CONTENT NEUTRALITY AS A CENTRAL PROBLEM OF FREEDOM OF SPEECH: PROBLEMS IN THE SUPREME COURT'S APPLICATION

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This wonderful symposium in honor of the centennial of the Law School provides an opportunity to reflect on changes in my primary field, constitutional law, since I began teaching the subject twenty years ago. It is startling how much law has changed in the last two decades and how many of the cases that I teach today in Constitutional Law and Federal Courts have been decided since I became a law professor in 1980. In this essay, I want to focus on one of these developments and to discuss some of the problems with regard to it. Specifically, increasingly in free speech law, the central inquiry is whether the government action is content based or content neutral.

For example, in almost every free speech case decided by the Supreme Court in the recently completed Term, the outcome depended, in large part, on whether the Court characterized the law as content based or content neutral. In *United States v. Playboy Entertainment Group, Inc.*, the Court declared unconstitutional a federal law that required that cable companies act to ensure that no unauthorized receipt of sexual images occurred.[1] The

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1. 120 S. Ct. 1878, 1888–93 (2000). The case involved the constitutionality of § 505 of the Telecommunications Act of 1996, 47 U.S.C. § 561 (Supp. IV 1998). *Playboy*, 120 S. Ct. at 1882. The provision was meant to prevent the "signal bleed" of sexual images, which occurs when television viewers receive images from stations to which they do not subscribe. *See id.* The law required that cable companies either prevent all signal bleed of sexual images or restrict sexual images to late night hours. *Id.* This case is discussed more fully *infra* in the text accompanying notes 29–33.

Court said that by restricting only the receipt of sexual material, the law was content based and would be upheld only if it met the rigorous requirements of strict scrutiny.[2]

In contrast, in upholding a city's ordinance prohibiting nude dancing,[3] a state university's requirement for mandatory student activity fees,[4] and a state law restricting speech outside abortion clinics,[5] the Court found each to be content neutral.[6] Clearly crucial to the result in each case was the Court's conclusion that the laws were content neutral, not content based.

I do not disagree with the Court's position that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content."[7] Content-based restrictions risk the government targeting particular messages and attempting to control thoughts on a topic by regulating speech.[8] As the Court noted, "[such a restriction] raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace."[9]

Rather, my focus in this essay is on how the Court has erred in developing the principle of content neutrality. The Court's applications are inconsistent with the very reasons that this principle is at the core of First Amendment analysis.

Part I of this essay describes how the principle of content neutrality has become the core of free speech analysis. Parts II–IV then examine three problems with how the Court has applied this distinction. Part II

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2. *Playboy*, 120 S. Ct. at 1886.

3. *See* City of Erie v. Pap's A.M., 120 S. Ct. 1382 (2000) (finding city's ordinance prohibiting public nudity constitutional as applied to prevent nude dancing). *See* discussion *infra* text accompanying notes 24–25.

4. *See* Bd. of Regents v. Southworth, 120 S. Ct. 1346 (2000) (holding that the First Amendment is not violated by a program under which public university students must pay mandatory fees that are used in part to support organizations that engage in political speech). *See* discussion *infra* text accompanying notes 21–23.

5. *See* Hill v. Colorado, 120 S. Ct. 2480 (2000) (finding constitutional a Colorado law that prohibits approaching without consent within eight feet of a person, who is within 100 feet of a health care facility, for purposes of oral protest, education, or counseling). *See* discussion *infra* text accompanying notes 26–28.

6. These cases are discussed in more detail below. *See infra* text accompanying notes 21–33.

7. Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).

8. For an excellent explanation of the basis for the content-based/content-neutral distinction, see Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987). *But see* Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981) (arguing, in part, that content-based restrictions limit less speech than content-neutral ones).

9. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991).

argues that the Court has adopted an unduly narrow definition of viewpoint neutrality. Part III contends that the Court has erred by deeming laws to be content neutral if they serve a permissible purpose unrelated to suppression of the message. Part IV argues that the Court has greatly confused free speech analysis by applying the principle of content neutrality to categories of unprotected speech.

My goal in this essay is not exhaustively to analyze all aspects of the principle of content neutrality.[10] Rather, I seek briefly to describe how this has become the central inquiry in free speech analysis and to suggest some of the problems with the Court's current application of the principle.

By way of definition, at the outset, a law is content based if its application depends on the message of the speech. More specifically, a law is content based if its application depends on either the subject matter or the viewpoint expressed. Phrased another way, the requirement that the government be content neutral in its regulation of speech means that the government must be both viewpoint neutral and subject-matter neutral.[11] The viewpoint-neutral requirement means that the government cannot regulate speech based on the ideology of the message.[12] A law that prohibited anti-war demonstrations in a park, but allowed pro-war demonstrations, would be a viewpoint restriction. The subject-matter-neutral requirement means that the government cannot regulate speech based on the topic of the speech.[13] A law that allowed demonstrations about the war, from any perspective, but prohibited demonstrations on all other topics would be a subject-matter restriction. If a law is either a viewpoint or a subject-matter restriction it is deemed to be content based.

I. CONTENT NEUTRALITY AS THE CENTRAL PRINCIPLE OF FREE SPEECH ANALYSIS

Twenty years ago, there were a few initial cases invoking and relying on this distinction. Interestingly, they did so from an equal protection perspective. In *Police Department of Chicago v. Mosley*[14] and *Carey v.*

10. I have written elsewhere about another aspect of the problem, the difficulty posed by the principle in situations in which the government must make content-based choices. *See* Erwin Chemerinsky, *The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLEV. ST. L. REV. 199 (1994).

11. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

12. *See* Amy Sabrin, *Thinking About Content: Can It Play an Appropriate Role in Government Funding of the Arts?*, 102 YALE L.J. 1209, 1220 (1993).

13. *See id.* at 1218–19.

14. 408 U.S. 92 (1972).

Brown,[15] the Court expressly relied on the Equal Protection Clause in declaring unconstitutional subject-matter restrictions on speech on public sidewalks.

Mosley involved a Chicago ordinance that prohibited picketing or demonstrations within 150 feet of a school building while the school was in session, except for peaceful picketing in connection with a labor dispute. Earl Mosley frequently picketed the school, usually by himself, to protest what he perceived as race discrimination by the school. The protests were conceded by the city always to be peaceful, orderly, and quiet.[16]

The Supreme Court expressly used equal protection for analyzing the Chicago ordinance. Justice Marshall, writing for the Court, said: "Because Chicago treats some picketing differently from others, we analyze this ordinance in terms of the Equal Protection Clause of the Fourteenth Amendment."[17] The Court also recognized that the law restricted speech that was clearly protected by the First Amendment.

The Court concluded that the law was unconstitutional because it was an impermissible subject-matter restriction on speech. Justice Marshall declared: "The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign."[18]

Similarly, in *Carey*, the Supreme Court declared unconstitutional an Illinois statute that prohibited picketing or demonstrations around a person's residence unless the dwelling was used as a place of business or was a place of employment involved in a labor dispute.[19] In other words, under the law, picketing in residential neighborhoods was allowed if it was a labor dispute connected to a place of employment, but otherwise, such speech was generally prohibited. The Court again applied equal protection and found the law unconstitutional. The Court applied *Mosely* and concluded:

> [T]he Act accords preferential treatment to the expression of views on one particular subject; information about labor disputes may be freely disseminated, but discussion of all other issues is restricted.

15. 447 U.S. 455 (1980).
16. *Mosley*, 408 U.S. at 93.
17. *Id.* at 94–95.
18. *Id.* at 95.
19. *Carey*, 447 U.S. at 457–59.

> . . . When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized.[20]

I recall teaching *Carey* soon after it was decided in my first year as a law professor and suggesting that it and *Mosley* represented a major shift in the approach by the Supreme Court to handling free speech cases under equal protection. That trend did not materialize. But the other trend that I described then, the emergence of content neutrality as a core principle of free speech analysis, definitely has occurred.

Today, virtually every free speech case turns on the application of the distinction between content-based and content-neutral laws. As evidence for this, consider the free speech cases from the Supreme Court's 1999–2000 Term that were alluded to in the introduction. Almost all of them invoked and ultimately were decided based on the principle of content neutrality.

In *Board of Regents v. Southworth*, the Court considered the constitutionality of mandatory student activity fees at a public university.[21] The Court rejected a First Amendment challenge by students who objected to being forced to subsidize causes that they opposed. The Court said that the fees helped to facilitate a diversity of ideas on campus and that they were permissible so long as they were administered in a viewpoint-neutral manner. Justice Kennedy, writing for a unanimous Court, declared: "The proper measure, and the principal standard of protection for objecting students, we conclude, is the requirement of viewpoint neutrality in the allocation of funding support."[22] Because the students stipulated in the District Court that the program was viewpoint neutral, the Court upheld its constitutionality. The Court explained: "If the stipulation is to continue to control the case, the University's program in its basic structure must be found consistent with the First Amendment."[23]

In *City of Erie v. Pap's A.M.*, the Court upheld a city's ordinance prohibiting public nudity that was adopted to close down a nude dancing establishment.[24] Justice O'Connor, writing for the plurality, said that the law should be upheld because it was a content-neutral restriction on

20. *Id.* at 461–62.
21. 120 S. Ct. 1346, 1349 (2000).
22. *Id.* at 1356.
23. *Id.*
24. 120 S. Ct. 1382, 1387 (2000).

conduct that communicates. The plurality declared: "We conclude that Erie's asserted interest in combating the negative secondary effects associated with adult entertainment establishments like Kandyland is unrelated to the suppression of the erotic message conveyed by nude dancing. The ordinance prohibiting public nudity is therefore valid . . . ."[25]

In *Hill v. Colorado*, the Court upheld a Colorado law that prohibits approaching without consent within eight feet of a person, who is within 100 feet of a health care facility, for purposes of oral protest, education, or counseling.[26] Justice Stevens, writing for the Court, emphasized the content neutrality of the law as the basis for upholding it. He quoted the determination by the Colorado Supreme Court that the "restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech."[27] Justice Stevens explained that "the State's interests in protecting access and privacy, and providing the police with clear guidelines, are uurelated to the content of the demonstrators' speech."[28]

In each of these cases, the determination that the speech was content neutral was crucial to the Court's decision to uphold the government regulation. In sharp contrast, in *United States v. Playboy Entertainment Group, Inc.*,[29] the Court declared unconstitutional a provision of the federal Cable Act which prohibited "signal bleed" of sexual images.[30] Signal bleed occurs when people receive images from cable stations to which they do not subscribe. The law required that cable companies either completely eliminate signal bleed of sexual images or that sexual programming be shown exclusively during late-night hours.[31] In finding the law unconstitutional, Justice Kennedy declared: "The speech in question is defined by its content; and the statute which seeks to restrict it is content based."[32] The Court explained:

> Section 505 applies only to channels primarily dedicated to "sexually explicit adult programming or other programming that is indecent." The statute is unconcerned with signal bleed from any other channels. . . . It

25. *Id.* at 1394. The Court found the ordinance valid under the four-part test for evaluating restrictions on symbolic speech from *United States v. O'Brien*, 391 U.S. 367 (1968). *Pap's A.M.*, 120 S. Ct. at 1395–98.

26. 120 S. Ct. 2480, 2484–85 (2000).

27. *Id.* at 2491 (quoting Hill v. Thomas, 973 P.2d 1246, 1256 (Colo. 1999)).

28. *Id.*

29. 120 S. Ct. 1878 (2000).

30. Telecommunications Act of 1996 § 505, 47 U.S.C. § 561 (Supp. IV 1998).

31. *See id.*

32. *Playboy*, 120 S. Ct. at 1885.

> "focuses *only* on the content of the speech and the direct impact that speech has on its listeners." This is the essence of content-based regulation.[33]

The Court concluded that the law was unconstitutional because it was not the least restrictive alternative for achieving the government's interests. In earlier cases, the Court concluded that content-based restrictions on sexually explicit, nonobscene speech did not have to meet strict or even intermediate scrutiny.[34] But in *Playboy*, the Court said that strict scrutiny is to be used for restrictions of sexual speech.

These cases are illustrative of countless others in recent years that place the principle of content neutrality at the core of First Amendment analysis. Indeed, the Supreme Court has held that the level of scrutiny applied depends on whether the law is content based or content neutral. The Court has declared that "[c]ontent-based regulations are presumptively invalid."[35] In *Turner Broadcasting System, Inc. v. FCC*, the Court said that the general rule is that content-based restrictions on speech must meet strict scrutiny, while content-neutral regulations only need meet intermediate scrutiny.[36] Justice Kennedy, writing for the Court, declared that precedents apply "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."[37] But, "[i]n contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny."[38]

The Court has explained that "[t]o allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth."[39] Almost two decades ago, Professor Kenneth Karst persuasively argued that equality is at the core of the First Amendment.[40] All speech, regardless of its content, must be treated the same by the government. To allow the government to target

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33. *Id.* (quoting 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 deleted)); Boos v. Barry, 485 U.S. 312, 321 (1988) (opinion of O'Connor, J.)).

34. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978); Young v. Am. Mini Theatres, Inc., 427 U.S. 50 (1976).

35. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

36. 512 U.S. 622, 642 (1994).

37. *Id.* at 642 (citations omitted).

38. *Id.* (citation omitted).

39. Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 538 (1980).

40. Kenneth L. Karst, *Equality As a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975). *See also* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 201–07 (1983).

particular views or subjects permits the government to greatly distort the marketplace of ideas.

In the following sections, I identify three problems with how the Court has applied the principle of content neutrality. As to each, I contend that the Court has abandoned, or at least compromised, its proper commitment to this important principle.

II. THE NARROW DEFINITION OF VIEWPOINT DISCRIMINATION

As the law has developed, subject-matter restrictions on speech have been upheld, at times,[41] but viewpoint restrictions have never been upheld. Viewpoint restrictions "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion."[42]

The determination of whether a law is viewpoint based is thus crucial in determining its constitutionality. Two recent Supreme Court decisions—*Arkansas Educational Television Commission v. Forbes*[43] and *National Endowment for the Arts v. Finley*[44]—are important because each narrowly defines what constitutes viewpoint discrimination. Each compromises the protection against content-based regulation by adopting an unduly restrictive definition of viewpoint discrimination.

Forbes involved a state-owned television station staging a debate among candidates for a congressional seat. The State of Arkansas owns and operates a public television station. In 1992, the station sponsored a debate between candidates for a congressional seat, but ouly invited the Democratic and Republican nominees to participate. Ralph Forbes, a minor party candidate with little public support, formally requested to be included in the debate. After being denied participation, Forbes sued and claimed that his exclusion violated the First Amendment.

The United States Supreme Court, in a 6-3 decision, ruled against Forbes and in favor of the public television station. The Court concluded that public television stations, when owned by the government, are to be regarded as nonpublic forums, even when they create a debate among

41. *See, e.g.*, Burson v. Freeman, 504 U.S. 191 (1992) (upholding restriction on campaigning activity near polling places); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (allowing ordinance prohibiting political advertisements on buses, while permitting commercial advertisements).

42. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994).

43. 523 U.S. 666 (1998).

44. 524 U.S. 569 (1998).

candidates.[45] In reaching its decision, the Court distinguished among three types of forums: public forums, designated public forums, and nonpublic forums. Public forums are government owned properties that the government constitutionally must make available for speech; sidewalks and parks are classic examples.[46] Designated public forums are places that the government can close to speech, but that the government chooses to open for First Amendment activities.[47] Nonpublic forums are places that the government can and does close to speech.

The Court concluded that a public television station was not a public forum and did not become a designated public forum by creating the debate. The law is clearly established that for nonpublic forums, government regulations are allowed so long as they are reasonable and viewpoint neutral.[48] The Court, in its majority opinion by Justice Kennedy, concluded that the exclusion of the minor party candidate was viewpoint neutral and thus did not violate the First Amendment. The Court cited the statements of the station's Executive Director in stating that "Forbes' views had 'absolutely' no role in the decision to exclude him from the debate."[49] The Court concluded: "There is no substance to Forbes' suggestion that he was excluded because his views were unpopular or out of the mainstream. His own objective lack of support, not his platform, was the criterion."[50]

The Court's conclusion that the government's decision was viewpoint neutral was essential to the result. But what causes a candidate to be from a minor, rather than a major, party? The answer, of course, is that a minor party candidate's *views* are favored by a much smaller percentage of the population than those of a major party candidate. From this perspective, choosing whom to include in a debate based on whether they are from a minor or a major party is all about viewpoint.

National Endowment for the Arts v. Finley upheld federal restrictions on funding of artists.[51] The National Endowment for the Arts ("NEA") provides grants to artists. Since 1965, when it was created, it has disbursed over $3 billion in funds to individuals and organizations.[52] The federal statute creating the NEA gives it substantial discretion in awarding funds; it

45. *Forbes*, 523 U.S. at 678–79.
46. *Id.* at 677.
47. *Id.*
48. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983).
49. *Forbes*, 523 U.S. at 682.
50. *Id.* at 683.
51. NEA v. Finley, 524 U.S. 569, 572–73 (1998).
52. *Id.* at 574.

is empowered to give money based on "artistic and cultural significance, giving emphasis to American creativity and cultural diversity," "professional excellence," and the encouragement of "public knowledge, education, understanding, and appreciation of the arts."[53] In 1990, the statute was amended to provide that the NEA also should "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[54]

Karen Finley, a performance artist, brought a First Amendment challenge to this latter requirement. The United States Court of Appeals for the Ninth Circuit declared it unconstitutional, concluding that it was unconstitutionally vague and that it was impermissible, content-based discrimination.[55] The United States Supreme Court, in an 8-1 decision with only Justice Souter dissenting, reversed the Ninth Circuit and upheld the "decency and respect" provision.

Justice O'Connor's opinion for the Court emphasized that the federal law did not require that the NEA consider decency and respect for values; rather, the statute permitted such consideration. The Court rejected the vagueness challenge and noted that "when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe."[56] In other words, when the government is giving subsidies, imprecise criteria are permitted, even if they would not be tolerated in a regulatory statute.

Justice O'Connor also rejected the claim that the law was impermissible viewpoint discrimination. The Court stressed that the government must make choices among applicants and it said that the statute's language does "not engender the kind of directed viewpoint discrimination that would prompt this Court to invalidate a statute on its face."[57] The Court said that there was no allegation of viewpoint discrimination in the application of the law and that facially the law was constitutional.[58]

Integral to the Court's decision was its conclusion that it was viewpoint neutral for the federal law to authorize the NEA to consider "decency and respect" for values. Yet, these terms inherently focus attention on viewpoint. What is decent or indecent depends entirely on the

53. 20 U.S.C. § 954(c)(1)–(10) (1994).
54. *Id.* § 954(d)(1); *Finley*, 524 U.S. at 576.
55. Finley v. NEA, 100 F.3d 671, 683–84 (9th Cir. 1996).
56. *Finley*, 524 U.S. at 589.
57. *Id.* at 583.
58. *Id.* at 586–87.

evaluator's views. Likewise, determining whether art shows respect for values requires a viewpoint-based assessment. It is hard to imagine these terms as being other than authority for the government to look at viewpoint. There is no conceivable way in which "decency and respect" for values can be defined or administered in a viewpoint-neutral fashion.

The Supreme Court never has defined what constitutes viewpoint discrimination. What is of concern about these two recent decisions is that both adopt a narrow definition of viewpoint discrimination and thus give the government more latitude to regulate speech. In *Forbes*, the Court concluded that excluding a minor party candidate from a debate is viewpoint neutral. But the entire difference between minor party and major party candidates revolves around their views. In *Finley*, the Court said that a federal law that authorized the NEA to consider "decency and respect" for values was viewpoint neutral. Yet, these terms are all about government examination of the viewpoint expressed.

The Supreme Court has created a virtually complete prohibition of the government engaging in viewpoint discrimination. Nothing is more inconsistent with freedom of speech than for the government to use its awesome power to advance some views and suppress or disfavor others. The Court has erred by adopting such an unduly restrictive definition of viewpoint discrimination in these cases.

III. TREATING CONTENT-BASED LAWS AS CONTENT NEUTRAL BECAUSE OF A PERMISSIBLE PURPOSE

A second major problem with the Court's application of the principle of content neutrality has been its willingness to find clearly content-based laws to be content neutral because they are motivated by a permissible content-neutral purpose. The Court articulated and applied this rule in *City of Renton v. Playtime Theaters, Inc.*[59] In *Renton*, the Court rejected a First Amendment challenge to a zoning ordinance that prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multi-family dwelling, church, park, or school. The ordinance was clearly content based in its very terms: It applied only to theaters that showed films with sexually explicit content.

The Court, however, treated the law as content neutral because it said that the law was motivated by a desire to control the secondary effects of

59. 475 U.S. 41, 47–48 (1986).

adult movie theaters, such as crime, and not to restrict the speech.[60] The Court stated that "the Renton ordinance is completely consistent with our definition of 'content-neutral' speech regulations as those that 'are *justified* without reference to the content of the regulated speech.'"[61] *Renton* thus makes the test of whether a law is content based or content neutral depend not on its terms, but rather on its justification. A law that is justified in content-neutral terms is deemed content neutral even if it is content based on its face.

The Court followed *Renton* this past Term in *City of Erie v. Pap's A.M.*, described above. The Court expressly invoked *Renton* and declared: "[T]he regulation . . . is . . . properly evaluated as a content-neutral restriction because the interest in combating the secondary effects associated with those clubs is unrelated to the suppression of the erotic message conveyed by nude dancing."[62]

The contrast between *Erie* and *Playboy*, described above, is striking. Both laws facially were content based and regulated sexual speech. Both arguably were designed to prevent harmful secondary effects—crime in *Erie* and exposure of children to sexual images in *Playboy*. In *Erie*, the Court used the secondary effects as a basis for finding that the law was content neutral and upheld it. In *Playboy*, the Court rejected the secondary effects argument, concluded that the law was content based, and declared it unconstitutional.

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.[63] The law in *Renton* may have been properly upheld as needed to combat crime and the secondary effects of adult theaters, but it nonetheless was clearly content based: The law applied only to theaters showing films with sexually explicit content.[64] Similarly, the entire focus of Erie's ordinance was stopping one type of speech: nude dancing.

The *Renton* approach is objectionable because it allows the Court to characterize clearly content-based laws as being content neutral. *Renton* thus "permits an end run around the First Amendment: the government can

60. *Id.* at 48.

61. *Id.* at 48 (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (emphasis added)).

62. City of Erie v. Pap's A.M., 120 S. Ct. 1382, 1394 (2000).

63. For an excellent summary of these criticisms, see Marcy Strauss, *From Witness to Riches: The Constitutionality of Restricting Witness Speech*, 38 ARIZ. L. REV. 291, 314–20 (1996).

64. *See* Kimberly K. Smith, Comment, *Zoning Adult Entertainment: A Reassessment of* Renton, 79 CAL. L. REV. 119, 142 (1991).

always point to some neutral, non-speech justification for its actions."[65] Justice Brennan expressed his "continued disagreement with the proposition that an otherwise content-based restriction on speech can be recast as 'content-neutral' if the restriction 'aims' at 'secondary-effects' of the speech .... [S]uch secondary effects offer countless excuses for content-based suppression of political speech."[66]

If the application of a law depends on the content of the message, then, by definition, the law is content based. The Court can uphold it by finding that it serves a sufficiently important purpose, but it is still content based. In fact, the Court might even say that it is a category of speech that warrants less than full First Amendment protection, but it is simply wrong to say that a facial, content-based distinction is otherwise because it is based on a permissible purpose.

IV. DISTINCTIONS WITHIN CATEGORIES OF UNPROTECTED SPEECH

The Supreme Court has identified some categories of unprotected speech that the government can prohibit and punish. In *Chaplinsky v. New Hampshire*, in 1942, the Supreme Court expressed the view that some types of speech are unprotected by the First Amendment.[67] The Court stated:

> Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting words"—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[68]

The Court observed that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[69]

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65. Strauss, *supra* note 63, at 317.

66. Boos v. Barry, 485 U.S. 312, 334–35 (1988) (Brennan, J., concurring in part and concurring in the judgment) (citations omitted).

67. 315 U.S. 568, 571–72 (1942).

68. *Id.* at 571–72 (citations omitted).

69. *Id.* at 572 (citation omitted).

In the more than half century since *Chaplinsky*, the Court has recognized several categories of unprotected speech, such as incitement of illegal activity[70] and obscenity.[71] Additionally, there are categories of less-protected speech where the government has more latitude to regulate than usual under the First Amendment. For instance, government generally can regulate commercial speech if intermediate scrutiny is met.[72]

In other words, these categories are exceptions to the general rule that content-based regulations of speech must meet strict scrutiny. The categories obviously are defined by the content of the speech being regulated. But the Court essentially says that there is a sufficiently important justification for finding that the entire category is outside the scope of full First Amendment protection.

Until very recently, it was thought that the government had broad latitude to prohibit and regulate speech within the categories of unprotected expression. The conventional view was that laws in these areas would be upheld so long as they met the rational basis test that all government actions must satisfy. However, in *R.A.V. v. City of St. Paul*, the Court stated generally that content-based distinctions within categories of unprotected speech must meet strict scrutiny.[73]

In *R.A.V.*, the Court declared unconstitutional a city's ordinance that prohibited hate speech based on race, color, religion, or gender that was likely to arouse "anger, alarm, or resentment in others."[74] The Court said that even though fighting words are a category of unprotected speech, the law impermissibly drew content-based distinctions among fighting words by prohibiting expression of hate based on race, but not based on political affiliation.[75]

Justice Scalia, writing for the Court, explained that even within categories of unprotected speech, the government is limited in its ability to draw content-based distinctions. He wrote:

> We have sometimes said that these categories of expression are "not within the area of constitutionally protected speech," or that the "protection of the First Amendment does not extend" to them. Such

70. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (citing Dennis v. United States, 341 U.S. 494 (1951)).

71. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973).

72. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561–63 (1980).

73. 505 U.S. 377, 382–86 (1992).

74. *Id.* at 391.

75. *Id.*

> statements must be taken in context.... What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.[76]

Justice Scalia said that there was not an absolute prohibition of content-based discrimination within categories of unprotected speech. He wrote: "When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists."[77] As an example, Justice Scalia stated that the government may choose to prohibit sexually oriented materials that are the most patently offensive or that most appeal to prurient interest, but that it could not prohibit only sexually oriented materials that convey a political message.

Justice Scalia also indicated that apparent content-based distinctions would be permissible if they were designed to prevent secondary effects so that "the regulation is 'justified without reference to the content of the ... speech.'"[78] Justice Scalia here cited to *City of Renton v. Playtime Theaters, Inc.*, discussed above, where the Court said that it is not content-based discrimination if the government's purpose is preventing secondary effects of speech.

Thus, Justice Scalia's opinion indicates that content-based distinctions within a category of unprotected speech will have to meet strict scrutiny, subject to two exceptions. One is that a content-based distinction is permissible if it directly advances the reason why the category of speech is unprotected; for example, an obscenity law could prohibit the most sexually explicit material without having to ban everything that is obscene. Second, a law will not be deemed to be content based if is directed at remedying secondary effects of speech and is justified without respect to content.

Justice Scalia's approach in *R.A.V.* adds enormous confusion to the law concerning the principle of content neutrality. Categories of

76. *Id.* at 383–84 (citations omitted).
77. *Id.* at 388.
78. *Id.* at 389 (emphasis and citations omitted).

unprotected speech, by definition, restrict speech based on their content. Inescapably, the government will prohibit some speech within such a category, but not all. Justice Scalia's approach, if followed, will require that any such law meet strict scrutiny, which undermines the rationale for the category in the first place.

At first, this might seem a desirable result for those who desire to increase protection of speech. But, the consequences of this approach seem quite undesirable. Courts likely will resort to approaches, similar to that used in *Renton*, in finding content-based laws to be content neutral and weakening the protections of strict scrutiny in order to uphold laws. Analytically, the categories of unprotected speech, which have been central to First Amendment analysis for over a half century, are ultimately obliterated if Scalia's approach is followed, because virtually all government regulation draws distinctions within these categories.

The result is to give the courts far more latitude in deciding which government regulations of speech to allow and which to strike down. This discretion inherently risks the courts engaging in their own content-based restrictions, upholding regulation of speech they dislike and protecting the speech they like. In other words, *R.A.V.* opens the door to content-based determinations of exactly the sort that it, and the principle of content neutrality, seeks to eliminate.

CONCLUSION

First Amendment law has changed over the last twenty years in the development of content neutrality as a central principle of free speech analysis. This development is to be applauded for the clarity it adds to the law and because of its proper commitment to preventing the government from manipulating the marketplace of ideas by controlling the messages that can be expressed.

However, as applied, the Supreme Court has compromised, and even undermined, the principle of content neutrality that it seeks to uphold. In the future, the Supreme Court must adopt a broader definition of what constitutes viewpoint discrimination, reject the *Renton* approach that content-based laws become content neutral if they serve a permissible purpose, and abandon the *R.A.V.* approach. Individually and together, these changes will best advance the Court's proper commitment to the essential principle of content neutrality.