content category to extend beyond subject matter or viewpoint discrimination. For example, in *Ward v. Rock Against Racism*, the Court labeled the City's concern with sound mix and amplification content neutral.[144] It cautioned, however, that "[a]ny governmental attempt to serve purely esthetic goals by imposing subjective standards of acceptable sound mix on performers would raise serious First Amendment concerns."[145] In a number of circumstances, the Court has also recognized that prohibitions of nudity, sexual explicitness or indecency in speech, although not identified exclusively with a particular subject matter or viewpoint, are content-based.[146]

C. *Determining the Scope of Application of the Government Action*

Whether a government action is content-based or content neutral, or content- as opposed to viewpoint-based, often depends upon the way that the Court or individual Justices view the scope of its application. In *Turner Broadcasting System, Inc. v. FCC*, the majority of the Court looked at the government action from the perspective of the burdened speaker, asking whether the must-carry rule's application varied according to a particular speaker's choice of content.[147] The dissenters, however, focused more broadly on whether Congress's selection of particular types of speakers for benefits and burdens depended upon the likely content of their expression.[148]

The Court has struck down flag desecration statutes as content-based.[149] The Court reasoned that the government's purpose for preventing desecration, while allowing respectful disposal of worn or soiled flags, was to "suppress[]

144. 49 U.S. 781, 792 (1989).

145. *Id.* at 793.

146. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 811 (2000) (stating that the prohibition of "sexually explicit adult programming or other programming that is indecent" "is defined by its content; and the statute which seeks to restrict it is content based"); FCC v. Pacifica Found., 438 U.S. 726, 745 (1978) ("The question in this case is whether a broadcast of patently offensive words dealing with sex and excretion may be regulated because of its content."); Erznoznik v. City of Jacksonville, 422 U.S. 205, 211 (1975) ("The Jacksonville ordinance [which makes it a nuisance for a movie theater to exhibit scenes of nudity visible from public places] discriminates among movies solely on the basis of content."). *But see* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48-49 (1986) (finding adult theater zoning ordinance content neutral because justified by nonspeech secondary effects); City of Erie v. Pap's A.M., 529 U.S. 277, 279 (2000) (concluding that secondary effects purpose renders public nudity prohibition that limits nude dancing content neutral).

147. 512 U.S. 622, 644 (1994) ("Nothing in the Act imposes a restriction, penalty, or burden by reason of the views, programs, or stations the cable operator has selected or will select.").

148. *Id.* at 679 (O'Connor, J., concurring in part and dissenting in part) (suggesting that Congress's reasons for preferring broadcasters over cable programmers "rest in part on the content of broadcasters' speech.").

149. United States v. Eichman, 496 U.S. 310, 318-19 (1990); Texas v. Johnson, 491 U.S. 397, 412-15 (1989); *see* Spence v. Washington, 418 U.S. 405, 414-15 (1974) (striking down statute as applied prohibiting affixing anything to the flag).

expression out of concern for its likely communicative impact."[150] The statutes were therefore content-based.[151] Dissenters disagreed, arguing that "[t]he Government's legitimate interest in preserving the symbolic value of the flag is . . . essentially the same regardless of which of many different ideas may have motivated a particular act of flag burning."[152] According to the dissenters, flag burning is a method of conveying a range of different ideas, and does not represent a particular viewpoint or subject matter itself.[153]

A similar division is evident in the disagreement between the majority and dissent in *Rosenberger v. Rector and Visitors of University of Virginia*, where the issue was whether exclusion from funding of student publications that "primarily promote[] or manifest[] a particular belie[f] in or about a deity or an ultimate reality"[154] constituted viewpoint discrimination.[155] According to the majority, the exclusion was invalid because it did not "exclude religion as a subject matter but select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints."[156] By contrast, the dissent noted that the exclusion applied "to agnostics and atheists as well as it does to deists and theists" and so did not "skew debate by funding one position but not its competitors."[157] Rather, it "den[ied] funding for the entire subject matter of religious apologetics."[158] The majority rejoined that the dissent's characterization of the relevant debate "reflected an insupportable assumption that all debate is bipolar and that

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150. *Eichman*, 496 U.S. at 317.

> [I]f we were to hold that a State may forbid flag burning wherever it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role—as where, for example, a person ceremoniously burns a dirty flag—we would be . . . permitting a State to "prescribe what shall be orthodox" by saying that one may burn the flag to convey one's attitude toward it and its referents only if one does not endanger the flag's representation of nationhood and national unity.

Id. (quoting *Johnson*, 491 U.S. at 416-17) (alteration in original).

151. *Eichman*, 496 U.S. at 318; *Johnson*, 491 U.S. at 416-17.

152. *Eichman*, 496 U.S. at 321 (Stevens, J., dissenting); *Johnson*, 491 U.S. at 438 (Stevens, J., dissenting) ("The content of respondent's message has no relevance whatsoever to the case. The concept of 'desecration' does not turn on the substance of the message the actor intends to convey, but rather on whether those who view the *act* will take serious offense.").

153. *Eichman*, 496 U.S. at 321-22 (Stevens, J., dissenting) ("[T]he Government may—indeed, it should—protect the symbolic value of the flag without regard to the specific content of the flag burners' speech. . . . [T]he prohibition does not entail any interference with the speaker's freedom to express his or her ideas by other means.").

154. 515 U.S. 819, 825 (1995) (quoting Appendix to Petition for Certiorari at 66a).

155. *Id.* at 893 (Souter, J., dissenting).

> [T]he Court recognizes that the relevant enquiry in this case is not merely whether the University bases its funding decisions on the subject matter of student speech; if there is an infirmity in the basis for the University's funding decision, it must be that the University is impermissibly distinguishing among competing viewpoints.

Id.

156. *Id.* at 831.

157. *Id.* at 895-96 (Souter, J., dissenting).

158. *Id.* at 896 (Souter, J., dissenting).

antireligious speech is the only response to religious speech."[159] The dissent, however, claimed that the majority "all but eviscerated the line between viewpoint and content," noting that, under the Court's reasoning, "primarily religious and antireligious speech, grouped together, [will] always provide[] an opposing (and not merely related) viewpoint to any speech about any secular topic" and so render impossible exclusion from government-created forums of speech about "the desirability of religious conversion."[160]

The majority and dissent in *Rosenberger* differed in another way on the scope of the regulation before the Court. The majority characterized the exclusion of publications that "primarily promot[e] or manifes[t] a particular belie[f] in or about a deity or an ultimate reality," as "a sweeping restriction on student thought and student inquiry."[161] According to the majority, "undergraduates named Karl Marx, Bertrand Russell, and Jean-Paul Sartre would likewise have some of their major essays excluded from student publications."[162] The dissent disagreed, noting that the majority's broad interpretation of the application of the exclusion "reads the word 'primarily' . . . right out of the Guidelines."[163]

In *Lehman v. City of Shaker Heights*, the plurality upheld the exclusion of political or public issue advertising from a city's buses.[164] Although the Justices did not then focus on the content/viewpoint distinction, the Court has later described the case as involving content discrimination.[165] Justice Brennan, in dissent, however, pointed out how, at a different level of generality, the distinction between commercial and political advertisements can be viewpoint-based: "For instance, a commercial advertisement peddling snowmobiles would be accepted, while a counter-advertisement calling upon the public to support legislation controlling the environmental destruction and noise pollution caused by snowmobiles would be rejected."[166]

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159. *Id.* at 831-32.

> It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint. The dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.

160. *Id.* at 898-99 (Souter, J., dissenting).

161. *Id.* at 836 (alterations in original).

162. *Id.* at 837.

163. *Id.* at 896 (Souter, J., dissenting).

164. 418 U.S. 298, 304 (1974).

165. R.A.V. v. City of St. Paul, 505 U.S. 377, 390 n.6 (1992) (describing *Lehman* as involving "reasonable and viewpoint-neutral content-based discrimination in [a] nonpublic forum[].").

166. *Lehman*, 418 U.S. at 317 (Brennan, J., dissenting); *see also id.* at 319 n.10 (Brennan, J., dissenting); *see also id.* at 319 n.10 (Brennan, J., dissenting) (quoting Wirta v. Alameda-Contra Costa Transit Dist., 434 P.2d 982, 986-87 (Cal. 1967)).

> In *Wirta*, Justice Mosk, while reviewing a similar restriction of "political" advertising, wrote "A cigarette company is permitted to advertise the desirability of smoking its brand, but a cancer society is not entitled to caution by advertisement that cigarette smoking is injurious to health. A theater may advertise a motion picture that portrays sex and violence, but the

In *R.A.V. v. City of St. Paul*, the Court determined the constitutionality of an ordinance that prohibited symbolic speech "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[167] According to Justice Scalia, writing for the Court, the ordinance was content-based because "[d]isplays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics."[168] Additionally, he found that "[i]n its practical operation . . . the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination."[169] As he interpreted the scope of the statute, it allowed proponents of racial tolerance and equality to use fighting words that those advocating racial hatred could not.[170] The example he created was that "[o]ne could hold up a sign saying . . . that all 'anti-Catholic bigots' are misbegotten; but not that all 'papists' are, for that would insult and provoke violence 'on the basis of religion.'"[171]

Justice Stevens interpreted the scope of the St. Paul ordinance differently, which caused him to characterize its application as "evenhanded."[172] He saw no difference in treatment between advocates of tolerance and of racial hatred.[173] Rather, he saw the Court's "anti-Catholic bigots" example as missing the point.[174] According to Justice Stevens, the response to such a sign "is a sign saying that

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Legion for Decency has no right to post a message calling for clean films. A lumber company may advertise its wood products, but a conservation group cannot implore citizens to write to the President or Governor about protecting our natural resources. An oil refinery may advertise its products, but a citizens' organization cannot demand enforcement of existing air pollution statutes."

Id.

167. *R.A.V.*, 505 U.S. at 380 (quoting St. Paul, Minn., St. Paul Bias-Motivated Crime Ordinance, Legis. Code § 292.02 (1990)).

168. *Id.* at 391.

169. *Id.*

170. *Id.*

Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views. But "fighting words" that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person's mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents.

Id.

171. *Id.* at 391-92.

172. *Id.* at 435 (Stevens, J., concurring in the judgment).

173. *Id.* (Stevens, J., concurring in the judgment).

In a battle between advocates of tolerance and advocates of intolerance, the ordinance does not prevent either side from hurling fighting words at the other on the basis of their conflicting ideas, but it does bar *both* sides from hurling such words on the basis of the target's "race, color, creed, religion or gender." To extend the Court's pugilistic metaphor, the St. Paul ordinance simply bans punches "below the belt"—*by either party*.

Id.

174. *Id.* (Stevens, J., concurring in the judgment).

'all advocates of religious tolerance are misbegotten.'"[175] In this case, "neither sign would be banned by the ordinance for the attacks were not 'based on . . . religion' but rather on one's beliefs about tolerance."[176]

In *Hill v. Colorado*, Justices differed both on the characterization of a restriction on "protest, education and counseling" and its practical operation.[177] Justice Kennedy, in dissent, stated,

> Under the most reasonable interpretation of Colorado's law, if a speaker approaches a fellow citizen . . . and chants in praise of the Supreme Court and its abortion decisions, I should think there is neither protest, nor education, nor counseling. If the opposite message is communicated, however, a prosecution to punish protest is warranted.[178]

The majority disagreed, responding, "[t]he statute is not limited to those who oppose abortion. It applies to the demonstrator in Justice Kennedy's example."[179]

IV. THE SOLUTION

For the content-based/content neutral and the content/viewpoint discrimination determinations to continue to play meaningful roles in free speech clause doctrine, the current confusion must end. An acceptable solution in both areas must meet two requirements. The first, as with any point in constitutional doctrine, is that the defining inquiry implement the values that underpin the constitutional guarantee. The second, which is not always a requirement, but which has become crucial in this particularly confused area, is that the inquiries depend upon bright lines that can be applied by the Court, lower courts and government officials attempting to regulate speech in a constitutional manner.

These two requirements conflict somewhat. An inquiry well-tailored to implement free speech values depends upon evaluating multiple factors that do not mesh well with bright lines. It is possible to reconcile the two goals, however, seriatim. Bright lines must establish the initial categorization—content-based/content neutral or content/viewpoint-based. The current confusion results from the creeping insertion of factors that go to the weight and legitimacy of the government purpose and the relationship of the means to the end into the initial categorization. These many factors are relevant and important, but they must be put into a place where courts can evaluate them openly and together. This place is the purpose and means/end analysis that follows either categorization. Insisting on a

175. *Id.* (Stevens, J., concurring in the judgment).
176. *Id.* (Stevens, J., concurring in the judgment).
177. 530 U.S. 703 (2000).
178. *Id.* at 769 (Kennedy, J., dissenting).
179. *Id.* at 725.

firm placement of the many variables that must influence the validity of a government speech action will clarify and legitimize the doctrine.

A. Content-Based/Content Neutral

1. A Clear Statement of the Test

The content-based/content neutral inquiry requires clarification in two respects. The first is whether the face of the government action and/or its justifications determine the categorization. The second is clarification as to the meaning of "content." Is it limited to viewpoint or subject matter classifications or is it broader?

a. On the Face vs. Justifications

Two inquiries currently influence the content-based/content neutral determination: (1) a review of the lines drawn on the face of the government action;[180] and (2) a review of the government's purpose for those lines.[181] The Court gives these inquiries different weights in different cases, and assesses their interaction differently in different contexts.

Specifically, it is not clear how to characterize a government action when it is content-based under one inquiry but content neutral under the other. The Court has sometimes used the "justified without reference to the content" requirement to find a facially content-based action content neutral because its purpose is to combat nonspeech secondary effects.[182] The scope of the secondary effects that can sanitize a content-based action, however, is not clear.[183] The Court has also at times implied that the inquiry may go the other way: that a content-based purpose can render a content neutral statute content-based.[184] Yet almost always it has rejected such showings of "underlying purpose," repeating that it "will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive."[185]

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180. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) (finding that a statute restricting speech about crime is content-based).

181. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) (determining that a purpose to address nonspeech secondary effects makes facially content-based action content neutral).

182. *Id.* (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)) (emphasis omitted).

183. *See* Boos v. Barry, 485 U.S. 312, 321 (1988) (concluding that listener reactions are not secondary effects); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 430 (1993) (finding that clutter is not a secondary effect when it does not differ according to the content of speech).

184. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) ("[W]hile 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.").

185. City of Erie v. Pap's A.M., 529 U.S. 277, 292 (2000) (quoting United States v. O'Brien, 391 U.S. 367, 382-83 (1968)).

The test that best serves the value of clarity and legitimacy is the bright line "on the face" test. The problems that haunt the content-based/content neutral inquiry stem almost entirely from the Court's failure to adhere to the face of a government action as its controlling feature. The question is whether such a bright line can also serve underlying free speech clause values.

On one side of the equation, the Court has, in effect, already decided that the bright line should control. Although the Court occasionally mentions that an actual content-based purpose can corrupt a facially content neutral action, it almost never labels an action according to this determination.[186] It reasons that the government will usually be able to articulate plausible legitimate justifications for otherwise valid lines apparent on the face of its action.[187] It will be rare that sufficient evidence exists to demonstrate that the purpose of a facially neutral action is content- or viewpoint-based, and that the proffered neutral justification is, in fact, a sham. The debate among the Justices in *Hill v. Colorado* illustrates this tension.[188] The majority found the "protest, education and counseling" ban content neutral because of its hypothetical applications to speakers other than abortion protesters, although they were its obvious aim.[189] The dissenters found the evidence of its motivation combined with its effect to render it content-based.[190] In any event, in the rare circumstance where the evidence is overwhelming, the values that underpin the free speech clause require that the content-based label apply.[191] But in most instances, where such evidence does not exist, the government will prevail in attaching the content neutral label.

The bright line rule of looking to the face of a government action to determine its level of scrutiny is imperfect. It favors the government where it can craft its rule in a way that is content neutral and so may lessen the scrutiny applied to certain "[c]lever content-based restrictions."[192] This balance between the virtues of a bright line rule and of a more nuanced inquiry is acceptable in other constitutional contexts and so should be acceptable in the speech arena as well. That the government must craft its rule to be content neutral on its face limits the extent to which the government can covertly accomplish content-based

186. *O'Brien*, 391 U.S. at 383; *City of Erie*, 529 U.S. at 277.

187. *See O'Brien*, 391 U.S. at 384 (suggesting that legislators will usually be able to articulate valid purposes for such statutes that Congress has the power to enact).

188. 530 U.S. 703 (2000).

189. *Id.* at 725.

190. *Id.* at 769 (Kennedy, J., dissenting); *id.* at 744 (Scalia, J., dissenting).

191. The Court has found an unconstitutional purpose to be a reason to invalidate a government action in other areas as well. Griffin v. County Sch. Bd., 377 U.S. 218, 230-31 (1964) (holding that the closing of schools to avoid desegregation is unconstitutional); Gomillion v. Lightfoot, 364 U.S. 339, 346-47 (1960) (finding that a gerrymandered statute still leaves no doubt as to its discriminatory purpose and so is unconstitutional); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 545-46 (1993) (concluding that the purpose of the statute is to target religious practice and so it is unconstitutional).

192. *Hill*, 530 U.S. at 767 (Kennedy, J., dissenting). Note, however, that the *Hill* rule is not properly characterized as content neutral when "content" is understood to mean "communicative impact," and so the *Hill* rule is properly labeled content-based for a different reason than advocated by Justice Kennedy.

purposes in this way.[193] Delving into government motivation to examine that neutrality further is uncertain, indeterminate, and, like the bright line presumption, imperfect.[194] Compared to the certainty that a bright line rule provides, the benefits of a thorough judicial canvassing of government motivation do not outweigh its costs in constitutional inquiry.

So, the rule must be that a government action is content-based if it either appears on the face or it is the government's actual purpose. This rule captures the proper scope of dangerous behavior by the government. Dangerous behavior is when the government considers content when taking action against private speakers. This occurs when *either* the face or the actual purpose of a government action is content-based. In application, however, this rule does not introduce significant uncertainty into the constitutional inquiry because mustering a sufficient demonstration of "actual purpose" is so difficult to do. It is, in effect, a bright line rule.

The Court has been consistent in applying the bright line rule of "on the face" content neutrality. It is in the opposite circumstance of "on the face" content discrimination that the Court has created inroads. Why a different balance should affect the "on the face" underlying purpose determination in this context is not clear. Rather, the same considerations apply. A bright line rule is imperfect, but the benefits of clarity and legitimacy outweigh any greater precision that a more thorough inquiry may produce at the categorization stage.

The rule in this circumstance must be as follows: where the face of a government action betrays a content-based line, the government action should be characterized as content-based. Period. This rule will condemn some government actions to strict scrutiny that do not pose as great a danger of government censorship of ideas as others, but that is the nature of categorization. If categories are to apply, actions that are facially content-based belong on the dangerous side of the line. The different characteristics and effects of different types of government actions remain relevant in the analysis that follows the initial categorization. Here, a court can discuss them openly and perhaps, even in strict scrutiny, validate a facially content-based government action.[195]

Any less-bright line leads to the problems that currently exist with the "justified without reference to the content" test generally and the secondary effects rationale particularly. Such a test involves the Court in highly malleable subjective inquiries. It creates confusion among lower courts, litigants and government officials as they try to determine what type of secondary effects may be sufficient to sanitize a facially content-based action. It invites all of these agents to extend content-based rules into contexts beyond the sexual speech

193. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 676 (1994) (O'Connor, J., concurring in part and dissenting in part).

194. *See* United States v. O'Brien, 391 U.S. 367, 383 (1968) (stating that "[i]nquiries into congressional motives or purposes are a hazardous matter.").

195. Burson v. Freeman, 504 U.S. 191, 198, 211 (1992).

where it was created.[196] All of these effects lead to uncertainty, which leads to inconsistent applications, which restrict and chill protected speech.

b. The Meaning of "Content"

Knowing where to look is not enough to clarify the content inquiry. It is also necessary to clarify the meaning of "content" to determine what lines—on the face or in the justification of a government action—are suspect. Both the values that underpin the free speech clause and the need for a bright line support a broad scope for the category of "content-based." Government action taken because of disagreement with a private message may be the most egregious type of content discrimination,[197] and subject matter distinctions may present the most obvious danger to skewing the market for free speech, but neither exhausts the scope of the free speech guarantee. Government action taken with consciousness of content is dangerous as well.[198] The government may try to promote particular viewpoints as well as suppress them. It may also do so with respect to certain subject matters, and with respect to certain ways of speaking. All of these efforts affect the mix, impact and meaning of private communication. Moreover, to the extent that content discrimination is suspect because it may hide purposeful viewpoint discrimination or result in the same effects, government actions beyond subject matter distinctions carry this danger.

For all these reasons, the proper meaning of "content" is communicative impact.[199] The appropriate question, when examining a government action, is whether its application depends upon the communicative impact of the speech affected. If so, then the action is content-based. The area of ambiguity in applying this rule is determining the significance of the face of the government action. But this meaning of content-based can be applied by a bright line inquiry: on the face of the government action, is it necessary to understand the meaning of the words or images to apply the rule?[200]

The bright line question—is it necessary to understand the content of a speaker's speech to apply the rule?—establishes that the scope of the content inquiry is not viewpoint, or subject matter, but most broadly, communicative impact. As one example, such a test would resolve the debate among the Justices

196. *See supra* note 183 and accompanying text.

197. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

198. Cohen v. California, 403 U.S. 15, 26 (1971); United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 818 (2000).

199. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 658 (1994) (stating that government action is suspect if it is concerned with communicative impact (citing Buckley v. Valeo, 424 U.S. 1, 17 (1976))).

200. An alternate way of asking the question is: Can the speaker change the application of the inquiry by changing the words or images presented? *See* John Hart Ely, Comment, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1498 (discussing *Cohen v. California* and suggesting that "[h]ad [the] audience been unable to read English, there would have been no occasion for the regulation.").

whether chanting in favor of abortion would be prohibited by the Colorado ordinance at issue in *Hill v. Colorado*.[201] Applying the rule that prohibits "protest, education, or counseling" requires understanding of the communicative impact of the expression. The rule is content-based and strict scrutiny applies. This clear rule avoids characterizations that appear result driven.[202] Considering many factors—including the weight of the government interest, the additional location restriction, and other ways to achieve the government's purpose—is necessary to reach the result.[203] The bright line categorization puts these factors where they belong—in a rigorous analysis that acknowledges the danger always present in a content classification and that requires that all of the factors be weighed and balanced together in light of this danger.

In sum, the virtue of the bright line rule is the legitimacy that comes from certainty of application combined with its implementation of free speech values. The implementation is less precise at the initial categorization level than a more nuanced inquiry. But the nuanced inquiry suffers from a fatal indeterminacy. The bright line rule occupies a middle ground between speech protection and respect for democratic government action. It captures more government actions as content-based than the current inquiry, making government actions that are facially content-based less likely to survive because strict scrutiny is the level of review. It places a broad range of government actions that are facially content neutral into intermediate scrutiny, although they may have great disproportionate impact and even a content-based motivation. In both of these instances, it is the means/end analysis that considers the nuances, which adds legitimacy to the ultimate determinations, openly evaluating and balancing the factors such as government interest, additional location restrictions, and alternative means to achieve the government purpose.

2. *The Relevance of Effects*

Although purpose is important to the constitutionality of a government action under the free speech guarantee, effects are important as well. Both speech and nonspeech effects are important. Speech effects cast doubt on an action's constitutionality, while nonspeech effects may support it. For this reason, as well as for general clarity, the two types of effects should be considered in the same place in the constitutional analysis. The appropriate place is *after* the initial categorization, in considering the weight of the government purpose and the

201. 530 U.S. 703, 769 (2000) (Kennedy, J., dissenting); *id.* at 725; *see also supra* notes 188-90 and accompanying text.

202. *Hill*, 530 U.S. at 741 (Scalia, J., dissenting) (accusing the Court of running an "ad hoc nullification machine" favoring the abortion right).

203. Burson v. Freeman, 504 U.S. 191, 199, 208-11 (1992) (considering these factors and upholding a restriction of political speech in the area around polling places).

precision with which the means address it. The effects should not be smuggled by bits and pieces into the content-based/content neutral inquiry.

a. Nonspeech "Secondary" Effects

Content neutral effects, even if a legitimate target of a content-based action, should not make the action content neutral. As with determining the "actual purpose" of a content neutral law, it is simply too difficult to tell why the government "actually" took a facially content-based action.[204] In both of these situations, the line on the face of the government action is the best proof of its purpose and should control the content-based/content neutral determination.

Also, so-called "secondary effects" are inevitably linked to the content of the expression.[205] Why is it that crime and neighborhood deterioration occur near adult theaters? It is because criminals and others who may reduce the quality of a neighborhood are attracted by the sexual speech content. Although the purported aim of the legislature is to suppress the conduct of people who are not speaking, the means is to limit the lawful speech that draws them. The speaker/actor correlation is the reason why a content-based line on the face of the statute is well tailored to serve the government purpose. It is also the reason that the content-based line poses a free speech danger.[206]

The potential expansion of the secondary effects rationale beyond the area of sexual speech further illustrates why it is an inappropriate means of categorization. One court, following *Hill*, which did not rely on a secondary effects rationale, articulated it in upholding a similar restriction on "protest, education or counseling" around abortion clinics. Although it did not rely on the secondary effects reasoning to find the government action content neutral, it used the language, noting the legislature's purpose to "combat[] the deleterious secondary effects of anti-abortion protests."[207] Probably because of the uncertainty of the concept, litigants argue it in contexts beyond sexual speech.[208]

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204. Boos v. Barry, 485 U.S. 312, 335 (1988) (Brennan, J., concurring in part and concurring in the judgment) ("[S]econdary effects offer countless excuses for content-based suppression of political speech.").

205. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 448 (2002) (Kennedy, J., concurring in the judgment) ("The fiction [that a Renton-type ordinance] is content neutral—or 'content neutral'—is perhaps more confusing than helpful . . . .); *id.* at 457 (Souter, J., dissenting) (proposing to call Renton-type zoning ordinances "content correlated").

206. *Id.* at 457 (Souter, J., dissenting) ("The risk lies in the fact that when a law applies selectively only to speech of particular content, the more precisely the content is identified, the greater is the opportunity for government censorship.").

207. McGuire v. Reilly, 260 F.3d 36, 44 (1st Cir. 2001).

208. Petitioner's Brief at 38, 39 n.22, *Virginia v. Black*, 123 S. Ct. 1536 (2003) ("[T]he Virginia statute [prohibiting cross burning with intent to intimidate]—which deals not with mere fighting words, but with virulent intimidation—presents genuine examples of secondary effects akin to those identified by the Court in Renton . . . "[T]he fear and intimidation of a victim of a malicious cross burning crosses the line between emotive reaction and tangible injury." (citing *In re* Steven S., 31 Cal. Rptr. 2d 644, 651 (Ct. App. 1994).

Casual and imprecise use of the secondary effects concept is dangerous. The "secondary effects" referred to in this instance do not have the speaker/actor separation of those that have placed some sexual speech restrictions in the content neutral category. Rather, the rule limits speech so that the restricted speakers themselves will not engage in illegal conduct. This blurs the line between content-based and content neutral actions almost completely.

Secondary effects are properly a factor in the strict scrutiny that applies to content-based analysis. Specifically, secondary effects go to the strength of the government's purpose.[209] Located in this position, it is clear that the government must prove both that the speech causes the effects and their magnitude.[210] Other factors are relevant as well, such as the precision of the line drawn by the government and the availability of other ways to achieve the government's objective.[211]

Of course, removing the secondary effects means of categorizing sexual speech restrictions as content neutral will mean that fewer will be valid, because they cannot pass more rigorous review. Rather than a drawback, however, this, too, is the bright line's virtue. Placing the secondary effects inquiry where it belongs—as part of strict scrutiny analysis—forces the question that prompted the "secondary effects" rationale in the first place. This question is whether there should exist a category of less protected sexually explicit speech or speech-related activities to which a lesser level of scrutiny should apply, and, if so, how to define it.[212]

b. Content-Based Effects

Should content-based effects make a facially content neutral rule content-based? A strong content-based impact undermines many of the free speech values that the content inquiry is designed to implement. A precisely-tailored

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209. Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 60 (2000) ("The Renton approach confuses whether a law is content based or content neutral with the question of whether a law is justified by a sufficient purpose.").

210. *Alameda Books, Inc.*, 535 U.S. at 458-64 (Souter, J., dissenting) (demanding evidence that secondary effects exist, that they are caused by the expressive activity subject to the government action and that the government action can be expected either to reduce them or enhance the government's ability to combat them).

211. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000).

212. *Compare* City of Erie v. Pap's A.M., 529 U.S. 277, 294 (2000).

> [A]s Justice Stevens eloquently stated for the plurality in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 . . . (1976), "even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . .

with Playboy Entm't Group, Inc., 529 U.S. at 811, 814 (finding that restriction on indecent programming is content-based and subject to strict scrutiny; the speech is not obscene and so "adults have a constitutional right to view it").

inquiry would categorize a government action as content-based when its content impact reaches a certain threshold.[213] The problem, however, is that a multi-factored inquiry at this stage is uncertain and malleable. It is difficult to establish the threshold for content-based effects that would change the content neutral rule's categorization.[214] Even after identifying a threshold, the effects of any government action cannot be quantified precisely. This reality suggests that the content neutrality of the face and justification of a government action should control.

Content-based effects should be an important part of the intermediate scrutiny that applies to content neutral government action. The Court recently revived disproportionate impact as a factor that can, in combination with the other intermediate scrutiny considerations, invalidate a facially content neutral government action.[215] A robust disproportionate impact analysis in this location serves free speech clause values. In the balancing analysis, a court can weigh the content-based effects against the purpose of the action and the scope of its application. So, a content neutral injunction directed solely at abortion protesters would be analyzed under intermediate scrutiny.[216] That it applies because of previous illegal actions of those speakers would weigh in its favor.[217] By contrast, a general ban of picketing around medical facilities would be content neutral but would not as likely be constitutional because its disproportionate impact on abortion protesters would weigh against it.

A bright line content inquiry puts the significance of location restrictions in its proper place—in the tailoring inquiry.[218] The question is whether the location limit lessens or accentuates the dangerous free speech impact. So, with a content-based rule, like the *Hill* ordinance limiting "protest, education, or counseling," the fact that it applies to the most effective area for abortion protesters to speak weighs against it; that it applies only within eight feet of a person and leaves open the rest of the medical clinic facility enhances its tailoring if protecting unwilling listeners is a legitimate government goal.[219] By contrast, a content

213. Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615 (1991) (arguing for a nuanced inquiry).

214. The debate among the Justices in *Hill* illustrates this difficulty. Hill v. Colorado, 530 U.S. 703 (2000).

215. Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 163 (2002) ("[D]oor to door distribution of circulars is essential to the poorly financed causes of little people." (quoting Martin v. City of Struthers, 319 U.S. 141, 144-46 (1943))).

216. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 762-63 (1994) (stating that a state law would "equally restrain similar conduct directed at a target having nothing to do with abortion . . . .").

217. *Id.*

218. *But see Hill*, 530 U.S. at 723 (stating that the statute limiting "protest, education and counseling" in certain areas outside medical facilities "simply establishes a minor place restriction on an extremely broad category of communications with unwilling listeners."); *id.* at 767 (Kennedy, J., dissenting) ("By confining the law's application to the specific locations where the prohibited discourse occurs, the State has made a content-based determination.").

219. *Id.* at 723 (noting that the rule "simply establishes a minor place restriction on an extremely broad

neutral restriction of speech around the entire area of an abortion clinic would likely be unconstitutional because the location restriction focuses the impact of the rule on abortion protesters without limiting its impact as well.

B. Content/Viewpoint

When the government restricts private speech, either content or viewpoint discrimination leads to strict scrutiny review.[220] So, the content/viewpoint determination is crucial only when the government in one way or another assists private speakers.[221] And, the significance of the determination is greater than in the content-based/content neutral context because the levels of review that apply are the extremes—strict scrutiny if the action is viewpoint discriminatory but if not, then rational basis review.[222]

The high stakes of the inquiry have warped it. So, too, have the different forms of government aid and the reaction of the Court and individual Justices to it. The Court's struggle in *National Endowment for the Arts v. Finley*[223] to find the requirement that the NEA "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public" not to be viewpoint discriminatory,[224] and the concurring and dissenting Justices' responses illustrate these effects. The Court reasoned that because the provision introduced vague,[225] nonmandatory "considerations"[226] into a funding decision where the government should have leeway,[227] it did not "engender the kind of directed viewpoint discrimination that would prompt [the] Court to invalidate a statute on its face."[228] Justice Scalia concurred, arguing that the provision

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category of communications with unwilling listeners."). The *Hill* Court uses these considerations to bolster its argument that the rule is content neutral rather than in the means/end inquiry where they belong.

220. Burson v. Freeman, 504 U.S. 191, 197 (1992) ("[The] Court has held that the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic.").

221. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587-88 (1998) ("[A]lthough the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake."); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983) ("Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity.").

222. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 682 (1998) ("To be consistent with the First Amendment, the exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint and must otherwise be reasonable in light of the purpose of the property.").

223. 524 U.S. 569 (1998).

224. *Id.* at 576 (quoting 20 U.S.C. § 954(d)).

225. *Id.* at 583 (stating that the considerations are "susceptible to multiple interpretations").

226. *Id.* at 582 (noting that the statute "admonishes the NEA merely to take 'decency and respect' into consideration").

227. *Id.* at 587 (stating that the government may selectively fund a program without discriminating according to viewpoint).

228. *Id.* at 583.

"unquestionably constitutes viewpoint discrimination,"[229] but that because the government was funding speech, the First Amendment did not apply.[230] Justice Souter, in dissent, agreed that the provision was "the very model of viewpoint discrimination,"[231] but rejected the notion that the form of government aid—funding—rendered the discrimination constitutional.[232] Even more than the content-based/content neutral inquiry, the content/viewpoint determination requires clarity and the legitimacy that this can bring.

Because the content/viewpoint inquiry applies only to a limited range of government actions that impact speech, a crucial question must precede it. This is whether the speech is by the government or is private. Only if it is private must the inquiry proceed. If the speech is private, then the fundamental question is whether the government excludes perspectives on an otherwise permissible subject. This inquiry breaks down into two substantive determinations and two procedural determinations. Substantively, these determinations are whether the boundaries of aid are legitimate and not viewpoint-based, and whether the boundaries are reasonably related to a legitimate government interest. Procedurally, these determinations are whether specific guidelines limit the possibility of viewpoint discrimination in administration of the aid, and whether the aid is administered consistently according to the guidelines.

1. Private, Not Government, Speech

The content/viewpoint determination only matters when the government impacts private speech.[233] The government can discriminate in its speech according to viewpoint.[234] This is because fulfilling the functions of government require it to distinguish among policies and points of view.[235] Because it is legitimately responsive to the democratic majority, it is primarily politics that limits the speech of the government, not the Constitution's free speech

229. *Id.* at 593 (Scalia, J., concurring in the judgment).

230. *Id.* at 599 (Scalia, J. concurring in the judgment) ("I regard the distinction between 'abridging' speech and funding it as a fundamental divide, on this side of which the First Amendment is inapplicable.").

231. *Id.* at 606 (Souter, J., dissenting).

232. *Id.* at 613 (Souter, J., dissenting) ("When the government acts as patron, subsidizing the expression of others, it may not prefer one lawfully stated view over another.").

233. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 834 (1995) ("A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles.").

234. Legal Serv. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) ("[V]iewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker . . ."); Rust v. Sullivan, 500 U.S. 173, 194 (1991) ("When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, 22 U.S.C. § 4411(b), it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.").

235. Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 606 (1980) ("Government has legitimate interests in informing, in educating, and in persuading.").

guarantee.[236] But when the government assists private speakers in a way that does not constitute government speech, the Constitution's ban on viewpoint discrimination applies.[237] So, where the government aids private speakers, the initial question must be whether the resulting speech is by the government or is private speech.[238]

No one test exists to make the government/private speech determination. A number of factors are relevant to the analysis, which looks generally at the nature of the government aid program and the degree to which the government identifies itself with the content of the private expression.[239] It is beyond the scope of this article to analyze the application of the factors in particular contexts.[240] What is crucial here is that the government/private speech determination occur first, and remain distinct from, the content/viewpoint determination. Different factors are relevant to the two determinations. Mixing them is one cause of the current confusion. The initial inquiry must focus solely on who is speaking according to articulated standards that can be applied in subsequent cases. Only if the speech is private must the content/viewpoint inquiry occur.

2. *All Perspectives Included*

The initial inquiry immunizes a range of government/private speech interactions from free speech clause review. After the range of legitimate government speech is excised, however, the fact that the government assists

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236. Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) ("When the government speaks, for instance 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.").

237. *Velazquez*, 531 U.S. at 548-49 ("Where private speech is involved, even Congress' [sic] antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest.").

238. *See generally* Leslie Gielow Jacobs, *Who's Talking? Disentangling Government and Private Speech*, 36 U. MICH. J.L. REFORM 35 (2002).

239. Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles, 288 F.3d 610, 618 (4th Cir. 2002).

> Our sister circuits have examined (1) the central "purpose" of the program in which the speech in question occurs; (2) the degree of "editorial control" exercised by the government or private entities over the content of the speech; (3) the identity of the "literal speaker"; and (4) whether the government or the private entity bears the "ultimate responsibility" for the content of the speech, in analyzing circumstances where both government and a private entity are claimed to be speaking.

Id. Jacobs, *supra* note 238, at 56 (indicating that the characteristics of legitimate government speech are "accountability for speaking, identifiable message, and non-speech-suppressing impact"); Randall P. Bezanson & William G. Buss, 86 IOWA L. REV. 1377, 1510 (2001) ("[G]overnment should be able to act as a speaker only when it does so purposefully, with an identified message, which is reasonably understood by those receiving it to be the government's message.").

240. For such analysis applied, *see* Jacobs, *supra* note 238, at 88-112 (analyzing the application of the government speech analysis in the context of signs, license plates, advertising and public-private events; Bezanson & Buss, *supra* note 239 (analyzing case studies and paradigms).

private speakers or the particular form of the government assistance should not further impact the content/viewpoint determination. One test should apply to all government actions. For legitimacy, the test should be as clear as possible and should encompass the entire range of dangerous government action.

As with the content-based/content neutral inquiry, the range of dangerous government action in the content/viewpoint inquiry extends beyond particularly malevolent targeting of disliked points of view. A government action that demonstrates viewpoint consciousness poses free speech clause dangers as well. Consequently, statements of the content/viewpoint test that require the government to "ai[m] at the suppression of dangerous ideas,"[241] or "manipulate[]" its aid "to have a 'coercive effect'"[242] are too narrow. The test should be, as the Court has emphasized in the context of aid denied to religious speech, whether the government excludes some perspectives on "a subject otherwise permitted" in the forum.[243]

The test, of course, is more easily stated than applied. The content/viewpoint determination must occur because the government has acted to assist some speakers by creating a private speech "forum" and is involved in a continuing way in administering it. Viewpoint discrimination can occur either in the forum's creation or its administration. The content/viewpoint inquiry must therefore incorporate both substance and procedure.

a. Substance

i. Legitimate Forum Boundaries

The Court has repeatedly emphasized that the government creates a private speech forum and is responsible for its definition.[244] The government is not required to open a private speech forum and can decide to close it as well.[245] Once it has opened a private speech forum, however, it is responsible for adhering to its own definition.[246] So, the first step in determining whether the government

241. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587 (1998) (quoting Regan v. Taxation With Representation of Wash., 461 U.S. 540, 550 (1983) (alteration in original)).

242. *Id.* (citing Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting)).

243. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 109 (2001) (citing Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993)).

244. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 680 (1998) ("[W]ith the exception of traditional public fora, the government retains the choice of whether to designate its property as a forum for specified classes of speakers.").

245. *Id.* ("By [allowing the government to limit access], we encourage the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all.").

246. *Id.* at 682 ("[N]onpublic forum status 'does not mean that the government can restrict speech in whatever way it likes.'") (quoting Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 687 (1992)).

excludes some perspectives on an "otherwise permissible" subject is for the government to identify the boundaries of its forum.

These boundaries, once identified, must be legitimate, which means that they may not be, on their face, viewpoint-based.[247] Forum boundaries can be based on anything other than viewpoint. Permissible forum boundaries include subject matter, mode of expression and speaker status.[248] The "on the face" content/viewpoint classification is, thus, delicate, since these variables may be very closely related to viewpoint.

What a court must do is identify each forum qualification and analyze it separately to ensure that a legitimate non-viewpoint reason explains it. The religious speech cases display this methodology. In these cases, the Court has identified other forum qualifications, such as speaker status[249] or topics,[250] that are viewpoint neutral. It has then examined the religious exclusion as a qualification, finding that it excises perspectives "otherwise permissible" in the forum.[251] Finally, where the government excludes religious groups, the Court has found that only viewpoint can explain it.[252]

This same inquiry must apply to other types of exclusions as well. Most times, forum qualifications that may correlate to viewpoint will have a legitimate non-viewpoint reason that explains them. One difficult example is a forum defined by "majority"[253] or "politically popular"[254] speaker status. The status itself

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247. As with the content-based/content neutral determination, this inquiry should look primarily to the face of the government action, but overwhelming evidence of a government purpose to target a point of view should render the action viewpoint-based as well.

248. *Forbes*, 523 U.S. at 683 (finding that a speaker's status is a legitimate ground for excluding speech from a nonpublic forum); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) ("The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.").

249. Widmar v. Vincent, 454 U.S. 263 (1981) (determining that a restriction requiring status as a student group is permissible); *Rosenberger*, 515 U.S. 819 (1995) (same).

250. Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (concluding that moral development is a permissible topic exclusion); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (same).

251. *Good News Club*, 533 U.S. at 103, 108-09 ("[A]ny group that 'promote[s] the moral and character development of children' is eligible to use the school building"; however, the community use policy prohibited use "by any individual or organization for religious purposes"; the Court found that "the Club [sought] to address a subject otherwise permitted under the rule, the teaching of morals and character, from a religious standpoint."); *id.* at 109.

> In Lamb's Chapel, the local New York school district similarly had adopted § 414's "social, civic or recreational use" category as a permitted use in its limited public forum. The district also prohibited use "by any group for religious purposes." [*Lamb's Chapel*,] 508 U.S. at 387. . . . Citing this prohibition, the school district excluded a church that wanted to present films teaching family values from a Christian perspective. We held that, because the films "no doubt dealt with a subject otherwise permissible" under the rule, the teaching of family values, the district's exclusion of the church was unconstitutional viewpoint discrimination.

Id. at 394. *Good News Club*, 533 U.S. at 109.

252. *Rosenberger*, 515 U.S. at 831 ("[T]he University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints.").

253. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (discussing provision that gave one union exclusive access to school mail system because that union represented the teachers).

seems to incorporate a point of view.[255] Majority approval of the viewpoint expressed is not a legitimate access qualification for a private speech forum.[256] Nevertheless, where the government administers a private speech forum, it may serve purposes where the popularity of the speakers is legitimately relevant to their inclusion.

In *Perry Education Ass'n*, the union that represented the school's teachers had access to the internal mail system whereas a challenging union did not.[257] While the distinction may be based upon viewpoint, it could also be based on the special need for communication that the union has because of its representing status. If this is, indeed, the distinction,[258] then the distinction that correlates to viewpoint has a non-viewpoint basis as well.

In *Forbes*, a television station allowed some candidates, but not others, to participate in a debate.[259] One ground for excluding the candidate who brought suit was that he did not have significant voter support.[260] Certainly, this ground correlates to viewpoint. But the purpose of the forum is to put candidates before voters in a meaningful way, and so some threshold of popularity serves the purpose of the forum. Access to the ballot itself requires threshold qualifications, and so the qualification may be labeled non-viewpoint-based.[261]

In sum, a court must inquire whether these legitimate reasons apart from viewpoint may exist for the access qualifications in the particular context.[262] If they do, then speaker popularity may be a legitimate, non-viewpoint-based boundary in the initial classification.

ii. Boundaries Are Reasonably Related to a Legitimate Government Purpose

The next inquiry in the established test looks to whether the forum's boundaries are "reasonable" in light of its purposes.[263] It is at this step where the

254. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998) (stating that a candidate's lack of popular support led to his exclusion from debate).

255. *Perry Educ. Ass'n*, 460 U.S. at 64-65 (Brennan, J., dissenting).

256. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 304 (2000) (indicating that school, in administering a private speech forum, cannot "place . . . students who hold [minority] views at the mercy of the majority."); Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) ("Access to a public forum . . . does not depend upon majoritarian consent.").

257. *Perry Educ. Ass'n*, 460 U.S. at 38-39.

258. *But see id.* at 62-66 (Brennan, J., dissenting) (noting this possibility, but arguing that the school had not crafted or administered its policy to distinguish the representing union on this basis).

259. *Forbes*, 523 U.S. at 669.

260. *Id.* at 683.

261. *But see id.* at 693-94 (Stevens, J., dissenting) (arguing that such a qualification, to be valid, must be articulated in advance to limit the possibility of viewpoint discriminatory applications).

262. In other contexts, a popularity requirement will not be explainable on a ground other than viewpoint. *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, at 304-05 (2000).

263. *Forbes*, 523 U.S. at 677-78, 683; Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985).

government must justify its qualifications as serving the purpose of the forum. The test is not rigorous. Most qualifications will pass muster. It is at this point, however, when a court should notice that a qualification may correlate to viewpoint. It should then examine the facts of the particular case to ensure that the qualification in some reasonable way actually serves a legitimate purpose of the forum.

b. Procedure

If a forum passes the boundary/reasonableness review, a court must ask two procedural questions. The first is whether guidelines exist that limit administrators' discretion so that they cannot engage in viewpoint discrimination. As the forum creator, the burden must be on the government to articulate sufficiently specific forum boundaries so that viewpoint discrimination in application will not occur. The second question is whether the government has been consistent in its administration of the forum. Here, too, the burden must be on the government to demonstrate consistent application of its specific guidelines.

i. Specific Guidelines

In a line of cases, the Court has emphasized that government administrators may not act with "unbridled discretion" in administering access to a public forum.[264] The dangers of unbridled discretion in the hands of government licensing authorities are twofold. First, "the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused."[265] This type of self-censorship is immune to judicial review.[266] Second, "the absence of express standards makes it difficult to distinguish, 'as applied,' between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power" because "*post hoc* rationalizations" are "far too easy" for administrators to invent and very difficult for a reviewing court to discern.[267]

264. Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150 (1969) (holding that a city ordinance is unconstitutional because it confers "virtually unbridled and absolute power" to prohibit parades and demonstrations); City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 753, 755, 772 (1987) (invalidating statute that conferred "unbridled discretion" on forum administrator); Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 130 (1992) (stating that a permit system "may not delegate overly broad licensing discretion to a government official"); Thomas v. Chi. Park Dist., 534 U.S. 316, 323 (2002) (stating that a permit system must "contain adequate standards to guide the official's decision and render it subject to effective judicial review").

265. *City of Lakewood*, 486 U.S. at 757.

266. *Id.*

267. *Id.* at 758.

To avoid these constitutional dangers, licensors and forum administrators[268] must act under "narrow, objective, and definite standards"[269] that are subject to judicial review.[270] That these specific, non-viewpoint-based standards exist must be a part of the viewpoint neutrality requirement.[271] Absent such standards, the government creates the risk that access decisions will be based upon viewpoint and so the viewpoint discriminatory label must apply.[272]

ii. Consistent Application

If the forum access standards appear viewpoint neutral, then the final requirement is that the government administer the forum consistently. That is, potentially viewpoint neutral access qualifications are not viewpoint neutral if they are applied in a viewpoint discriminatory way. So, for example, a transit authority's policy that prohibits advertising that is "sexually explicit" or "patently offensive" might be specific enough to avoid the viewpoint discriminatory label.[273] The transit authority's access policy becomes viewpoint discriminatory, however, when it prohibits condom awareness advertisements pursuant to the policy but accepts a commercial film advertisement that contains the same degree of sexual innuendo.[274] Similarly, a transit authority engages in viewpoint discrimination when it rejects an advertisement portraying a union protest as "too controversial" and "not aesthetically pleasing" when it otherwise accepts "a wide array of political and public-issue speech."[275] That the government demonstrate it has consistently administered its forum in a viewpoint neutral way must be a requirement of the label.

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268. Southworth v. Bd. of Regents of Univ. of Wis. Sys., 307 F.3d 566, 578 (7th Cir. 2002) ("While the Supreme Court has never expressly held that the prohibition on unbridled discretion is an element of viewpoint neutrality, we believe that conclusion inevitably flows from the Court's unbridled discretion cases.").

269. *Forsyth County, Ga.*, 505 U.S. at 131 (quoting *Shuttlesworth*, 394 U.S. at 150-51).

270. *Thomas*, 534 U.S. at 323.

271. *Southworth*, 307 F.3d at 579 ("Given that the risks which the Supreme Court sought to protect against in adopting the unbridled discretion standard are risks to the constitutional mandate of viewpoint neutrality, we conclude that the prohibition against unbridled discretion is a component of the viewpiont-neutrality requirement.").

272. United Food & Commercial Workers Union v. S.W. Ohio Reg'l Transit Auth., 163 F.3d 341, 361 (6th Cir. 1998) ("We believe any prohibition against 'controversial' advertisements unquestionably allows for viewpoint discrimination."); Planned Parenthood Ass'n v. Chi. Transit Auth., 767 F.2d 1225, 1230 (7th Cir. 1985) ("We question whether a regulation of speech that has as its touchstone a government official's subjective view that the speech is 'controversial' could ever pass constitutional muster.").

273. AIDS Action Comm. of Mass., Inc. v. Mass. Bay Transp. Auth., 42 F.3d 1, 10 (1st Cir. 1994) ("[A]ssum[ing] *arguendo* that the [transit authority] . . . may constitutionally proscribe sexually explicit and/or patently offensive speech in its cars . . .").

274. *Id.* (discussing the fact that choosing between advertisements with the same degree of sexual innuendo demonstrates unacceptable risk of viewpoint discrimination in the forum).

275. *United Food & Commercial Workers Union*, 163 F.3d at 354-55.

V. CONCLUSION

Like liberty, free speech "finds no refuge in a jurisprudence of doubt."[276] This fundamental freedom is, however, awash in a sea of confusion. Details are haphazardly entering into all levels of analysis, so that each case threatens to become a jurisprudence unto itself. These many considerations have their place in a rich constitutional analysis, but they must be pushed back into a location where they can be weighed and evaluated together. The initial content-based/content neutral and content/viewpoint determinations that are pivotal in free speech clause analysis must be made according to bright lines that lend certainty and legitimacy to the constitutional adjudication.

The content-based/content neutral inquiry must look to content consciousness on the face of the government action. One question—whether it is necessary to understand the communication to apply the government's rule—identifies the government actions that are content-based. Details such as the nonspeech secondary effects that are the true target of the action or the narrow scope of its impact are properly evaluated in the means/end inquiry that follows the initial categorization.

The content/viewpoint inquiry must look to both substance and procedure. Where the government assists private speech, the fundamental question is whether it excludes some viewpoints on an otherwise permissible topic. This determination requires careful examination of the substance of the rule. As to each access qualification, a court must ask whether anything other than a viewpoint preference can explain it. If so, then it may be viewpoint neutral if it is also specifically stated, to avoid viewpoint discriminatory applications of discretion, and consistently applied.

276. Planned Parenthood of S.E. Penn. v. Casey, 505 U.S. 833, 844 (1992).

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