Content Regulation and the First Amendment: A Revisionist View

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Despite its oft-stated adherence to the principle of content neutrality, the Supreme Court in recent years has upheld a number of restrictions that are obviously related to speech content. Unlike other commentators, Professor Farber argues that these cases are not wrongly decided, but that they reveal a pattern of principled decisionmaking. Professor Farber perceives the Court subjecting content regulations to two distinct tests, the first a variant of equal protection analysis, and the second a balance of the interests served by the regulation against the regulation's impact on speech. In the author's view, the second test is not a mere ad hoc inquiry into the reasonableness of the regulation, but is circumscribed by restrictions the Court has placed on the permissible goals of content-based regulation.

I. INTRODUCTION

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."1 That, in a nutshell, is the principle of content neutrality. For at least the past decade, this principle has been a dominant force in first amendment theory.2 Yet in practice the principle has not been

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1. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (citations omitted). Mosley is discussed in detail at notes 34-50 infra and accompanying text.

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followed with much consistency. In recent years, the Supreme Court has upheld laws regulating misleading advertising,\textsuperscript{3} "indecent" language in radio broadcasts,\textsuperscript{4} political posters on buses,\textsuperscript{5} and the location of adult movie theatres.\textsuperscript{6} These restrictions are clearly related to the content of the regulated speech. Obviously, there is a discrepancy between theory and practice in this area of first amendment law.\textsuperscript{7}

\textsuperscript{3} See Friedman v. Rogers, 440 U.S. 1, 15-16 (1979) (statute prohibiting deceptive uses of optometrical trade names not violative of first amendment); Ohradik v. Ohio State Bar Ass'n, 436 U.S. 447, 459-62 (1978) (state's regulation of lawyer solicitation likely to involve fraud or other "vexatious conduct" not violative of first amendment).

\textsuperscript{4} See FCC v. Pacifica Foundation, 438 U.S. 726, 750-51 (1978) (plurality opinion) (FCC restriction of broadcast containing indecent language not violative of first amendment). The plurality opinion in Pacifica has been termed "a disquieting and a significant departure from traditional first amendment theory." J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 812-17 (1978).

\textsuperscript{5} See Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (plurality opinion) (no first amendment forum involved; decision to prohibit political advertising on city buses rationally related to objectives of avoiding imposition on captive audience, appearance of favoritism, and interruption of long-term commercial advertising).

\textsuperscript{6} Young v. American Mini Theatres, Inc., 427 U.S. 40, 60 (1976) (plurality opinion) (zoning ordinances regulating location of "adult movie theatres" have no significant deterrent effect on exhibition of films protected by first amendment).

\textsuperscript{7} This discrepancy has not escaped the attention of the Court. In Young v. American Mini Theatres, Inc., a plurality of the Court argued that the principle of content neutrality should be sharply limited:

\begin{quote}
Even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguable artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same.
\end{quote}
Perhaps these cases are simply aberrations. So argue academic commenta-
tors who have sharply criticized the Court’s failure to adhere to the con-
tent-neutrality principle or to articulate a coherent view of content regu-
lation.\(^8\) Admittedly, the cases allowing content regulation have often been decided by
badly divided Courts in opinions that are not notable for their doctrinal
clarity.\(^9\) Unlike these commentators, however, I believe that if one looks at the
Court’s actual methodology rather than at what it says about its methodolo-
gy, a pattern can be found. In this article, I will suggest a method of analysis
that I believe underlies the case law of content regulation.

Under this analysis, regulations based on content are subject to two tests.
The first test, extracted from Young v. American Mini Theatres, Inc.,\(^10\) is an
equal protection test: regulatory classifications based on the speaker’s view-
point are subject to strict scrutiny, and other content-based classifications are
subject to the milder scrutiny currently given classifications based on sex and
illegitimacy.\(^11\) That is, to withstand constitutional challenge, the content-

But few of us would march our sons and daughters off to war to preserve the citizen’s right to
see “Specified Sexual Activities” exhibited in the theaters of our choice. Even though the First
Amendment protects communication in this area from total suppression, we hold that the
State may legitimately use the content of these materials as the basis for placing them in a
different classification from other motion pictures.

427 U.S. 50, 70-71 (1976) (Stevens, J., with Burger, C.J., White & Rehnquist, JJ.). Four members of the
Court vigorously contested this argument. Id. at 84-88 (Stewart, J., with Brennan, Marshall & Blackmun,
J.J., dissenting). Justice Powell concurred separately in the judgment of the Court that the ordinance was
not invalid because vague or tantamount to a prior restraint. Id. at 84. See also FCC v. Pacifica
Foundation, 438 U.S. 726, 744-48 (1978) (plurality opinion) (rejecting absolute rule of content neutrality;
depending on content, context of speech dispositive of presence or absence of first amendment protection).

8. See, e.g., Stone, supra note 2, at 99 (Court’s reasoning in American Mini Theatres, Erznoznik, Lehman
“contradictory and imprecise”); The Supreme Court, 1975 Term, supra note 2, at 200-02 (criticizing
American Mini Theatres approach as “inconsistent,” “unworkable,” and ignorant of close interrelationship
between work’s message and form of expression); Case Note, 28 Case W. Res. L. Rev. 456, 490-92 (1978)
(American Mini Theatres termed “jurisprudential mess,” demonstrating insensitivity toward freedom of
expression; Court chastised for unwillingness to impose any burden on society to guarantee freedom of
speech for all); Note, supra note 2, at 347-54 (review of first amendment jurisprudence provides no support
for American Mini Theatres plurality assumption that protected speech regulable on basis of content).

9. See discussion of cases at notes 20-31, 144-64, 191-98 infra and accompanying text.

10. 427 U.S. 50 (1976) (plurality opinion). American Mini Theatres is discussed at notes 20-31 infra and
accompanying text.

11. The most explicit articulation of this intermediate level of scrutiny is found in Craig v. Boren, 429
U.S. 190 (1976) (invalidating statutory scheme that prohibited sale of 3.2 beer to males under 21 but
permitted sales to females over 18). Justice Brennan, writing for the Court, noted that for the facially
discriminatory classification to withstand scrutiny under the equal protection clause, it “must serve
important governmental objectives and must be substantially related to achievement of those objectives.”
Id. at 197. This level of scrutiny is less intense than that given to classifications that disadvantage racial
minorities, but more intense than the minimal scrutiny given economic legislation that arguably burdens an
identifiable class of people. See generally J. NOWAK, R. ROTUNDA & J. YOUNG, supra note 2, at 522-27,
601-16; L. TRIBE, supra note 2, at 1057-66. For further discussion of the intermediate or middle-
tier standard of review of content-based speech regulation, see notes 55-62 infra and accompanying text.

For examples of the application of the intermediate level of scrutiny to classifications based on sex or
illegitimacy, see Califano v. Westcott, 99 S. Ct. 2655, 2663 (1979) (provision of benefits to dependent
children on basis of father’s but not mother’s unemployment not substantially related to any important
government objective); Caban v. Mohammed, 441 U.S. 380, 391 (1979) (provision allowing unwed mother
based classification must "serve important governmental objectives and must be substantially related to achievement of those objectives."12 The second test involves balancing the interests served by a regulation against the regulation's impact on speech. This balancing test, derived from Justice Harlan's opinion in Cohen v. California,13 is not simply an ad hoc determination of reasonableness. Instead, it is controlled by restrictions on the permissible goals of content-based regulation.

Neither test is entirely novel. A major premise of this article is that the "problem" of content regulation does not require a novel solution, just recognition that the problem is largely illusory. The cases seem puzzling and unintelligible only because one is distracted from the real issues by the alluring mirage of content neutrality. Once this distraction is disposed of, the cases become straightforward and sensible.

The remainder of this article is divided into three sections. The first two sections are devoted to developing the proposed tests for content-based regulations. Each of these sections begins with an analysis of a "model case" employing one of the proposed tests, followed by criticism of existing theories of content neutrality and a fuller explanation of the proposed test. The final section of the article attempts to show that the proposed approach provides an intelligible explanation of the case law. That section focuses on three types of regulations that are commonly considered especially troublesome: Restrictions on commercial speech; restrictions on "offensive speech"; and restrictions utilizing subject-matter classifications. The thesis is that the cases involving these kinds of regulation all fit into a coherent pattern.

The discussion of the case law is also intended to serve another function. The facts of these cases go a long way to support the reasonableness of the kind of moderate, balanced approach proposed in this article. On the one hand, it is hard to take seriously the idea that the statutes involved pose dire threats to freedom of expression. For example, one case involves a restriction on the right to build an adult theatre next to another adult theatre when there are other sites available.14 Surely the right to cluster adult theatres is not close to the "central meaning of the First Amendment,"15 no matter what we think that central meaning is. On the other hand, many of the statutes involved in the cases were intended to protect individual interests that have constitutional status—for example, the right of parents to control the upbringing of their children.16 Although reasonable people obviously can disagree about the

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proper resolution of these cases, the regulatory activities that prompted them cannot be regarded simply as examples of government repression or censorship. A more sensitive analysis is necessary, or at least, so I hope to demonstrate.

II. THE EQUAL PROTECTION PHASE OF THE PROPOSED APPROACH

In most first amendment cases, the ultimate issue is whether a sufficient justification exists for the burden the state has placed on free speech. This is not, however, the only issue raised by content-based regulations. For example, we might agree that banning posters on city buses is a proper means of aiding commuters who prefer to avoid exposure to the messages of the posters. Yet we still might be troubled by an exemption for commercial advertising. Our concern would not be so much the restrictive effect on communication of the poster ban as the differential treatment of categories of speech. The distinction is like the familiar one between substantive due process and equal protection. One doctrine focuses on the extent of the burden placed on the complaining individual, the other on the different treatment accorded individuals because of a certain classification. Although these issues are often related, they are analytically distinct. This section of the article will address only the differential treatment issue.

17. These are the facts of Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (plurality opinion). Lehman is discussed in detail at notes 191-98 infra and accompanying text.

18. This is not a novel observation. See Stone, supra note 2, at 87 n.27 (noting that in Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972), Court looked to relative harmfulness of permitting only labor picketing, not to harmfulness of prohibiting nonlabor picketing); Stone, Fora Americana: Speech in Public Places, 1974 Sup. Ct. Rev. 233, 258 n.105, 272-80 (describing two “rights” provided by first amendment guarantee of freedom of expression as “public forum” right and “equal protection” right). A somewhat similar distinction is also drawn in Williams, Subjectivity, Expression, and Privacy: Problems of Aesthetic Regulation, 62 MINN. L. REV. 1, 40 (1977) (distinguishing “equal access,” which prohibits discrimination in granting access to forum, and “minimum access,” which balances state interest in protecting captive audience against communicator’s interest in using particular forum) and Note, The Public Forum: Minimum Access, Equal Access, and the First Amendment, 28 STAN. L. REV. 117, 132 (1975) (positive first amendment values require affirmation of minimum access because equal access invites legislative bans on expression). For earlier discussions of the equal protection/first amendment interface, see Blasi, Prior Restraints on Demonstrations, 68 Mich. L. Rev. 1482, 1492-97 (1970); Van Alstyne, Political Speakers at State Universities: Some Constitutional Considerations, 111 U. PA. L. REV. 328, 337-39 (1963). But see L. Tribe, supra note 2, at 385-86 (analyzing differential treatment problem on basis of presence or absence of activity’s communicative impact).

19. See Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 82 Harv. L. Rev. 1, 20-24 (1972) (traditional distinction between equal protection and due process jurisprudence is that of judicial scrutiny with regard to means versus judicial scrutiny with regard to ends); Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1130-32 (1969)
A. THE PARADIGM CASE

The differential treatment issue was raised in its purest form in the case of Young v. American Mini Theatres, Inc.20 In 1972, the Detroit city council adopted certain zoning ordinances in an effort to limit undesirable concentrations of adult theatres.21 These ordinances prohibited the establishment of new adult theatres within 500 feet of a residential area or within 1000 feet of any two "regulated uses," a category that included adult theatres, adult bookstores, bars, pawn shops, pool halls, and motels.22 The primary issue before the Supreme Court was the constitutionality of this classification of movie theatres based on the content of the films displayed in the theatres.23

One of the virtues of the plurality opinion in Mini Theatres is that, unlike the concurring and dissenting opinions, it correctly identifies this classification of movie theatres as primarily raising an equal protection issue rather than a first amendment issue.24 The real objection to the ordinance was not that it restricted speech. The district court found that ample sites for adult theatres were available despite the ordinances and that the market for adult movies would not be curtailed because of the ordinances.25 Moreover, as

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(process of identifying implicated interests under due process or equal protection analysis similar, but focus in due process is balance of state objective against fundamental interest; focus in equal protection is nature of classification made by legislature).

20. 427 U.S. 50 (1976) (plurality opinion). This article will discuss only the portion of the opinion that dealt with the content discrimination issue. Id. at 63-73. This part of Justice Stevens' opinion was joined only by Chief Justice Burger, and Justices White and Rehnquist.

21. A theatre was classified as "adult" if used to present "material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas.'" Id. at 53; see id. at 53 nn.4 & 5 (definitions of "Specified Sexual Activities" and "Specified Anatomical Areas").

22. Id. at 52 & n.3.

23. Id. at 52.

24. See id. at 62-63 (perfunctorily dismissing first amendment claim). Justice Powell's concurrence applied the O'Brien balancing test, weighing Detroit's zoning interest, which did not "suppress" free expression, against the "incidental restriction" on respondent's first amendment interest. Id. at 79-82. For a discussion of United States v. O'Brien, 391 U.S. 367 (1968), see notes 76-83 infra and accompanying text.

In dissent, Justice Stewart contended that the ordinance involved "selective interference with protected speech whose content is thought to produce distasteful effects. It is elementary that a prime function of the First Amendment is to guard against just such interference." 427 U.S. at 85 (footnote omitted). Justice Stewart argued that "cardinal principles of First Amendment law . . . require that time, place, and manner regulations that affect protected expression be content neutral except in the limited context of a captive or juvenile audience." Id. at 85-86 (footnote omitted). Justice Blackmun's dissenting opinion focused on the vagueness issue, id. at 89-96, but he too joined the Stewart dissent. Commentators have also generally criticized American Mini Theatres on first amendment rather than equal protection grounds. See, e.g., J. NOWAK, R. ROTUNDA & J. YOUNG, supra note 2, at 845-46 (American Mini Theatres an exception to rule prohibiting content-based regulation); L. TRIBE, supra note 2, at 674-82 (after American Mini Theatres sexually explicit speech regulable but government may not be motivated by desire to protect citizens from exposure to the speech itself and may not completely suppress sexually explicit speech); Stone, supra note 2, at 96-100 (ambiguities of American Mini Theatres view that subject-matter restrictions should be tested by less rigorous standard than other content-based restrictions may lead to proliferation of content regulation); Developments in the Law—Zoning, 91 Harv. L. Rev. 1427, 1557 (1978) (after American Mini Theatres, legitimate pornography zoning must still satisfy established first amendment criteria); The Supreme Court, 1975 Term, supra note 2, at 200, 205 (American Mini Theatres represents first regulation of protected speech on basis of content, is further step in trend away from characterizing speech as fully protected or fully unprotected).
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Justice Powell's concurrence pointed out, the theatre owners did not claim that their movie selections represented an attempt to "convey their own personal messages." Rather, their theatres served as pipelines between movie producers and the public. So long as the flow was not impeded, the location or ownership of the pipelines should be immaterial to both producer and audience. Consequently, the zoning ordinance placed no burden on speech and presented no substantial first amendment problem. But this conclusion did not dispose of the case. The theatre owners who sought relief could still properly complain that they were being classified on the basis of a constitutionally suspect trait, namely, the content of their presentations. This was clearly an equal protection issue.

The plurality opinion in Mini Theatres does not explicitly identify the level of scrutiny to be applied to this classification, but it does identify two factors upholding the classification. First, the record disclosed "a factual basis for the [City Council's] conclusion that this kind of restriction will have the desired effect." Second, "[T]he city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect." This "scrutiny" resembles that applied to classifications based on sex or illegitimacy. In the sex discrimination cases, for instance, the test has been stated as a requirement that the regulatory scheme substantially further an important state interest. This appears to be the test actually applied although not articulated by the Mini Theatres plurality.

B. THE MOSLEY APPROACH

The Mini Theatres Court indicated that it had given the Detroit ordinance milder scrutiny than it might have given a statute aimed at a particular viewpoint. In contrast, some commentators have argued that all content-based classifications should be subject to the same level of strict scrutiny.

26. 427 U.S. at 78 n.2 (Powell, J., concurring); accord, L. Tribe, supra note 2, at 676-77.
27. 427 U.S. at 63.
29. 427 U.S. at 71. For a perceptive evaluation of the values at stake, see L. Tribe, supra note 2, at 674-79 (describing Court as attempting to accommodate municipality's need to protect quality and character of community life, right of individual to speak, and right of public to know).
30. To be upheld, the classification must "serve important governmental objectives" and be "substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976); see note 11 supra and accompanying text.
31. A recent statement of the test is found in Califano v. Westcott, 99 S. Ct. 2655, 2661-63 (1979) (invalidating as not substantially related to any important government objective provision providing benefits to dependent children on basis of father's but not mother's unemployment).
32. See 427 U.S. at 67, 70 (essential that government regulation of communication not be affected by sympathy or hostility to speaker's viewpoint).
33. See, e.g., L. Tribe, supra note 2, at 672 & n.1, 673 (first amendment requires that subject matter restrictions be treated with same suspicion as viewpoint restrictions; time, place, and manner regulations must be content-neutral unless affecting captive or juvenile audiences); Kaest, supra note 2, at 28 (any content-based restriction that selectively excludes speaker from forum must be shown to be minimum necessary to further significant government interest); Stone, supra note 2, at 86 (first amendment requires that subject matter restriction, like viewpoint restriction, be treated as presumptively invalid). See generally Krattenmaker & Powe, Televised Violence: First Amendment Principles and Social Science Theory, 64 Va. L. Rev. 1123, 1268-70 (1978); Stone, supra note 18, at 275.
These commentators base their arguments largely on the Supreme Court’s opinion in Police Department of Chicago v. Mosley. Although the major concern of this article is not with the Mosley opinion itself but with what Mosley has come to mean, a close inspection of the case is nevertheless rewarding.

The facts in Mosley were simple enough. Earl Mosley, a postal worker, frequently picketed a Chicago high school with a sign accusing the school of “practic[ing] black discrimination” and having a “black quota.” Seven months after Mosley had started picketing, the city enacted an ordinance prohibiting picketing within 150 feet of any school just before, just after, or while the school was in session. A proviso exempted from this ban “the peaceful picketing of any school involved in a labor dispute.” Mosley’s principal argument was that the ordinance was overbroad because it prohibited even peaceful picketing near a school. The Supreme Court did not, however, reach this issue. Instead, it decided the case on the basis of Mosley’s fallback argument that the labor picketing exemption denied him equal protection.

One problem with Mosley is that the Court’s theory fails to support its disposition of the case, which was to affirm the judgment below. The Court of Appeals had struck down the main body of the ordinance as void for overbreadth. In contrast, the Supreme Court held that the difference in treatment caused by the labor picketing exemption violated the equal protection clause. Obviously, there were two ways of eliminating this disparate treatment. One was to extend the favored treatment accorded peaceful labor picketing to all other peaceful picketing, which in effect was what the Supreme Court did; the other was to eliminate the labor picketing

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34. 408 U.S. 92 (1972).
35. Id. at 93.
36. The ordinance read in relevant part as follows:

A person commits disorderly conduct when he knowingly:

(i) Picks or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session been has concluded, provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute . . . .

Id. at 92-93.
37. See Mosley v. Police Dep’t of Chicago, 432 F.2d 1256, 1258 (7th Cir. 1970).
38. 408 U.S. at 94-95.
39. Id. at 94, 102.
40. Mosley v. Police Dep’t of Chicago, 432 F.2d 1256, 1259 (7th Cir. 1970). Mosley had sought an injunction against enforcement of the ordinance as well as declaratory relief. Appellant’s Brief at 24, Mosley v. Police Dep’t of Chicago, 432 F.2d 1256 (7th Cir. 1970) (copy on file at Georgetown Law Journal).

The Court of Appeals’ disposition of the case was as follows:

We conclude that [the ordinance] denies absolutely plaintiff’s right to express his views by the mere carrying of a sign as he walks upon the public sidewalk adjoining the school during school hours. It is, therefore, patently unconstitutional on its face. . . .

For the foregoing reasons, the judgment of the district court is reversed and this cause is ordered remanded with directions to grant plaintiff the injunctive relief sought below.

432 F.2d at 1259.
41. 408 U.S. at 102. The Court noted that it was deciding the case on grounds not reached by the Seventh Circuit. Id. at 94.
exemption, leaving the main body of the ordinance intact. The question of which route to take is normally one of state law and could be reduced here to whether the labor proviso was severable from the rest of the ordinance.42 Instead of affirming, then, the Court should have remanded for consideration of this question.43

Another problem with the opinion is that the most important passages are dicta. The opinion is typically cited for its lengthy discussion of the validity of subject-matter restrictions.44 But the ordinance before the Court did not, in fact, discriminate simply on the basis of subject matter. As the Court construed the ordinance, the labor exemption applied “only to labor picketing of a school involved in a labor dispute.”45 Thus, the government was giving a preference not only to a particular subject, but also to the expression of a single viewpoint, that of labor unions. Viewpoint-based discrimination is more clearly troublesome than subject-matter discrimination;46 the Court’s remarks on the latter subject were apparently gratuitous.

42. See, e.g., Stanton v. Stanton, 421 U.S. 7, 17-18 (1975) (issue of what is proper remedy when state statute held violative of equal protection clause “plainly” one of state law to be resolved on remand); Developments in the Law—Equal Protection, supra note 19, at 1136-37 (if statute denies equal protection by making unconstitutional classification, classification abolished by making statute operate on everyone or on no one; court must weigh general interest in retaining statute against reluctance of judiciary to extend legislation to those not previously covered); Comment, Equal But Inadequate Protection: A Look at Mosley and Grayned, 8 HARV. C.R.-C.L. L. REV. 469, 470, 477 (1973) (arguing that Mosley holding might allow state to prohibit all picketing in vicinity of schools).

43. Of course, on remand, the Seventh Circuit might well have held that the labor exemption was not severable. See Brown v. Scott, 602 F.2d 791, 795 & n.5 (7th Cir. 1979) (on authority of Mosley, Illinois statute that made residential picketing misdemeanor with enumerated exceptions violative of equal protection clause “plainly” one of state law to be resolved on remand); cert. granted sub nom. Carey v. Brown, 48 U.S.L.W. 3426 (U.S. Jan. 7, 1980) (No. 79-703).

44. It is possible, of course, that the Court’s failure to discuss the possibility of severing the labor picketing exemption stems from its view that a flat ban on picketing near public schools would be unconstitutional. In a companion case to Mosley, Grayned v. City of Rockford, 408 U.S. 104 (1972), an antipicketing ordinance identical to the one in Mosley was invalidated even though the ordinance had been amended after petitioner’s conviction to eliminate the labor exemption. Id. at 107 n.2; see Karst, supra note 2, at 37 (absolute ban on picketing near schools would constitute de facto content regulation). If indeed this was the basis of the Mosley decision, the Court acted inexplicably by purporting to decide the case on equal protection grounds but actually basing its decision on the Seventh Circuit’s first amendment theory.

45. See 408 U.S. at 95-98. The Court of Appeals in American Mini Theatres based its decision on this view of Mosley. American Mini Theatres, Inc. v. Gribbs, 518 F.2d 1014, 1020 (6th Cir. 1975). For similar reliance on Mosley, see Community-Service Broadcasting of Mid-America, Inc. v. FCC, 593 F.2d 1102, 1112 n.23 (D.C. Cir. 1978); Gay Students Organization v. Bonner, 509 F.2d 652, 661, 662 (1st Cir. 1974); Tollett v. United States, 485 F.2d 1087, 1091-92 (8th Cir. 1973); People Acting Through Community Effort v. Doorley, 468 F.2d 1143, 1145 (1st Cir. 1972).

46. 408 U.S. at 94 n.2 (emphasis in original). This appears to have been the reading given Mosley in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), in which the plurality described Mosley as a case in which “picketing in the vicinity of a school [was] allowed to express the point of view of labor.” Id. at 64. This reading of Mosley is supported by the concluding paragraph of the first section of the Mosley opinion, 408 U.S. at 97-98, in which the Court quoted with approval Justice Black’s attack in Cox v. Louisiana, 379 U.S. 536 (1965), upon a statute that specifically permitted “picketing for the publication of labor union views” but not other picketing. Id. at 581 (concurring opinion).

47. As the Court said in Young v. American Mini Theatres, Inc., “[w]hether political oratory or philosophical discussion moves us to applaud or despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same.” 427 U.S. at 70. Professor Stone has articulated a number of reasons for this strong disapproval of viewpoint-based prohibitions. First, such prohibitions distort the functioning of the marketplace of ideas by giving certain viewpoints a selective
The biggest problem with Mosley is the lack of clarity in the Court's articulated standard of review. Some parts of the opinion give the impression that classifications based on subject matter are per se unconstitutional. These are the primary passages on which commentators rely to support their theories of content neutrality. In the final two sections of the opinion, however, the Court tested the ordinance against the requirement that "discriminations among pickets must be tailored to serve a substantial government interest." The Court found that the ordinance could not pass even this relatively weak test. Because the Court used both tests, it is impossible to say whether the proper test is a per se prohibition, a "narrowly tailored" requirement, or something in between.

In sum, Mosley provides weak support for the proposition that subject-matter classifications should be subject to the same high level of scrutiny as viewpoint classifications. Apart from the dubious authority of Mosley, the primary argument for this standard of review seems to be that subject-matter restrictions may actually disguise discrimination against certain viewpoints. Although this may sometimes be true, subject-matter restrictions can also be entirely innocuous. For instance, there is nothing suspect about the decision of the drafters of the National Labor Relations Act and the Taft-Hartley Act to regulate labor picketing but not antiwar picketing. One would expect as much from labor statutes. Similarly, restrictions on legal advertising are surely not suspect because they fail to cover dental advertising. Perhaps one advantage. Second, these restrictions violate the principle that the truth of an idea should be determined by the public at large, rather than by the government. Third, these restrictions have an inherent paternalism that violates an underlying premise of the first amendment, which is that individuals should be allowed to direct their own intellectual, moral, and social development. See Stone, supra note 2, at 100-104. As Professor Stone has pointed out, the reasons for disapproving viewpoint-based restrictions do not always apply with equal force to other content-based restrictions. Subject-matter restrictions are not necessarily due to government hostility toward particular ideas, nor do they necessarily have the effect of preventing contrasting viewpoints from competing equally. See id. at 104-106. See also Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 510-11 (1969) (public school prohibition against wearing of black armbands to protest American involvement in Vietnam, in absence of prohibition against wearing other symbols of political or controversial significance, unconstitutional viewpoint restriction).
could trump up some kind of compelling state interest for these classifications, but such an exercise seems fundamentally misdirected. Indeed, there is something misguided about the entire Mosley approach. As one of its early supporters has recently pointed out, this approach often has positively perverse implications. In Broadrick v. Oklahoma, for example, the Court upheld restrictions on partisan political speech by state employees. Whatever troubling aspects these restrictions may present, surely no one is troubled because the legislature failed to extend the ban to all speech by state employees.

C. THE PROPOSED TEST

As we have just seen, there is only a weak argument for strict scrutiny of all content-based classifications. Use of a “middle tier” test in cases like Mini Theatres seems more sensible. The classification at issue in Mini Theatres was not as suspect as one based directly on viewpoint. As the plurality opinion points out, “[T]he regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical message a film may be intended to communicate.” In this respect, the classification is like a subject-matter classification. On the other hand, such classifications are not entirely free from suspicion. Like gender classifications, they may be based on invidious purposes. Just as disparate treatment of working women may be based on prejudice or stereotypes about the proper role of women, disparate treatment of sexually explicit films may be based on disapproval of erotic art or on notions that no longer correspond to social realities. Furthermore, classifications based on content must always be approached with caution because, despite appearances, they may burden speech, if only by stigmatizing the categories they single out for special

52. Id. at 115.
54. Id. at 618.
55. 427 U.S. at 70.
56. See Stone, supra note 2, at 83 n.8 (subject matter distinctions not the only “viewpoint-neutral” content-based distinctions; consider offensive language).
57. A good statement of this principle is found in Justice Stevens’ dissent in an illegitimacy case:

However irrational it may be to burden innocent children because their parents did not marry, illegitimates are nonetheless a traditionally disfavored class in our society. Because of that tradition of disfavor the Court should be especially vigilant in examining any classification which involves illegitimacy. For a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification. Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white. But that sort of stereotyped reaction may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is being made.

Mathews v. Lucas, 427 U.S. 495, 520-21 (1976) (Stevens, J., dissenting); see Califano v. Goldfarb, 430 U.S. 199, 211 (1977) (plurality opinion) (gender classifications may rest only upon “old notions” and “archaic and overbroad” generalizations); Id. at 223 (Stevens, J., concurring in the judgment) (gender classification that was “accidental byproduct of a traditional way of thinking about females” insufficient justification for statute).
treatment. For these reasons, something more than the minimal scrutiny given to classifications in economic regulatory schemes is necessary.

The gender and illegitimacy cases provide appropriate guidelines for this heightened scrutiny. Although the Court has not completely articulated its analysis of gender and illegitimacy classifications, several useful principles have emerged. First, to withstand this intermediate level of scrutiny, a classification must substantially further an important government interest. Second, mere recitation of a benign purpose as the justification for a classification is not enough. The asserted purpose must be plausible in light of the legislative history and circumstances surrounding the enactment of the legislation. A court may properly determine whether the classification...
results from archaic and overbroad generalizations or unfounded stereotypes, or is an accidental byproduct of traditional ways of thought.\(^6\) In short, the regulation must bear the earmarks of a deliberate legislative decision based on the justifications being asserted before the Court.

In the final section of this article, I will attempt to show that the test articulated in the gender and illegitimacy cases closely fits the results in the content regulation cases. Before turning to this examination of the case law, it is necessary to consider the other phase of the proposed approach.

### III. The Balancing Test

The equal protection test discussed above cannot be the end of the analysis. It is one thing to say adult movies can be subject to special zoning; it is quite another to say they can be banned. More is involved than the equal protection issue of whether the legislature has drawn the lines properly. There is also the first amendment issue whether what the state has done within those lines unconstitutionally “abridges the freedom of speech.” That issue is the subject of this section.

#### A. The Paradigm Case

My model for analyzing the first amendment issue is Justice Harlan’s opinion in *Cohen v. California*.\(^6\) Paul Cohen was convicted of disturbing the peace by displaying in the Los Angeles County Courthouse a jacket bearing the slogan, “Fuck the Draft.”\(^6\) Justice Harlan divided his analysis of the first amendment issues into two parts. The first part discusses “various matters

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\(^{62}\) See Califano v. Westcott, 99 S. Ct. 2655, 2663 (1979) (provision of benefits to dependent children on basis of father’s but not mother’s unemployment not substantially related to any valid statutory goal but part of “baggage of sexual stereotypes”; quoting Orr v. Orr, 440 U.S. 268, 283 (1979)); Stanton v. Stanton, 421 U.S. 7, 14 (1975) (reversing state supreme court judgment that pursuant to age-of-majority statute, divorced parent liable for daughter’s support only to age 18, notwithstanding liability for son’s support until age 21). In *Stanton* the Court rejected “old notions” about primary responsibilities of the sexes, noting that “no longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.” *Id.* at 14-15.

\(^{63}\) 403 U.S. 15 (1971).

\(^{64}\) *Id.* at 16-17. Some additional facts are worth noting. The slogan had been placed on the jacket several days earlier, along with several other inscriptions. Appendix at 18-19, *Cohen v. California*, 403 U.S. 15 (1971) (copy on file at *Georgetown Law Journal*). Cohen was in the courthouse (where he was arrested) to testify in a case that had no relationship to the draft. Transcript of Oral Argument, *Cohen v. California*, reprinted in 70 P. KURLAND & G. CASPER, LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 828, 830, 845 (1975). So far as the record showed, the only people who noticed the slogan were three police officers. *Id.* at 844-45. One of the officers followed Cohen from the hall where he was first observed into the courtroom. When he entered the courtroom, Cohen took off the jacket and folded it over his arm. Nevertheless, the policeman sent the judge a note suggesting that Cohen be held in contempt. The judge declined to do so. When Cohen left the courtroom, he was arrested and charged with disturbing the peace. *Cohen v. California*, 403 U.S. at 19 n.3.
which this record does not present." To begin with, the case did not fall "within those relatively few categories of instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed." It was not, for example, an obscenity case. Nor did it involve two other possible content-related justifications for the conviction: the state's desire to maintain a decorous atmosphere in the courthouse corridor where the arrest took place, or the state's desire to protect unwilling viewers from being forced to confront the defendant's distasteful language. After careful consideration, the Court found that neither justification was properly presented in Cohen because of the failure of the statute under which Cohen was convicted to focus on those attributes of his conduct.

The Court then turned to the one issue the case did properly present: Whether the state can ban the use of four-letter words in all public discourse, regardless of context. The Court considered two possible justifications for such a ban. The first was the possibility of a violent response to such language, a rationale the Court found too speculative to justify a restriction on speech. The second was the desire of the states, acting as "guardians of public

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65. 403 U.S. at 18 (emphasis in original).
66. Id. at 19-20.
67. Id. at 20. As Professor Ely has observed: "[A]nyone who finds Cohen's jacket 'obscene' or erotic had better have his valves checked." Ely, supra note 2, at 1493.
68. See 403 U.S. at 19 (statute gives no notice of any special restrictions on speech in courthouse as compared with other locations); id. at 22 ( captive audience rationale inapplicable because no evidence of objection by audience and statute does not mention this concern). Cohen is frequently misread as holding that outside the home no captive audience claim can be made if the viewer can look away. See, e.g., Erznoznik v. City of Jacksonville, 422 U.S. 205, 210-11 (1976) (reading Cohen to place burden on passerby to avert eyes from display of nudity on drive-in movie screen); Lehman v. City of Shaker Heights, 418 U.S. 298, 320 (1974) ( plurality opinion) (Brennan, J., dissenting) (citing Cohen for proposition that bus passengers not "captive" if they can avert eyes from "offensive" advertisement); Tollett v. United States, 485 F.2d 1087, 1092 (8th Cir. 1973) (relying on Cohen to dismiss Government's concern for protecting postal employees from "scurrilous" words on postcards and envelopes; employees not forced to read language on mail other than to determine addresses); Cinecom Theaters Midwest States, Inc. v. City of Fort Wayne, 473 F.2d 1297, 1303 (7th Cir. 1973) (citing Cohen for proposition that nudity on drive-in screen can be avoided by averting eyes). See generally Arkes, Civility and the Restriction of Speech: Rediscovering the Defamation of Groups, 1974 Sup. Cr. Rev. 281, 313-14, 317 n.98; Haiman, Speech v. Privacy: Is There a Right Not to be Spoken To?, 67 Nw. U.L. Rev. 153, 171-72 (1972).

The inaccuracy of reading Cohen to hold that outside the home the burden is on the viewer to avert his eyes from offensive material is clear from the concluding sentence of the Court's discussion:

Given the subtlety and complexity of the factors involved, if Cohen's "speech" was otherwise entitled to constitutional protection, we do not think the fact that some unwilling "listeners" in a public building may have been briefly exposed to it can serve to justify this breach of the peace conviction where, as here, there was no evidence that persons powerless to avoid appellant's conduct did in fact object to it, and where that portion of the statute upon which Cohen's conviction rests evinces no concern, either on its face or as construed by the California courts, with the special plight of the captive auditor, but, instead, indiscriminately sweeps within its prohibitions all "offensive conduct" that disturbs "any neighborhood or person."

403 U.S. at 22.
69. 403 U.S. at 22-23.
70. Id. at 23. The Court concluded that this rationale reflected at most "an 'undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression.'" Id. (quoting Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 508 (1969)).
morality," to cleanse the "public vocabulary." The Court's examination of this possible justification began with the following important observation:

At the outset, we cannot overemphasize that, in our judgment, most situations where the state has a justifiable interest in regulating speech will fall within one or more of the various established exceptions, discussed above but not applicable here, to the usual rule that governmental bodies may not prescribe the form or content of individual expression.

After a sensitive examination of the first amendment interests involved, the Court declined to create an additional exception to accommodate the state's interest in cleansing the public vocabulary.

In short, the court applied a balancing test, restrained by two factors: A strong concern for sharpness of focus in regulatory schemes, and a rebuttable presumption against recognizing new justifications for content regulation. This provides a viable approach to the problem of content regulation. It combines some of the structure sought by supporters of content neutrality with enough flexibility to cope with the diversity of government efforts to regulate speech.

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71. 403 U.S. at 22, 23. This language emphasizes the contrast between the actual state interest and the asserted state interest in protecting captive audiences. The state's interest in upgrading public discourse, if it exists at all, applies even when a speaker addresses a willing audience. Indeed, perhaps the willing audience is more in need of protection, because its very willingness to expose itself to such discourse shows that its moral sensibilities are in peril. Thus, the state's argument essentially extended to other speech the idea that people need to be protected from pornography regardless of their desire to read it. The captive audience argument, by contrast, does not depend upon the state's asserted right to protect people from hearing what they want to hear. Rather, it rests on the less paternalistic view that in certain instances the right of some people to hear what they want to hear must give way to the right of other people to avoid being forced to hear the speech. For thoughtful, but contrasting, discussions of the captive audience problem, see Haiman, supra note 68 (first amendment values override competing privacy rights), and Black, He Cannot Choose but Hear: The Plight of the Captive Auditor, 53 COLUM. L. REV. 960 (1953) (captive audience should have right to be free from exposure to unwanted speech).

72. 403 U.S. at 24. Professor Ely's article also quotes this sentence. Ely views it as an example of protected-unprotected speech categorizing. Ely, supra note 2, at 1492 & n.42. It seems to me that this is an oversimplification. Justice Harlan qualified the quoted language by limiting the categorical approach to "most situations." 403 U.S. at 24. This qualification creates a rebuttable presumption against departing from established categories of exceptions to protected speech, rather than the irrebuttable presumption Ely favors. Moreover, the categories themselves are different from the context-free categories Ely proposes. See Ely, supra note 2, at 1493 & n.44. Among the exceptions to content neutrality "discussed above but not applicable here," 403 U.S. at 24, are the captive audience rationale, id. at 21-22; intentional provocation of the audience, id. at 20; and maintenance of courthouse decorum, id. at 19. All of these exceptions are context related.

73. 403 U.S. at 23-26.

74. Professor Ely found "little trace of balancing" in Cohen. Ely, supra note 2, at 1493. A careful reading of the opinion, however, confirms that Justice Harlan indeed used a balancing approach. Justice Harlan's reference to categorization is itself rooted in balancing theory. He said that most situations in which the state has a "justifiable interest" in regulating speech fall into certain established categories. 403 U.S. at 24. The fact that the state has a justifiable interest does not mean that a regulation is valid, for the interest may be outweighed by the burden on speech. For example, Justice Harlan concluded that the captive audience rationale should only be recognized in cases where "substantial privacy interests are being invaded in an essentially intolerable manner." Id. at 21. As I read Cohen, Justice Harlan's basic approach is a balancing test, controlled by limiting the range of interests that the government may assert to justify content regulation of speech. For further discussion of the balancing test, see notes 100-02 infra and accompanying text.
B. THE COMPETING THEORY

The major competitor of the Cohen approach as here articulated is a theory that is far less flexible in its treatment of content-related justifications for regulating speech.75 The original formulation of this theory was based upon a particular analysis of United States v. O'Brien,76 in which the court upheld a conviction for draft-card burning.77 The following passage from O'Brien provides the foundation for the argument:78 "[A] government regulation is sufficiently justified 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."79 The crucial element of the O'Brien test is said to be the second one: The requirement that the government interest be "unrelated to the suppression of free expression."80 This element purportedly links two very different first amendment tests.81 If a possible justification for a regulation is unrelated to communicative impact,82 its validity is determined by application of the O'Brien balancing test.83 On the other hand, if a justification is related to communicative impact, a categorization test is used under which a regulation is valid only if the regulated communication falls into one of the narrow categories of expression that are completely unprotected by the first amendment.84

For example, a high school might ban the distribution of leaflets in its halls for a number of reasons, some of which have nothing to do with content. Littering or traffic disruption in the halls would be problems even if the leaflets were illegible. A court would then balance these justifications against the regulation's incidental impact on speech, using less restrictive alternative

75. This theory has been adopted by Professors Ely and Tribe. See generally Ely, supra note 2; L. Tribe, supra note 2, at 580-88. Professor Tribe does discuss the possible emergence of a new approach based on the Court's somewhat flexible treatment of content-based regulation, as articulated in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (plurality opinion). L. Tribe, supra note 2, at 672-82.
77. Id. at 377.
78. Ely, supra note 2, at 1483-84.
79. 391 U.S. at 377.
80. Ely, supra note 2, at 1496.
81. L. Tribe, supra note 2, at 580-84; Ely, supra note 2, at 1484.
82. This determination is made for each justification asserted in defense of the statute. Ely, supra note 2, at 1497 n.59. For another attempt to distinguish content-related justifications from content-neutral justifications, see Nimmer, The Meaning of Symbolic Speech Under the First Amendment, 21 U.C.L.A. L. Rev. 29, 38-46 (1973).
83. The O'Brien opinion speaks in terms of "alternative means" rather than balancing, 391 U.S. at 388, but as Professor Ely has pointed out, "less restrictive alternative" analysis necessarily entails balancing. This is because less restrictive alternatives will almost invariably be less efficient means of reaching the government goal, and the Court will have to decide whether the trade-off is acceptable. Ely, supra note 2, at 1484-90.
84. Ely, supra note 2, at 1484. This categorization approach derives from Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942), in which the Court indicated that some categories of utterances (such as lewd, obscene, profane, libelous, and insulting or "fighting" words) "are of such slight social value as a step to truth" that they enjoy no first amendment protection. For a recent attempt to analyze Supreme Court obscenity jurisprudence in a manner that is evocative of Chaplinsky, see Schauer, Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language, 67 Geo. L.J. 899 (1979) (defining unprotected obscenity as material devoid of intellectually communicative content).
analysis. Other potential justifications are related to content, such as the assertion that inflammatory leaflets might cause classroom disruption. Under the original formulation of the theory, these justifications would be considered invalid, unless a leaflet were lewd or obscene or otherwise outside first amendment protection. In short, content-based regulation would be allowed only if the type of speech at issue were unprotected by the first amendment in every possible context. Context could never serve as a valid justification for regulation speech, except to the extent context could be used to determine the meaning of an utterance.85

One of the most intriguing aspects of this theory is its definition of content regulation. The presence of content regulation is determined by asking whether the government's goals relate to the communicative impact of the speech.86 For instance, a ban on sound trucks to prevent noise pollution is considered content neutral, because the ban's purpose would be "threatened as much by meaningless moans and static . . . as by a political message."87 On the other hand, Cohen's conviction for wearing a jacket with the inscription "Fuck the Draft" was clearly related to the communicative impact of the inscription: "Had his audience been unable to read English, there would have been no occasion for the regulation."88 The critical question, therefore, is whether the state interest would be equally implicated by similar conduct that lacks communicative content.89

The attempt to define content regulation in terms of communicative impact presents several problems. To begin with, the original effort to ground this

85. See Ely, supra note 2, at 1493 n.44 (context may be considered to determine whether expression is protected or unprotected). Professor Ely argues that the "less verbal" the communication, the more necessary is a reference to context to discover what is being said. Once speech comes under first amendment protection, however, a categorization approach is used, regardless of context. Id.
86. Id. at 1497.
87. Id. at 1499.
88. Id. at 1498. Actually this is not altogether clear. As I recall, Lenny Bruce was once arrested for using similar language in Yiddish, and the authorities went to the trouble of finding a policeman who was fluent in Yiddish to make the arrest. This aptly illustrates the distinction I have previously drawn between government efforts to protect unwilling or captive audiences, and government efforts to upgrade the public vocabulary. See note 71 supra and accompanying text. See generally Farber, Civilizing Public Discourse: An Essay on Justice Harlan, Professor Bickel, and the Enduring Significance of Cohen v. California, 1980 DUKE L.J. (to be published).
89. Ely, supra note 2, at 1497. Professor Tribe, who generally follows Professor Ely's approach to this problem, offers a somewhat different definition of content regulation. He defines a statute as being content-related if the state's interest relates only to public conduct rather than to the same conduct performed in secrecy. L. Tribe, supra note 2, at 587-88. Professor Tribe's definition goes too far. As he must recognize, it would extend first amendment protection, for example, to any couple having sexual intercourse in a public park, because the state could not object to the same act if performed in a private place. But see Park's Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973) (dictum) (couple engaging in sexual intercourse in public place would be unprotected by first amendment even if "simultaneously [engaged] in a valid political dialogue"); Roth v. United States, 354 U.S. 476, 512 (1957) (Douglas, J., dissenting) ("No one would suggest that the First Amendment permits nudity in public places."). To avoid this extension of first amendment protection, Professor Tribe is forced to invent a compelling state interest in protecting any member of the public audience from being observed while watching two people copulate, on the theory that voyeuristic responses are deeply private. L. Tribe, supra note 2, at 681. This is obviously strained. For one thing, it implies that the couple may proceed as long as no two members of the audience are present at the same time. More importantly, the explanation is simply unrealistic as an account of the purpose of laws against indecent exposure or public sexual conduct. For a case that is inconsistent with Professor Tribe's approach, see Schacht v. United States, 398 U.S. 58, 61 (1970) (statute prohibiting unauthorized wearing of United States military uniforms held valid on authority of O'Brien).
in the O'Brien opinion was somewhat strained. Too much weight was placed on a few sentences in the O'Brien opinion, and the gloss added to those sentences went far beyond the meaning the Court probably intended.\textsuperscript{90} More significantly, relying on "communicative impact" as a test for content regulation can lead to puzzling results. Consider the problem of public nudity. Assume that the state claims an interest in protecting the public from unwilling exposure to nudity. Is this interest related to the suppression of free expression? In the case of an outdoor movie theatre, the answer is said to be "yes," because the state interest is not equally implicated when other, meaningless but potentially distracting, visual images are projected on the screen.\textsuperscript{91} On the other hand, in the case of nude performances in a play, the answer is presumably "no," because the state interest is equally implicated by nonexpressive nudity, as in the case of public exhibitionists.\textsuperscript{92} This peculiar difference in treatment seems hard to justify. In both cases the state's interest relates to the visual image received by the viewer and is only triggered by the viewer's ability to recognize the image.\textsuperscript{93} Why should images from one source be subject to greater regulation than images from another?

\textsuperscript{90} The critical passage in the O'Brien opinion quoted at text accompanying note 79 supra, begins by focusing on the distinction between speech and conduct. The Court then says that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." 391 U.S. at 376. The Court then cites a number of cases in which various terms were used to describe such overriding governmental interests. With the single exception of Thomas v. Collins, 323 U.S. 516 (1945), none of these cases fits Professor Ely's content-related formulation; instead, the cases involve restrictions on other first amendment activities such as association or religious practices. See Sherbert v. Verner, 374 U.S. 398, 408 (1963) (in absence of showing of "strong state interest," unemployment compensation cannot be denied a person who refuses to work on Saturday for religious reasons); NAACP v. Button, 371 U.S. 415, 438 (1963) (state must have "compelling" interest to justify limitation of organization's solicitation of civil rights litigation, because such activity protected by freedom of expression and association); Bates v. Little Rock, 361 U.S. 516, 524 (1960) (freedom of association prevents compelled disclosure of membership lists in absence of showing of "coercive" or "subordinating" state interest); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 464 (1958) (freedom of association prevents state from demanding organization's membership list in absence of showing of "substantial" state interest); cf. Thomas v. Collins, 323 U.S. 516, 530 (1945) (registration requirement for labor organizer constitutes prior restraint justifiable only by "paramount" state interest). The key passage in the opinion, which immediately follows the Court's cite of these cases, appears to have been intended to summarize them. Cf. L. Tribe, supra note 2, at 599 & n.8 (citing O'Brien as example of "speech plus" case).

\textsuperscript{91} Ely, supra note 2, at 1497 n.59.

\textsuperscript{92} For present purposes, it can be assumed that not all of the theatregoers would have advance knowledge that they would see nude performances and that some of them would find such performances offensive. Cf. Schauer, supra note 84, at 925 ("[r]unning down Main Street naked" is conduct, not speech).

\textsuperscript{93} Although the Supreme Court has never squarely decided the issue, it did indicate in Southeastern Promotions v. Conrad, 420 U.S. 546 (1975), that a play containing a nude scene should not be held to a "drastically different standard" than other art forms. Id. at 558. Indeed, it would seem somewhat peculiar to say that restrictions on live performances are subject to lesser scrutiny than closed-circuit television showings of the same performances. Professor Ely's theory would lump nonexpressive nudity and theatrical nudity together, whereas our intuitive notions about the distinction between expression and conduct indicate that theatrical nudity is more akin to cinematic nudity and is different from exhibitionism. Under Professor Ely's theory it is possible that prohibitions on theatrical nudity would fail the balancing test, although this result is far from clear. The real problem, however, is not whether the ban on theatrical nudity would be valid, but why a ban on closed-circuit television should be subject to stricter scrutiny.

This problem highlights a general difficulty with Professor Ely's theory. Application of the theory rests on unexplained intuitive judgments. The concept of communicative impact on which it is based is far from self-evident. In using the concept, Professor Ely relies on his ability to identify other conduct that is similar
A more important objection to this definition of content regulation in terms of communicative impact is the lack of any justification for subjecting such a broad range of statutes to such stringent scrutiny. The argument given in support of this scheme is that we need to guard strictly against instances "where messages are prescribed because they are dangerous."\textsuperscript{94} But this approach is an extremely inefficient way of isolating such threats to free expression. It indiscriminately groups together highly suspect statutes with many harmless regulations. It is easy to find examples of innocuous regulations that run afoul of this definition of content regulation. For example, a city might decide to ban the placement of advertisements on its buses because bus riders object to being subjected to a variety of commercial and political messages. Inasmuch as the problem exists only because the ads are in a
to the regulated conduct but that fails to communicate any message. For example, a ban on movie nudity is related to communicative impact because the policies underlying the ban would not apply to similar noncommunicative conduct, namely, meaningless visual images on the screen. But there is some noncommunicative conduct that we only perceive visually to which the ban would apply, namely, public exhibitionism. Professor Ely does not tell us why one is a more appropriate analogue than the other.

Even in \textit{O'Brien} itself, there are serious problems in applying the test. Professor Ely argues that the draft card mutilation statute is not related to communicative content because its purpose of preserving the selective service registration system would equally apply if David O'Brien had used the card to start a campfire for a solitary cookout. Ely, \textit{supra} note 2, at 1498. But the governmental interest would not apply if the card were blank—the government's purpose is to preserve the message on the card, not the cellulose. As Professor Ely points out in connection with flag burning, this kind of ban on destruction must be considered content-related because the government is singling out a particular message for protection. Ely, \textit{supra} note 2, at 1502-08. This apparent problem is resolved by the choice of comparative types of noncommunicative activity. Thus, at the heart of Professor Ely's analysis of \textit{O'Brien} and the flag burning cases is the view that the relevant analogue to public draft-card burning is the use of a draft card to start a campfire, \textit{id.} at 1498, but the relevant analogue to flag burning is burning a blank cloth. See \textit{id.} at 1505 (in case of privately owned flag, although both government and flag burner have interest in symbolic value of flag, cloth belongs to flag burner alone). The basis for this dissimilar treatment is unclear.

In fact, despite Professor Ely's attack on the speech-conduct distinction, \textit{id.} at 1494-96, application of his own approach seems to rest on intuitions about what aspect of conduct is communicative and what aspect is nonexpressive. This intuitive perception generates the examples used to apply the test. To return to the movie nudity example, Professor Ely identifies the presence of an identifiable image on the screen as the communicative aspect of the movie. See \textit{id.} at 1497 n.59. He then asks if a particular regulation is based on justifications that would be equally present if the image on the screen were nonidentifiable (a meaningless "configuration of lights on the screen," \textit{id.}). But he could equally well have defined the communicative aspect of the film to be the presence of any image on the screen, identifiable or not. He would then ask if a particular state interest was implicated by a blank screen. Or, he could have defined the communicative aspect of the movie to be the story, which would lead him to conclude that the relevant question is whether a particular state interest is implicated by the prolonged projection of a single frame containing nudity. The choice between these alternatives is dictated by one's view of what aspect of a movie is expressive. One of the primary problems with Professor Ely's approach is that it conceals this difficult question behind what purports to be a mechanical test.

\textsuperscript{94} Ely, \textit{supra} note 2, at 1501. I do not quarrel with the idea that we should stringently limit laws that are based on fears that ideas are dangerous. It does not seem to me, however, that Professor Ely's approach does a very good job of identifying these laws. Indeed, the \textit{O'Brien} case itself seems to me to involve a clear example of such a law. The statute's real basis was plainly a belief that the idea of draft resistance is dangerous and should be suppressed. Professor Ely argues that his approach is "the surest hedge against judicial capitulation that is available." \textit{Id.} at 1501 n.75. Arguing for the validity of a legislative attempt to stamp out draft protesters seems to me a doubtful way of building barriers against judicial capitulation in times of national hysteria. Indeed, Professor Ely's support of the \textit{O'Brien} result is an apt example of a familiar problem with attempts to build rigid, conceptual barriers into first amendment law. These rigid absolutes work very well when suppression takes traditional, obvious forms, but their lack of flexibility turns into a fatal flaw when the repression is novel or subtle. See generally Gunther, \textit{In Search of Judicial Quality on a Changing Court: The Case of Justice Powell}, 24 STAN. L. REV. 1001, 1009-11 (1972); Kalven, \textit{Upon Rereading Mr. Justice Black on the First Amendment}, 14 U.C.L.A. L. REV. 428, 447-53 (1967).
language spoken by the viewers, the advertising ban is "related to the suppression of free expression." To take another example, a regulation governing express warranties in commercial advertising is also "related to the suppression of free expression," because the regulation will be based on the meaning of the language used in the warranties. Something is wrong with an approach that fails to distinguish these examples from genuine threats to free expression.

Aside from the definition of content regulation, serious problems are also raised by the categorization approach that is used after content regulation is found. Once a regulation is found to be based on content, the regulation could be applied only to communications that are entirely unprotected by the first amendment. Under the original formulation, context could be considered only as a means of determining the meaning of the communication. This approach is totally unsupported by the case law. Rather, both the Warren Court and the Burger Court have clearly accepted the view that speech can be sometimes banned in one context when it could not be banned in other contexts, although its meaning is unchanged.

95. Ely, supra note 2, at 1493 n.44:

As Justice Harlan suggests, the context in which a message is communicated may have to be considered in determining its meaning and thereby whether it falls within one of the unprotected categories of speech. 403 U.S. at 20, 23. (The less verbal the communication, the more necessary such a reference will be: an armband, for example, might convey a variety of messages or even no message at all.) What distinguishes a categorization approach from "clear and present danger" and similar tests is that context is considered only to determine the message the defendant was transmitting and not to estimate the danger that the audience would react to the message by antisocial conduct. Of course such considerations figure in the initial definition of the unprotected categories. See, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). But once they are defined, a categorization approach, in determining the constitutionality of a given restriction of expression, asks only, "What was he saying?"—though admittedly a reference to context may be needed to answer that question. A clear and present danger or ad hoc balancing approach, in contrast, would regard that question as nondispositive: a given message will be sometimes protected and sometimes not, depending on the actual or projected behavior of the audience in response to it.

96. Professor Ely cites Cohen v. California, 403 U.S. 15 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam); and Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969), as primary examples of his approach. See Ely, supra note 2, at 1492-93, 1497-98 (on Cohen), 1492, 1497 (on Brandenburg), 1492 (on Tinker). In footnotes, however, Professor Ely seems to admit that two of these cases do not apply his categorization approach. See id. at 1491 n.35 (Brandenburg), 1492 n.39 (Tinker). In both Tinker and Brandenburg, the Court clearly included the disruptive or violent effects of speech as part of its test for constitutionally proper prohibitions. These effects are obviously context-related. We have already seen that Cohen provides little support for Professor Ely, because the Court failed to reach any of the arguable context-related justifications for restricting Cohen's speech. See text accompanying notes 64-74, supra.

97. The Warren Court found context to be crucial in the obscenity area. Depending on the age of the buyer and the method of advertising, sale of certain reading materials could be prohibited in one context but not in another. See Ginsberg v. New York, 390 U.S. 629, 637 (1968) (upholding statute prohibiting sale of magazines that depict nudity to persons under 17 years of age); Ginzburg v. United States, 383 U.S. 463, 475-76 (1966) (in close case, evidence that distributor deliberately represented publications as erotically arousing in advertisements supports trial court determination that publication obscene). As Chief Justice Warren himself stated, "[T]he conduct of the defendant is the central issue, not the obscenity of a book or picture." Roth v. United States, 354 U.S. 476, 495 (1957) (Warren, C.J., concurring). More recent cases indicate that the Burger Court also rejects the view that context is relevant only in determining the
A later formulation of the theory has attempted to remedy this problem by adding a "compelling state interest" test to the original categorization approach.\textsuperscript{98} This remedy amounts to using a fairly demanding balancing test to supplement the categorization test.\textsuperscript{99} The definition of content regulation in terms of communicative impact is then used to determine whether this demanding test or the more lenient balancing test of \textit{O'Brien} applies. Under this modification of the original test, if a regulation is based on communicative impact, it is valid only in the presence of a compelling state interest, even if it has little impact on speech. But a regulation that is not based on communicative impact requires a less-than-compelling interest even though it substantially burdens speech. For instance, a ban on the placement of advertisements on buses would be subject to the same level of scrutiny as a decision outlawing socialist books, because both regulations presumably would be based on communicative impact. On the other hand, a nationwide ban on \textit{all} posters (intended to conserve paper) would be subject to lesser scrutiny because its purpose is unrelated to communicative impact. If we are going to engage in balancing, this is a most peculiar way in which to do so.

\section*{C. THE PROPOSED TEST}

One flaw in the communicative impact approach is its broad definition of content regulation. Under that definition, a regulation that affects all speech equally can still be considered a form of content regulation if the justification for the regulation relates to communicative impact. It seems more fruitful to restrict our definition of content regulation to cover only regulations that discriminate on the basis of content. Although the idea behind the term "content" is intuitively clear, it is not easy to give a precise definition. For present purposes, it is enough to say that a statute is considered to regulate content if its applicability depends on the message, symbols, or images used by the communicator.

Despite its flaws, underlying the communicative-impact theory are two important insights: First, that content regulation is somewhat suspect, and second, that ad hoc balancing does not provide an adequate check on such regulation. The approach proposed in this article is intended to avoid the rigidity of this theory yet still provide adequate safeguards against the dangers of an unrestrained, ad hoc balancing test. One of these safeguards is provided by the equal protection phase of the proposed approach. Many cases can be decided simply on the basis of an equal protection holding if the court finds that the regulation is too loosely tied to the state goal. This makes it possible to avoid the often more difficult problem of comparing the relative impor-

\begin{footnotesize}
\begin{enumerate}
\item See FCC v. Pacifica Foundation, 438 U.S. 726, 750 (1978) (plurality opinion) (upholding FCC finding that particular radio program, as broadcast during early afternoon, was "indecent"); Court noted that FCC finding based on nuisance rationale "under which context . . . all-important"); Greer v. Spock, 424 U.S. 828, 838-39 (1976) (upholding military post regulation banning partisan political speeches or demonstrations without prior approval; assembly areas on military reservation not public fora, unlike municipal streets and parks).
\item L. Tribe, supra note 2, at 602.
\item As Professor Tribe points out, the categorization approach itself may rest on the use of some form of balancing to define the categories of unprotected speech. \textit{Id.} at 583. See generally Shiffrin, \textit{Defamatory Non-Media Speech and First Amendment Methodology}, 25 U.C.L.A. L. Rev. 915, 958-61 (1978).
\end{enumerate}
\end{footnotesize}
tance of the state goal with the burden on speech.\textsuperscript{100} Similarly, it is possible to avoid the difficult exercise of balancing in cases like \textit{Mini Theatres}, in which only a de minimus burden is placed on speech, because these cases involve no real threat to free expression.

When balancing cannot be avoided, Justice Harlan's opinion in \textit{Cohen} provides useful guidance. If a regulation substantially burdens speech on the basis of content, the teaching of \textit{Cohen} is that balancing must be controlled by three factors. First, the only justifications that should be considered are those on which the statute clearly focuses. Second, we should be reluctant to add to the list of acceptable justifications for content regulation; we should normally insist that the state goal be one previously recognized as a justification for content regulation. Third—and most obviously—we must balance with a sensitivity to first amendment values and an awareness of precedent.\textsuperscript{101} These guidelines cannot make balancing a mechanical process, but if scrupulously followed, they should sharply reduce the likelihood of unprincipled results.\textsuperscript{102}

\textsuperscript{100} There are actually four reasons for applying the equal protection phase of the analysis initially. First, invalidation on equal protection grounds is commonly considered to be less restrictive of future legislative efforts than invalidation on substantive grounds. Gunther, supra note 19, at 22-23. See \textit{generally} Railway Express Agency v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). Second, requiring the legislation to take a broader form may sometimes serve to protect speech, because the public will be unwilling to tolerate broad restrictions on speech if the restrictions impinge on popular modes of expression. See Kalven, \textit{The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 29-30} (despite Court's resort to equal protection analysis in first amendment cases, municipalities burdened by protests will not enact nondiscriminatory prohibitions against public demonstrations; desire to have traditional parade on July 4 and other national holidays requires "freedom for the parades we hate"). Third, the alternative to beginning with the equal protection analysis under my proposal is to proceed directly to the second stage of the analysis, which is a balancing test. This balancing test seems likely to be more difficult to apply than the equal protection analysis. The reason is that the equal protection analysis primarily requires a consideration of the tightness of fit between the classification and the legislative purpose. The balancing test, on the other hand, requires an assessment of the importance of the state's goal and a comparison of that goal with the extent of the regulation's impact on speech. This is likely to be a fairly difficult assessment in some cases and one that we should avoid making when possible. Fourth, equal protection review also has the advantage of possibly invalidating the regulation on its face, which may help reduce "chilling" effects.

It should be noted that the two stages of the analysis are considered separately for reasons that go beyond simple convenience. The two tests focus on different aspects of the regulation, one on its discriminatory features and the other on its impact. Moreover, in applying the two tests, it may sometimes happen that the relevant set of state goals will be different. Consider a regulation banning commercial advertising over loudspeakers when the volume exceeds 100 decibels. For purposes of the equal protection test, some goal must be found that relates to the commercial nature of the speech. The goal of avoiding noise pollution is relevant for the balancing part of the test.

\textsuperscript{101} For more extended discussions of Justice Harlan's technique, see Farber, supra note 88; Gunther, supra note 94, at 1004-14.

\textsuperscript{102} Professor Schmidt has recently offered an especially cogent summary of the debate about balancing:

Critics of ad hoc balancing have claimed that no predictable standards emerge, that the scales tend to be tipped against the first amendment because particular and often trivial expression, rather than the general value of freedom of expression, is weighed against competing social values, that the particularized focus tends to overlook the dynamics of how restrictions on expression actually will be administered, and that the absence of general rules leaves room for excessive judicial discretion in individual cases. On the other side, defenders of ad hoc balancing have argued that first amendment issues are too complex for categorical responses, that broad rules are brittle and will tend to generate categorical exceptions, that categorical
IV. APPLYING THE PROPOSED APPROACH TO THE CASE LAW

The remainder of this article considers whether this approach provides a principled explanation of the cases. My contention is that this approach is something more than a proposal, that it is in a sense already "the law." To be persuasive, this kind of theory of the case law should be able to do three things. First, it must plausibly account for the results in the significant cases. Second, it must do so without doing violence to the Court's opinions. The theory must not make the results of a case hinge on facts the Court found totally insignificant or on arguments foreign to the Court's reasoning. Instead, it should provide a doctrinal framework for the Court's apparent concerns. Third, the theory should be sufficiently sensible to persuade an openminded reader that the results of the cases are not unreasonable. In short, it should provide a coherent structure for the intuitions that seem to underlie the decided cases.

The problem of content regulation has arisen in three distinct lines of cases. One line of cases involves speech that violates traditional norms because of its use of explicit sexual imagery or four-letter words. The second line of cases concerns commercial advertising. Finally, there are cases dealing with regulation of speech based on subject matter. Each line of cases is readily explainable under the approach suggested in the first half of this article.

A. OFFENSIVE SPEECH

Speech can offend in many ways. The cases in this section involve speech that offends by using symbols or images traditionally taboo in American rules are disguises behind which judges covertly engage in intuitive balancing, and that categorical guarantees inject the Supreme Court too far into disputed questions of policy that should be left to, or at least shared with, the democratic branches of government.

Schmidt, Nebraska Press Association: An Expansion of Freedom and Contraction of Theory, 29 Stan. L. Rev. 431, 463-64 (1977) (footnotes omitted). To my mind the strongest of the arguments made against balancing is that balancing is essentially an ad hoc process that leaves too much room for judicial abdication in periods of strong public feeling. By restricting the number of justifications that the government is allowed to raise in defense of attempts to regulate content, the proposed approach reduces the amount of uncontrolled discretion built into the balancing test. The presence of the equal protection test as an initial barrier to content regulation also lessens the amount of uncertainty created by the proposed approach as a whole. Furthermore, I do not exclude the possibility that the results of balancing could be expressed in more structured rules for certain categories of cases. For instance, Justice Harlan's formulation of the captive audience issue in Cohen v. California reduced the number of relevant factors and gave some indication of their relative strengths. See 403 U.S. 15, 21 (1971) (ability of government to invoke captive audience protection depends on showing that "substantial privacy interests are being invaded in an essentially intolerable manner"). An analysis like that proposed by Professor Blasi for controlled balancing in the public demonstration context might also prove fruitful in the captive audience context. See Blasi, supra note 18, at 1489-92 (reduce elements in balance to number of demonstrators and interested onlookers; number of people experiencing "substantial inconvenience" as defined by decisionmaker; number of people experiencing "minor inconvenience"; planned and actual duration of demonstration; burdens of proof apportioned appropriately).


Two of these cases have already been examined. Cohen v. California provided the model for the balancing test component of the proposed analytic approach. In Cohen only two possible justifications for Cohen's arrest were properly before the Court, because the statute did not focus on other cognizable goals such as protecting captive audiences. Of the two explanations that were properly presented, one, the threat of retaliatory violence, was not sufficiently implicated to justify the restriction on speech; the other, the desire to cleanse the public vocabulary, was unable to overcome the presumption against recognizing new justifications for content regulation. Unlike Cohen, the other case that has been examined did not involve a significant problem in balancing because the burden on speech was minimal. That case, Young v. American Mini Theatres, Inc., provided the model for equal protection analysis of content-based classification schemes. Applying the mode of equal protection analysis recommended in this article, the Court found a demonstrable basis for concluding that the zoning classification scheme furthered the important goal of improving the quality of urban life. Because these two cases were models for the suggested approach to content-regulation analysis, it is not surprising they fit neatly into it. A more substantial test of the proposed approach lies in its ability to account for the other three cases in this area. Each of these cases requires detailed discussion.

Rowan v. United States Post Office Department. In Rowan v. United States Post Office Department the Supreme Court considered the validity of a federal statute that permitted recipients of unsolicited mail advertisements who believed the materials to be "erotically arousing" or "sexually provocative" to have the Postal Service order the advertiser to stop mailing the materials.

Congress had enacted the statute in 1967 in response to an outpouring of public complaints. Congress was motivated by two related concerns: Many adults were offended when they received unsolicited advertisements in their homes; and many of these same advertisements were addressed to minors. The solution was to grant the addressee the power to veto further mailings to him and to any of his resident children under the age of nineteen. The statute was challenged by several companies that were in either the mail order business or the business of selling mailing lists. They contended that compliance would be prohibitively expensive. The District Court granted summary judgment to the Government, and the Supreme Court af-

106. See note 70 supra and accompanying text.
107. See notes 71-73 supra and accompanying text.
109. See notes 20-31 supra and accompanying text.
110. 427 U.S. at 71.
112. Id. at 729-30.
113. Id. at 731.
114. Id. The Court noted that advertisers sought the mailing lists of youth organizations. Id. at 731-32.
115. Rowan v. United States Post Office Dept, 300 F. Supp. 1036, 1041 (C.D. Cal. 1969). The plaintiffs claimed that deletions would cost five dollars per name because their mailing lists were nonalphabetical.
116. Id. at 1042. Although the District Court did not find the five dollars per deletion cost claim to be credible, id. at 1041, for purposes of reviewing a grant of summary judgment it must, of course, be taken as true.
The Court's conclusion was that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee. Rowan arguably is not a content-regulation case at all. As the Court pointed out, the statute theoretically allows an addressee to stop the mailing of a dry goods catalogue, for there is no review of his designation of material as "lewd and salacious." It is preferable, however, to treat the statute as content-based. Congress clearly was concerned solely with erotic mailings. Furthermore, the practical effect of the statute is only on this class of mailings. Few people are likely to notify the Post Office that they find dry goods catalogues, advertisements for physics books, or political literature to be "erotically arousing or sexually provocative." In some respects, a contrary assumption about the statute's target would make the statute more difficult to sustain. If the statute were considered to be unrestricted in its impact, the asserted costs of complying with it could substantially inhibit a variety of mailings to willing recipients. In short, for purposes of analysis, the statute is best considered as reaching only erotic material.

The first step of the proposed analysis is application of the equal protection test. The question in Rowan is whether the statute's distinctive treatment of erotic speech significantly furthers an important government interest. The Court stressed the importance of the individual's interest in preventing offensive communications from entering the home. The equal protection issue is whether this goal justifies singling out offensive, erotic speech, as opposed to other offensive speech.

The distinctive treatment of erotic mailings is defensible. Congress received evidence that these mailings were a particular problem in that they had caused hundreds of thousands of complaints. Congress also received expert testimony from child psychologists reflecting concern about the impact of erotic materials on children. Furthermore, erotic materials have always been handled in a special way in our society, as shown by the Court's rulings in the obscenity cases. The recognized status of erotic materials in our

117. 397 U.S. at 740. It should be noted that the District Court had a somewhat different construction of the statute than the Supreme Court. The different constructions arose from the fact that at one point the statute referred to a prohibition on "further mailings of such materials," whereas at another, it referred to a prohibition simply on "further mailings." See 39 U.S.C. § 4009(c) (Supp. IV 1964) (current version at 39 U.S.C. § 3008(a) (1976)). The District Court stressed the reference to "such materials," and held that the sender was simply forbidden to send similar materials in the future. 300 F. Supp. at 1041. The Supreme Court's view of the statute was apparently motivated by a desire to ensure that the postal authorities were not given discretionary power over mailings, the exercise of which would require "an evaluation suspiciously like censorship." 397 U.S. at 735.

118. 397 U.S. at 736-37. The Court refused to determine "where [the mailer's right to communicate] fits into constitutional imperatives." Id. at 736.

119. Id. at 737.

120. See Stone, supra note 2, at 85-86 n.17 (statute permits ban of erotic material only; addressee would have to lie to Postmaster to censor material without regard to content).

121. 397 U.S. at 736-38 ("very basic right" to be free in one's home from offensive sights and sounds); see Stone, supra note 117, at 84 (government interest in protecting privacy "legitimate and substantial").

122. 397 U.S. at 732.

123. Id.

124. See Miller v. California, 413 U.S. 15, 23 (1973) (printed matter that portrays sexual conduct in patently offensive way, as defined by state law, not protected by first amendment); Roth v. United States, 354 U.S. 476, 484 (1957) (printed matter that appeals to prurient interests not protected by first amendment).
society reinforces the conclusion by Congress that these materials deserved distinctive treatment.

Because the statutory classification passes equal protection scrutiny, the statute must then be subjected to the balancing test. It is tempting to dispose of the case by saying that no balancing is necessary, because no one has the right to force speech on an unwilling listener. Unfortunately, the case cannot be dismissed so easily. The problem is that in addition to protecting unwilling recipients, the statute also burdens mailings to willing recipients. As a result of the statute, a book company contemplating a mass mailing confronts several additional costs. One is that it will have to remove the names of active objectors from its mailing lists, at an estimated cost of five dollars apiece. Another cost is that whenever in the future it buys a mailing list, the company will have the expense of ensuring that each objector is removed from the new list. The company also will lose the possibility of selling other kinds of books to the objectors, because it cannot lawfully contact them through the mails. Moreover, it will lose the possibility of selling books to any minors in these households. The threat of incurring costs like these can reasonably be expected to act as a fairly potent deterrent, particularly for companies that do not specialize in erotic literature. Therefore, a burden will be placed on the flow of the material to people who would actually respond positively to it. At the very least, the burden on speech to willing recipients cannot safely be said to be de minimus.

Although this burden on speech is not insubstantial, it must be weighed against “the very basic right to be free from sights, sounds, and tangible matter we do not want.” That right is especially strong in the home and is further strengthened when it intersects with the right of parents to control their children’s upbringing. Even Justice Black believed the government could properly limit speech to protect the home, “sometimes the last citadel of the tired, the weary, and the sick” and “the sacred retreat to which families repair for their privacy and their daily way of living.” On balance, considering the narrow class of materials involved and the importance of the state interest in protecting unwilling recipients, the possible incidental burden on mailings to willing recipients does not seem intolerable.

Erznoznik v. City of Jacksonville. At issue in Erznoznik v. City of Jacksonville was the validity of a municipal ordinance regulating drive-in movie theatres that exhibited films containing nudity. The ordinance prohibited the showing of these films if the theatre screen was visible from a street or

125. But see FCC v. Pacifica Foundation, 438 U.S. 726, 766 (1978) (plurality opinion) (Brennan, J., dissenting) (interpreting Rowan as not preventing willing addressees from receiving senders’ communications); Krattenmaker & Powe, supra note 33, at 1231 (interpreting Rowan as allowing unwilling recipient to assert right of privacy in home, but not bar speaker from communicating with others). See also Stone, supra note 18, at 266 (Rowan statute indirectly affects advertiser’s ability to reach willing recipients).

126. See notes 115-16 supra and accompanying text.

127. Rowan v. United States Post Office Dep’t, 397 U.S. at 736.


130. 422 U.S. 205 (1976).
other public place. The Supreme Court held the ordinance invalid on its face.

*Erznoznik* yields easily to equal protection analysis. The ordinance classifies drive-in movies on the basis of two factors: Nudity and visibility from the streets. The justifications offered for the ordinance were insufficient to support this classification. The primary justification was that it protected passersby from exposure to offensive material. But the ordinance is only loosely tailored to this purpose. It applies when the screen image is barely visible from the road and also when the road itself is rarely traveled or traveled only by persons on their way to the drive-in. The ordinance also covers the most fleeting glimpse of nudity, which those not in the audience are unlikely to notice. In short, the ordinance goes far beyond its purpose of protecting passersby from obtrusive displays of highly offensive material. The two other suggested justifications fare no better. The first was protection of children from exposure to erotic material. As the Court pointed out, this justification is rather weak, inasmuch as the ordinance includes even the most innocent displays of nudity, sweeping well beyond the erotic or the seriously offensive. The second was a belated attempt by the city to justify the

131. More precisely, the ordinance made it an offense for any drive-in theatre to exhibit "any motion picture, slide, or other exhibit in which the human male or female bare buttocks, human female bare breasts, or human bare pubic areas are shown, if such motion picture, slide, or other exhibit is visible from any public street or public place." *Id.* at 206-07.

132. *Id.* at 216-17.

133. *Id.* at 208-12.

134. In discussing the protection-of-passersby rationale, the Court did not apply the test discussed in the text, which focuses on the closeness of fit between the ordinance and the purported goal. Instead, the Court stated that the government may regulate content on the basis of its "offensiveness" only when the speaker intrudes into the privacy of the home, or when circumstances otherwise create a captive audience. *Id.* at 209 (citing *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736-38 (1970) and *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-04 (1974) (plurality opinion)). At first sight, this admonition differs sharply from the theory discussed in the article, because under the Court's rationale, neither the degree of offensiveness of the material nor the degree of obtrusiveness of the display would be relevant. *422 U.S.* at 210-11, 212. Nevertheless, there are important indications in the Court's opinion that these considerations were relevant to the result. In the concluding paragraph of this section, the Court stresses that the ordinance prevents the theatres from "showing movies containing any nudity, however innocent or even educational." *Id.* at 211. Elsewhere in the opinion, the Court indicates that the ordinance might be valid if applied only to movies that are obscene as to minors. *Id.* at 216 n.15. This application would encompass most seriously offensive nudity. Finally, the Court apparently made obtrusiveness a relevant issue by carefully distinguishing the unintentional displays to the public from deliberate attempts to thrust material on an unwilling audience. *Id.* at 210 n.6. Thus, although the Court's rationale initially seems more sweeping than the equal protection rationale discussed in the text of this article, the actual results may be similar. Furthermore, the opinion is quite guarded in its treatment of content neutrality. In the section of the opinion dealing with the protection-of-vehicular-traffic justification for the ordinance, the Court says that content discrimination is impermissible "unless there are clear reasons for the distinction." *Id.* at 215. This formulation seems consistent with the middle-tier equal protection test proposed in this article. Even on the captive audience issue, the Court's language is somewhat guarded. Although articulating a rather sweeping test in one place, see *id.* at 210 (in pluralistic society that spawns new, ingenious forms of communication, "we are... captive audiences for many purposes"; quoting *Rowan v. United States Post Office Dep't*, 397 U.S. at 736), the opinion more cautiously states in another that "each case must depend on its own specific facts." *422 U.S.* at 209. In short, the rationale discussed in the text does not, on closer examination, appear to do violence to the *Erznoznik* opinion.

135. *422 U.S.* at 212.

136. The ordinance is not directed against sexually explicit nudity, nor is it otherwise limited. Rather, it sweepingly forbids display of all films containing any uncovered buttocks or breasts, irrespective of context
measure on traffic safety grounds. The Court found no reason, however, to think that this purpose was actually in the legislature's contemplation; furthermore, the city failed to demonstrate the existence of a significantly greater threat to traffic safety from erotic films than other movies. In short, as Justice Douglas observed in his concurrence, the ordinance was "fatally overinclusive in some respects and fatally underinclusive in others." Besides being a good example of the operation of the equal protection approach, Erznoznik also illustrates some of the resemblances between content regulation and discrimination based on gender or illegitimacy. One of the fears in the latter category of cases is that a classification may have an invidious basis. In Erznoznik, this was a real possibility. The ordinance can be plausibly attributed either to a general antipathy to erotic films or to a fear that showing these films in drive-ins would increase sexual activity by teenagers. A second consideration in the gender and illegitimacy cases is a fear that classifications may be due to archaic stereotypes or hasty generalizations. These concerns were present in Erznoznik. Apparently, the city did not pause to consider that a fleeting glimpse of movie nudity might not offend passersby under contemporary standards, nor did the city consider the varying degrees of obtrusiveness a drive-in movie screen might have. Instead, its action was apparently based on the outmoded Victorian view that all nudity is highly offensive and was perhaps enhanced by a preconception about the obtrusiveness of drive-in screens. Middle-tier equal protection analysis is an appropriate response to these concerns about the city's decisionmaking process.

FCC v. Pacifica Foundation. FCC v. Pacifica Foundation is probably the most controversial content regulation case. It arose from a radio

or pervasiveness. Thus, it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous. The ordinance also might prohibit newswreld scenes of the opening of an art exhibit as well as shots of bathers on a beach. Id. at 213. See also Cinecom Theaters Midwest States, Inc. v. City of Fort Wayne, 473 F.2d 1297, 1300-02 (7th Cir. 1973) (child's freedom of speech too important to be overridden by overbroad obscenity ordinance). 137. 422 U.S. at 214. 138. Id. 139. Id. at 214-15. But see Chemline, Inc. v. City of Grand Prairie, 364 F.2d 721, 734 (5th Cir. 1966) (Moore, J., concurring in the result) (showing of specific traffic hazard resulting from exclusion of "nude" films at drive-in ample basis for upholding content-based ordinance). 140. 422 U.S. at 218. 141. The Court has stressed the possibly punitive basis of laws discriminating against illegitimates. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972). 142. See Stone, supra note 2, at 111-12 (high probability that real motivation for Erznoznik type ordinances is content regulation); The Supreme Court, 1974 Term, 89 Harv. L. Rev. 123, 125 (1975) (nuisance ordinances often mask attempts to suppress constitutionally protected material). The record suggests the possibility that the ordinance was adopted only after the city became frustrated by the difficulty of using obscenity laws to repress erotic films at drive-ins. For instance, the record shows official concern that teenagers were congregating by the side of the road to watch "R-Rated" movies. Appendix at A-49, Erznoznik v. City of Jacksonville, 422 U.S. 205 (1976) (copy on file at Georgetown Law Journal); cf. Chemline, Inc. v. City of Grand Prairie, 364 F.2d 721, 724-26 (5th Cir. 1966) (city acted within police power in banning exhibition of nude films on drive-in screen visible from street; record showed increased incidence of teenage traffic violations on street adjoining theater). 143. See note 57 supra and accompanying text. 144. 438 U.S. 726 (1978) (plurality opinion). 145. For commentary critical of the decision, see L. Tribe, supra note 2, at 61-68 (1979 Supp.) (Pacifica
broadcast of a monologue called "Filthy Words" by the comedian George Carlin. The broadcast by WBAI-FM in New York City took place at 2 o'clock on a Tuesday afternoon in October and led to a complaint to the Federal Communications Commission by a man who heard the broadcast while driving with his young son. As its title indicates, the monologue consists of almost uninterrupted repetitions of four-letter words. The FCC issued a Declaratory Order granting the complaint and holding that Pacifica Foundation could have been the subject of administrative sanctions for violating a statutory prohibition against indecent language in broadcasting. Although the FCC did not immediately impose any formal sanctions, it did include the Declaratory Order in the radio station's file with the warning that if further complaints were received, the FCC would then decide whether to apply any of the available sanctions. A badly divided Supreme Court held that in this factual context, the exercise of FCC regulatory power over "indecent" language did not violate the First Amendment.

Under the analysis proposed in this article, the first question to ask is whether the Commission's classification of speech violated equal protection. The criterion used by the FCC was whether the speech was "patently offensive." In determining that the monologue was patently offensive, the FCC considered the nature of the words and the context of the communication should be discarded as "derelict in the stream of the law"); Krattenmaker & Powe, supra note 33, at 1228-38, 1280-88 (Pacifica rests on "uninformmed doctrinal basis," represents "cavalier treatment of precedent," is product of Court "going out of its way to invent a transparently unprincipled excuse for refusing to extend some settled first amendment principles"); The Supreme Court, 1977 Term, supra note 4, at 148-63 (calling for confinement of Court's "subjective enterprise of defining and controlling 'indecency'"); Case Comment, FCC v. Pacifica Foundation: An Indecent (Speech) Decision?, 40 OHIO ST. L.J. 155, 183 (1979) (concluding that Court has created "grave potential" for FCC censorship of "socially valuable communication").

146. 438 U.S. at 729.
147. Id. at 729-30. Apparently this was the only complaint provoked by the broadcast. Pacifica Foundation v. FCC, 556 F.2d 9, 11 (D.C. Cir. 1977). The "young son" was 15 years old at the time of the broadcast. WBAI ruling: Supreme Court saves the worst for last, BROADCASTING, July 10, 1979, at 20.
149. 438 U.S. at 732. 18 U.S.C. § 1464 (1976) makes it a crime to utter "any obscene, indecent, or profane language by means of radio communication."
150. 438 U.S. at 730. The FCC is empowered to impose civil sanctions to enforce § 1464. See 47 U.S.C. § 307 (1976) (FCC may deny license renewal or grant short term renewal when that would serve public interest); id. § 312(a)(6) (FCC may revoke station license or construction permit for § 1464 violation); id. § 312(b)(2) (FCC may issue cease and desist orders when it finds § 1464 violation); id. § 503(b)(1)(E) (FCC may exact monetary forfeitures up to $1000 for each day that § 1464 violation occurs; total forfeiture not to exceed $10,000). In 1978, the daily and total ceilings for monetary forfeitures were doubled. 47 U.S.C.A. § 503(b)(D) (West Supp. 1979).
151. 438 U.S. at 750-51. Invoking the porcine metaphor employed by Justice Sutherland in Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926), the Court held that the FCC need not find that a pig is obscene before evicting it from the parlor. 438 U.S. at 750-51. Justice Stevens announced the Court's judgment in an opinion joined by Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist with respect to the statutory authority of the FCC to regulate indecent language in broadcasting. Although concluding that the FCC action did not violate the First Amendment, Justices Blackmun and Powell could not agree with Justice Stevens' "social value" theory of First Amendment protection, and did not join that part of the opinion. Id. at 761. Justice Stewart dissented, joined by Justices Brennan, White, and Marshall. Id. at 777. Justice Brennan also filed a separate dissent, in which Justice Marshall joined. Id. at 762.
tion. The monologue was deemed indecent specifically because words referring to excretory or sexual activities and sexual organs were frequently repeated, and children "were undoubtedly" in the audience.\footnote{The FCC finding of patent offensiveness was determined by reference to "contemporary community standards for the broadcast medium."\textsuperscript{153} Id. at 99.} An application of this "patently offensive" standard comports with the requirements of equal protection. The FCC was concerned about adults accidentally tuning in to highly offensive broadcasts and unsupervised children listening to the broadcasts.\footnote{Id. at 100.} The concept of patent offensiveness used by the Commission is closely attuned to these concerns. If instead of banning certain offensive speech, the FCC had demanded that a broadcaster warn listeners before airing such language,\footnote{Id. at 100.} few people would think it unreasonable to draw a line for this purpose between "patently offensive" speech and other speech. The reason is that this line correctly isolates the category of speech most likely to offend unwilling adult listeners, and most likely to give rise to parental objections. Assuming that any broadcast can be properly banned as "offensive," a test of "patent offensiveness" correctly identifies the speech that can most appropriately be banned from broadcasts.

The problem with the Commission's regulation in \textit{Pacifica} is not so much where the Commission drew the line as what that action did to the speech within the line. In short, the real issue in \textit{Pacifica} is balancing, not equal protection. Was a ban on "patently offensive" speech too drastic a remedy in view of the severity of the problem? Should the Commission have used a milder remedy, such as a warning requirement?

Unfortunately, in \textit{Pacifica}, use of the balancing test does not provide a clear-cut answer of what the appropriate result should be. When the three elements relied upon in \textit{Cohen v. California} are examined,\footnote{Id. at 95-96.} initially it can be seen that unlike the statute in that case, the FCC's regulatory ban focuses closely on the purported goal of protecting children and unwitting listeners from exposure to offensive speech. Secondly, the FCC's articulated concern for the sensitivity of some listeners and the presence of children in the audience is a previously accepted basis for content regulation.\footnote{See \textit{Rowan v. United States Post Office Department}, which dealt with 157.} It is the third element that presents the hard question. That is, can the government's interest in protecting listeners in this manner be balanced, consistent with precedent, against traditional first amendment values to reach the \textit{Pacifica} result?\footnote{See note 101 supra and accompanying text.} \textit{Rowan v. United States Post Office Department}, which dealt with...
junk mail, indicates that the Court would view the FCC's goals as justifying some burden on the flow of information to willing participants. 159 Rowan is not dispositive, however, because of the distinguishable effect of the statutory provision. Rowan simply increased the costs of using a particular medium; the effect of the FCC action in Pacifica is to bar daytime use of a medium even to reach willing listeners. 160 Nevertheless, even this rather drastic step seems acceptable in at least some situations. If, for example, the Carlin monologue were broadcast in the middle of a children's show, the balance would easily be struck in favor of the FCC.

The facts in Pacifica, however, were not so clear-cut. Perhaps the ideal disposition in Pacifica would have been to remand for fuller consideration of the factual setting. The station's sophisticated FM audience, 161 its location in New York City, its premonologue warning about the potential offensiveness of the broadcast, 162 and the serious discussion of contemporary attitudes toward language that preceded the monologue 163 all support a finding that in its total context and in light of its probable audience the broadcast was not "patently offensive." But Pacifica apparently chose not to press for a consideration of this factual issue, preferring to seek a ruling that the FCC was powerless to regulate any broadcast of patently offensive language. 164 The

any of the context-related justifications raised in that case. See notes 69-73 supra and accompanying text. Hence, it does little to resolve the issues in Pacifica.

159. See notes 125-26 supra and accompanying text (discussing extent of burden created by statute upheld in Rowan). In terms of the privacy interest, there seems to be little difference. After Rowan, both junk mail and radio broadcasts may enter the home, but only at the invitation of the homeowner; both can be avoided after a single exposure to stimuli; and both are accessible to children. But see Case Comment, supra note 158, at 174 (junk mail usually unsolicited, but people choose to turn on radio broadcast; only self-designating individuals protected from intrusion of junk mail by Rowan, but everyone cut off from radio broadcast when it is prohibited).

160. It is unclear whether the FCC would find the Carlin monologue to be indecent if it were broadcast late at night. See 438 U.S. at 750 n.28 (noting that neither Court nor FCC has decided whether such a broadcast permissible in late evening when audiences contain few children); In re Pacifica Foundation Station WBAI (FM), N.Y., N.Y., 59 F.C.C.2d 892, 892 (1976) (FCC intended only to channel language like that in Carlin monologue to times of day when children would not be exposed to it).


163. Id. at 95.

164. See Brief for Respondent at 11-16, FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (summary of argument) (copy on file at Georgetown Law Journal) [hereinafter Pacifica Brief]. The FCC stressed that Pacifica had not denied that the broadcast was offensive by contemporary community standards for the broadcast media or that there were children present in the audience; nor had Pacifica defended its choice of broadcast time. Brief for Petitioner at 17, FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (copy on file at Georgetown Law Journal). According to the FCC, if Pacifica had challenged the findings in the Commission's Declaratory Order, the FCC would have afforded Pacifica the functional equivalent of a jury determination of a clear community consensus of offensiveness, complete with the formalities of an adjudicative proceeding. Petitioner's Reply Brief at 5, FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (plurality opinion) (copy on file at Georgetown Law Journal). Pacifica countered that the original FCC inquiry only asked for comments in response to the complaint received; that Pacifica did not deny certain of the alleged facts underlying the Declaratory Order cannot be construed as a tacit admission of such facts. Pacifica Brief at 3 n.3. A plausible argument can be made that Pacifica should have prevailed if it had properly raised the factual issues of the broadcast's context. See L. TRIBE, supra note 2, at 64 (1979 Supp.) (unreasonable to suppose that children listening or that adult listeners offended by broadcast; WBAI targeted programming at adults, politicized, educated audience; broadcast occurred during school hours) (citations omitted).
Court cannot be faulted for declining entirely to deprive the FCC of this power.

B. COMMERCIAL SPEECH

In *Bigelow v. Virginia*, decided during the 1974 Term, the Supreme Court extended first amendment protection to commercial advertising. Since then, commercial speech has posed a serious problem for content neutrality advocates. A state is not allowed to prohibit deceptive political editorials, with the limited exception of libel actions. Why is the state allowed to pervasively regulate misleading advertising? Analysis of this question reveals that it concerns two separate forms of content discrimination—first a distinction between commercial speech and other speech, and then a further distinction between misleading commercial speech and other commercial speech. The problem for advocates of content neutrality is to justify this dual content discrimination.

The generally accepted basis for distinguishing misleading commercial speech from other misleading speech was offered in the principal case on the regulation of commercial speech, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* Briefly, the theory is that false


166. See id. at 829 (invalidating state statute as applied). Appellant Bigelow was convicted under a statute prohibiting the encouragement of abortion through advertising, lecture, or other means. Bigelow, the editor of a Virginia newspaper, had run advertisements in his paper for an abortion referral service operating in New York. Id. at 811-12.

Dicta in earlier cases indicated that commercial speech might be protected by the first amendment. See, e.g., Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 389 (1973) (dismissing "any First Amendment interest which might be served by advertising an ordinary commercial proposal"); Ginzburg v. United States, 383 U.S. 463, 474 (1966) ("commercial activity, in itself, is no reason for narrowing the protection of expression secured by the First Amendment"); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (fact that contested expression was a paid advertisement irrelevant for purposes of first amendment; advertisement not "commercial" activity in normal sense).

166. Once commercial speech was brought within the protection of the first amendment, the problem of regulating false speech immediately presented itself. In the leading case of *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), Justice Stewart addressed this problem. In light of the "cardinal principle" of content neutrality, Justice Stewart believed that the decision "call[ed] into immediate question the constitutional legitimacy of every state and federal law regulating false or deceptive advertising." Id. at 776 (Stewart, J., concurring). Similarly, Justice Powell has been unable to reconcile his rejection of content regulation in *Pacifica* with his opinion for the Court in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), in which he argued that commercial speech was given more limited protection than other speech because of its "subordinate position in the scale of First Amendment values." Id. at 456; see FCC v. Pacifica Foundation, 438 U.S. at 761 & n.3 & 4 (commercial speech a "limited exception to content neutrality"); Court not free to decide on basis of content which speech more deserving of first amendment protection (Powell, J., with Blackmun, J., concurring in part and concurring in judgment). Justice Stevens, on the other hand, has relied on the commercial speech cases in defending his rejection of content neutrality. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 68-69 & nn.28-32 (1976) (plurality opinion) (content of particular advertisement determines extent of first amendment protection; citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (plurality opinion); *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946); FTC v. Nat'l Comm'n on Egg Nutrition, 517 F.2d 485 (7th Cir. 1975); E.F. Drew & Co. v. FTC, 225 F.2d 735 (2d Cir. 1956); Markham Advertising Co. v. State, 73 Wash. 2d 405, 439 P.2d 248 (1968), appeal dismissed for want of a substantial federal question, 393 U.S. 316 (1969)).

political speech is protected because penalizing it may chill the expression of truthful political speech. Arguably, commercial speech is less easily chilled because the truth of a commercial claim may be more easily verified than the truth of news reporting or political commentary. In addition, the strong financial incentive of advertisers to promote their products should overcome any chilling effect.\footnote{169 See id. at 771 n.24 (commercial speech described as more durable, objective, and hardy than other types of speech); id. at 780-81 (Stewart, J., concurring) (commercial speech generally conveys empirically verified information).}

This attempt to reconcile regulation of commercial speech with the principle of content neutrality involves the kind of overgeneralization content-neutrality advocates themselves condemn.\footnote{170 See Police Dep't of Chicago v. Mosley, 408 U.S. 92, 100-01 (1972) (Marshall, J.) (distinctions involving freedom of expression and equal protection must not be made on "wholesale and categorical basis").} These overgeneralizations are also too broad to survive middle-tier scrutiny. Commercial speech is sometimes, but not always, more verifiable than other kinds of speech. A product may be the subject of intense scientific controversy, while a political statement may be easily verifiable by the speaker, as when it concerns his own past. Moreover, the degree of any chilling effect depends upon both the severity of the penalty and the strength of the speaker's motivation. Neither trait is closely related to the commercial nature of the speech.\footnote{171 For further discussion of these points, see Farber, Commercial Speech and First Amendment Theory, 74 Nw. U.L. Rev. 372, 385-86 (1979).}

A much more satisfactory explanation can be given for the special status of commercial speech. When an advertiser makes misrepresentations about a product, delivery of a product that fails to conform to the advertiser's claims can be seen as a breach of a contractual undertaking. Thus, the legitimate state interest in upholding consumers' contractual expectations justifies state regulation of commercial speech. The existence of contractual expectations explains the distinction between commercial speech cases and noncommercial speech cases in which the listener's expectations are legally unenforceable. The same listener interest justifies the distinction between truthful and misleading commercial speech.\footnote{172 I have elaborated on this approach in Farber, id. at 386-95. The earlier approach is recast slightly to fit within the broader framework proposed in this article.}

Application of the equal protection aspect of the proposed approach creates little difficulty in the commercial speech area, because the distinctions made by the regulatory statutes are typically supported by the legitimate state interest in upholding contractual obligations. Similarly, application of the balancing test supports the regulation of consumer fraud. The state interest implicated is strong, and the impact on freedom of expression is minimal. Commercial speech has been given first amendment protection because of the consumer's interest in receiving truthful, useful information.\footnote{173 Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 765.} Obviously, a ban on deceptive speech furthers, not hinders, this consumer interest. Finally, allowing regulation of commercial speech does not violate the Cohen presumption against expanding the list of exceptions from content neutral-
ty. Until recently, the state’s right to regulate in this area was almost unlimited, so this can hardly be considered a new area of content control.

C. SUBJECT-MATTER CLASSIFICATION

The problem of subject-matter classifications has already been encountered in Police Department of Chicago v. Mosley. The Mosley holding fits neatly into the proposed approach. The distinction made in the Mosley ordinance between peaceful labor picketing and all other picketing cannot survive middle-tier equal protection scrutiny. The ordinance was purportedly intended to prevent school disruption, yet the city presented no factual basis for believing that nonlabor picketing was markedly more disruptive than labor picketing. Nor did the city explain why the line between legal and illegal picketing could not be drawn on the basis of disruptive effect rather than subject-matter distinctions. Thus, there is no problem in accounting for Mosley under the proposed theory. The two other subject-matter classification cases that must be explained require somewhat more detailed consideration.

Greer v. Spock. The first of these cases, Greer v. Spock, involved regulation of speech at the Fort Dix Military Reservation in New Jersey. Unrestricted parts of this military base were open to civilians, and civilian speakers had occasionally been invited to address the troops on subjects ranging from business management to drug abuse. In addition, commercial magazines and newspapers were freely sold on the base, and leaflets could be distributed, subject to restriction only if they posed a clear threat to military discipline. Partisan political speeches and demonstrations, however, were uniformly banned on the base. The major issue in Greer was the validity of this ban, as applied to a planned political rally at which Dr. Benjamin Spock, then a candidate for Vice President, planned to speak.

The equal protection problem is not especially difficult. The primary justification for the regulation was the strong policy of keeping military activities wholly free from entanglement with partisan political campaigns. Political rallies held on a military base pose a particular threat to this interest. One of the major purposes of a rally is to demonstrate support for a candidate.

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175. See Breard v. Alexandria, 341 U.S. 622, 641-43 (1951) (local ordinance prohibiting door-to-door sale of periodical subscriptions held not violative of first amendment); Valentine v. Chrestensen, 316 U.S. 52, 54-55 (1942) (local ordinance prohibiting distribution of commercial handbills held not violative of first amendment, even when applied against distributor of handbills that also contained noncommercial message). See generally J. NOWAK, R. ROTUNDA & J. YOUNG, supra note 2, at 653 n.16.
176. 408 U.S. 92 (1972); see notes 34-54 supra and accompanying text.
177. 408 U.S. at 100.
178. Id. at 101-02.
180. Id. at 830-31.
181. Id. at 831 & n.2.
182. Id. at 831, 839.
183. Id. at 832-34.
184. Id. at 839.
by drawing a large crowd. Collecting a crowd of soldiers on a military base to demonstrate support for a candidate threatens to make the military a visible political force.\textsuperscript{185} Thus, there is a close fit between the goal of political neutrality of the armed forces and the classification of partisan political rallies on military bases as subject to special regulation.

The balancing test is also rather easily applied. Keeping the military out of politics is an important government interest.\textsuperscript{186} Countering that interest is the burden placed on the first amendment rights of military personnel, their dependents, and those who wish to address them at the military base. This burden was minimized because other means of communication were allowed on the base and virtually unrestricted communication was allowed off the base. For instance, leaflets that did not present a clear threat to military discipline could be distributed on the base,\textsuperscript{187} and soldiers could attend off-base rallies so long as they did not wear their uniforms.\textsuperscript{188} If only the first amendment interests of civilians were involved, the balance might still tip against the government. But the final and decisive consideration is that prior to \textit{Greer} the Court had already held that soldiers have diminished first amendment rights.\textsuperscript{189} Even Justice Douglas conceded that "[t]he power to draft an army includes, of course, the power to curtail considerably the 'liberty' of the people who make it up."\textsuperscript{190} Given this background, the Court was justified in upholding the regulation in \textit{Greer}.

\textit{Lehman v. City of Shaker Heights.} In \textit{Lehman v. City of Shaker Heights}\textsuperscript{191} a candidate for political office challenged a municipal transit system's refusal to post his paid political advertising in commercial advertising space maintained on the municipal buses.\textsuperscript{192} The issue was whether this exclusion of political speech was valid. A sharply divided Court upheld the exclusion as a nonarbitrary exercise of the city's discretion.\textsuperscript{193}

Under the proposed analysis, \textit{Lehman} is not a troublesome case. The primary interests asserted by the city were a desire to avoid any possible appearance of favoritism toward particular political candidates and a desire to avoid imposing possibly objectionable speech on the captive audience of bus passengers.\textsuperscript{194}

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\textsuperscript{185} This point is stressed in Justice Powell's concurrence. \textit{Id.} at 845-48.

\textsuperscript{186} See \textit{id.} at 867 (Brennan, J., dissenting) ("could not agree more that the military should not become a political faction in this country").

\textsuperscript{187} \textit{Id.} at 831 & n.2 (majority opinion).

\textsuperscript{188} \textit{Id.} at 847 (Powell, J., concurring).

\textsuperscript{189} \textit{Parker v. Levy}, 417 U.S. 733, 758-59 (1974). \textit{Parker} rejected a vagueness challenge to a Military Code of Justice prohibition against "conduct unbecoming an officer and a gentleman" that was brought by an army doctor who was imprisoned for urging black soldiers not to fight in Vietnam. The Court stressed the special status of the military community as the justification for diminished first amendment protection. \textit{Id.} at 756-61.

\textsuperscript{190} \textit{Id.} at 772 (Douglas, J., dissenting).

\textsuperscript{191} \textit{418 U.S.} 298 (1974) (plurality opinion).

\textsuperscript{192} \textit{Id.} at 299-300.

\textsuperscript{193} \textit{Id.} at 304. The plurality opinion by Justice Blackmun, joined by Chief Justice Burger and Justices White and Rehnquist, concluded that the bus did not constitute a public forum, thus eliminating the first amendment issue. \textit{Id.} Justice Douglas, who cast the decisive vote, stated in his concurring opinion that no one had a constitutional right to expose to their advertisements the "captive audience" of a bus. \textit{Id.} at 307-08. Justice Brennan, joined by Justices Stewart, Marshall, and Powell, delivered a strong dissent, stating that the municipality's acceptance of advertisements created a public forum on the buses, making subsequent content regulation impermissible. \textit{Id.} at 315.
The captive audience problem is especially strong where ideological speech is involved. For the same reasons that the government cannot require citizens to salute the flag or engage in other ideological speech, the government may properly be wary of forcing ideological messages on unwilling viewers or even giving the appearance of doing so. Thus, the captive audience issue and the favoritism problem both implicate a more general interest in preventing the government from becoming involved in influencing the political process. In this respect, *Lehman* resembles *Greer*, in which the goal of regulation was also to maintain government neutrality in politics.

Given this government interest, the Court was not unreasonable in upholding the exclusion of campaign posters from Shaker Heights buses. With regard to the equal protection component of the proposed approach, a ban on political advertising is tailored to preventing any political entanglement problem. As for the balancing test, advertising space on mass transit vehicles is hardly such a critical forum that the state is constitutionally obligated to provide it. Somewhat more troublesome is the dissent’s argument in *Lehman* that the ban in effect favors certain viewpoints, such as cigarette ads over antismoking campaigns. In light of the relative unimportance of the forum, however, to the extent the ban favors one viewpoint over another the effect is too inconsequential to give rise to serious concern.

**V. Conclusion**

The time has come to reconsider present doctrines concerning content neutrality. When the cases sanctioning content regulation are examined, they do not turn out to be aberrations or to involve narrow exceptions from established doctrine. Instead, these cases fit into a coherent approach to the issue of content regulation—an approach that explains as well the cases in which such regulation has been disallowed. It consists of a middle-tier equal protection test, similar to that used in cases of discrimination on the basis of gender or illegitimacy, coupled with a controlled balancing test.

Behind every asserted first amendment doctrine lies a vision of the free society. The emerging approach to content regulation that I perceive embodies a vision that may be especially appropriate for the diffuse, pluralistic society of the United States in the 1980’s. This vision gives broad scope to individual freedom. Large areas—the institutional press and the traditional public forums of the streets and the parks—are left virtually free of
government control. In other areas, government intervention is cautiously allowed, but only when it is possible to accommodate pursuit of the government's interests without jeopardizing the free flow of speech through the system as a whole. Thus, the goal is not only to create a system in which free expression can flourish, but also to respect the diverse needs of a complex society. This seems to me a respectable vision of a free society. Whether the vision will come to pass depends largely on the abilities and sensitivity of the legislators and judges who seek to translate it into reality.

199. See generally L. Tribe, supra note 2, at 679, 689-90. For an intriguing suggestion that maintaining a healthy system of free expression, while accommodating other values, may best be accomplished through intentionally disparate treatment of different media, see Bollinger, Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media, 75 Mich. L. Rev. 1, 32-37 (1976).