A VARIABLE NUMBER OF CHEERS FOR VIEWPOINT-BASED REGULATIONS OF SPEECH

*R. George Wright**

INTRODUCTION

If there is one thing we think we know about the First Amendment, it is that speech restrictions based on viewpoint are especially objectionable. The Supreme Court has declared that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[1] For this proposition, the Court has on one occasion cited thirteen of its own precedents.[2]

Much more broadly, the Court has also held that a government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[3] Focusing more specifically, though, on viewpoint-based restrictions, the Court has declared that "[g]overnment discrimination among viewpoints—or the regulation of speech based on 'the specific motivating ideology or the opinion or perspective of the speaker'—is a 'more blatant' and 'egregious form of content discrimination.'"[4]

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* Lawrence A. Jegen Professor of Law, Indiana University Robert H. McKinney School of Law.

1 Texas v. Johnson, 491 U.S. 397, 414 (1989) (political flag desecration case).

2 *See id.* The cases cited begin with the intentional infliction of emotional distress case of *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55–56 (1988), extending historically to the "red flag" display case of *Stromberg v. California*, 283 U.S. 359, 368–69 (1931).

3 Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (quoting Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972)) (public sign restriction case); *see also* Iancu v. Brunetti, 139 S. Ct. 2294, 2299 (2019) (citing Matal v. Tam, 137 S. Ct. 1744, 1762–63 (2017)) (trademark registration context); United States v. Stevens, 559 U.S. 460, 468 (2010); Ashcroft v. ACLU, 535 U.S. 564, 573 (2002); Leathers v. Medlock, 499 U.S. 439, 448–49 (1991); Cohen v. California, 403 U.S. 15, 24 (1971).

4 *Reed*, 576 U.S. at 168 (quoting the university speech subsidy case of *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). In *Reed*, Justice Breyer, who is often prone to engage in proportionalist interest balancing, refers to viewpoint-discrimination as "a strong reason weighing against the constitutionality of a rule." *Reed*, 576 U.S. at 178 (Breyer, J., concurring in the judgment); *see also id.* at 182 (Kagan, J.,

However clear these statements may seem, they immediately raise various problems of substance. Merely for example, is there any constitutionally significant difference between prohibiting the expression of an idea entirely, and merely restricting, in some contexts, the expression of that idea, perhaps well short of complete prohibition?[5] Can viewpoint regulation ever be motivated, to any degree, by any concern other than for the offensiveness or disagreeableness of the regulated idea itself?[6] What about the regulation of speech the government actually endorses on the merits, but fears is premature for public discussion?[7] Or what if a government that is quite sympathetic to the idea in question but fears the uncontrollable consequences of a disruptive "heckler's veto" responds to the prospective speech?[8] If the "hecklers" and their sympathizers comprise only a very small fraction of all interested persons, could they still qualify as the critical "society?"[9] And what if the government is again indeed sympathetic to the restricted idea, but believes that the idea's current dominance should be tested by legally advantaging, to some limited degree, its minority, dissenting, or less well-funded critics?[10]

The idea that viewpoint-based restrictions of speech are distinctively "egregious"[11] also conceals a split between those who think of viewpoint-based

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concurring in the judgment) (endorsing a rule of "strict scrutiny," as distinct from an absolute prohibition, in all cases of facial discrimination "on the basis of viewpoint"); *Matal*, 137 S. Ct. at 1766 (Kennedy, J., concurring in part and concurring in the judgment).

5 Thus, the idea of "silencing" is ambiguous between suppression in only one or more contexts or occasions, and a more thorough suppression. Note the reference to prohibition in the *Johnson* flag burning case, 491 U.S. at 414; *see also* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 600–01 (1998) (Souter, J., dissenting).

6 *See Johnson*, 491 U.S. 397; *Finley*, 524 U.S. 569. Note also the distinction between viewpoint restriction and viewpoint discrimination. There may be a sense in which equally restricting all viewpoints could equally and severely burden all viewpoints, but without also discriminating against any viewpoint. "Discriminating" equally against all possible viewpoints would undermine freedom of speech, but perhaps without discriminating against, or treating unequally, any particular viewpoint. For a much broader and sophisticated treatment, see Wojciech Sadurski, *Does the Subject Matter? Viewpoint Neutrality and Freedom of Speech*, 15 CARDOZO ARTS & ENT. L.J. 315, 320–25 (1997).

7 A regulating government might thus decide that public discussion of its own ultimate aims would, for the present, be inexpedient.

8 *See* Terminiello v. Chicago, 337 U.S. 1, 4–5 (1949) (invalidating a law that "permitted conviction of petitioner" for speech that "stirred people to anger, invited public dispute, or brought about a condition of unrest"); R. George Wright, *The Heckler's Veto Today*, 68 CASE W. RSRV. L. REV. 159 (2017).

9 The anticipated "hecklers" could, after all, be not only small in numbers, but politically relatively powerless as well.

10 Regulating the expression of the clearly dominant viewpoint, for the sake of a more level playing field, might be thought not merely to "equalize" speech, but to enhance meaningful free speech, overall, on the topic in question. For background in a related context, see J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976).

11 *See supra* text accompanying note 4; *see also* Iancu v. Brunetti, 139 S. Ct. 2294, 2299 (2019) ("The government may not discriminate against speech based on the ideas or opinions it conveys." Viewpoint discrimination amounts to an "'egregious form of content

regulations as absolutely illegitimate and irredeemable,[12] and those who would merely apply some form of strict judicial scrutiny to such regulations.[13] This dispute between judicial absolutism and a merely presumptive judicial scrutiny of viewpoint-based restrictions requires some explanation.

One obvious such explanation would point to the common[14] assumption that viewpoint-based restrictions, as a category, are uniformly and uniquely egregious, or especially constitutionally harmful.[15] But as illustrated below, this assumption is fundamentally mistaken.[16]

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discrimination' that is [however, only] 'presumptively unconstitutional.'" (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829–30 (1995))); Morse v. Frederick, 551 U.S. 393, 436 (2007) (Stevens, J., dissenting) ("Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or the perspective of the speaker is the rationale for the restriction." (quoting *Rosenberger*, 519 U.S. at 828–29)); Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 69 (2007) ("[T]he most universally condemned threat to the foundations of free expression [is] . . . suppression based on the regulator's subjective disagreement with or disdain for the views being expressed.").

12 *See* Minnesota Voters Alliance v. Mansky, 138 S. Ct. 1876, 1885 (2018) (noting how in a traditional public forum, "restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited"); *see also Iancu*, 139 S. Ct. at 2299; *Morse*, 551 U.S. at 436 (Stevens, J., dissenting); Texas v. Johnson, 491 U.S. 397, 414 (1989); Redish, *supra* note 11, at 109 ("What should not—and for the most part, has not been the subject of serious dispute is that regulation of expression that is grounded in *nothing more than governmental* hostility to the normative viewpoint to be expressed is unqualifiedly unconstitutional. There can be no exceptions to the constitutional bar of viewpoint-based regulations—at least in the context of coercive regulations and prohibitions." (emphasis added)); *id.* at 111 ("The absoluteness of the constitutional prohibition on viewpoint discrimination flows from the *unique harm* that such regulations *necessarily* cause to the foundations of free expression." (emphasis added)). For commentary, see Robert C. Post, *Viewpoint Discrimination and Commercial Speech*, 41 LOY. L.A. L. REV. 169, 169–72 (2007); Eric Heinze, *Viewpoint Absolutism and Hate Speech*, 69 MOD. L. REV. 543, 546 (2006). More broadly, see Clay Calvert, Iancu v. Brunetti*'s Impact on First Amendment Law: Viewpoint Discrimination, Modes of Offensive Expression, Proportionality and Profanity*, 43 COLUM. J.L. & ARTS 37 (2019).

13 S*ee, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 182 (2015) (Kagan, J., concurring in the judgment) ("[W]hen the restriction 'raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace'—we insist that the law pass the most demanding constitutional test." (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992))); *Rosenberger*, 515 U.S. at 829–30. There seems to be a consensus that viewpoint-based, but not other content-based restrictions of speech, are prohibited in so-called non-public government owned fora. *See, e.g.*, Pleasant Grove City v. Summum, 555 U.S. 460, 469–70 (2009); Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 237 (2d Cir. 2019).

14 Except in the context of government-owned speech fora, as noted in *Summum*, 555 U.S. at 469–70, and in *Knight First Amend. Inst.*, 928 F.3d at 237.

15 See the authorities cited *supra* notes 4, 11, 12.

16 *See infra* Part I.

Crucially, viewpoint-based restrictions take on a wide range of quite diverse forms.[17] These diverse forms of viewpoint-based restrictions on speech also vary widely in the nature and severity of any threat they pose to freedom of speech, or to the basic values underlying freedom of speech.[18] So diverse and variable are the forms of viewpoint-based restrictions that any general rule of strict scrutiny in all such cases,[19] much less any absolute prohibition thereof,[20] makes little constitutional sense.[21]

Consider a bare typology of viewpoint-based restrictions, postponing any clarification and any examples. Thus consider first a viewpoint-based restriction of speech that we might well indeed think of as "egregious." This form of viewpoint-based restriction might involve a governmental attempt at dictatorial repression.[22] Of course, few governments rest their viewpoint-based restrictions on a self-serving will to power alone. In the American constitutional context, viewpoint-based speech restrictions are normally claimed to be justified by reference to some sort of affirmative public value.[23] Thus even clear cases of viewpoint-based speech restriction will normally involve some degree of mixed-motive justification,[24] in which the prominence of any legitimate justifications will vary. And in such cases, the severity of the speech-burden on regulated parties and audiences will also vary.[25]

But not all instances of viewpoint-based restrictions will be clearly identifiable as such, or even intended to be viewpoint-based. Thus there will be dubious cases in which the courts and the restricting government itself fail to acknowledge, or even recognize, the viewpoint-based elements of the speech restriction in question.[26] These cases may well overlap with the many kinds of cases in which the viewpoint restriction actually does not reflect the substantive, first-order policy views of the restricting government itself.[27]

There are cases in which a government policy should, realistically, be treated as a viewpoint-based restriction, even though the policy does not itself refer to viewpoint, and where again no viewpoint bias may have been intended.[28] On the other hand, there are also cases of formal or explicit viewpoint restriction with only a trivial actual constitutional impact on the relevant speakers, in light of the quality of their remaining realistically available alternative speech channels.[29]

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17 *See infra* Part I.
18 *See infra* Part I.
19 See the authorities cited *supra* note 13.
20 See the authorities cited *supra* notes 11–12.
21 *See infra* Part I.
22 *See infra* Section I.A.
23 *See infra* Section I.A.
24 *See infra* Sections I.C–I.D.
25 *See infra* Sections I.C–I.D.
26 *See infra* Sections I.C–I.D.
27 *See infra* Sections I.C–I.D.
28 *See infra* Section I.E.
29 *See infra* Section I.F.

Then there are also viewpoint-based restrictions of speech, applied in particular institutional contexts, where the speech restriction seems to be intrinsic or essential to the functioning of the institution in accordance with its own vital basic purposes.[30] In such cases, again, it is difficult to see any special "egregiousness,"[31] much less any justification for any nearly absolute rule regarding viewpoint-based restrictions of speech.

And finally on this bare, unelaborated typology, there are cases in which the viewpoint basis of the speech restriction seems clear, but the constitutional gravity of the restriction is debatable. In these cases, the focus is not on institutional context as immediately above, but on the fundamental nature and character of the speech that is subject to regulation. Viewpoint-based regulation of pure commercial speech, with no pretense to any political or other social content, may fall into this category.[32]

Below, we elaborate on and explore this typology of the forms and dimensions of viewpoint-based restrictions on speech. On this basis, we ultimately show that the nearly universal claim that viewpoint restrictions are uniquely dangerous, egregious, or damaging to the values of underlying freedom of speech is actually unjustified. The idea of viewpoint-based restrictions in itself is, despite its familiarity, actually not a useful concept.

I. THE DIVERSE FORMS AND DIMENSIONS OF VIEWPOINT-BASED RESTRICTIONS ON SPEECH

A. The Most Egregious Cases

The most egregious forms of viewpoint-based restrictions of speech involve either broad or narrow governmental attempts at dictatorial repression. Among the purest examples would be the classic dystopian regime depicted in George Orwell's *1984*.[33] The officially imposed language of Newspeak therein rendered "the expression of unorthodox opinions, above a very low level, . . . well-nigh impossible."[34] This broad, systematically engineered inarticulability, and indeed inconceivability, of disfavored ideas stands as the extreme case of viewpoint-based restriction of expression. At a more personal level, *1984* depicts more dramatic specific forms of viewpoint repression, as in the classic colloquy between Inner Party member O'Brien and protagonist Winston Smith:

> O'Brien held up his left hand, its back toward Winston, with the thumb hidden and the four fingers extended.
>
> "How many fingers am I holding up, Winston?"

30 *See infra* Section I.G.

31 *See supra* text accompanying notes 4, 11, 12.

32 *See infra* Section I.H.

33 GEORGE ORWELL, 1984 (Plume Books 2003) (1949).

34 *Id.* at 320.

> "Four."
>
> "And if the Party says that it is not four but five—then how many?"
>
> "Four."
>
> The world ended in a gasp of pain. The needle of the dial had shot up to fifty-five.[35]

This incident, of course, illustrates the punishment and deterrence of expressing officially disfavored views, rather than the broad, systematic prevention of even entertaining any such views.

Whatever laudable goals may once have motivated the Party, it is clear that at this point, the Party seeks primarily the deepening, extension, and security of its own power. Free speech values such as the pursuit of truth[36] are of no interest to the Party. Rather than posing any sort of independent constraint on party doctrine, truth is now to be subject to the Party's dictates.[37]

Consider now some actual practices of former Soviet bloc regimes. Even under the cynicism and careerism of the decaying Soviet bloc regimes, conformity to official viewpoint norms was broadly enforced. The dissident and future Czech President Vaclav Havel thus reported that he lived "in a country where the authority and radioactive effect of words are demonstrated every day by the sanctions which free speech attracts."[38] The imprisoned Soviet dissident Natan Sharansky observed in turn that "Soviet citizens are divided by a host of invisible barriers that determine what they can read."[39] Polish dissident Czeslaw Milosz added that the Soviet-style regimes prohibited "what has in every age been the writer's essential task—to look at the world from his own independent viewpoint, to tell the truth as he sees it, and so to keep watch . . . in the interest of society as a whole."[40]

Extreme forms of viewpoint-based speech repression have not gone unnoticed in American free speech jurisprudence. Before the rise of modern totalitarian regimes, Justice Holmes classically observed that "[p]ersecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition."[41] But the motives underlying viewpoint-based restrictions more

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35 *Id.* at 257.

36 See, classically, JOHN STUART MILL, ON LIBERTY ch. 2 (Michael B. Mathias ed., Pearson Education 2007) (1859).

37 ORWELL, *supra* note 33, at 257.

38 Václav Havel, *A Word About Words*, *in* OPEN LETTERS: SELECTED WRITINGS 1965–1990, at 377, 379 (Paul Wilson ed., First Vintage Books 1992).

39 NATAN SHARANSKY, FEAR NO EVIL 235 (Stefani Hoffman trans., 1998).

40 CZESLAW MILOSZ, THE CAPTIVE MIND, at xii (Jane Zielonko trans., Alfred A. Knopf ed., 1953) (1951).

41 Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (World War I–era subversive advocacy case). See also the hypothetical case raised in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 (1992) ("[T]he government may proscribe [all] libel; but it may not make the further content [and viewpoint] discrimination of proscribing *only* libel

generally may be mixed, or only mildly objectionable, or even benign. Mixed motives may be of all varieties. This mixture of motives may be simple, or complex, again to any degree. Motives may change, in any direction, over time. And the malevolence, or benevolence, of any single government motive may again vary, to virtually any degree.

B. Mixed Motives with Different Degrees of Objectionability

We see examples along the above spectra in the classic World War I–era subversive advocacy cases.[42] Consider, for example, the mixture and the range of motivations for punishing acts of pamphleteering in *Pierce v. United States*.[43] In *Pierce*, the government criminally punished the distribution, in particular, of a pamphlet entitled "The Price We Pay."[44]

This pamphlet was broad-ranging as to the subjects and perspectives presented therein.[45] Certainly, the speech-restricting government may have been motivated, at least in part, by the understandable purposes of discouraging inducement to "insubordination, disloyalty, and refusal of duty in the military and naval forces of the United States."[46] Or so we can imagine, in the context of an assumedly just and vital war effort.

Relatedly, the pamphlet in question was thought to promote "obstruction of the recruiting and enlistment service," and to seek to intentionally "interfere with the success of our military and naval forces in the war in which the United States was then engaged."[47] Again, assuming a legally defensible war effort, these potential motives may be entirely reasonable, given in particular the perceived need to maintain readiness against foreign military threats to the values underlying freedom of speech.

The problem, for our purposes, is the likelihood of other motives, of one degree of causal importance or another, where those additional motives are less justifiable, in general or in light of the values underlying freedom of speech. Thus the Supreme Court itself concluded in *Pierce* that the pamphlet "contained much in the way of denunciation of war in general, the pending war in particular, . . . [and an] assertion that under Socialism things would be better."[48]

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critical of the government."). The Court apparently assumed an absolutist prohibition of at least this class of viewpoint-based regulations of speech, rather than referring merely to strict scrutiny, implicitly raising the possibility of mixed governmental motives in imposing viewpoint-based restrictions.

42 See, for example, the majority and dissenting opinions in *Abrams*, 250 U.S. 616, and in *Debs v. United States*, 249 U.S. 211 (1919) (a Socialist presidential candidate convicted of subversive advocacy).

43 252 U.S. 239 (1920).

44 *See id.* at 241–51.

45 *See id.* at 245, 249–50.

46 *Id.* at 249.

47 *Id.*

48 *Id.* at 245.

Clearly, a government attempt to suppress, generally or in a particular context, the view that socialism is preferable to some alterative, is no more constitutionally justifiable than an attempt to suppress the antithetical view, held by Winston Smith, that Orwell's Ingsoc is objectionable.[49]

In *Pierce*, however, the federal government objected as well to the defendant's speech as allegedly calculated

> to arouse suspicion as to whether . . . the Government was not more concerned in enforcing the strictness of military discipline than in protecting the people against improper speculation in their food supply; and to produce a belief that our participation in war was the product of sordid and sinister motives, rather than a design to protect the interest and maintain the honor of the United States.[50]

The Supreme Court majority in *Pierce* took these latter claims to be provably, if not knowingly, false, or "grossly false,"[51] rather than as legitimate political arguments, of whatever strength or weakness.[52]

Under the basic logic of freedom of speech, any speech that is not independently criminal and that expresses any view of the causes of the First World War should be constitutionally protected, whether the government agrees with any such viewpoint or not.[53] The ultimate appeal in this and all free speech cases must crucially be to the fundamental reasons for specifically protecting speech in the first place. These reasons refer to values or goals commonly thought to be promoted by a regime of freedom of speech.[54] As a matter of consensus, these values or goals are said to include optimally advancing the pursuit of knowledge and truth;[55] meaningful participation in

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49 *See generally* ORWELL, *supra* note 33 (Ingsoc, or English Socialism, is the Party's political ideology).

50 *Pierce*, 252 U.S. at 249–50.

51 *See id.* at 250–51.

52 As duly recognized by, unsurprisingly, Justices Brandeis and Holmes. *See id.* at 267–69 (Brandeis, J., dissenting).

53 See in particular John Stuart Mill's argument for the legal protection of political viewpoints widely judged to be partially, or even entirely, false. *See* MILL, *supra* note 36, ch. 2.

54 For standard typologies of free speech values, see, e.g., THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–7 (1970); FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY chs. 2–4 (1982); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 130–47 (1989); Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015, 1016. See also, in our context, Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 100 (1996).

55 *See* EMERSON, *supra* note 54, at 6; SCHAUER, *supra* note 54, at 15; Greenawalt, *supra* note 54, at 130; Heins, *supra* note 54, at 100; William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 4 (1995); Frederick Schauer, *Free Speech, the Search for Truth, and the Problem of Collective Knowledge*, 70 SMU L. REV. 231, 232 (2017); Steven D. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 S. CAL. L. REV. 649, 657 (1987); Tsesis, *supra* note 54, at 1016, 1038.

democratic decisionmaking;[56] promoting individual fulfillment or self-realization;[57] and reconciling the needs for both reasonable social stability and meaningful social change.[58]

Examining *Pierce* and other sorts of viewpoint-based speech restrictions in light of these basic free speech values yields interesting results.[59] As it turns out, viewpoint-based speech restriction cases are not reducible to a battle between the speaker's, and others', free speech interests on one side, and one or more nonspeech public interests, compelling or otherwise, on the other. In some cases of viewpoint-based restrictions of speech, the government is able to argue not only that the restriction promotes one or more public interests but, as well, that the viewpoint restriction, while impairing basic free speech values in some respects, also actually promotes one or more basic free speech values in other respects.

Importantly, viewpoint-based restrictions on speech may indeed actually promote one or more basic free speech values, to widely varying degrees. These degrees may range from near zero, in the case of systematic Orwellian

56 *See* EMERSON, *supra* note 54, at 6; SCHAUER, *supra* note 54, at 35; Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. U. L. REV. 1053 (2016); Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097, 1112–15 (2016); Greenawalt, *supra* note 54, at 145; Heins, *supra* note 54, at 100; Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011); Tsesis, *supra* note 54, at 1016, 1034; *see also* Corey Brettschneider, *Value Democracy as the Basis For Viewpoint Neutrality: A Theory of Free Speech and Its Implications for the State Speech and Limited Public Forums Doctrine*, 107 NW. U. L. REV. 603 (2013).

57 *See* EMERSON, *supra* note 54, at 7; SCHAUER, *supra* note 54, at 48; C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 253 (2011); Susan J. Brison, *The Autonomy Defense of Free Speech*, 108 ETHICS 312 (1998); Greenawalt, *supra* note 54, at 143; Heins, *supra* note 54, at 100; Brian C. Murchison, *Speech and the Self-Realization Value*, 33 HARV. C.R.-C.L. L. REV. 443 (1998); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982); Tsesis, *supra* note 54, at 1016, 1028; *see also* MILL, *supra* note 36, ch. 2.

58 *See* EMERSON, *supra* note 54, at 7; SCHAUER, *supra* note 54, at 35, 37; Greenawalt, *supra* note 54, at 142; Tsesis, *supra* note 54, at 1017, 1020; Heins, *supra* note 54, at 100.

59 Consider, e.g., what turns out to be the structurally similar viewpoint-based public-school-compelled flag salute case of *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 627–29, 640 (1943). In *Barnette* the viewpoint-based speech-burdening was arguably motivated, in part, by a disdain for purported "insubordination," as well as by a desire, however ill-considered, for a sense of national unity against the military threat posed by the Nazi tyranny of Adolf Hitler. *See id.* On the one hand, a desire to suppress student "insubordination" of this sort is more damaging to than promotive of the basic purposes of freedom of speech. In particular, the free speech value of promoting individual autonomy, development, and self-realization is clearly impaired. *See supra* text accompanying note 57. But on the other hand, the desire for expressive solidarity against the immense Nazi threat, however possibly ill-considered, is clearly more compatible with essentially all of the basic free speech values. *See supra* text accompanying notes 54–68. Hitler's Nazi regime could reasonably be seen as not merely a threat to American interests, as in a typical viewpoint-based restriction case, but, in addition, as intentionally and directly antithetical specifically to all of the basic free speech values themselves.

government repression,[60] to a significant degree, as in a hypothetical case of a viewpoint-based speech restriction intended to effectively turn the tide of battle against an invading Orwellian or Nazi[61] regime. It is certainly in the broad public interest that both the Orwellian and the Nazi regime takeovers be avoided. But preventing Orwellian or Nazi tyranny also directly and substantially promotes, overall, each of the consensually basic free speech values.[62] The regimes of *1984* and the Third Reich, indisputably, are essentially destructive of free speech values such as the optimal pursuit of truth,[63] meaningful political democracy,[64] and any recognizable conception of personal autonomy, self-realization, or human flourishing.[65] And this effect is, crucially, a recurring matter of varying degrees among all viewpoint-based restrictions of speech.

C. Governmental Innocent Obliviousness Cases

In other kinds of cases, the government may well fail to recognize or acknowledge, initially or at any later point, the viewpoint-basis and viewpoint effects of the speech regulation in question. In the least controversial such cases, the government may not intend, or even recognize, the potential for viewpoint-based implementation of a speech regulation that seems viewpoint-neutral on its face. A typical such case, *Forsyth County v. Nationalist Movement*,[66] involved nearly unlimited administrative discretion to impose permit costs on potential speakers in any amount up to a specified maximum.[67] As the Court held, "[n]othing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees."[68] This degree of unconstrained, if formally neutral, discretion was held to have "the potential for becoming a means of suppressing a particular point of view."[69]

In this kind of case, bias in practical implementation may be conscious, or unconscious and unintended, or even nonexistent. Thus such speech regulations may vary widely in their actual impact on speakers and on the basic free speech values.[70] And more importantly, speech permitting schemes will not always track the largely unconstrained discretion in *Forsyth*.[71] Many such

60 *See supra* text accompanying notes 33–37.
61 *See supra* note 59.
62 *See supra* text accompanying notes 54–58.
63 *See supra* text accompanying note 55.
64 *See supra* text accompanying notes 54 & 56.
65 *See supra* text accompanying notes 54 & 57.
66 505 U.S. 123 (1992).
67 *See id.* at 130–34.
68 *Id.* at 133.
69 *Id.* at 130–31 (quoting Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981)).
70 *See supra* text accompanying notes 54–58.
71 *See Forsyth*, 505 U.S. at 130–34.

permitting schemes, for example, may require of the administrator some degree of evidence-based reasoning, or some reference to other constraining standards. Thus, crucially, many such permitting schemes will pose lesser risks, to one degree or another, to the basic free speech values.[72] No general presumption as to the degree of viewpoint-burdensomeness may thus be presumed in these kinds of cases.

D. Judicial-Level Viewpoint Obliviousness Cases

In the obverse kinds of cases, it is crucially the courts themselves that fail to recognize, or acknowledge, an at least debatable potential of the government regulation for one degree or another of viewpoint-bias in application.

Consider, for example, a recent federal appellate case involving corporate self-branding by using an ethnic slur as a trade name.[73] Sensibly finding viewpoint-based speech discrimination in the *Destito* case,[74] the Second Circuit therein also claimed that government disapproval of a message is "the essence of viewpoint discrimination"[75] and, without much elaboration or explanation, that a regulation can somehow be viewpoint-based even if it is an "across-the-board prohibition applicable to all speakers without regard to their intended messages."[76]

For our present purposes, though, the *Destito* case is interesting for its intriguing claim that Title VII restrictions on workplace speech do not count as viewpoint-based restrictions on speech because such regulations limit merely verbal conduct, rather than expression.[77] Thus language that, under Title VII, may contribute to a hostile work environment may be constitutionally prohibited.[78] Legal restriction of some workplace harassing speech may, in the court's words, amount to "viewpoint disparity," but as mere conduct regulation, does not also amount to viewpoint-based restriction of speech.[79] At a minimum, then, the differences between viewpoint-based restrictions, subject to strict scrutiny if not to absolute prohibition,[80] and the

72 *See supra* text accompanying notes 54–58.

73 Wandering Dago, Inc. v Destito, 879 F.3d 20 (2d Cir. 2018).

74 *See id.* at 33.

75 *Id.* at 32 (quoting Matal v. Tam, 137 S. Ct. 1744, 1766 (Kennedy, J., concurring)).

76 *Id.* at 33.

77 *See id.* at 32.

78 *See id.*

79 *See id.* For background, see, e.g., City of Erie v. Pap's A.M., 529 U.S. 277 (2000) (commercial nude dancing); Texas v. Johnson, 491 U.S. 397 (1989) (public flag burning); United States v. O'Brien, 391 U.S. 367 (1968) (public draft card burning case); Arnold H. Loewy, *Distinguishing Speech From Conduct*, 45 MERCER L. REV. 621 (1994); Caroline Mala Corbin, *Speech Or Conduct: The Free Speech Claims of Wedding Vendors*, 65 EMORY L.J. 241 (2015).

80 *See supra* text accompanying notes 12–13; Maura Douglas, Comment, *Finding Viewpoint Neutrality in Our Constitutional Constellation*, 20 U. PA. J. CONST. L. 727, 738 (2018)

murky notion of mere "viewpoint disparity,"[81] subject potentially to mere rationality review,[82] must be somehow clarified.

A separate attempt to distinguish "directed"[83] from undirected,[84] and supposedly thus much less objectionable,[85] viewpoint-based speech restrictions is present in the artistic subsidy case of *National Endowment for the Arts v. Finley*. In *Finley*, the federal artistic subsidy program required that grant applications be judged not only on the basis of artistic merit, but "taking into consideration general standards of decency" as well.[86]

The *Finley* majority argued first that the "general standards of decency" consideration should not count as a viewpoint-based restriction on speech, in that the "decency" factor was not a classic prohibition of disfavored thought.[87] While free speech considerations can certainly arise in a government subsidy context,[88] the "decency" criterion was not "the kind of directed viewpoint discrimination that would prompt this Court to invalidate a statute on its face."[89] Speakers were not therein silenced.[90] There was no express threat of the censorship of ideas.[91] No "realistic danger [of a] compromise [of] First Amendment values" was thought to be present.[92]

Not surprisingly, several of the Justices in *Finley* took issue with one or more of these claims. Justice Scalia found that the "decency" consideration "unquestionably constitutes viewpoint discrimination."[93] That the viewpoint consideration did not amount to an absolute or blanket prohibition of applications deemed to be indecent went only to the reduced gravity of the viewpoint-based restriction.[94]

("Despite the heavy presumption against viewpoint discrimination, the Supreme Court has never made a per se rule on its (un)constitutionality.").

81 *See supra* text accompanying note 79.

82 *See generally* Robert C. Farrell, *The Two Versions of Rational-Basis Review and Same-Sex Relationships*, 86 WASH. L. REV. 281, 288 (2011); Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 30–32 (1972). For more background, see the logic of the Court in the public employment case of *New York City Transit Authority v. Beazer*, 440 U.S. 568, 592–593 (1979).

83 Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 583 (1998). For commentary, see Leslie Gielow Jacobs, *Clarifying the Content-Based/Content-Neutral and Content/Viewpoint Determinations*, 34 MCGEORGE L. REV. 595, 627 (2003).

84 *See Finley*, 524 U.S. at 583.

85 *See id.* at 587–88.

86 *Id.* at 572.

87 *See id.* at 583–88.

88 *See id.* at 587.

89 *Id.* at 583.

90 *See id.*

91 *See id.*

92 *Id.*

93 *See id.* at 593 (Scalia, J., concurring in the judgment); *see also* Matal v. Tam, 137 S. Ct. 1744, 1763 (2017) ("Giving offense is a viewpoint."). For commentary on *Matal*, see Calvert, *supra* note 12.

94 *See Finley*, 524 U.S. at 600 (Scalia, J., concurring in the judgment).

For Justice Scalia, though, this viewpoint-based restriction on speech in *Finley* was an "abridgement" of the freedom of speech in only a limited sense, and only to a limited and nearly inconsequential degree.[95] Evidently, not all viewpoint-based restrictions of speech are created even roughly equal in constitutional significance. Those persons who wish to create "indecent" art were, for Justice Scalia, just as free to do so as before.[96] The only limit was that those who create "indecent" art were disadvantaged in applying for a federal government subsidy thereof.[97]

A third view of the matter in *Finley* was taken by Justice Souter.[98] Justice Souter declared that "[t]he decency . . . proviso mandates viewpoint-based decisions in the disbursement of Government subsidies."[99] Further, "the Government has wholly failed to explain why the statute should be afforded an exemption from the fundamental rule . . . that viewpoint discrimination in the exercise of public authority over expressive activity is unconstitutional."[100] In defense of this approach, Justice Souter drew upon the classic caselaw apparently adopting an absolutist prohibition of viewpoint-based restrictions of speech.[101]

The *Finley* case opinions, taken together, thus illustrate, along more than one dimension, the remarkable range of available judicial approaches to what is plausibly characterized as a viewpoint-based discrimination against speech. Again, our point is not to adjudicate among this range of approaches on the merits. It is merely to record the judicial disputes in *Finley* as further evidence for the ordinarily unrecognized broad range of viewpoint-based restrictions on speech. These crucial differences generally do not reflect differences in the weight of any public interests thought to justify the speech regulation in question. Rather, these variations reflect important differences in the nature and gravity of the viewpoint-based restriction itself.

E. First- and Second-Order Viewpoint-Based Restrictions

Equally important further complications arose in the foreign embassy protest case of *Boos v. Barry*.[102] *Boos* nicely illustrates some of the problems that arise when an arguably viewpoint-based restriction on speech reflects not the actual, first-order, substantive beliefs of the restricting government itself, but that government's attempt, for one reason or another, to politically

95 *See id.* at 595–96.

96 *See id.*

97 *See id.*

98 *Id.* at 600 (Souter, J., dissenting).

99 *Id. See also* Matal v. Tam, 137 S. Ct. 1744, 1761–63 (2017). For a critique, see Calvert, *supra* note 12.

100 *Finley*, 524 U.S. at 600–01, 603 (Souter, J., dissenting).

101 Including *Texas v. Johnson*, 491 U.S. 397, 414 (1989), and *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

102 485 U.S. 312 (1988).

accommodate the speech-restrictive preferences of some other group, whether that group is politically powerful or not.

Boos involved a local District of Columbia regulation that prohibited, in part, "the display of any sign within 500 feet of a foreign embassy if that sign tends to bring a foreign government into 'public odium' or 'public disrepute.'"[103] Such a restriction might be considered viewpoint-neutral, in that neither the enacting government authority, nor any other party, can be certain in advance of the restriction's actual political impact, in practice, years later. Presumably, the enacting government need not really hold the view that no foreign government should ever be subjected to the relevant risk of public odium or disrepute.[104] And this speech prohibition could be applied against demonstrations favored by the enacting government against a foreign government to which the enacting government vehemently objects.

In this limited sense, the rule of *Boos* could be thought of as viewpoint-neutral. But in a broader sense, attention to viewpoint is crucial to the application of the regulation. Any sign that is subject to the regulation would first have to be read, understood, and interpreted with regard to its message. And crucially, messages favorable to a particular government or policy would then be permitted, while critical messages tending to evoke odium or disrepute would not.[105] The viewpoint of the demonstrator, the foreign government, and perhaps even of the United States would thus be directly implicated.

Among the most interesting complications would be cases in which the rule-enacting government fully agrees with the message of the demonstrators but prohibits the demonstration pursuant to the regulation. Such cases would be driven by the viewpoint-hostility not of the rule-enacting government, but of the foreign government subject to criticism, as merely accommodated, without sympathy on the merits, by the speech-restriction enacting government.

This latter possibility illustrates the much broader phenomenon in which a regulating government adopts a viewpoint-based restriction not because of that government's own first-order lack of sympathy with the speech

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103 *Boos*, 485 U.S. at 315. For commentary, see Kent Greenawalt, *Viewpoints From Olympus*, 96 COLUM. L. REV. 697, 701 (1996) ("[T]he meaning of 'viewpoint' is ambiguous in this context.").

104 *See Boos*, 485 U.S. at 315. The Court in *Boos* held the restriction to be content-based, but not viewpoint-based, or at least not "directly" viewpoint based. *Id.* at 319. The regulation was held to distinguish among permitted and prohibited viewpoints "in a neutral fashion by looking to the policies of foreign governments." *Id.* Query, though, whether we would also think of a heckler's veto rule as viewpoint neutral if the permitted heckling met a similarly neutral criterion such as by looking to a current voting majority. *See generally* Wright, *supra* note 8.

105 *See Boos*, 485 U.S. at 319. It is certainly possible that some critical messages may not also be judged to tend to bring the targeted government into odium or disrepute. Less realistically, a demonstration intended to support a government or its policy might backfire, and indeed tend to bring the foreign government into disrepute.

on the merits, but merely to accommodate the views of one or more nongovernmental groups that oppose the regulated speech on the merits. And there is no reason to believe that the groups thereby granted a sort of "veto" over the speech they disfavor will all be politically powerful.

At least on some occasions, a regulating government might thus suppress speech to which it has no serious objection on the merits, mostly in order to accommodate a disadvantaged or stigmatized group.[106] It is also possible that a government might restrict speech of a particular viewpoint, to which it has little objection, for the sake of some value such as social peace, community, or some form of equality. This regulatory choice could politically mirror the interpersonal virtues of politeness, sensitivity, restraint, and tact.

A viewpoint regulation motivated by such considerations might well then be properly judged on standards quite distinct from an absolute prohibition, or even strict scrutiny. In the most innocently motivated cases, with the lowest potential for harm to the basic free speech values,[107] some sort of alternative test, including judicial balancing or proportionality,[108] if not a version of minimum scrutiny,[109] might be called for.

F. The Importance of Any Disparities in the Value of Any Remaining Speech Channels

A further crucial dimension along which viewpoint-based speech restrictions vary widely in their effects focuses on whether the regulated speakers have available to them one or more realistic alternative channels in which to convey the message in question, without any meaningful loss in the basic free speech values,[110] as judged crucially by the regulated parties themselves.[111] A viewpoint-based regulation that, for practical purposes, prevents the meaningful delivery of a disfavored message is one thing. A viewpoint-based regulation that allows the regulated speaker equally good or better access, from their own free speech value standpoint, to alternative speech channels in which to convey their message, is quite another. The latter

106 As well, there will be gradations among the cases in which the regulating government has mixed motives in adopting the viewpoint regulation. The objectionability of such viewpoint-based speech restrictions may correspondingly vary.

107 *See supra* notes 54–58 and accompanying text.

108 For one elaborated version, see AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (2012). *See also* ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 66 (Julian Rivers trans., 2010 ed.) (2002). For a broader legal perspective, see the essays collected in PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES (Vicki C. Jackson & Mark Tushnet, eds., 2017).

109 *See supra* text accompanying note 82.

110 *See supra* text accompanying notes 54–58.

111 This inquiry is utterly distinct from the more familiar examination of the "tailoring," narrow or otherwise, of the actual scope a regulation to its intended purpose. *See generally* R. George Wright, *The Unnecessary Complexity of Free Speech Law and the Central Importance of Alternative Speech Channels*, 9 PACE L. REV. 57 (1989).

sort of viewpoint-based restriction on speech is, almost by definition, constitutionally nearly harmless.

Imagine, for example, a viewpoint-based rule that prevents conservative Republican billionaires, but not progressive Democrat billionaires, from promoting their political candidacy through cardboard signs attached to telephone poles. Regardless of how such a rule might be enforced, its effect on any regulated party's speech, or on the rights of any voter who wishes to hear the candidate's message, could well be trivial, if not actually slightly favorable. Any affected party would still have equal or better ways, from their own free speech values standpoint, of communicating the ideas in question.[112] The overall free speech value loss could be minimal, nonexistent, or even slightly negative.

We see recognizable suggestions of this possibility in some familiar caselaw. Consider for instance, the well-known flag burning protest case of *Texas v. Johnson*.[113] The majority in *Johnson* explained that "Johnson was prosecuted because he knew that his politically charged expression would cause 'serious offense.'"[114] After all, the State of Texas had no objections to the idea of safely and environmentally responsibly burning an American flag. Burning an American flag is recognized as an appropriate method of disposal thereof.[115] It is only when burning the flag amounts to desecration, as in sending a message of contempt or disdain, that such an act is criminalized.[116]

This clearly amounts to a form of viewpoint-based discrimination against one category of symbolic speech. Perhaps the most relevant viewpoint-responder is the Texas state government, or more crucially, the segment of the Texas population that would take "serious offense" to politically motivated flag desecration. It is possible that the Texas state officials themselves had no serious objection to politicized flag burning, but felt that popular sentiment, or some segment thereof, left them no choice.

The main dissenting opinion in *Johnson*, though, raises a crucial concern. The defendant Johnson had also engaged in a number of more conspicuous public protest events and activities at the Republican National Convention.[117] These activities included leading marches and protests, engaging in a "die-in," and protest chanting.[118]

Whether any of these other protest events by Johnson had any causal role in motivating his flag-burning arrest may be unclear. But as the main

112 Consider, merely for example, the continuing availability of televised debates, dedicated websites, various social media, as well as paid radio and television time.

113 491 U.S. 397 (1989).

114 *Id.* at 411.

115 *See id.*

116 *See id.*

117 *See id.* at 431 (Rehnquist, C.J., dissenting).

118 *See id.*

dissenting opinion points out, Johnson was not criminally charged with any of the above contemporaneous and similarly-themed protest activities.[119]

The main dissent then argues, interestingly, that the fact that Texas allowed Johnson to engage in various sorts of similar, perhaps even more articulate, forms of dramatic protest bears significantly upon the extent and degree to which Johnson's free speech rights, given his own basic free speech value priorities, were really inhibited.[120] Hence the dissenters' argument in Johnson that "[f]ar from being a case of 'one picture being worth a thousand words,' flag burning is the equivalent of an inarticulate grunt or roar that . . . is most likely to be indulged in not to express any particular idea, but to antagonize others."[121]

Thus the main dissenting opinion looked to the viewpoint-based speech restriction's actual effects on Johnson's ability to authentically and effectively express his political message. The conclusion was that the relevant "statute deprived Johnson of only one rather inarticulate symbolic form of protest . . . and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his deep[122] disapproval of national policy."[123] Johnson was thought to have expressed "nothing that could not have been conveyed . . . just as forcefully in a dozen different ways."[124]

The dissenting opinion in question thus focused on the availability, or not, of one or more alternative speech channels remaining available to Johnson, ideally with a deferential acknowledgement of Johnson's own speech priorities as to, for example, intensity versus articulateness, size and selection of audience, public visibility, and financial costs, along with any other relevant consideration.[125]

The crucial point is that some persons whose speech is somehow limited on the basis of viewpoint may still have available to them alternative speech channels that are just as good, in terms of their own priorities among free speech values, and other such speakers may not. This sort of free speech impairment is a matter of varying degrees and dimensions in different cases.

In general, viewpoint-based speech restrictions that leave the speaker essentially unimpaired in disseminating their message are dramatically different in nature and consequences from viewpoint-based restrictions that largely, if not entirely, prevent the speaker from presenting anything like the targeted message in any forum.

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119 *See id.*

120 *See id.*

121 *Id.* at 432. We may assume that a desire purely to antagonize other persons, even in a political context, is at best only poorly related to the basic free speech values. *See supra* text accompanying notes 54–58.

122 Or at least, emotionally intense. For an emphasis on the constitutional value of what the Court refers to as "emotive" speech, see *Cohen v. California*, 403 U.S. 15, 26 (1971).

123 *Johnson*, 491 U.S. at 432 (Rehnquist, C.J., dissenting).

124 *Id.* at 431.

125 *See generally* Wright, *supra* note 111.

We can understand why viewpoint-based restrictions might evoke strict scrutiny, if not an absolute prohibition, in the latter, more serious kinds of cases.[126] But it is far less clear why a viewpoint-based restriction that has only a negligible or even a net favorable effect on the free speech values of the affected parties should be tested by any rigorous judicial standard.[127]

A further illustration of this theme is the controversial Indianapolis pornography ordinance case of *American Booksellers Ass'n v. Hudnut*.[128] In this case, Judge Frank Easterbrook began with the assertion that "[u]nder the First Amendment the government must leave to the people the evaluation of ideas."[129] Judge Easterbrook then noted that the Indianapolis ordinance purported to regulate not all graphic sexually explicit depictions of women, but only those depictions that involved the "subordination" of women.[130]

The ordinance thus, in that sense, established an officially approved view of women.[131] And according to Judge Easterbrook, those who adopt the approved view may use graphic, sexually explicit depictions of women in their communications, while those who do not adopt that approved view may not.[132] On this basis, Judge Easterbrook then struck down this viewpoint-based speech regulation,[133] even while explicitly assuming, at least hypothetically, the existence of a compelling governmental interest in preventing serious harms to women,[134] and while recognizing that counter-speech is not a meaningful response to a harmful pornographic image.[135]

Rather than at least hypothetically sacrifice the compelling interest of women in not being physically assaulted for the sake of avoiding a particular viewpoint-based speech restriction, we would do well to consider the rule's actual impact on freedom of speech.[136]

Suppose we assume, perhaps controversially,[137] that a potential pornographic speaker in this *American Booksellers* case intended to convey some constitutionally sufficient idea within the scope of coverage of the Free Speech Clause.[138] This idea would of course have to be conveyable by means

126 This point assumes that the weight of any state interest in restricting the expression of a viewpoint can be set temporarily aside for purposes of doing the crucial alternative speech channels analysis.

127 *See supra* text accompanying note 82.

128 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (mem.).

129 *Id.* at 327.

130 *See id.* at 328–329.

131 *See id.* at 328, 332.

132 *See id.* at 328.

133 *See id.* at 334.

134 *See id.*

135 *See id.* at 330.

136 *See supra* text accompanying notes 122–27.

137 *See generally* R. George Wright, *What Counts as "Speech" in the First Place?: Determining the Scope of the Free Speech Clause*, 37 PEPP. L. REV. 1217 (2010).

138 *See, e.g.*, SCHAUER, *supra* note 54, at 89–92 (drawing a distinction between the range or scope of protection of speech and the degree or intensity of any protection of covered speech).

of the graphic, sexually explicit depiction of the subordination of women.[139] Otherwise, it would not be subject to the ordinance in question.[140]

But then, the vital question becomes: What idea can be conveyed only through the graphic, sexually explicit depiction of the subordination of women, and, crucially, by no other means? Why, to begin, must the assumed idea be conveyed graphically? And sexually explicitly? And through whatever counts as a depiction? Why wouldn't some even slight departure from this combination of characteristics allow the speaker to convey the relevant message while preserving that speaker's free speech priorities as to communication?

It may well be that the specific form of pornography restricted by the Indianapolis ordinance was, for some restricted speaker, the most financially lucrative available business opportunity. But we are not constitutionally concerned with the overall state of mind of the speaker, or with their income level, apart from their priorities with respect, precisely, to the free speech values promoted by the expression of some minimally sufficient idea. Maximizing profits need not be the same thing as, or require, maximizing the free speech values associated with expressing some particular message. It is at best unclear what particular message must, in practice, be conveyed in a manner that violates the narrow Indianapolis ordinance, and not essentially equally well, or better, by some other, legally permitted means.

But now let us assume that any other remaining alternative way of conveying the speaker's idea must, to at least some minimal degree, distort or otherwise impair the speaker's message. If we are still, with Judge Easterbrook, assuming the existence of a compelling government interest underlying the ordinance, we must then ask a further question: Is any minimal loss in overall free speech values attributable to this narrow ordinance worth anything remotely like the assumed resulting increase in violent attacks upon women?[141]

That is, why couldn't a hypothetical minimal loss in free speech values be balanced against, and grossly outweighed by, any degree of an assumed resulting reduction in violent attacks against innocent victims? This is a matter of judgment at the margins,[142] and not at all a matter of entirely abolishing all freedom of speech, in some specific context, for some payoff.[143]

The broader point is, again, that not all viewpoint-based restrictions of speech are anywhere near equally "egregious."[144] Some viewpoint-based speech restrictions, as in *American Booksellers*, are not egregious at all because

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139 *See American Booksellers Ass'n*, 771 F.2d at 328.

140 *See id.*

141 *See id.* at 329.

142 *See, e.g.*, ALFRED MARSHALL, PRINCIPLES OF ECONOMICS bk. V, ch. VIII (8th ed. 1920) (1890) (discussing the economic principle of decisionmaking on the margin).

143 Given the uncertainties on both sides of this kind of balancing, we could adopt any presumption, or make any adjustment to the weighing process, we thought appropriate.

144 *See supra* text accompanying note 4.

they only narrowly and minimally impact speech,[145] even if we ignore any compelling interests they might also promote.

G. Viewpoint Discrimination as Crucial to Essential Institutional Functioning

But the sorts of cases noted immediately above are merely another category of viewpoint-based restrictions of speech in which the severity of the restriction is either quite variable, or else commonly minimal. As a distinct further category, consider the cases in which it might plausibly be claimed that some viewpoint-based restrictions of speech are not merely slightly favorable to overall free speech values, but are essential to the functioning of what we take to be an indispensable public institution. In particular, consider the problem of viewpoint-based restrictions of student speech in public schools.[146]

The judicial test applied in public school speech regulation cases may depend upon whether the school administration is clearly speaking on its own behalf;[147] whether a student is speaking with the apparent approval of the school;[148] or whether the student is clearly speaking on her own behalf.[149]

Among the cases considering a possible role for viewpoint-based restrictions of speech attributable solely to a student is the "BONG HiTS 4 JESUS" banner display case of *Morse v. Frederick*.[150] In *Morse*, Chief Justice Roberts, writing for a plurality, held that public "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use."[151] Chief Justice Roberts explained

145 *But see American Booksellers Ass'n*, 771 F.2d at 330 (expressing an ultimate fear of government as "in control of all the institutions of culture, the great censor and director of which thoughts are good for us").

146 *See generally, e.g.*, Susannah Barton Tobin, *Divining* Hazelwood*: The Need for a Viewpoint Neutrality Requirement in School Speech Cases*, 39 HARV. CR.-C.L. L. REV. 217 (2004); Emily Gold Waldman, *Returning to* Hazelwood*'s Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63 (2008); R. George Wright, *School-Sponsored Speech and the Surprising Case for Viewpoint-Based Regulations*, 31 S. ILL. U. L.J. 175 (2007); Alexis Zouhary, *The Elephant in the Classroom: A Proposed Framework for Applying Viewpoint Neutrality to Student Speech in the Secondary School Setting*, 83 NOTRE DAME L. REV. 2227 (2008).

147 *See generally* Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695 (2011); Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008); Note, *Three's a Crowd—Defending the Binary Approach to Government Speech*, 124 HARV. L. REV. 805 (2011).

148 *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (leaving unclear whether viewpoint-based restrictions in such cases must be not only legitimate and reasonable, but viewpoint-neutral as well).

149 *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (black arm band protest of the Vietnam War); Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986) (vulgar speech by student at a student election assembly).

150 551 U.S. 393, 397 (2007).

151 *Id.*

that "deterring drug use by schoolchildren is an 'important—indeed, perhaps compelling' interest."[152]

Let us assume that Mr. Frederick's displaying the "BONG HiTS 4 JESUS" banner involved expression of a message sufficiently coherent to fall within the scope of First Amendment coverage.[153] The question then becomes whether the speech restriction at issue was recognizably viewpoint-based. And the answer seems clear. A banner that called for discussion of the possible harms of illegal drug use among public high school students would not have been censored, and certainly would not have fallen within the logic of Chief Justice Roberts's reasoning.[154] A banner that was perceived as, in whatever respect, critical of such illegal drug use would clearly not have been censored.[155]

Thus the dissenting opinion in *Morse* argued "the Court does serious violence to the First Amendment in upholding—indeed, lauding—a school's decision to punish Frederick for *expressing a view with which it disagreed*."[156] At the most general level, any rule that permits the expression of message "A," while prohibiting the otherwise similarly situated expression of message "not-A," should be presumed to be based, in one way or another, on viewpoint.

Yet the plurality opinion by Chief Justice Roberts, in the case of a viewpoint-based speech restriction, referred to either a compelling or to a merely "important" governmental interest, without engaging in any especially rigorous investigation of causation or any narrowness of tailoring.[157]

This judicial laxity of Chief Justice Roberts in the face of a viewpoint-based restriction of speech is best explained by emphasizing the public school educational context,[158] its "special characteristics,"[159] and the presumed vital public functions of the essential institution of the public-school system. Public schools, at least at certain grade levels, are not intended to serve as indoor public fora, as debating societies, or even as the site of general and open discussion groups. Such schools have other, typically imperfectly achieved, purposes.

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152 *Id.* at 407 (quoting Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 661 (1995)).

153 *See supra* text accompanying notes 137–38. Certainly, one could reasonably argue to the contrary. *See, e.g.*, *Morse*, 551 U.S. at 433, 434–35 (Stevens, J., dissenting). The banner in question was raised on a public sidewalk, and thus in a traditional public forum, but in the course of an official school function. *See id.* at 400–01 (majority opinion).

154 *See supra* text accompanying note 153.

155 *See id.* Had a banner critical of drug use been lewd, indecent, or vulgar in expression, the case might then fall under the rule espoused in *Bethel School District v. Fraser*, 478 U.S. 675 (1986).

156 *Morse*, 551 U.S. at 435 (Stevens, J., dissenting) (emphasis added). Justices Alito and Kennedy attempted to draw a viable distinction between the unprotected advocacy of illegal drug use and protected commentary "on any political or social issue," including drug-related issues. *See Morse*, 551 U.S. at 422 (Alito, J., concurring).

157 *See supra* text accompanying note 155.

158 *See Morse*, 551 U.S. at 408.

159 *Id.* (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

In some small measure, the mission of the public schools as an institution involves both educating about and appropriately discouraging the use by students of illegal drugs.[160] Much more broadly, and much more essentially, the public schools as an indispensable institution exist to promote the transmission of both a broad range of knowledge and basic cultural values including sufficient civility, mutual respect, a recognition of basic equality among persons, and reciprocal recognition and tolerance.[161] And these basic cultural values are, not at all surprisingly, linked to the promotion of the fundamental free speech values themselves,[162] including the optimal pursuit of truth, an effectively functioning democratic self-government, and the opportunity for optimal self-realization.[163]

These essential institutional purposes of the public school system largely explain why clearly viewpoint-based restrictions on speech in public schools may evoke something short of traditional strict scrutiny, much less any absolute prohibition.[164] In some such cases, courts may recognize that the viewpoint-neutrality requirement normally applied elsewhere, even to so-called nonpublic fora, may not be appropriate for pure student speech contexts, given the schools' institutional purposes and values.[165]

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160 *See id.* at 407–08.

161 See, crucially, the logic of the fundamental public school desegregation case of *Brown v. Board of Education*, 347 U.S. 483, 493 (1954); *see also* Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986). More theoretically, see JOHN DEWEY, DEMOCRACY AND EDUCATION 19–20 (Dover ed. 2004) (1916). In the context of arguably officially endorsed student speech, see *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271–72 (1988). For the case of a public school library book removal, see *Board of Education v. Pico*, 457 U.S. 853, 879–80 (1982) (Blackmun, J., concurring in part and concurring in the judgment).

162 *See supra* notes 54–58 and accompanying text.

163 *See Fraser*, 478 U.S. at 683–85; *Hazelwood*, 484 U.S. at 271–72. Notice, relatedly, how restrictions on the display in public schools of Confederate flags are typically upheld on grounds of reasonably anticipated disorder, where the free speech values of the "targets" or victims of Confederate flag display could also be implicated as well. *See, e.g.*, Hardwick *ex rel.* Hardwick v. Heyward, 711 F.3d 426, 438 (4th Cir. 2013); Defoe *ex rel.* Defoe v. Spiva, 674 F.3d 505, 507 (6th Cir. 2011) (Boggs, J., dissenting from denial of rehearing en banc); A.M. *ex rel.* McAllum v. Cash, 585 F.3d 214, 222 (5th Cir 2009); B.W.A. v. Farmington R-7 Sch. Dist., 554 F.3d 734, 736–38 (8th Cir. 2009); Barr v. Lafon, 553 F.3d 463, 466 (6th Cir. 2009). Or more broadly, consider the Title VII workplace treatment of the display of Confederate flags, as distinct from flags conveying other messages, as in *Ellis v. CCA of Tennessee, LLC*, 650 F.3d 640, 648 (7th Cir. 2011) ("[D]isplays of confederate flags in the workplace may support a hostile work environment claim."); *Watson v. CEVA Logistics US, Inc.*, 619 F.3d 936, 938–39 (8th Cir. 2010); *Brown v. Nucor Corp.*, 576 F.3d 149, 157 (4th Cir. 2009); *Renfroe v. IAC Greencastle, LLC*, 385 F. Supp. 3d 692, 704 (S.D. Ind. 2019).

164 *See supra* text accompanying notes 3–5, 11, 13.

165 *See Pico*, 457 U.S. at 871 (allowing the removal of public school library books judged to be "pervasively vulgar" or "educational[ly] [un]suitab[le]"). Inescapably, these judgments must involve reflection not only on the content of the books, but on the worthiness of the ideas, messages, or views expressed therein. *But see id.* at 872 (arguing to the contrary). *See also* Walker v. Tex. Div. of Sons of Confederate Veterans, 135 S. Ct. 2239, 2251 (2015) (brief survey of the evolving forms of public fora); Int'l Soc'y for Krishna

H. Viewpoint Discrimination Against Speech Categories of Lesser Constitutional Significance

In yet another class of viewpoint-based restriction cases, courts may shy away from forthrightly adopting either strict scrutiny or speech-protective absolutism because of a judicial sense, whether universally shared or not, that the very nature of the general type or category of the speech itself is of only diminished constitutional significance.

Consider, for example, the otherwise puzzling commercial speech case of *Sorrell v. IMS Health Inc.*[166] *Sorrell* involved Vermont's restrictions on the disclosure of pharmacy records that would indicate the drug prescription practices of particular physicians, which would clearly be of commercial interest to parties seeking to increase their market share of prescription drug sales.[167]

The Court in *Sorrell* indicated that the speech restriction in question disfavored some speech based on viewpoint.[168] In particular, the restriction burdened those who would use the information obtained for commercial, but not for educational, speech purposes.[169] Crucially, the Court held that the Vermont law "on its face burdens *disfavored speech by disfavored speakers*,"[170] thus amounting not only to content-discrimination, but as well to viewpoint-based discrimination.[171]

If viewpoint-based speech discrimination were uniformly abhorrent or egregious,[172] one might well expect the Court in *Sorrell* to have said so, and then tested the relevant statute by strict scrutiny, if not by an absolutist standard. But this is not how the Court in *Sorrell* in fact proceeded. Instead, the Court concluded merely that the speech regulation at issue would supposedly fail a range of elevated, or heightened, degrees of judicial scrutiny.[173] The particular degree of elevated scrutiny applied was thus irrelevant, and therefore need not be specified. [174] The dissenters in the case, interestingly, would not have applied any form of elevated judicial scrutiny, and would have upheld the state regulation of speech.[175]

Consciousness, Inc. v. Lee, 505 U.S. 672, 678–79 (1992) (rejecting viewpoint-based, but not all content-based, speech restrictions in nonpublic fora).

166 564 U.S. 552 (2011).

167 *See id.* at 557–58.

168 *See id.* at 563–64.

169 *See id.* at 564. Of course, if one declines to view this sort of speech restriction as in any sense based on viewpoint, that would further complicate the logic of the scope and defensibility of the law of viewpoint-based restrictions on speech.

170 *Id.* at 564 (emphasis added).

171 *See id.* at 565, 571.

172 *See supra* text accompanying notes 3–4.

173 *See Sorrell*, 564 U.S. at 557, 571–80.

174 *See id.* at 571 (citing Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 184 (1999)).

175 *See id.* at 580–81 (Breyer, J., dissenting).

The Court's carefully specified reluctance in *Sorrell* to clearly and explicitly subject the viewpoint regulation in question to the most rigorous forms of judicial scrutiny stems, certainly, from a judicial reluctance to decide what need not presently be decided. But it stems as well from a widely, but not universally, shared sense that even nonmisleading, nonfraudulent commercial speech, without any inseparable elements of political speech, is generally unworthy of the same level of constitutional protection as core political speech,[176] even where viewpoint-based restriction of such purely commercial messages is present.[177]

Whether freedom of pure and nonmisleading commercial speech, as a category, tends to promote the basic free speech values[178] of pursuing the truth, democratic self-government, and self-realization as much as freedom of political speech is vigorously debated.[179] To the extent that some courts, in some contexts, perceive differences between the free speech value of commercial and of political speech, viewpoint-based restrictions of pure commercial speech may understandably be tested in less than rigorous fashion.

CONCLUSION

It is widely taken for granted that viewpoint-based restrictions of speech are, as a class, especially disfavored, meriting either absolute prohibition or strict scrutiny. As it turns out, however, this common assumption is both descriptively incorrect and normatively unjustifiable.

A typology of the various basic forms of viewpoint-based restriction on speech supports this initially surprising claim. This typology can be constructed out of the obvious uncertainties, ambiguities, equivocations, and gaps found in the viewpoint-restriction cases.

There are, certainly, genuinely egregious cases of viewpoint-based restrictions. But these cases do not begin to exhaust the range of the possibilities. There are also mixed-motive viewpoint-based restriction cases, where the governmental motives, apart from the weight of any governmental interest, may vary widely in their degree of objectionability. In other cases, the government enacting the viewpoint-based restriction may be more or less unaware of the viewpoint-based effects of the speech restriction in question.

176 *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562–63 (1984) (citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978)).

177 *See supra* text accompanying notes 168–71. Whether discrimination against speakers who use the data for commercial speech purposes, as compared to other speakers who use that same data for noncommercial purposes, should be classified as viewpoint-based discrimination is debatable.

178 *See supra* text accompanying notes 54–58.

179 For a sense of the relevant arguments, see, e.g., STEVEN H. SHIFFRIN, WHAT'S WRONG WITH THE FIRST AMENDMENT? 79–93 (2016); C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981 (2009). For background, see the arguments in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

Sometimes it is the courts themselves that are oblivious to the viewpoint-based effects of the regulation in question. In a further class of cases, the viewpoint-based restriction does not at all reflect the enacting government's own first-order substantive preferences on the merits. Instead, the enacting government is expressing only its own second-order preferences, not on the merits, but as among the various groups who may or may not favor the speech restriction, in general or on a specific occasion. The enacting government may in such cases be accommodating groups, large or small, or else generally politically weak and disenfranchised, or relatively powerful.

As well, viewpoint-based restrictions of speech may well not leave the regulated speakers and audiences in any meaningfully worse position with respect to anyone's own authentic basic free speech values and priorities. In such cases, the regulated speakers may be unaffected, or even better off, in terms of their own free speech values, because the speakers still have available alternative speech channels through which to convey their message as well, as before.

And in yet other viewpoint-based restriction cases, the crucial complication is again not the weight of the government interest at stake, but an understandable reluctance to impose strict scrutiny, much less an absolute prohibition, on the speech regulation in question. Public schools, for example, collectively qualify as social institutions that, by their very nature, purposes, and functions, properly resist the broad application of strict scrutiny to viewpoint-based restrictions of much student speech.

Finally, there are cases in which the general category or class of speech in question is thought by many, but certainly not all, to implicate less strongly, if at all, the basic values and purposes underlying the idea of special legal protection for speech. At least some instances of even nonmisleading pure commercial speech are often thought to fall in this category. And on this assumption, it is not surprising that even viewpoint-based restrictions on the category of speech in question do not evoke strict scrutiny, let alone an absolute prohibition of such regulations.

In general, then, we may say that viewpoint-based restrictions of speech can and should, depending on type and context, evoke any number of cheers from between zero and three.