ARTICLE

Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction

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I. INTRODUCTION

Some regulations of speech are said to be based on the content of the speech being regulated.[1] Other regulations of speech are said to be based on grounds that are neutral toward the content of the speech being regulated.[2] These terms themselves are not self-explanatory and it is reasonable to ask how one defines the "content" of speech. As well, one might ask what constitutes neutrality toward speech's content, and when a law is "based" on the content of speech. These formal issues are only the beginning of the difficulties posed by the "content-based" and "content-neutral" categories.[3]

Undeniably though, the distinction between regulations that are content-based (hereinafter "CB") or content-neutral (hereinafter "CN") is central to contemporary free speech law. A leading scholar has gone so far as to argue that "[t]oday, virtually every free speech case turns on the application of the distinction between content-based and content-neutral laws."[4] The sheer number of cases referring to this distinction is,

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1. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 412 (1991) (stating that "Johnson's political expression was restricted because of the content of the message he conveyed. We must therefore subject the State's asserted interest . . . to 'the most exacting scrutiny'" (quoting Boos v. Barry, 485 U.S. 312, 321 n.8 (1988))).

2. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (explaining that "even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information'" (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984))).

3. A number of genuinely important conceptual issues are especially referred to *infra*, Part III.

4. 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, 53 (2000); *see also id.* at 49 (noting that "increasingly in free speech law, the central inquiry is whether the government action is content-based or content-neutral"). The free speech tests applied in a number of specific contexts, including libel, obscenity, and commercial speech, make no explicit reference to the CB-

after a historically late start,[5] by now in the thousands.[6] Justice O'Connor, citing a range of free speech cases, has written that "[t]he normal inquiry that our doctrine dictates is, first, to determine whether a regulation is content based or content neutral, and then, based on the answer to that question, to apply the proper level of scrutiny."[7] The prominence of the CB-CN distinction is, in any event, now beyond dispute.

The CB-CN distinction cannot be explained adequately in a single paragraph. Merely for the sake of convenience, though, we can initially say that CB restrictions commonly "restrict expression because of its message, its ideas, its subject matter, or its content."[8] Roughly, the restriction is either motivated by, or thought to be justified by, reference to an audience's responses to the content of the speech in question,[9] where those responses are mediated in a sufficient way by the audience's cognitive and emotional processes.[10]

Once CB and CN restrictions are defined in a general fashion, the courts then characterize CB restrictions as generally worse, from the

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CN distinction. In some broad sense, of course, the content of the speech is examined in deciding such cases, and in deciding which free speech test to apply. *See generally* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 46-50 (1987) (finding seven different formulations of the standard of review, which actually embody three distinct standards of judicial review, for content-neutral regulations).

5. Among the relatively early cases explicitly employing the CB or CN terminology are *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537-38 (1980); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 84-85 (1976) (Stewart, J., dissenting); and *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). Of course, the substance of a distinction can appear even where the specific, but by now quite standard, terminology does not.

6. A check of the Westlaw "All Federal Cases" database as of April 9, 2005 with the query "content-based" yielded 1,973 cases. A search with the query "content-neutral" yielded 1,939 cases. Both search terms occurred in 1,035 cases. These figures exclude all state court decisions.

7. City of Ladue v. Gilleo, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring) (citing seven free speech cases).

8. *Mosley*, 408 U.S. at 95; *see also, e.g.*, Franklin Jefferson, Ltd. v. City of Columbus, 244 F. Supp. 2d. 835, 838 (S.D. Ohio 2003). Disagreement with the content of the message is often thought to be a crucial circumstance. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Housing Works, Inc. v. Kerik, 283 F.3d 471, 480 (2d Cir. 2002).

9. *See, e.g.*, Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 209 (3d Cir. 2001) (citing Forsyth County v. Nationalist Movement, 505 U.S. 123, 134 (1992)).

10. It is typically assumed that there is a difference between a restriction imposed out of a fear that audience members will agree with what is thought to be harmful or false speech, and a restriction imposed to avoid audience reactions such as being awakened by the speech, or being unable to concentrate or sleep because of the distraction of the speech in question. Both kinds of restrictions on speech may in some sense point to audience reactions, but the former restriction is more likely to be thought of as CB. See, for example, the classic sound truck regulation case of *Kovacs v. Cooper*, 336 U.S. 77 (1949), where the court held that a conviction for violation of a local ordinance barring "sound trucks from broadcasting in a loud and raucous manner" is a permissible regulation because it does not restrict "the communication of ideas," but instead provides "reasonable protection . . . from the distracting noises of vehicles equipped with such sound amplifying devices . . . ." *Id.* at 89.

standpoint of freedom of speech, than CN restrictions. Thus, "[c]ontent-based regulations receive strict scrutiny because 'content-based restrictions are especially likely to be improper attempts to value some forms of speech over others, or are particularly susceptible to being used by the government to distort public debate.'"[11] Similarly, "content-based discriminations are subject to strict scrutiny because of the weight of government behind the disparagement or suppression of some messages, whether or not with the effect of approving or promoting others."[12]

On the basis of these formulations, we have a preliminary idea of the meaning and purpose of the CB-CN distinction. The problem though, is that any such preliminary statement grossly oversimplifies the distinction, particularly as it has developed over time in a wide range of contexts. But we can hardly assess the real value of the distinction, or how to modify or replace the distinction, until we have a more complex understanding of the distinction as it is actually used.

This article takes up some of the complications and ambiguities that have arisen in the application of the CB-CN distinction, and examines their impact on free speech and other values. In reviewing these complications, a sense of arbitrariness in the judicial application of the CB-CN distinction emerges. Although this paper cannot inventory all of the complexities, it does illustrate enough of the arbitrariness and sheer cumbersomeness of the distinction to justify seeking to limit or simplify its use.

This article will demonstrate that calls for various sorts of reform have arisen in response to the increased complexity, arbitrariness, and cumbersomeness of the CB-CN distinction. Despite the alternatives proposed, this article suggests that it is more appealing for courts to focus directly on essentials, instead of attempting to apply an increasingly complex CB-CN distinction. Judges especially should seek to adopt an approach that focuses on the crux of free speech.[13]

In particular, courts should be much more willing to make and defend their best informed judgments as to the realistic repressive potential of the speech restriction in question. Once this realistic repressive

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11. Glendale Assocs., Ltd. v. NLRB, 347 F.3d 1145, 1155 (9th Cir. 2003) (quoting *Gilleo*, 512 U.S. at 60 (O'Connor, J., concurring)).

12. Hill v. Colorado, 530 U.S. 703, 735 (2000) (Souter, J., concurring) (contrasting restrictions based on the viewpoint or on the subject matter of the speech, which are CB, with regulations regarding "the circumstances of its delivery," which are not).

13. The judicial process will inevitably be complex in one sense or another, as it somehow takes into consideration everything from separation distances on a particular street to the need to assuage the chronic security anxieties of the era. But much of this judicial reflection can be undertaken intuitively and directly rather than according to some increasingly complex and otherwise questionable formula, and justified in plainly crucial terms. *See* R. George Wright, *The Role of Intuition in Judicial Decisionmaking*, 42 HOUS. L. REV. (forthcoming 2006).

potential is judicially assessed, the most appropriate overall judicial test of the speech restriction can be selected and applied, regardless of whether the speech restriction would be characterized as CB or CN under current practice.

In such a case, the court would not seek to classify the speech restriction at issue as CB, CN, or some hybrid or other variant thereof. The court would instead bypass all the accrued complications and the arbitrariness of the CB-CN distinction. Where appropriate, however, the court should still feel free to incorporate into their thinking any genuinely worthwhile considerations that would otherwise contribute toward a more formalistic CB-CN analysis.

What follows are a series of considerations that build toward the conclusions outlined above. First, this article takes up the continuing inconsistency in the law over the respective roles of the legislative text itself, or of a facial analysis of a speech restriction, as opposed to a broader inquiry into legislative intent and context, in classifying the speech restriction as CB or CN. From there, the article examines some of the controversies over the meaning, scope, and implications of CB speech regulations, devoting some attention to regulations based on either the distinctive viewpoint taken in the speech in question, or on the sheer subject matter of the regulated speech.

These accumulating complications and boundary-line issues are then elaborated in the following sections. Here, the complexity, arbitrariness, and ambiguity of the CB-CN distinction are explored with focus on a series of particular cases. Each of the selected cases and examples is intended to illustrate one or more dimensions which the CB-CN distinction tends to unravel.

Finally, this article briefly surveys some of the proposed alternatives to the current CB-CN distinction. Each of the proposed alternatives, however, involves problems and costs significant enough to call its value into serious question. The best available alternative, ultimately, involves a direct and intuitive judicial focus on assessing the realistic repressive potential of particular restrictions on speech.

There are two kinds of costs that justify such a direct judicial focus. First, there are occasional serious repressive dangers posed by restrictions that are assumed to be CN. Second, there are social costs from needless application of a demanding strict scrutiny test in cases of quite limited realistic repressive potential. Reflection on these kinds of cases strengthens the argument for a less formalistic and more direct judicial focus on the realistic repressive potential of the speech regulation in any given case.

II. TEXT-FOCUSED VERSUS LEGISLATIVE INTENT-FOCUSED APPROACHES TO THE CB-CN DISTINCTION

The distinction between CB and CN regulations of speech begins to unravel even as judges ask the initial question of what they are to consider in determining whether a regulation is CB. Different answers plainly can lead to different results. In attempting to answer this question, courts incompatibly talk both of focusing their inquiry on the text or face of the regulation, and of a broader judicial inquiry into the legislative intent, purpose, and justification of the regulation.

Justice Kennedy has argued straightforwardly that "whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based."[14] This argument, however, assumes a particular understanding of what it means for one thing to be "based on" another. Does being "based on" something really require explicit reference to that thing? More directly relevant to Justice Kennedy's point, can a regulation explicitly refer to the content of the speech, yet be based, in the sense of being justified, on considerations distinct from the content of the speech? Justice Kennedy seems to recognize this possibility, while preferring to still think of the speech regulation as CB.[15]

The courts, however, certainly do not uniformly hold the line on referring only to the text in distinguishing between CB and CN regulations. There is already some compromise of a textual focus in the Supreme Court's qualified statement that "laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are *in most instances* content neutral."[16]

More explicitly, if still in a technically qualified way, the Court has also concluded that "even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys."[17] Even more explicitly, the Court has elsewhere

14. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 448 (2002) (Kennedy, J., concurring). Justice Kennedy's approach and preferred terminology are also endorsed in *Ctr. for Fair Pub. Policy v. Maricopa County*, 336 F.3d 1153, 1161-64 (9th Cir. 2003). For application of the quote in a different context involving conduct and symbolic speech, see *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968), where the court sought to minimize judicial inquiry into legislative intent where the regulation is facially neutral.

15. *See Alameda Books*, 535 U.S. at 448 (Kennedy, J., concurring).

16. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994) (emphasis added). The quoted language by itself might be read merely to suggest that regulations based not on the speech's viewpoint, but on its subject matter, could still be CB. The point, however, could just as well be that a regulation may be facially neutral but intended to disadvantage certain viewpoints, and therefore is CB.

17. *Id.* at 645; *see also* Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 87 (1st Cir. 2004) (explaining that apparent neutral justifications can give way to findings of improper motives or

announced that "[i]n determining whether a regulation is content based or content neutral, we look to the purpose behind the regulation . . . ."[18] Clearly, there is already uncertainty over the respective roles of text and other evidence of legislative intent in the CB-CN determination, but the complications are certainly not confined to the most elementary text-versus-broader-intent question. To begin with, the previous quotation was further qualified by the Court, which concluded that "typically, '[g]overnment regulation of expressive activity is content neutral as long as it is '*justified* without reference to the content of the regulated speech.''"[19]

This seems to suggest that in some non-typical cases, a regulation could be justified without reference to speech content, yet still be classified as CB.[20] The Court's explanatory footnote, however, raises more questions than it answers:

> "[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 . . . . Nor will the mere assertion of a content-neutral purpose be enough to save a law which on its face discriminates based on content."[21]

This explanation does not address how a regulation that is justified without reference to speech content might still be CB. Such a classification might well be reasonable in some cases, but as yet, we have no account of when or how this could occur. In some, but not all, cases, a CB purpose will be sufficient for classifying a regulation as CB.[22] But a CB purpose is not always necessary either.[23] A CN justification may still underlie a CB regulation, but again, the nature and boundaries of this class of cases are not much clarified.[24] The basic message we are left with by these cases is that, beyond their sheer conflicts, the general rules of the CB-CN distinction will have mostly unspecified and increasingly complex exceptions.

In the cases that broaden the inquiry beyond the face of the speech

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purposes based on statements by enacting officials, suspicious under-inclusiveness of the regulation, or suspiciously ineffective pursuit of presumed governmental aim).

18. Bartnicki v. Vopper, 532 U.S. 514, 526 (2001).

19. *Id.* (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)) (emphasis added).

20. *See id.*

21. *See id.* at 526 n.9 (quoting *Turner Broad. Sys.*, 512 U.S. at 642).

22. *See id.*

23. *See id.* More broadly, the Court has elsewhere held that "'[i]llicit legislative intent is not the sine qua non of a violation of the First Amendment.'" Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 228 (1987) (quoting Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 592 (1983)).

24. *See Bartnicki*, 532 U.S. at 526 n.9. It is of some, but not much, help to learn that a merely asserted, but non-existent, CN purpose or justification will not suffice.

regulation, the emphasis shifts to something more general, like the justification,[25] the reason,[26] or the objective[27] underlying the regulation, including in particular someone's agreement or disagreement with the speech in question.[28] Other terms, yielding the same effect, also have been employed.[29] Whatever the terminology, the underlying problem remains the same. The courts have made little progress in sorting out the respective roles of an examination of the text of the speech regulation and of broader-ranging attempts to ascertain legislative intent[30] in distinguishing between CB and CN regulations.

III. Some Problems of Scope and Meaning in Regulating on the Basis of Content

The CB-CN distinction results in indeterminate and unattractive outcomes in a number of cases. The flexibility built into the CB-CN distinction may justify the diverse outcomes though. For example, a CB regulation certainly need not take the form of a complete ban on the speech in question; more limited restrictions on speech can also be CB.[31] Nor should one link the category of CB restrictions, or even the narrower class of particular viewpoint-based restrictions, too closely with the class of instances in which the regulating government itself actually disagrees with the message of the regulated speech.[32] Problems of doc-

25. *See supra* note 19 and accompanying text.

26. *See, e.g.*, McGuire v. Reilly, 386 F.3d 45, 57 (1st Cir. 2004) ("core inquiry" is whether the "legislative reason" is CN); Granite State Outdoor Adver., Inc. v. City of St. Petersburg, 348 F.3d 1278, 1281 (11th Cir. 2003) (stating that "if the government's reasons for regulating speech are not related to content, then regulation is content-neutral").

27. *See, e.g.*, *Granite State*, 348 F.3d at 1281 (stating that the "controlling consideration" is "[t]he government's objective").

28. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (stating that the "principal inquiry . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys"); Knights of Columbus v. Town of Lexington, 272 F.3d 25, 31 (1st Cir. 2001); Globe Newspaper Co. v. Beacon Hill Architectural Comm'n, 100 F.3d 175, 183 (1st Cir. 1996). A further complication, as we shall see, is that a government, while itself genuinely agreeing with the speech in question, can still be motivated by disagreement with the speech by either the target of the speech or by third parties. *See infra* notes 50-53 and accompanying text.

29. *See, e.g.*, R.V.S., L.L.C. v. City of Rockford, 361 F.3d 402, 407-08 (7th Cir. 2004) (referring to "predominant concerns motivating" the regulation).

30. For a recent discussion of some important issues involved in ascertaining legislative intent generally, see John M. Breen, *Statutory Interpretations and the Lessons of Llewellyn*, 33 Loy. L.A. L. Rev. 263 (2000).

31. But see the apparent assumption to the contrary in *Brentwood Acad. v. Brentwood Tenn. Secondary Sch. Athletic Ass'n*, 262 F.3d 543, 551-53 (6th Cir. 2001) (assuming that, because the regulation at issue was not a complete ban, the regulation was not CB).

32. However, close linkages exist between CB regulations and regulations motivated by or expressing the relevant government's disagreement with the message thought to be conveyed by the speech. *See, e.g.*, *Ward*, 491 U.S. at 791; *Knights of Columbus*, 272 F.3d at 31 ("To ascertain

trinal clarity begin to proliferate at this point.

One problem is that a government might genuinely agree with a message, yet regulate that message based on its content for various reasons. A government might agree with a speaker's message, but believe that the speech is premature and will likely backfire or be misunderstood. Alternatively, the government might agree with the message, but fear that public discussion of the message will alienate an important group or distract the public from more important matters.

Courts have widely agreed that the CB restriction category must include, at a minimum, viewpoint-based restrictions on speech,[33] along with some, if not all,[34] restrictions based on the subject matter of the speech.[35] Even setting aside the question of whether some subject-matter-based regulations are really CN rather than CB, the problems continue to expand.

Justice Scalia takes issue, for example, with the Court's belief[36] that viewpoint-based regulations and subject-matter-based regulations together exhaust the category of all CB regulations.[37] Is there really some third form of CB speech regulation, beyond those based on viewpoint or subject matter? Justice Scalia argues that it "would be absurd"

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whether a regulation is content-based, an inquiring court must determine whether it regulates speech because of disagreement with the particular message that the speech conveys.").

33. *See generally* Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99 (1996) (providing general background information on viewpoint-based restrictions on speech).

34. This qualification seeks to hold open the bare possibility that all regulation of the discussion of particular subjects is not CB speech regulation. *See generally* Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978). To choose an admittedly trivial example, a town might impose a time, place, or manner restriction on speech in the form of prohibiting examination of any volume in the philosophy section of the public library, but only because all of those, and only those, volumes are presently water-logged or heat-damaged. Such a regulation could count as subject-matter-based, at least in some coincidental sense, without also counting as CB, in the sense that the meaning or interpretation of the regulated speech really is not at issue.

Or consider a library regulation that regularly closes, for a two-week period, whichever subject-matter division of the collection is most used over the preceding year, on the theory that the books in that section will require the most binding or page repair. Here, the choice to restrict access to a particular subject is less coincidental, but still not CB in the sense that the government does not have an interest in the content or ideas expressed by the discussion of the particular chosen subject, but is only interested in the need to repair damaged pages. Such a subject-matter-based regulation would ordinarily not seem suspicious or worthy of rigorous judicial scrutiny.

This, of course, does not deny the more trivial, inevitable sense in which books discussing a particular subject matter will inescapably do so through their content. Regardless, restrictions such as those above should ordinarily not evoke strict judicial scrutiny.

35. *See, e.g.*, Chemerinsky, *supra* note 4, at 51 (stating that "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").

36. *See* Hill v. Colorado, 530 U.S. 703, 723-24 (2000).

37. *See id.* at 743 (Scalia, J., dissenting).

to hold that there is not.[38]

Justice Scalia's own example of a CB regulation that is neither viewpoint-based nor subject-matter-based is interesting, but unclear. Scalia asks us to imagine a restriction placed on all but "happy speech."[39] Speech expressing one's happiness in the success or failure of any political party, or on any subject about which one could express actual present happiness, would remain unrestricted.[40] Scalia thus assumes that the subjects about which one could express one's actual current happiness encompass all possible subjects about which one might want to speak.

Justice Scalia also assumes that persons could speak happily of the success or failure of any political idea, program, ideology, or party, thus illustrating the apparent viewpoint-neutrality of the "happy speech" regulation. Such a rule might well be called viewpoint neutral, if the permission for "happy speech" was tenseless. Perhaps Scalia means to include speech that merely predicts or anticipates future happiness, that refers to past happiness now lost, or speech that specifies conditions under which one would be happy. But if not—if the regulatory permission covers only expressions of actual current happiness—the situation is more complicated. Whether there remains any sense in which the "happy speech" rule is viewpoint neutral, there is an important sense in which it is not.

As we interpret Justice Scalia's hypothetical rule, no one could say that they would be happy only if the current political regime were changed in some way. Admittedly, saying that one would be happy only if one could be sure that the regime would remain unchanged would also be subject to legal regulation. But the "happy talk" rule is still in an important sense not politically neutral. Some regimes value expressions of current unhappiness and dissent more than others, and would have little stake in a "happy speech" rule. The genuine liberal democracy, for example, welcomes meaningful political dissent.[41]

But a literal "brave new world"[42] could easily adjust to a "happy speech" rule, allowing speech on various subjects from various viewpoints, as long as the purpose was to express one's current happiness with one or more features of the overall totalitarian-manipulated state of

38. *Id.* at 743.

39. *Id.*

40. *See id.*

41. *See, e.g.*, Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) (explaining that allowing for dissenting speech and inviting or creating dissatisfaction with political conditions is a hallmark of a free, as opposed to a totalitarian, society).

42. *See generally* ALDOUS HUXLEY, BRAVE NEW WORLD (Doubleday, Doran & Company, Inc.) (1932).

affairs. Expressions of mere current happiness with the "brave new world," overall or in any respect, are hardly conducive to regime change.[43] In a key sense, the "happy speech" rule is, by its very essence, much better attuned to the "overall" viewpoint of the "brave new world" than to the "overall" viewpoint of liberal democracy.

We may still, with Justice Scalia, want to classify the "happy speech" rule as nonetheless viewpoint and subject-matter neutral. However neutral we find the rule, its essential affinity with an Orwellian "brave new world" illustrates the clear, politically repressive potential of such a "neutral rule." Ultimately, we must care more about the politically repressive potential of a rule, than the form of neutrality of any such rule. It is this crucial concern for the realistic politically repressive potential of any speech regulation that should control the overgrown complications of the CB-CN distinction.

On this point, we have assumed that there are practical distinctions to be drawn between regulating speech on the basis of its subject matter and on the basis of its viewpoint.[44] This familiar distinction is partially motivated by the sense that "[o]pinions and viewpoints can be repugnant or offensive, but topics or subject matters cannot."[45] The problem though, is that we typically address topics through opinions and viewpoints, regardless of whether those opinions are internal or external to the topic in question, and this blurs the viewpoint/subject matter distinction. Additionally, a person could strongly believe that all discussion of some subject matter, regardless of the viewpoint taken on that subject, is distracting, infantile, premature, degrading, or anti-progressive. Keeping an entire subject, and not merely disfavored views within the scope of that subject, off the public agenda could thus be an important, if often politically repressive, project for those people.

Nor can we say that "shrinking the agenda of a debate in a particular setting is less harmful to free debate within a society than official discrimination against a particular side in a given controversy."[46] It may initially seem that putting some matters entirely off limits for debate is somehow better from the standpoint of free speech than any discrimination against one viewpoint but not another. But it is easy to think of broad classes of counterexamples. Ultimately, the generalization that

43. This is not to suggest that a regime of genuine freedom of speech would have been ushered in merely by an absence of legal punishment for dissenting speech in *Brave New World*; too much governmental control over elemental preferences and thought processes would remain. *See generally id.*

44. This assumption apparently was shared by all of the Justices in *Hill*. 530 U.S. at 703.

45. Wojciech Sadurski, *Does the Subject Matter? Viewpoint Neutrality and Freedom of Speech*, 15 CARDOZO ARTS & ENT. L.J. 315, 337 (1997).

46. *Id.* at 349.

subject-matter restrictions are less grievous than discriminatory viewpoint restrictions is close to meaningless.

The severity of any subject-matter restriction is partly a matter of the established cultural and legal baselines. Prohibiting public discussion from any viewpoint of the entire subject of, for example, gay marriage, before gay marriage is legally instituted, is not remotely equally burdensome on all viewpoints. In fact, it would not be absurd to argue that, for advocates of gay marriage, a complete ban on speech on this subject from any viewpoint might in practice actually be worse than legal restrictions on, or even a prohibition of, pro-gay marriage speech alone.

One might imagine, for example, that the chief obstacle to gay marriage could be its sheer present cultural unthinkability. But if opponents of gay marriage were exclusively permitted to state their case, however frequently, their doing so might inadvertently tend to undermine the sheer cultural inconceivability of gay marriage. To argue repeatedly and extensively against something is to not merely concede its thinkability, but to actually contribute toward its thinkability and toward its familiarity as an idea and an option.

It is also possible that a viewpoint-based ban on advocacy of gay marriage could be self-limiting, and, to some degree, even self-correcting. Some listeners to a prolonged, one-sided "debate" might begin to critique what they heard, and to develop for their own consideration some sort of counter-argument to the established orthodoxy. Nor would it, as John Stuart Mill points out,[47] be unprecedented for a legally entrenched orthodoxy to become increasingly complacent and lifeless, eventually hollowing out its own appeal over time.

This is not to suggest that all viewpoint-based prohibitions can be expected to backfire. Nor does this suggest that disfavored views should welcome their own legal suppression. The point is, instead, that one cannot say that viewpoint-based prohibitions are generally worse than prohibitions of any discussion, from any perspective, of an entire topic. In some meaningful respects, the former may be better; not only from the overall standpoint of free speech interests, but, in some cases, from the political interests of those speakers whose views would be singled out for prohibition. Ultimately, the generalization that subject-matter restrictions are less grievous than discriminatory viewpoint restrictions is close to meaningless.

Of course, not all restrictions on either viewpoint or subject matter are complete prohibitions. A government might regulate the time, place,

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47. *See* JOHN STUART MILL, *On Liberty*, *in* On Liberty: With the Subjection of Women and Chapters on Socialism, 34-35, 42 (Stephan Collini ed., Cambridge Univ. Press 1989) (1859).

or manner of both speech on a particular subject and also speech from a particular viewpoint. It is not clear whether the logic of total prohibitions parallels that of partial time, place, or manner restrictions. How implicitly politically biased could a facially neutral time, place, or manner regulation be in practice? Would preventing evening discussions of gay marriage be better or worse than preventing the evening presentation of all pro-gay marriage viewpoints? The complications continue to compound.

Consider also that every subject-matter restriction and every viewpoint restriction unavoidably leaves a vague[48] set of unrestricted subjects and unrestricted viewpoints. Every speech restriction, no matter how broad, unavoidably leaves some sort of best available speech alternative.[49] With a best available speech alternative, some of what could have been conveyed in the absence of any subject-matter or viewpoint restriction can still be conveyed by speaking about a related, but unrestricted, subject or viewpoint. To one degree or another, there will always remain an unregulated viewpoint that captures some of the meaning and value of one's preferred, but regulated, viewpoint. The question then becomes whether unregulated viewpoints, in general, are usually somehow "closer" to regulated viewpoints than unregulated subjects are to regulated subjects. The complications thus further compound in an irresolute way.

These considerations are merely the beginning of the difficulties in determining the relationships among viewpoint-based, subject-matter-based, and more generally, CB restrictions on speech, along with their assertedly neutral counterparts. All of these difficulties, only a few of which can be illustrated here, jointly compound to undermine the value of the basic CB-CN distinction.

It is reasonable to assume that a government regulation of speech is unlikely to be CB if the regulating government cannot read or understand the regulated speech. How could a government in such a position object on the merits to the speech in question? Even with that speech though, other persons might understand the speech,[50] and the government might care about those persons' reactions to the speech. The regulating government might choose to favor one group's reaction to the

48. For a discussion of vagueness issues in the free speech context, see, for example, *Reno v. ACLU*, 521 U.S. 844, 871-74 (1997).

49. For a discussion of the importance of realistically available alternative channels for speech, see generally R. George Wright, *The Unnecessary Complexity of Free Speech Law*, 9 PACE L. REV. 57 (1989).

50. For a brief elaboration of some actors beyond the regulating government who might or might not be able to read and understand and react to a message, see Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 48-49 (2002).

speech for reasons unrelated to the government's opinion on the issue raised by the regulated speech. In this situation, a government might choose to regulate speech objected to by some foreign government, even if it understood and agreed with the expressed criticisms of the foreign government.[51]

The Supreme Court has held, in *Boos v. Barry*,[52] that a restriction aimed at speech by private parties critical of foreign governments is CB, but not viewpoint-based.[53] The restriction remains CB even if the United States government openly agrees with, or simply does not understand the meaning of, the message in question. Furthermore, the repressive potential of such a speech regulation is clear, even if the regulation, covering embassy protests only,[54] is narrow.

Even if there is agreement that such a regulation is CB, it is not clear why it is not also viewpoint-based.[55] In *Boos*, the Court may have been groping for a way to incorporate the possibility that the government might restrict speech with which it strongly agrees and finds timely. But if the regulation is CB for restricting some speech critical of foreign governments, it should be considered viewpoint-based as well, in that the regulation is typically invoked at the behest of foreign governments when the speaker's viewpoint is critical of the foreign government. The beliefs of the regulating government are no more relevant to the CB inquiry than to the viewpoint-based inquiry.

In any event, *Boos* illustrates the increasingly murky relationships among CB regulations; viewpoint-based regulations; the regulating government's agreement with, disagreement with, or ability to understand the regulated message; and the regulation's realistic repressive potential. Unfortunately, this historically increasing murkiness is not confined to any particular class of cases.

Consider, as a further illustration, the prohibition of speech by a broad class of speakers that is directed specifically at some target audience. Suppose the regulated potential speakers encompass the entire relevant range of viewpoints and ideas. In this formal sense, the regulation is neutral in its direct effects. Suppose also that the regulation could be seen as a broad attempt by the regulating government to protect the integrity of some important decision-making process.

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51. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 318-19 (1988) (holding regulation of foreign language signs critical of a foreign regime within 500 feet of their embassy to be CB, but, oddly, not viewpoint-based, despite statutory prohibition against speech critical of the foreign government).

52. *Id.* at 312.

53. *See id.* at 319.

54. *See id.* at 318-19.

55. *See id.* at 319.

Assuming the regulation in question makes no reference to the content of the regulated speech, if there were something distinctive about the forbidden audience for the speech such that one could generally guess the likely broad subject matter of the speech, though not the speech's viewpoint, from the identity of the distinctive forbidden audience, would that make the regulations CB?

The recent college athletic recruitment case of *Crue v. Aiken*[56] roughly mirrors these facts. In *Crue*, a state university policy prohibited all speech directed toward prospective student-athlete recruits without authorization by the Director of Athletics or his designee.[57] Such a broad rule could easily be characterized as a disfavored prior restraint on freedom of speech, and as an understandable attempt by the university to avoid costly NCAA investigations into possible recruiting violations by university agents.[58]

The plaintiffs in *Crue* had sought to contact prospective university student-athlete recruits to express their view that the university mascot was degrading to Native Americans.[59] Fortunately, other special and particularized free speech tests that did not rely on the CB-CN distinction were available to resolve *Crue*, and the court avoided having to classify the regulation as CB or CN.[60] Had no such alternative tests been available, the court would still have been better advised to adjudicate the case based on an assessment of the realistic repressive potential of the rule than by arbitrarily characterizing the rule as CB or CN.

Often, courts can agree on whether a regulation is CB or CN under particular circumstances, yet find that the proper classification obstructs the legal analysis or is of little help in the reasonable defense of civil liberties. To restrict misleading commercial speech is, admittedly, to restrict such speech on the basis of its content.[61] Many of us would be reluctant though, to impose a demanding strict scrutiny test on such CB restrictions of pure commercial speech, despite our unwillingness to regulate allegedly misleading pure political speech.[62]

In the case of pure commercial speech, the standard CB restriction

56. 370 F.3d 668 (7th Cir. 2004).

57. *Id.* at 676.

58. *Id.* at 678-79.

59. *Id.* at 674.

60. *See id.* at 678-80.

61. *See, e.g.*, United States v. Schiff, 379 F.3d 621, 631 (9th Cir. 2004) (permitting the regulation of content in a commercial setting, here a website that sells products, to prevent customer deception).

62. For a sense of the evolving difference in regulating allegedly misleading and non-misleading commercial speech, see the various opinions comprising *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

test of strict scrutiny seems too demanding.[63] But in other contexts, imposing only mid-level scrutiny on what is "merely" a CN speech regulation seems increasingly common and more profoundly disturbing. Consider, as a starting point, the explicitly CN restrictions on speech upheld by the Supreme Court in *Thomas v. Chicago Park District.*[64] In *Thomas*, the Court treated a system requiring groups of fifty or more persons to obtain a permit for park use for any purpose as CN rather than CB.[65] All groups, from ballplayers and barbecuers to all sorts of political demonstrators, were required to abide by the permitting system,[66] and the criteria applied in granting or denying a permit were facially neutral, aimed more at coordination and public safety than at speech content.[67]

One might wonder about the usefulness of the CB-CN distinction in this general context in an era of public, and certainly governmental, anxiety over security and safety.[68] To the extent that speech permitting systems are subject to CN tests only, free speech may be impaired by exaggerated concerns for safety and security deferred to by courts applying only moderate scrutiny.

On that note, it is important to recognize the extent to which CN tests can, in practice, restrict freedom of speech.[69] In an age of official insecurity and anxiety, the most difficult constitutional problem may not be controlling arbitrariness in permitting, but compensating for a chronic tendency to overestimate the likelihood of any damage to public security from public exercises of freedom of speech.[70] A mechanical application of a moderately stringent CN test is unlikely to alert reviewing courts to any systematic tendency of local agencies to overestimate risk in such contexts.

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63. Applying strict scrutiny to ordinary regulation of misleading or even non-misleading purely commercial speech has the potential to destabilize the familiar New-Deal-era regulatory state, in exchange for an increasingly commercial public culture. *See* R. GEORGE WRIGHT, SELLING WORDS: FREE SPEECH IN A COMMERCIAL CULTURE 12-78 (1997).

64. 534 U.S. 316 (2002).

65. *Id.* at 322-23.

66. *Id.* at 322.

67. *Id.* at 318 n.1, 318-22.

68. For background, see Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2004).

69. *See Thomas*, 534 U.S. at 323 (noting that there is a higher risk of a regulation being CB when licensing officials have broad licensing discretion).

70. *See generally* STONE, *supra* note 68; Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8, 15 (1st Cir. 2004) (upholding, as CN, a city plan to limit demonstrations associated with the Democratic National Convention to a single confined site based on security considerations). *But cf.* Blair v. City of Evansville, 361 F. Supp. 2d 846, 858-59 (S.D. Ind. 2005) (holding that a 500 foot no-protest zone around the Vice President fails security-based CN test on multiple grounds).

In this regard, courts are best advised to focus more directly on both the realistic risks and benefits of even the confrontational elements of public demonstrations, parades, and protests, instead of applying the current, technically correct CN test. Peaceful, visible, issue-focused protest is an element of the life-blood of democracy, not some sort of political pathogen to be kept in quarantine.

IV. THE PATHOLOGICAL COMPLICATIONS OF CONTENT-NEUTRALITY: SOME SPECIFIC EXAMPLES

It seems fair to say that the original understanding of a CN restriction on speech, whatever its ambiguities, is now well-advanced in the process of breaking down. In general, the breakdown takes the form of endless pathological complications. Perhaps the main complication is the application of the CB-CN categories in a wide variety of contexts. In some contexts, a clearly CN regulation of speech may be involved. In others though, a court may believe that some more rigorous constitutional test is actually appropriate, if only an unusually demanding CN test, because of a substantial risk to free speech.

In still other contexts, an evidently CB regulation may surprisingly receive only the moderate scrutiny normally associated with a CN regulation[71]or some variant thereof.[72] This complication may reflect a judicial sense that the real free speech stakes in such cases are actually rather limited.[73] The CB-CN distinction has further complications where courts have paused to consider the real magnitude of the free speech values at issue.

Thus, in *City of Renton v. Playtime Theatres*,[74] the Supreme Court

71. *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); *see also* Fly Fish, Inc. v. City of Cocoa Beach, 337 F.3d 1301, 1306 (11th Cir. 2003) (discussing the Court's use of an intermediate level of scrutiny to review the regulation in *Renton*); Clarkson v. Town of Florence, 198 F. Supp. 2d 997, 1006 (E.D. Wis. 2002).

72. Some CN speech tests impose a requirement that something ranging from "reasonable" to "ample" alternative speech channels remain available to the affected speaker. *See, e.g.*, *City of Renton*, 475 U.S. at 47; Ward v. Rock Against Racism, 491 U.S. 781, 792 (1989). Not all prominent CN speech tests incorporate this alternative speech channel requirement though, which in a practical sense is hardly taken seriously in *Renton*. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 377 (1968) (omitting any such element in the context of a supposedly CN regulation prohibiting draft card destruction even as an act of symbolic conduct); City of Erie v. Pap's A.M., 529 U.S. 277, 289-90 (2000) (plurality opinion) (applying the *O'Brien* test to determine what level of scrutiny should be imposed on a CN restriction aimed at all public nudity and not exclusively at expressive public nudity, for the sake of minimizing criminal and other "secondary effects" as in *Renton*, with no mention of the alternative speech channel requirement).

73. *See, e.g.*, *Clarkson*, 198 F. Supp. 2d at 1008 (stating that "City of Erie seems to suggest that intermediate rather than strict scrutiny should apply to restrictions on nude dancing even if they are content-based . . ."). *See infra* note 98 and accompanying text.

74. *City of Renton*, 475 U.S. at 41.

chose to apply one version of a CN test to a zoning ordinance that targeted adult movie theaters while omitting theaters showing other types of movies.[75] The facially CB restriction was treated as CN, the Court claiming that it was aimed not at discouraging disfavored speech content but at the "secondary effects" of the speech, including law enforcement, public health, and welfare concerns associated with adult theaters.[76]

The distinction between "primary" and "secondary" effects of speech is crucial to *Renton*'s extension of the idea of content-neutrality. The rough idea seems to be that some socially undesirable effects of speech are primary, such as an increased general distrust, cynicism, uncooperativeness, or decreased work effort attributable to an audience who agrees with a disheartening speech, but these sorts of effects are either part of what we seek from freedom of speech, or are inseparable therefrom.[77] Other sorts of socially undesirable effects somehow linked to speech are, in contrast, thought of as secondary. If this distinction is to make much sense as it is currently used, "secondary" effects of speech cannot be crucially mediated by the cognitive or emotional[78] reactions the speech invokes in the audience. In the simplest case, a secondary effect of speech cannot depend upon whether an audience agrees or disagrees with or is moved by the speech. Such effects are instead primary effects.

Thus, the Court in *Renton* was willing to treat increased neighborhood crime rates, quality of life concerns, public health concerns, and decreased neighborhood property values as secondary effects of the adult movie speech in question.[79] Can we say that the Court has established a distinction between primary and secondary effects of speech that is reasonably clear and that tracks the important underlying free speech concerns?

As it turns out, the primary versus secondary speech effect distinction merely further complicates the CB-CN distinction without clarify-

75. *See id.* at 47.

76. *See id.* at 47-49. Justice Kennedy has referred to the classification of the regulation in *Renton* as "something of a fiction." City of Los Angeles v. Alameda Books, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring); *see also id.* at 457 (Souter, J., dissenting) (referring to the regulation in *Renton* as "content correlated" in a "limbo" between genuinely CN and CB restrictions).

77. *See, e.g.*, Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) (explaining that "[t]he vitality of civil and political institutions in our society depends on free discussion" and that "a function of free speech is to invite dispute," concluding that "the alternative would lead to standardization of ideas").

78. *Cohen v. California*, 403 U.S. 15, 26 (1971), establishes protection for the emotive force of words, beyond their narrower cognitive import. For a general discussion, see R. George Wright, *An Emotion-Based Approach to Freedom of Speech*, 34 LOY. U. CHI. L.J. 429 (2003).

79. *See City of Renton*, 475 U.S. at 47-49.

ing why some facially CB regulations should receive only a looser, CN test. Assuming that it can be sufficiently shown that crimes tend to escalate, as local property values diminish, in response to the presence of one or more adult movie theaters, do the adult movie theaters actually cause those effects?

Property values in the area may diminish as a result of broken glass or excessive trash accumulation causally attributable to the adult theaters. But it may be difficult to meaningfully link the broken glass to the viewpoints, message contents, or subject matter of the adult movies, or even to the cognitive and emotional reactions of movie patrons, neighborhood residents, or the regulating government. In this respect, testing a government regulation of speech aimed at the problem of broken glass by some sort of moderate scrutiny seems justifiable.

If some of the causal chains running from the adult theaters to the reduced property values took a somewhat different path, a different analysis may be required. What if some of the causal chains were crucially mediated by personal judgments of the value of the adult theaters, of their lack of respectability, or of the speech in which they engaged? What if property values diminished in part because of the perceived social symbolism of the presence of adult theaters, or a perceived absence of neighborhood leadership, or the sheer unpopularity in some quarters of the adult theaters, including the local unpopularity of the general nature of adult movies? In such a case, a government regulation aimed at enhancing property values through regulating speech would not affect the content of the speech in a mere incidental way. Instead, the speech regulation would respond to and validate a hostile local reaction to the adult theaters and the content of their speech. The speech regulation in such a case seems more clearly CB.

Courts are not incapable of performing this kind of analysis. In *City of Cleburne v. Cleburne Living Center*,[80] by analogy, the Court undertook an unusually aggressive minimum scrutiny equal protection analysis of a zoning decision with respect to a group home for mentally impaired persons. The city had cited and relied upon a number of considerations, including "the negative attitude of a majority of [nearby] property owners . . . ."[81] However, the Court explained that the law could not give such negative attitudes direct or indirect effect.[82] Even apparently neutral concerns regarding flooding, legal responsibility, housing density, population concentration, fire hazards, and street congestion could not justify the city's decision if bias against mentally

80. 473 U.S. 432 (1985).
81. *Id.* at 448.
82. *Id.*

impaired persons was the best explanation for such concerns.[83]

From *City of Cleburne*, it is clear that if a zoning decision is motivated by negative attitudes toward the mentally retarded, the decision cannot stand. In a loosely parallel way, apparently neutral concerns for property values should not serve to reduce the level of judicial scrutiny of speech regulations if those concerns reflect direct or indirect audience distaste for the speech. In such cases, reduced property values are not mere side effects of the speech, but the result of a considered reaction[84] to the speech. Few censors in any culture would be unwilling to predict bad social consequences from their failure to censor.

By way of further complication, *City of Renton* certainly does not provide the only general model for a CN free-speech test. In some indeterminate class of cases involving incidental restrictions on symbolic speech or on mixed speech and conduct, the courts may choose to apply a different CN restriction test. This version of a CN test was enunciated in the draft-card-burning case of *United States v. O'Brien*.[85] In this context, the Court has said:

> [A] government regulation is sufficiently justified if it is within the constitutional power of government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[86]

The *O'Brien* CN regulation test can thus be contrasted with the *City of Renton* CN regulation test. When the *City of Renton* version applies, the court must examine whether the speech regulation "is designed to serve a substantial government interest and allows for reasonable alternative avenues of communication."[87] While this formulation by itself does not refer to any need for narrow tailoring, or the avoidance of over or under-inclusiveness of the regulation, the Court in *Renton* then goes on to include just such a narrow tailoring requirement as a necessary element.[88]

The most significant difference between the *O'Brien* and *Renton*

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83. *Id.* at 449-50.

84. It has been observed that a "[l]istener's reaction to speech is not a content-neutral basis for regulation." Forsyth County v. Nationalist Movement, 505 U.S. 123, 134 (1992). Presumably, literal reactions to speech such as being startled, or even being merely distracted, do not normally count as considered reactions in this sense.

85. 391 U.S. 367 (1968).

86. *Id.* at 377.

87. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986).

88. *Id.* at 52 (stating that "the Renton ordinance is 'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects, thus avoiding the flaw that proved fatal to the regulations in *Schad*").

tests is the requirement in *Renton*, omitted in *O'Brien*, that the regulation leave alternative channels of communication open and available for the speaker's use.[89] The phrasing of this alternative-speech-channels requirement unpredictably varies from case to case, as does the rigor or laxity of its demands in practice.[90]

Regardless, the courts are, presumably, to apply either some version of the *Renton* test or the *O'Brien* test to CN regulations in proper contexts. The difference in their scope of applicability is, however, not entirely clear. One court has understandably suggested that "[t]he *City of Renton* test applies to reasonable time, place or manner restrictions in the adult entertainment context, and the *O'Brien* test applies to content-neutral ordinances directed at a general class of conduct that have an unintended impact on expression."[91]

On the basis of this possible distinction between the adult-entertainment-focused scope of *Renton* and the more general scope of *O'Brien*, one might not have predicted that the commercial nude dancing case of *City of Erie v. Pap's A.M.*[92] would be addressed under *O'Brien* rather than under *Renton*. The ordinance in *City of Erie* was considered to be a general prohibition on public nudity,[93] which was construed as conduct, regardless of whether the public nudity in question involved any erotic or other expressive message or not.[94] Hence, the Court in *City of Erie*

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89. *See id.* at 50.

90. Whether the remaining available speech channels must merely be unimpeded, or "reasonable," or "ample" is unclear. *Compare, e.g., id.* (stating that the restrictions must be "reasonable"); R.V.S., L.L.C. v. City of Rockford, 361 F.3d 402, 407 (7th Cir. 2004); Derusso v. City of Albany, 205 F. Supp. 2d 16, 19 (N.D.N.Y. 2004) (stating that the restrictions must "not unreasonably limit alternative avenues of expression); *with* Gammoh v. City of La Habra, 395 F.3d 1114, 1125-26 (9th Cir. 2004), *amended by* 402 F.3d 875 (9th Cir. 2005), *cert. denied*, 74 U.S.L.W. 3026 (U.S. Oct. 3, 2005) (requiring simply "open alternative avenues of communication" with no further qualification); Gammoh v. City of La Habra, 402 F.3d 875, 876 (9th Cir. 2005), *amending* 395 F.3d 1114 (9th Cir. 2004), *cert. denied*, 74 U.S.L.W. 3026 (U.S. Oct. 3, 2005) (requiring that the "open" alternatives also be "ample"); Make the Road by Walking, Inc. v. Turner, 378 F.3d 133, 142 (2d Cir. 2004); Fly Fish, Inc. v. City of Cocoa Beach, 337 F.3d 1301, 1306 (11th Cir. 2003). Justice Kennedy takes an especially demanding position on this issue. According to Justice Kennedy, the regulation must leave "the quantity of speech . . . substantially undiminished," while substantially reducing the undesired secondary effects of the regulated speech. *See* City of Los Angeles v. Alameda Books, 535 U.S. 425, 451 (2002) (Kennedy, J., concurring); World Wide Video v. City of Spokane, 368 F.3d 1186, 1194 (9th Cir. 2004), *amended by* 2004 U.S. App. LEXIS 18927 (9th Cir. 2004) (discussing Justice Kennedy's position).

91. Clarkson v. Town of Florence, Inc., 198 F. Supp. 2d 997, 1008 (E.D. Wis. 2002); *accord* G.M. Enters., Inc. v. Town of St. Joseph, 350 F.3d 631, 638 (7th Cir. 2003) (noting that the *Renton* test applies to zoning regulations aimed at secondary effects of adult businesses, and the *O'Brien* test applies to "[r]egulations of public nudity").

92. 529 U.S. 277 (2000) (plurality opinion).

93. *Id.* at 290.

94. *Id.*

opted for the *O'Brien* test.[95]

The division of labor between the distinct tests in *Renton* and *O'Brien* in arguably CN regulation contexts adds further complexity to the CB-CN analysis. One might wonder, though, whether the chief difference between the tests, *Renton*'s requirement of an alternative available speech channel, actually tracks the differences between the *Renton* and *O'Brien* contexts.

The courts have not explained why the protections afforded by alternative-speech-channel requirements should be confined, in this context, to *Renton* without including *O'Brien* cases.[96] *O'Brien*, after all, involved a dramatic, principled, and conscientious protest of a major national policy.[97] *Renton* cases by their nature involve commercial sexual entertainment speech regulated for its secondary effects.[98] It remains unclear why courts feel bound to insist on alternative speech channels for *Renton* speech, but not for the arguably much more crucial category of *O'Brien* speech.[99]

V. The Often Murky Boundaries Between Content-Based and Content-Neutral Regulations

The preceding section briefly addressed some confusion over the proper classification of the type of regulations at issue in *City of Renton.* One might wonder whether the regulations should be classified as CN, in aiming at secondary effects rather than the message of the speech, or as CB, in singling out adult-movie speech, even if the regulations are then subjected only to a CN restriction test.[100]

In reality, the scope of general uncertainty over the CB-CN distinction is far broader than the *City of Renton* context and its associated boundary problems. Often, characterizing a speech regulation as CB or CN will prove to be inconsistent and arbitrary. The crucial CB-CN choice will depend upon how circumstances are conceived and described, how legislative purposes and motives are characterized, and

95. *Id.* at 289-91.

96. The commonly underappreciated importance of available alternative-speech-channel analysis is discussed in R. George Wright, *The Unnecessary Complexity of Free Speech Law*, *supra* note 49.

97. *See generally* United States v. O'Brien, 391 U.S. 367 (1968).

98. *See generally* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

99. The courts have often grudgingly extended free speech protection, even of a limited sort, to commercial sexual entertainment speech. *See City of Erie*, 529 U.S. at 289 (plurality opinion) (stating that commercial nude dancing "falls only within the outer ambit of the First Amendment's protection"); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) (plurality opinion) (referring to nude dancing at issue as "within the outer perimeters of the First Amendment, though we view it as only marginally so").

100. *See supra* notes 73-83 and accompanying text.

how willing courts are to probe beneath the formally recorded evidence of legislative intent. Often, a given speech regulation could quite reasonably be held to fall within either the CB or CN category.

The following cases provide brief illustrations of this widespread uncertainty. One of the best known judicial disputes over whether a particular set of rules was CB or CN occurred in *Turner Broadcasting Systems, Inc. v. FCC (Turner I)*.[101] The regulations at issue in *Turner I* required cable television systems to carry the programming of local broadcasters, lest the availability of free local television programming be lost to consumers without cable.[102] The *Turner I* plurality, in holding the regulations to be CN, emphasized the congressional desire for the continuing viability of local broadcast stations, as opposed to any desire to promote particular viewpoints or subject matter.[103]

Yet didn't the must-carry rules, in a real sense, either burden or benefit speakers based on the content of their speech? It would hardly be a stretch to argue that the must-carry rules were intended to enhance or preserve the distinctive perspectives of local broadcasters. Local broadcasters were thought to be knowledgeable of and concerned about their local communities. Their speech interests were preserved at the expense of the speech interests of the cable system operators, whose choices among programming were clearly constrained by governmental rule. To impose rules promoting the survival of locally-oriented programming on cable systems and via broadcast, beyond the results that might be reached by negotiation among the parties, is to intentionally affect the mix of available voices, and arguably enhance diversity among voices.

Whether these must-carry regulations are CB or CN is a reasonably close question.[104] It is quite reasonable to argue, as Justice O'Connor does, that "[p]references for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make reference to content."[105] Certainly, in a literal sense, a mandated preference for local news is a mandated preference on the basis of content.[106]

What *Turner I* presents us with is a set of circumstances interestingly different from those of *City of Renton*. In *Renton*, literally CB regulations were treated as CN because the limitations imposed on free speech were remote from the free speech core and, frankly, often rather

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101. 512 U.S. 622 (1994) (plurality opinion).

102. *Id.* at 646.

103. *Id.*

104. *But see id.* at 674-86 (O'Connor, J., concurring in part and dissenting in part).

105. *Id.* at 677.

106. *See id.* at 678.

trivial from the standpoint of free speech itself.[107] In *Turner I*, it could reasonably be said that whatever freedom of speech was lost by cable systems, as measured by the suppression of any intended message, such loss was limited in its magnitude, and was compensated for by an overall increase in the sheer number and diversity of voices available. In effect, a literally CB regulation in *Turner I* could be re-characterized, in good conscience, as CN, not merely because the intentions and effects of the must-carry regulations were benign, but because the regulations, on balance, arguably promoted free speech itself. Why, pragmatically, would one wish to impose a genuinely rigorous CB test on a generally free-speech-promoting rule?[108]

Turner I, to a limited degree, anticipates our thesis that what ultimately matters is not the CB-CN classification in any of its increasingly baroque and formal categorical refinements. Instead, what matters is an informed judicial sense of the regulation's realistic potential for repression of speech, or, such as in *Turner I*, the rule's potential to actually contribute, on balance, to the flourishing of freedom of speech.[109]

Also consider, by way of further example, *Hess*-like cases,[110] in which our desire to protect the speech in question is often clearer than our ability to classify a restriction on the speech in question as either CB or CN. Even a case in which a speaker is arrested for explicitly inciting a group to walk into the street for political demonstration purposes may not be the purest possible CB restriction. Presumably, the arresting officer in such a case must understand the words and in some sense disagree with the speaker's counsel in making the arrest. But it is also possible that the arresting officer, and indeed all local public officials, genuinely favor the protesters' cause in every respect, but are simply more aware of public access[111] or street safety concerns. Perhaps the protesters and the local government are in full political agreement. Under these specified circumstances, the realistic politically repressive potential of the restriction on speech seems limited.

As one variation on such a set of facts, consider a protest march along narrow sidewalks that, by virtue of its unexpected size, non-maliciously threatens to spill uncontrollably onto the street thereby creating

107. *See supra* notes 97-98 and accompanying text.

108. All else being equal, we shall assume, the number and variety of genuinely audible voices contributes to freedom of speech. *See* MILL, *supra* note 47, at 19-55.

109. *Cf.* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997) (*Turner II*) (upholding the must-carry rules under pragmatically, if not literally, appropriate mid-level scrutiny rules).

110. This hypothetical class of cases draws upon the alleged subversive advocacy or illegal incitement case of *Hess v. Indiana*, 414 U.S. 105 (1973), which follows the classic test imposed in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

111. *See, e.g.*, Veneklase v. City of Fargo, 248 F.3d 738, 744 (8th Cir. 2001) (recognizing the State's interest in "protecting access" as CN in nature).

genuine safety risks and impairing traffic flow. If the escorting police officers are realistically concerned about such risks, and warn a potential speaker not to use a bull horn for speech of any content, including speech encouraging taking to the streets, lest persons spill into the streets for the sole purpose of simply hearing what the user of the bull horn is attempting to convey, such crowd reactions would not be reactions to the content, message, or ideas sought to be conveyed by the speaker. And again, no one's disagreement with any such ideas would be relevant. One could thus easily classify such a restriction on speech as CN.[112] Yet it is less clear that some sort of mid-level scrutiny test would be sufficient in such a case. The potential for repressive abuse, consciously or unconsciously imposed, in arguably similar cases seems too significant.

Sometimes the problem will not be that we are conscientiously tempted to treat a CB regulation as CN, or vice versa. Instead, sometimes the proper classification of a restriction as CN or CB is elusive and controversial. Suppose, for example, that a government seeks to control the decibel level or the mix of particular instruments at a concert in a public or private place, for the sake of preventing disruption of neighbors who would prefer to sleep. In an early case, *Kovacs v. Cooper*,[113] the Court upheld an ordinance containing language regulating "loud and raucous noises" against claims of undue vagueness.[114] Are enthusiastic advocates and equally avid opponents of a particular speech's content likely to agree on when a broadcast is "loud and raucous"? Can it be assumed that governmental enforcers of such a rule will not, even if only subconsciously, allow their own sympathies to affect their perceptions of what is "loud and raucous"? This seems unrealistic.

More subtle, but no less real, are concerns that sound and mix[115] regulations of protected musical speech[116] can easily drift from CN to CB. The leading case in the sound control context, *Ward v. Rock Against Racism*,[117] upheld, under mid-level scrutiny, a requirement to use city equipment and a city sound technician for all public performances.[118] Crucially, such requirements were held to be CN. The Court summarized the law in this fashion:

112. Even in the classically CN speech regulation case of *Kovacs v. Cooper*, 336 U.S. 77 (1949), there could have been various audience mental reactions to the amplified sound truck's operation, including being awoken, startled annoyance, distraction, and so forth.

113. *Id.*

114. *Id.* at 78-79.

115. "The use of amplification to adjust the relative volume and tonal qualities of voices and instruments is called 'mixing.'" Casey v. City of Newport, 308 F.3d 106, 118 n.8 (1st Cir. 2002).

116. For the free speech protection of instrumental and vocal music, see, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989).

117. *Id.*

118. *See id.* at 784, 791-94.

> The principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of the expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is "*justified* without reference to the content of the regulated speech."[119]

Applying this standard in the dispute involving Central Park and neighborhood residents, the Court went on to hold:

> The principal justification . . . is the City's desire to control noise levels at bandshell events, in order to retain the character of the Sheep Meadow and its more sedate activities, and to avoid undue intrusion into residential areas and other areas of the park. This justification . . . "ha[s] nothing to do with content."[120]

The Supreme Court is thus committed to the view that authoritatively changing the sound volume, or the audible mix of instruments, voices, and tones, does not change the content of the musical message. There is plainly a sense in which a message, played louder, is no longer the same message. This is roughly similar to the way in which a verbal message, delivered with greater intensity or insistence, or in a different tone of voice, is changed in its content.[121] At least in certain contexts, emphasizing different instruments, voices, or tones alters the content of the musical message.[122]

Perhaps, therefore, the Court in *Ward* should have recognized the city's sound regime as CB. Nevertheless, it is at least possible that underlying the Court's consideration was a sense that limitations on sound volume and mix should be tested only for reasonableness, in the absence of evidence of any repressive government agenda, or any especially dramatic effect on the messages that the music conveys.

These examples should not be taken to suggest that the boundary between CN and CB regulations is hazy or unmanageable only in some

119. *Id.* at 791 (citations omitted).

120. *Id.* at 792 (quoting Boos v. Barry, 485 U.S. 312, 320 (1988)).

121. In general, it would seem doubtful that rock music is of the same content whether played sedately or raucously and regardless of any balance among instruments or voices. Similarly, contrast, for example, various memorable performances of the Star-Spangled Banner.

122. The First Circuit Court of Appeals has recognized that sound amplification can "create new 'messages' that cannot be conveyed without amplification equipment." Casey v. City of Newport, 308 F.3d 106, 118 (1st Cir. 2002). The *Casey* court explained that "[a]mplification enables performers to boost the relative volume of quiet instruments, such as the bass and the lower registers of the human voice, and to adjust the tonal qualities of voices and instruments without necessarily increasing the overall volume of the performance." *Id.*

special contexts. It is mainly a matter of the reasonable limits of a reader's patience that prevents further illustration of the point in a greater variety of contexts. The list of important contexts in which the CB-CN distinction ranges from murky to indeterminate could be extended indefinitely.[123]

VI. Conclusion: Choosing a More Direct and Intuitive Approach from Among the Reform Options

As this article has demonstrated, the distinction between CB and CN speech regulations has been remarkably complicated. One possible response to the burgeoning complexity is to try to account for many of the relevant considerations in a formalistic way. As these formal distinctions are drawn or detected, additional subcategories of the CB-CN distinction are recognized and developed. Thus, in one proposed reform scheme,[124] free speech cases are said to "involve the interaction of five variables: content,[125] character,[126] context,[127] nature,[128] and

123. For illustration of some important contexts, see, for example, *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (discussing the speech limits on harassing, degrading, or anti-egalitarian workplace speech under Title VII as CN rather than CB); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (involving an indirect restraint on descriptions of one's own criminal activities, but not on the subject of crime in general, and regardless of the speaker's boastful or repentant viewpoint; holding that no illicit governmental motive present). See also any flag-burning case involving a protected message arguably distinguishable from the generally offensive manner of delivering that message and even the question of whether ordinary copyright laws should be thought of as a CB or CN restriction on speech. After all, copyright law requires careful examination and understanding of texts to determine its applicability, but copyright rules also do not seem based on viewpoint or subject matter. *See, e.g.*, Erwin Chemerinsky, *Balancing Copyright Protections and Freedom of Speech: Why the Copyright Extension Act is Unconstitutional*, 36 Loy. L.A. L. Rev. 83, 92-93 (2002) (discussing the arguments for both classifications). On the narrow question of the viewpoint neutrality of a public transportation authority's rejection of demeaning or disparaging religious advertisements, see *Ridley v. Mass. Bay Trans. Auth.*, 390 F.3d 65, 91, 99 (1st Cir. 2004) (Torruella, J., concurring in part and dissenting in part) (concluding that such regulations are "intrinsically view-point oriented," biased, and discriminatory).

124. *See* Wilson R. Huhn, *Assessing the Constitutionality of Laws That Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 Ind. L.J. 801 (2004). Professor Huhn's broader proposals are explicitly based upon Justice Stevens' descriptive account of the Court's CB restriction jurisprudence. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 416, 429-31 (1992) (Stevens, J., concurring).

125. "Content" here refers to the subject matter of the speech, as in the categories of political speech, fighting words, commercial speech, or sexually explicit speech. Huhn, *supra* note 124, at 811; *R.A.V.*, 505 U.S. at 429.

126. "Character" here refers to the differences between written and oral speech and symbolic conduct. Huhn, *supra* note 124, at 811; *R.A.V.*, 505 U.S. at 429.

127. "Context" refers to institutional circumstances such as public schools, labor union disputes, and various sorts of public fora. Huhn, *supra* note 124, at 812; *R.A.V.*, 505 U.S. at 429-30.

128. The "nature" of the restriction encompasses categories such as prior restraints and

scope"[129] in assessing the constitutional value of the speech, the appropriate burden on the state in justifying the regulation, and the degree of tailoring required of the regulation in question.[130] But even this reform proposal treats the "easy" CB-CN classification cases as "essentially outcome-determinative."[131]

A judge who carefully and explicitly works through all of these categories and considerations may, in some sense, be teaching interested citizens about first amendment doctrine. Such a judge, however, will also be reducing the likelihood that such citizens will take away any judicially intended central message from the case. Some balance must be struck between exhaustiveness or formal rigor in justification on the one hand, and sheer meaningfulness and memorability on the other. Judicial opinions are unlikely to either meaningfully instruct the public or maintain proper public devotion to freedom of speech if they consist solely of increasingly complex algorithms and formulas which are only rarely explicitly linked to basic free speech values.

These reform efforts rightly emphasize the frequent difficulty of determining whether a regulation is CB or CN. Many regulations are capable of being recharacterized, or seem to involve a mixture of elements.[132] But reform efforts must also recognize that classification is only one part of the problem. Often, a regulation fits easily within either the CB or the CN rubric, but the associated CB strict scrutiny or moderate level CN scrutiny does not seem to fit the formally proper CB or CN classification of the regulation. That is, the CB or CN classifications themselves seem appropriate, but the corresponding free speech test may seem unduly risky, costly, or otherwise inappropriate.

As detailed above, one judicial response to this perception of a mismatch between the proper classification and the proper degree of judicial scrutiny is to further the now baroque complexity of the CB-CN formulations. A match between the classification and the degree of scrutiny can thus be restored, but only at the cost of further departure from the initially apparently intuitive CB-CN distinction.

Another judicial response to the classification/level of scrutiny mismatch is to accept the result of the classification process, and to then apply, straightforwardly or with some subconscious adjustment toward

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subject-matter versus viewpoint-based restrictions. Huhn, *supra* note 124, at 812; *R.A.V.*, 505 U.S. at 430-31.

129. The "scope" of the restriction considers the differences between time, place, and manner restrictions and absolute prohibitions, as well as restrictions confined to particular media. Huhn, *supra* note 124, at 812; *R.A.V.*, 505 U.S. at 431.

130. Huhn, *supra* note 124, at 813.

131. *Id.* at 860. Viewpoint-based restrictions would be prohibited per se.

132. *See id.*

common sense, the formally required degree of judicial scrutiny. The costs of this passive, or passive-aggressive, response can be significant. Applying only relaxed scrutiny to a CN regulation that somehow imposes special burdens on free speech involves accepting unnecessary costs in basic free speech values.[133]

One may be less disturbed when a realistically non-threatening but genuinely CB regulation is subjected to rigorous free speech review. Some broad reform proposals have explicitly aimed at increased rigor of free speech review across the board. Professor Martin Redish, for example, has argued for collapsing the scrutiny level of CN restrictions into that of CB restrictions.[134] The courts would then "subject all restrictions on expression to the same critical scrutiny traditionally reserved for regulations drawn in terms of content."[135]

The costs of this uniformly enhanced free speech protection against CN restrictions seem significant.[136] Although it is certainly possible for a CN restriction to be as destructive to free speech values as a view-

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133. This is the cost associated with proposals that the CB-CN distinction be reformed into a "bright-line" test, focusing on the role of communicative impact or understanding, and based essentially on the face itself of the government regulation. *See, e.g.*, Leslie Gielow Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Distinctions*, 34 McGeorge L. Rev. 595, 622-23 (2003). At worst, such constitutional tests increase the illicit payoffs of legislative indirection and pretext. Bright-line tests have costs in other contexts as well. CN restrictions on inexpensive media relied on by the poor, such as posters and signs, may well have a disproportionate effect on the speech of the poor. Although decided in the context of an electoral campaign, *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1989), is worth examination in this regard. *See also* Talley v. California, 362 U.S. 60 (1960) (protecting the right to anonymous hand billing, despite the risk of libel, in light of historical retaliation imposed on persecuted groups for speaking out). For a brief defense of the role of rules versus discretion in this area, see *City of Ladue v. Gilleo*, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring).

134. Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 Stan. L. Rev. 113, 142 (1981). Susan H. Williams takes a more moderate approach, arguing that some regulations currently classed as CN are in practice CB in one way or another, thereby raising distinct constitutional concerns and deserving different judicial analyses. Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. Pa. L. Rev. 615, 620-21 (1991).

135. Redish, *supra* note 134, at 142. Actually, Professor Redish appears to require an especially compelling government interest in cases in which the regulation leaves the speaker with no remotely adequate alternative speech channels. *Id.* at 143. More broadly, the courts may well treat some instances of CB restriction with less critical scrutiny than others, even without articulating why. Paul B. Stephan, *The First Amendment and Content Discrimination*, 68 Va. L. Rev. 203, 206-07, 251 (1982). Professor Daniel Farber has argued that CB restrictions are actually subjected to two tests: first, an equal-protection-like analysis that subjects only viewpoint-based regulations to strict scrutiny, and then a residual test balancing the government interests promoted against the adverse impact on speech. Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 Geo. L.J. 721, 729-30 (1980).

136. *See, e.g.*, Stone, *supra* note 4, at 116 (arguing that "extension of the strict standards of content-based review to content-neutral restrictions would hamstring regulations that are practical and necessary exercises of state power"). Dean Stone's recommendation is for the Court to clarify explicitly the line between CB and CN restrictions, as well as the use of the seven tests and three

point-based restriction, there are some instances of CN regulation that simply do not pose much of a realistic risk of significant speech-repressive potential. Predictably benign CN restrictions may serve useful and genuine, though not compelling, public interests. Some instances of limiting noise for the sake of peace and tranquility may fall into this category. Ordinary citizens may wonder why useful and benign public interests should be sacrificed on the altar of strict scrutiny. Eventually, those citizens may begin to wonder whether the constitutional status of free speech itself, outside of limited contexts, has been overrated.

In truth, CN restrictions can run the gamut from trivial to calamitous in their effects on freedom of speech. It is at least as important to recognize that CB restrictions on speech, as well, can run the same gamut from trivial to calamitous effects of free speech. Where the typical CN or CB regulation case will fall on this scale is another matter. Most of the reform proposals say little about this CB-CN scale correspondence, or about the price in various constitutional and non-constitutional values the reforms would require us to pay over the long term.

Consider, by way of example, the case of *Arkansas Writers' Project, Inc. v. Ragland.*[137] A curious Arkansas sales tax scheme taxed general interest magazines, but exempted newspapers, as a class, along with religious literature, trade and professional journals, and sports magazines.[138] It seems clear that much of this distinction in tax treatment is based directly on the content of expression or the kinds of ideas being conveyed, since the government must examine and understand the content of any item to determine whether the sales tax applies. As the Court in *Ragland* recognized, this is enough to bring the tax regulation within the CB category, triggering application of a rigorous strict scrutiny test requiring that the restriction be narrowly tailored to a compelling government interest.[139]

Consequently, strict scrutiny was applied in *Ragland* in the absence of viewpoint discrimination, or of any governmental desire to censor on an invidious basis.[140] In *Ragland,* the costs of unnecessarily applying strict scrutiny rather than some moderate level of scrutiny may not have been substantial, even though it is unclear what government interests

degrees of stringency of judicial review of even CN restrictions that he detects in the case law. *See id.* at 46, 117-18.

137. 481 U.S. 221 (1987). *Ragland* is actually a free-press-clause case that, for purposes of this article, may be harmlessly analyzed in terms of freedom of speech. Portions of the case suggest that applying some sort of Establishment Clause or, more broadly, Equal Protection theory could be of as much interest as addressing *Ragland* as a CB free speech case.

138. *Id.* at 224-25.

139. *Id.* at 230-31.

140. *Id.*

were served by the odd categorization scheme.[141] The appropriateness of applying strict judicial scrutiny, even in light of the content-basis of the speech regulation, however, raises broader questions.

In *Ragland* and in a wide range of other speech cases, the courts should have inquired into the realistic potential that legitimate concerns of conscientious citizens will be repressed over time. Of course, such judgments may later require revisiting, as any regulation is subject to later amendment or unpredicted future use in ways that dramatically affect its risks, range of victims, and severity of impact.

Under the *Ragland* rule, it is more plausible to see speech restrictions that reflect familiar interest-group politics. While interest-group politics can certainly take its toll on freedom of speech, the free speech costs in *Ragland* seem rather limited in reality. For example, *Time*, *Newsweek*, *The Economist*, *National Review*, *Mother Jones*, *The Weekly Standard*, *The Nation*, and *TV Guide* would be among the general interest magazines taxed under the *Ragland* scheme. Yet newspapers of any political or cultural variety, from *The Washington Post* to *The New York Post*, *The Washington Times* to *The New York Times*, *The Wall Street Journal*, and *The Guardian*, though not *The Guardian Weekly*, would be exempt, under a largely non-ideological exception. Similarly exempt would be the *ABA Journal*, *Sports Illustrated*, *Tikkun*, *Sojourners*, and the *Watchtower*. These examples suggest that any systematic underlying political or cultural bias, in intent or effect, is not easy to discern.

Ultimately, there will remain a clear gap between the *Ragland* Court's denunciation of CB regulations as "particularly repugnant to First Amendment principles"[142] and any apparent, realistic risk of repression under the tax regime in *Ragland*. If, for some reason, the rules were likely to change, affecting their likely adverse impact on free speech, with or without further amendment, a heightened degree of concern might become appropriate.[143] At least as drafted, and under most conditions, it is difficult to see the *Ragland* rules as having much of a distinct free speech impact, in the sense of an impact on the practical expression of ideas, as opposed to merely the taxation of separate print media. The *Ragland* rules were thus plainly CB, yet hardly "particularly

141. *Id.* at 231-32.

142. *Id.* at 229.

143. A concern for future manipulation of complex tax systems to punish or intimidate disfavored speakers in plausibly deniable ways, or at least for a continually looming threat to do so, seems to have played some role in *Minneapolis Star & Tribune Co. v. Minn. Comm'r*, 460 U.S. 575, 588 (1983), where the Court held that a complex state tax system exempting most newspapers, while arguably singling out the press or elements thereof, was an unjustified CB restriction.

repugnant to First Amendment principles"[144] in any realistic potential repressive effect. Although limited state taxation and somewhat different costs for different print media were involved, it is also hard to see the *Ragland* rules as economically class-biased in a way likely to affect an economic class's ability to address typical public concerns.

More generally, it seems fair to conclude that the CB-CN distinction has accrued increasing complexity without becoming a reliable guide to the risk to free speech values[145] in any given case. At this point, then, the courts' focus should shift explicitly, and in ways openly acknowledged in written opinions, to a more directly crucial concern. Specifically, judges should, based on available evidence, precedents, history, logic, circumstances, and judgment, attempt, however fallibly, to assess the regulation's realistic potential over time for speech-repressive effects.

Such an assessment may itself be unavoidably complex. A judge may seek guidance from precedent and the record on how to classify moderate but likely threats and severe but less likely threats to free speech values.[146] The differences between narrowly focused and more broadly extended repression must be considered. Judges must be able to assess and compare repression that looms only in the future, with repression that is apparent now but will have only a temporary effect. There is a difference, however, between unavoidable complexities, and artificial and contrived complexities. A responsible judge simply cannot escape considerations of repressive potential where they are relevant. In fact, judges must care about these considerations if society is to genuinely care about the role of freedom of speech.[147]

Nor can it be said that courts have too little historical experience in identifying the various forms free speech repression might take. Whatever ideological differences exist regarding the idea of speech repression, the arguments are certainly not too complex for judicial comprehension. Additionally, it is clear that political disputes over the

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144. *Ragland*, 481 U.S. at 229.

145. For a standard discussion of the main values underlying the institution of freedom of speech, see Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989).

146. Thus, in some cases, the harm sought to be avoided by the restriction must be shown to be serious, probable, and imminent, where in other cases some balancing or trading off of these factors may be appropriate. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 539, 562 (1976) (citing the Learned Hand balancing calculus from *Dennis v. United States*, 341 U.S. 494, 510 (1951)).

147. Normally, the repressive potential of a speech regulation will include some crucial but less direct considerations, such as the scope and value of any alternative speech channels left realistically available to affected speakers, and issues of tailoring or overinclusiveness. *See generally* Wright, *supra* note 49. Of course, other considerations, certainly including the strength of the government interests at stake and the degree of their actual promotion, will also be necessary to decide the case on the merits.

nature of speech repression are already embodied in a CB-CN analysis. Certainly, ordinary citizens will have a clearer grasp of judicial discussion of repression in core speech areas than they currently have of the complexities of CB-CN analysis.

For this reason, judges should avoid the complications of the CB-CN distinction when those complications do not irreplaceably contribute toward understanding the realistic repressive potential of the regulation at issue. Judges should otherwise avoid further complications and sub-categorizing of an initially intuitive CB-CN distinction. In particular, judges should make sure that their intuitive decision-making process remains transparent to the public. Free speech, after all, is an area of the law that is central to democracy itself.

On the other hand, judges should not attempt to minimize both the necessary and unnecessary complexity simply by adopting a uniform bright-line test or per se rule to classify speech regulations under the CB-CN distinction. Any bright-line free speech rule, despite its attractions, will seem insensitive, given the enormous variety of free speech contexts. As we have seen, neither simple nor complex forms of the CB-CN distinction serve as a useful proxy for the underlying values about which society cares most. Simplification should instead take the form of a greater judicial focus on the realistic potential for speech repression.

Finally, reform should not come by way of a blanket strengthening of free speech protection in all areas where it is currently less than strictly protected, without regard to cost. Some regulations of speech, whether CB or CN, simply are not substantially burdensome or discriminatory. Such regulations may be required to promote other interests, such as personal privacy or the equality of persons, that are worth pursuing despite the necessary cost to free speech. This is not to excuse unnecessarily broad regulation of speech. Nevertheless, to impose strict judicial scrutiny on all reasonable regulations, CB or not, is to run an unnecessary risk of failing to promote social interests of varying strengths. Instead, the judicial goal should be to take all regulations of speech, regardless of their artificial category, as neither more nor less serious than they actually are, and as neither more nor less justified than they actually are.