METHOD AND OBJECTIVITY IN FREE SPEECH ADJUDICATION: LESSONS FROM AMERICA

IVAN HARE*

I. INTRODUCTION

Following a dispute with his black neighbour, a white man in Virginia erects and ignites a crude home-made cross on the neighbour's lawn. The white man is convicted under a law prohibiting intimidation by use of a burning cross.

In the run-up to the 2001 British General Election, a pro-life group produces an election broadcast which contains scenes from actual suction abortion operations showing bloodied and dismembered limbs and a severed head. The national broadcasting authorities prohibit the programme pursuant to their statutory duty not to transmit distasteful and offensive material and their decision is upheld in judicial review proceedings.

These cases were decided within three days of one another by the United States Supreme Court and the House of Lords.[1] Both raise fundamental issues concerning the extent of legitimate restrictions on free speech and have certain characteristics in common. For example, both cases involve the use of images rather than direct speech and both have a claim to be expressions of view on matters of intense political controversy. Evidently, there are also significant differences: the former involves *ex post facto* criminal punishment; the latter, the imposition of a prior restraint. Further, the former involved expression directed at a particular individual, whereas the latter was a broadcast intended for the public at large via the medium of television.

Despite these differences, this article is based on the premise that the two cases can usefully be compared at the level of free speech method and that they provide an opportunity to investigate the merits of the principal doctrinal tool which the US Supreme Court has developed for analysing free speech disputes: the distinction between content-based and content-neutral forms of speech regulation.[2]

* Barrister, Blackstone Chambers and Visiting Fellow of the Centre for Public Law in the University of Cambridge. The author is grateful to Professors Eric Barendt, Chris McCrudden, Tony Smith, and Jim Weinstein for their comments on an earlier draft.

[1] *Virginia v Black, Elliott and O'Mara and Elliott* 123 SCt 1536 (2003) and *R v British Broadcasting Corporation, ex parte ProLife Alliance* [2004] 1 AC 185. The Supreme Court gave judgment in *Black* on 7 Apr 2003; the House of Lords decided the *ProLife Alliance* appeal on 10 Apr 2003 and gave their reasons the following month.

[2] Kagan describes the distinction as 'the keystone of First Amendment law' (E Kagan 'Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine' (1996)

[*ICLQ* vol 54, January 2005 pp 49–87]

https://doi.org/10.1093/iclq/54.1.49 Published online by Cambridge University Press

The structure of the article is as follows. After a brief summary of the doctrinal background to the First Amendment in Part I, Part II begins by defining and illustrating the distinction between content-based and content-neutral forms of speech regulation and then explains that sub-set of content-based regulations which are viewpoint-based. Part III sets out the traditional justifications for adopting this method and Part IV refines the initial definition in order to accommodate judicial line-drawing on grounds of content. The majority of the paper is then devoted to considering some of the problems to which content-based method has given rise. In particular, the difficulty of satisfactorily defining content-based restrictions, the problems of regulating expressive conduct and the impact which content-neutral provisions can have on the exercise of free speech rights. Finally, I consider the responses of previous UK commentators to this branch of First Amendment doctrine and conclude that their criticisms may have misstated the real focus of content-based method and thereby underestimated its potential merits for the United Kingdom and other systems committed to the legal protection of free speech.

II. DOCTRINAL BACKGROUND TO THE FIRST AMENDMENT

Although content-neutrality has a strong claim to be the dominant doctrinal tool used in First Amendment adjudication, it operates as part of a matrix of free speech rules and principles.[3] The First Amendment itself is, of course, limited to Congress, but the Court has held that its prohibition applies equally to the other branches of the Federal government and to the states through the medium of the Fourteenth Amendment.[4] Nonetheless, the Court has continued to insist, through the State action doctrine, that the free speech guarantee does not govern relations between private entities and individuals. Moreover, the Court has consistently treated the government as a provider of subsidies to speech differently from its role as regulator.[5]

The Court also draws certain distinctions between different speech forums. Public property (such as parks and streets) which has 'immemorially been held in trust for the use of the public and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions'[6] is generally immune from government attempts

63 U Chi L Rev 413, 443); Stone regards it as 'perhaps the most intriguing feature of contemporary first amendment doctrine' (GR Stone 'Content Regulation and the First Amendment' (1983) 25 Wm & Mary L Rev 189, 189). The history of content-based method is traced in PB Stephen 'The First Amendment and Content Discrimination' (1982) 68 Virginia L Rev 203, 214–31.

[3] The First Amendment itself (in relevant part) reads: 'Congress shall make no law . . . abridging the freedom of speech' (1791).

[4] *Gitlow v New York* 268 US 652 (1925).

[5] *Rust v Sullivan* 500 US 173 (1991) (upholding a decision which prohibited federally funded healthcare projects from advocating abortion as a form of family planning).

[6] *Hague v CIO* 307 US 496 515 (1936), per Roberts J.

https://doi.org/10.1093/iclq/54.1.49 Published online by Cambridge University Press

to regulate the content of expression taking place there. However, public property which is dedicated to uses inconsistent with unlimited expressive activity (such as the school classroom) is a non-public forum and the government may regulate the content of speech there so long as the regulation is reasonable and not an attempt to suppress a viewpoint with which the government disagrees.

At the level of substantive doctrine, there is a basic division between protected and unprotected speech; the latter including the obscene, perjury, bribery, criminal solicitation, and so on.[7] There is a hierarchy within the categories of protected speech with political expression at the core of the First Amendment and with, for example, commercial speech and non-obscene pornography regarded as of lower value and hence more readily regulated by the state.[8] The judicial method described and analysed in the pages below operates against the background of these rules and principles.

III. DEFINING CONTENT-BASED SPEECH REGULATION

A content-based restriction uses the 'subject-matter', 'category', or 'topic'[9] of the speech or the message conveyed by it as a way of defining what is, or is not, restricted; whereas a content-neutral regulation is applied irrespective of the subject-matter or content of the speech in question.[10] For example, a law prohibiting all public statements on abortion would be content-based whereas a statute which penalized all use of sound amplification equipment within 100 yards of a hospital is content-neutral.

The case of *Regan v Time, Inc*[11] furnishes examples of both types of provision. Federal law made it a crime to photograph any US currency. However, there was an exception for the printing and publication of illustrations 'for philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums' if the illustrations were in black and white and were either less than three-quarters or more than one-and-a-half times actual size. When the validity of this provision was challenged by a magazine publisher, the Supreme Court held that the first part of the exemption was unconstitutionally content-based:

[7] See (nn 44–53) and associated text.

[8] *New York Times v Sullivan* 376 US 254 (1964) (political expression); *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council, Inc* 425 US 748 (1976) (commercial speech); and *Young v American Mini Theatres, Inc* 427 US 50, 64–5 (1976) (pornography).

[9] *Rosenberger v Rector and Visitors of University of Virginia* 515 US 819, 829 (1995), *Burson v Freeman* 504 US 191, 197 (1992), and *Boos v Barry* 485 US 312, 319 (1988) respectively.

[10] The terms content and subject-matter neutrality are used interchangeably in the cases: see *Perry Education Association v Perry Local Educators' Association* 460 US 37, 59 (1983), per Brennan J (dissenting on the merits). Weinstein defines content-based laws as 'ones in which the government seeks to regulate expression because of the message it conveys' (J Weinstein *Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine* (Westview Press Boulder, CO 1999) 35).

[11] 468 US 641 (1984).

https://doi.org/10.1093/iclq/54.1.49 Published online by Cambridge University Press

> A determination concerning the newsworthiness or educational value of a photograph cannot help but be based on the content of the photograph and the message it delivers. Under the statute, one photographic reproduction will be allowed and another disallowed solely because the Government determines that the message being conveyed in the one is newsworthy or educational while the message imparted by the other is not.[12]

The Court then turned to the colour and size limitations. The Court noted that these requirements did not prevent the magazine from using the images to express any view on any subject and, moreover, that they did not require the government to evaluate the nature of the message being communicated by their use. As such, this part of the exception was independent of the content of the images and related only to the manner of their presentation. The Court analogized this to a limitation on the decibel level for amplified speech or on the size of billboards, both of which it has upheld in the past as legitimate content-neutral restrictions on expression. The colour and size limitations were therefore constitutional and furthered the government's substantial purpose in preventing counterfeiting.

As *Regan* reveals, the Court applies different levels of judicial scrutiny to a regulation depending on whether it is classified as content-based or content-neutral. For a content-based restriction to pass constitutional muster, the Court requires that it must serve a compelling state interest and be narrowly tailored to achieve that end.[13] It makes no difference that the law-maker had no intention of restricting expression and was pursuing an otherwise legitimate state purpose nor that the provision involves only a burden rather than an outright ban on speech.[14] A content-neutral restriction (such as a specification of the time, manner, or place in which speech may occur) is more easily defended and will be upheld if it is narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels for communication of the information or views.[15]

The Court has also held that government attempts to proscribe the form or content of individual expression are unconstitutionally content-based. The leading example is *Cohen v California* in which the Court held an ordinance to be unconstitutional for seeking to prohibit offensive expression.[16] Cohen

[12] ibid 648, per White J.

[13] *Widmar v Vincent* 454 US 263 (1981). Cf Kennedy J in *Simon & Schuster, Inc v Members of New York State Crime Victims Board* 502 US 105 (1991) and *Burson v Freeman* (n 9) 211–14.

[14] *Simon & Schuster, Inc* (n 13). 'Our precedents thus apply the most exacting scrutiny to regulations that suppress, *disadvantage, or impose differential burdens* upon speech because of its content' (*Turner Broadcasting System, Inc v FCC* 512 US 622, 642 (1994) (emphasis added)).

[15] See, eg, *City Council of Los Angeles v Taxpayers for Vincent* 466 US 789 (1984) and *Ward v Rock Against Racism* 491 US 781 (1989). This test has now been fused with that for expressive conduct set out in *US v O'Brien* 391 US 367 (1968) (see n 72 and associated text below and *Clark v Community for Creative Non-Violence* 468 US 288 (1984)).

[16] 403 US 15 (1971).

https://doi.org/10.1093/iclq/54.1.49 Published online by Cambridge University Press

was an anti-Vietnam War protestor who wore a jacket carrying the words 'Fuck the Draft' in the Los Angeles County Courthouse. The Court rejected the 'facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process'.[17]

However, this dichotomy between content-based and content-neutral provisions does not exhaust the classifications adopted in US doctrine since the Supreme Court also sub-divides content-based restrictions into those which are founded on the viewpoint of the speaker and those which apply to a whole category of expression. An example would be a classic dialectic such as abortion. A viewpoint-based restriction would prevent or impede one side of the debate (such as those who are pro-life) from putting across its arguments while permitting the other side (those who favour women's reproductive choice) to have unrestricted access to the public. The Court has reserved its most searching scrutiny for viewpoint-based restrictions. Indeed, there is no example in the law reports of a case in which the Court has found a restriction to be viewpoint-based and yet has gone on to uphold it as constitutional.[18]

The question of flag-burning, which the Court has addressed twice in recent years, provides a revealing illustration.[19] In the first case, *Texas v Johnson*,[20] the defendant was convicted of the offence of desecrating a venerated object.[21] Johnson had burned the US flag during the 1984 Republican National Convention as part of a protest against the Reagan administration and certain Dallas-based corporations. Unsurprisingly, a majority of the Court found Johnson's action to be expressive conduct within the First Amendment.[22] Since the statute only prohibited flag destruction which the actor knew would cause serious offence, the majority held that the prohibition was viewpoint-based and had to be struck down.

> If we were to hold that a State may forbid flag burning wherever it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role—as where, for example, a person ceremoniously burns a dirty flag—we would be saying that when it comes to impairing the flag's physical integrity, the flag itself may be used as a symbol—as a substitute for the written or spoken word or a 'short cut from mind to mind'—only in one direction. We would be permitting a State to 'prescribe what shall be orthodox' by saying that one may burn the flag to convey one's attitude toward it and its referents only if one does not endanger the flag's representation of nationhood and national unity.[23]

[17] ibid, 26 per Harlan J.

[18] In contrast, content-based (but viewpoint-neutral) restrictions on speech have been upheld from time to time by the Court. Examples include *Burson v Freeman* (n 9). See DA Farber 'Content Regulation and the First Amendment: A Revisionist View' (1980) 68 Geo LJ 727.

[19] J Ely 'Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis' (1975) 88 Harv L Rev 1482.

[20] 491 US 397 (1989).

[21] The Texas Penal Code, s 42.09 provided: '(b) For purposes of this section, "desecrate" means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.'

[22] See (n 20) 406, per Brennan J.

[23] ibid 416–17, per Brennan J.

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As a result of this decision, Congress passed the Flag Protection Act 1989 which criminalized the conduct of anyone who 'knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon' a United States flag, except if done in relation to the disposal of a 'worn or soiled' example. Again, the same majority of the Court held this provision to violate the Constitution.[24] The majority held that the words used in the Act (with the possible exception of 'burns') denote disrespectful treatment of the flag and that this fact, combined with the exception for the disposal of worn or soiled flags, made clear that the Act was intended to protect the flag's symbolic value and was therefore unconstitutionally viewpoint-based.

IV. JUSTIFYING THE DISTINCTIONS

The justification for the distinction between content-based and content-neutral forms of regulation is based partly on intuition and partly on legal principle. The Supreme Court appears to be innately suspicious of government attempts to differentiate between different topics which may form part of public debate, but has also advanced more concrete justifications. One of the most powerful is the fear that the state may use a content-based restriction on speech to drive discussion of a specified subject-matter from the field of public discourse altogether. As the Court has held: 'To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.'[25]

And also:

> To permit the continued building of our politics and culture, and to assure self-fulfilment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open'.[26]

The power to determine what is and what is not fit for public discussion is not one which should be possessed by a democratic legislature. It is not difficult to understand how the nature and quality of discourse in a given polity would be undermined if, to repeat the above example, public discussion of abortion were to be prohibited.[27]

[24] *US v Eichman* 496 US 310 (1990).

[25] *Consolidated Edison Company v Public Service Commission* 447 US 530 (1980), per Powell J.

[26] *Young v American Mini Theatres, Inc* (n 8). The internal quotation is from *New York Times v Sullivan* (n 8) 270.

[27] Among an extensive literature, see A Meiklejohn *Political Freedom–The Constitutional Powers of the People* (Harper New York 1960) and 'The First Amendment Is an Absolute' (1961)

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Such a regulation would also violate those theories of free speech based on the instrumental contribution of expression to democracy and the realization of truth. Additionally, an attempt by government to dictate which subjects are appropriate for general discussion smacks of a degree of paternalism which most liberal democracies have rejected. Related to this, content-based restrictions undermine those justifications for political participation in general, and the protection of free speech in particular, which are founded on the individual right to democratic self-governance.[28] Content-based method therefore has a high level of consonance with the orthodox justifications for the protection of free speech which were summarized in a recent House of Lords decision:

> Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self fulfilment of individuals in society. Secondly, in the famous words of Mr Justice Holmes (echoing John Stuart Mill), 'the best test of truth is the power of the thought to get itself accepted in the competition of the market': *Abraham v United States,* 250 US 616 at 630 (1919), *per* Holmes J (dissent). Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country . . .[29]

Content-based restrictions may also shade into de facto discrimination against certain viewpoints. This is likely to occur where there is a prevailing orthodoxy on a given issue. In these circumstances, a prohibition on all discussion of a subject does not affect both sides of the debate equally and will have a greater adverse impact on speech that challenges the established view. For example, if the vast majority of people believe in creationism and all public discussion of the origin of the universe is banned, the ban will have a greater impact on the opportunities of those who believe in Darwinian evolution to influence public opinion than on those creationists to whom it equally applies. Thus some content-based, but viewpoint-neutral, provisions can have profoundly distorting effects on the nature of public discourse.

Sup Ct Rev 245; JS Mill *On Liberty* (Penguin London 1985); and, generally, F Schauer *Free Speech–A Philosophical Enquiry* (CUP Cambridge 1982).

[28] Eg TM Scanlon 'A Theory of Freedom of Expression' (1972) 1 Phil & Pub Aff 204; R Post 'The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v Falwell' (1990) 103 Harv L Rev 603; and J Raz 'Free Expression and Personal Identification' in J Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press Oxford 1994).

[29] *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 at 126, per Lord Steyn. Kagan challenges speaker or audience-based justifications for content-based method ('Governmental Motive' (n 2) 444–50).

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In contrast, content-neutral regulations possess none of these flaws. First, they do not single out a particular topic for special treatment and so there is less reason to be suspicious of the government's motive for regulation.[30] Secondly, there is no fear of a subject being driven from the marketplace of ideas since the restriction is applied to all speech and the Court requires that adequate alternative methods for communication remain available.[31]

Restrictions on speech which only affect the manner in which the message is conveyed and not the content of the message itself also appear to conform more closely to our conceptions of how the interests of speakers and (sometimes unwilling) listeners should be reconciled. Take the classic examples of the ban on the use of amplified speech within close proximity of a hospital or of a school during class hours. Such a restriction applies to all speech on whatever subject, serves a substantial governmental purpose in ensuring that health and educational facilities can fulfil their primary responsibilities without undue interference, and leaves open ample alternative avenues of communication.[32]

The distinction between content-based restrictions and that subset of them which distinguish between speech on the basis of viewpoint also has an appeal to both intuition and principle.[33] One is naturally suspicious of any attempt by government to impede the ability of one side in a controversy to advance its views. This must be particularly so where that view is one which is disfavoured by, or unfavourable to, the government itself.[34] For example, in *Keyishian v Board of Regents,*[35] the Court struck down New York State statutory provisions which disqualified public school teachers who uttered 'treasonable' or 'seditious' language or who joined any society advancing such doctrine. It was clear that this provision sought to cast a 'pall of orthodoxy' and prevent the articulation of a viewpoint which was critical of the government.[36] It was thus appropriately subject to the strictest scrutiny.

[30] Sullivan and Gunther suggest that it is easier to mobilize political opposition to a more general law (which will by definition affect more people) than to a law directed at a particular subject-matter (KM Sullivan and G Gunther *First Amendment Law* (Foundation Press New York 1999) at 200).

[31] See (n 15) and associated text.

[32] Such as *Grayned v Rockford* 408 US 104 (1972).

[33] Stone advances four justifications for the higher level of judicial scrutiny applied to viewpoint-based restrictions: equality, communicative impact, distortion of public debate and suspicion of the motives for regulation (GR Stone 'Content Regulation and the First Amendment' (n 2), and 'Content Neutral Restrictions' (1987) 54 U Chi L Rev 46). The doctrine has other powerful supporters: Ely 'Flag Desecration' (n 19) and LH Tribe *American Constitutional Law* (2nd edn Foundation Press Mineola, New York 1988) ch 12. See also PB Stephen 'The First Amendment and Content Discrimination' (1982) 68 Virginia L Rev 203 and GR Stone 'Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions' (1978) 46 U Chi L Rev 81.

[34] 'On my view, the absence of seditious libel as a crime is the true pragmatic test of freedom of speech' (H Kalven *The Negro and the First Amendment* (Ohio State University Press Columbus 1965) 16).

[35] 385 US 589 (1967).

[36] ibid 603.

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Of course, the viewpoint restricted need not necessarily be one critical of the government,[37] but the prohibition on viewpoint discrimination prevents the State from proscribing what shall be orthodox and skewing public debate in favour of one side in a controversy.[38] Indeed, the US Constitution itself provides a strong commitment to equality and some free speech disputes have been resolved principally through the mechanism of the Equal Protection Clause of the Fourteenth Amendment rather than the First Amendment.[39] Governmental neutrality in permitting its citizens to choose between competing views of the good rather than seeking to preclude certain options also bolsters our commitment to the autonomy of the citizen. As the Court stated in *Cohen v California*:

> The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[40]

For these reasons, the Court has reserved its closest scrutiny for cases involving viewpoint discrimination.

Through the application of content-based method, the US Supreme Court has secured a higher degree of protection for the individual's right to freedom of expression than exists in any comparable legal system. As we have seen, the method also possesses a powerful appeal to our intuitions about the proper extent of government involvement in the free exchange of ideas. For the judges, the great benefit of content-based method is that it appears to provides an objective and relatively straightforward test for reviewing speech regulation: the courts are not concerned with which subjects are removed from public discourse by a content-based restriction nor with which side of the debate is disadvantaged by a viewpoint-based one, but only with the fact that such a restriction has been imposed. If genuine, this is an immense advantage of content-based method which should provide a useful check on judicial

[37] *Kingsley International Pictures Corporation v Regents* 360 US 684 (1959) (unconstitutional refusal to license the showing of the film of 'Lady Chatterley's Lover' under a statute banning films which portrayed 'sexual immorality' as desirable).

[38] '[T]he prohibition on viewpoint discrimination serves that important purpose of the Free Speech Clause, which is to bar the government from skewing public debate. . . . It is precisely this element of taking sides in a public debate that identifies viewpoint discrimination and makes it the most pernicious of all distinctions based on content' (*Rosenberger v Rector and Visitors of University of Virginia* (n 9) per Souter J (dissenting)). AE Brownstein 'Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests' (1996) 29 UC Davis L Rev 553, 591.

[39] Eg *Police Department of Chicago v Mosley* 408 US 92 (1972) and *Carey v Brown* 447 US 455 (1980). See KL Karst 'Equality as a Central Principle in the First Amendment' (1975) 43 U Chi L Rev 20 and ME Gale 'Reimagining the First Amendment: Racist Speech and Equal Liberty' (1991) 65 St John's L Rev 119.

[40] See (n 16) 24.

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power and enhance the legitimacy and likely acceptance of the courts' role.[41] Such clarity may be particularly useful in a system such as the United States, where the Supreme Court has to prescribe tests to be applied by a large number and range of inferior courts.[42]

V. REFINING THE DEFINITION OF CONTENT-BASED CLASSIFICATIONS

Before embarking on an analysis of the Supreme Court's application of content-based method, two important doctrinal refinements of the definition set out in Part II need to be added. Both relate to the judicial use of content-based classifications and, as emerges below, both are treated differently from similar lines drawn by other State actors.

The first relates to the point made above about those categories of expression, which are presumptively excluded from First Amendment protection.[43] Since the inception of modern free speech doctrine, the Supreme Court has identified certain categories of expression which do not fall within the protection of the First Amendment.

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libellous, and the insulting or fighting words.[44]

[41] In *Texas v Johnson* (n 20), Kennedy J. stated in concurrence: 'The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result' (420–1). Bollinger has argued that certain of the judges who decided the Skokie controversy (permitting pro-Nazis to march in a predominantly Jewish area—*Collin v Smith* 578 F 2d 1197 (1978, 7th Cir)) were unhappy with the result that First Amendment doctrine compelled them to reach (L Bollinger *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (OUP Oxford 1986)). Some applications of the principle of viewpoint-neutrality have proved extremely controversial. For the reaction to the Court's flag-burning cases, including a proposed constitutional amendment to permit the criminalization of flag-burning, see GR Stone 'Flag Burning and the Constitution' (1989) 75 Iowa L Rev 111 and F Michelman 'Saving Old Glory: On Constitutional Iconography' (1990) 42 Stan L Rev 1337.

[42] O'Connor J has defended content-based method in part because '[I]t is a rule, in an area where fairly precise rules are better than more discretionary and more subjective balancing' (*Ladue v Gilleo* 512 US 43, 60 (1994)). See further D Kretzmer 'Freedom of Speech and Racism' 8 Cardozo L Rev 445, 473 (1987) and F Schauer 'Categories and the First Amendment: A Play in Three Acts' (1981) 34 Vanderbilt L Rev 265.

[43] Note 7 above, and associated text.

[44] *Chaplinsky v New Hampshire* 315 US 568, 571–2 (1942), per Murphy J. It should be added that the Court has limited the scope of these exceptions: *Roth v United States* 354 US 476 (1957) and *Miller v California* 413 US 15 (1973) (on obscenity); *Cohen* (n 16) (on the profane); *Sullivan* (n 8) (on libel), and *RAV v City of St Paul, Minnesota* 505 US 377 (1992) (on fighting words). For a sceptical account of the usefulness of a categorical approach to free speech adjudication, see I Hare 'Is the Privileged Position of Political Speech Justified?' in J Beatson and Y Cripps *Freedom of Expression and Freedom of Information* (OUP Oxford 2001).

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Plainly, it would be impossible to determine whether speech fell within one of these excluded categories without examining its content, as the Court has acknowledged on a number of occasions.[45] As we have already seen, the Court also considers content when determining how close an example of speech is to the central values of the First Amendment.[46] Therefore at the core of First Amendment doctrine there appears to lie an anomaly: a general hostility to government discriminations based on content coupled with widespread judicial use of content as a way of determining whether speech falls within the First Amendment at all and, if so, to what level of protection it is entitled.

One argument in favour of the acceptance of these excluded categories of expression is that the Framers of the Constitution would never have intended them to fall within the First Amendment and hence their longevity raises fewer concerns than more recent attempts at such classifications.[47] However, this argument is difficult to sustain for a number of reasons. First, the view taken by the Framers of, for example, seditious libel is at best unclear: speech which would constitute seditious libel is regarded by many as entitled to the highest level of protection under the First Amendment and yet the Sedition Act 1798 was passed within seven years of the Bill of Rights.[48] Secondly, the Framers' opinion about whether 'lewd and obscene' speech should be protected is much disputed.[49] Thirdly, there is no doubt that the law on libellous speech has been subject to the most fundamental changes in the past 50 years.[50]

However, perhaps the most significant difficulty with defending the Court's use of content classifications on the ground of longevity is that the Court has still not renounced the ability to hold that new categories of speech fall outside First Amendment protection because of their content. The principal example is *New York v Ferber*.[51] Here the Court upheld a statute which prohibited the knowing promotion of a performance involving sexual conduct by a child under the age of 16 through the distribution of material which depicts such a performance. The definition in the Act of sexual conduct

[45] Eg: 'The question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech' *Young v American Mini Theatres, Inc* 427 US 50, 66 (1976), per Stevens J.

[46] See (n 8) and associated text.

[47] Kennedy J has referred to these 'historic and traditional categories long familiar to the bar' (*Simon & Schuster* (n 14) 127).

[48] The Act 'punished false, scandalous and malicious writings against the government, either House of Congress, or the President, if published with intent to defame any of them, or to excite against them the hatred of the people, or to stir up sedition or to excite resistance to law', see Z Chafee *Free Speech in the United States* (Harvard University Press Cambridge MA 1941).

[49] Weinstein produces convincing evidence that those who framed and ratified the First Amendment would not have considered obscene speech to be outside of its protection (J Weinstein 'A Constitutional Roadmap to the Regulation of Campus Hate Speech' (1991) 38 Wayne L Rev 163, 188).

[50] See *Sullivan*: 'Libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment' (n 8) 269 and the cases (n 44).

[51] 458 US 747 (1982).

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extended significantly beyond what would be defined as obscene (and therefore already outside the protection of the First Amendment)[52] or as independently criminal and included, for example, simulated sexual intercourse, masturbation, and lewd exhibition of the genitals. The Court acknowledged that it was breaking new ground, but regarded its decision as compatible with previous cases which had placed certain categories of speech outside the First Amendment.

> Thus, it is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.[53]

One must conclude that content-based classifications of speech remain at the core of the judicial approach to the First Amendment and that this cannot be explained as an historical anomaly.

The second modification relates to judicial decisions which themselves restrict free speech. For example, an injunction which has been issued in response to a certain form of protest will by definition be based upon the content of the expressive activity which the remedy seeks to enjoin. Thus it is not surprising that in *Madsen v Women's Health Center, Inc*[54] the Court upheld an injunction issued against anti-abortion protestors restraining them, inter alia, from demonstrating within a 36-feet buffer zone around an abortion clinic. The manner in which the Court arrived at this conclusion is questionable.

The Court began by classifying the injunction as content-neutral on the basis that to do otherwise would involve classifying all injunctions as content-based. However, when the terms of the *Madsen* injunction are examined, it is clear that they applied not only to those who had previously engaged in prohibited protest outside the clinics, but also to 'all persons acting in concert or participation with' those named in the injunction. From the trial record, it emerged that this in turn was defined to include all those who manifested views similar to the addressees of the injunction. Therefore, it is difficult to avoid the conclusion that the injunction was content-based and indeed constituted a form of viewpoint discrimination.[55]

[52] Although some examples of child pornography might also fulfil the legal definition of obscenity, the Court held that child pornography was proscribable even if it failed to satisfy three of the elements of the test of obscenity identified in *Miller* (n 44).

[53] See (n 51) 763–4, per White J. It should be conceded that Court has recently refused to extend the holding in *Ferber* to exclude from First Amendment protection any visual depiction which *'appears to be* [. . .] of a minor engaging in sexually explicit conduct' and therefore struck down the Child Pornography Prevention Act 1996 (*Ashcroft v Free Speech Coalition* 122 S Ct 1389 (2002) (emphasis added)). This decision is criticized in I Cram 'Beyond Madision? The US Supreme Court and the Regulation of Sexually Explicit Expression' [2002] PL 743.

[54] 512 US 753 (1994).

[55] ibid 794–6, per Scalia J (dissenting, joined by Kennedy J and Thomas J).

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The majority's view on classification is therefore surprising and reveals the tension inherent in such forms of classification. If the result of classifying a form of speech regulation as content-based automatically has the effect of rendering it highly vulnerable to constitutional challenge, courts may be inclined to distort their method of application in order to preserve regulations which they do not regard as threatening to First Amendment values. The Court could more transparently have held that judicial injunctions were subject to a different form of First Amendment analysis because they are by their very nature based on an assessment of content of the prior or proposed speech.

The Court went on to decide that a 'somewhat more stringent' application of First Amendment principles than would usually apply to a content-neutral provision was appropriate since injunctions reflect judicial rather than more balanced legislative choices. This approach weakens one of the justifications announced by some commentators for content-based method in the first place: that it provides a universal, bright-line standard that is reasonably easily (and therefore predictably) applied by inferior courts.

These two modifications of content-based method do not present an obstacle to the adoption of the doctrine in UK or European law. Domestic and European courts already exclude certain categories of expression from free speech protection and, since US method has not explicitly been adopted by them, no modification of their approach judicial orders is yet required.[56] This is not to say that the exclusion of certain classes of expression and the categorical approach to free speech protection generally are desirable as a matter of principle, but that debate lies outside the scope of this article.[57]

VI. THE PROBLEMS OF CONTENT-BASED METHOD

A. Distinguishing content-based from content-neutral regulations

As the example of *Madsen* reveals, an obvious difficulty with the Court's method is the complexity of distinguishing those regulations which are content-based from those which are content-neutral.[58] The Supreme Court applies the following test: 'Government regulation of expressive activity is

[56] Eg *Jersild v Denmark* (1994) 19 EHRR 1 and *Lingens v Austria* (1986) 8 EHRR 407.

[57] EM Freedman 'A Lot More Comes into Focus When You Remove the Lens Cap: Why Proliferating New Communications Technologies Make it Particularly Urgent for the Supreme Court to Abandon its Inside-Out Approach to Freedom of Speech and Bring Obscenity, Fighting Words, and Group Libel within the First Amendment' (1996) 81 Iowa L Rev 883. In the UK context, see Hare 'Political Expression' (n 44) and CR Munro 'The Value of Commercial Speech' [2003] 62 CLJ 134.

[58] There has been some explicit judicial acknowledgement of this: 'Deciding whether a particular regulation is content based or content neutral is not always a simple task' (*Turner Broadcasting* (n 14) 642–3 (quoted by Stevens J in *Bartnicki v Vopper* 532 US 514, 526 (2001)). See MH Redish 'The Content Distinction in First Amendment Analysis' (1981) 34 Stan L Rev 113.

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content neutral so long as it is "justified without reference to the content of the regulated speech".'[59]

The distinction is relatively simple to state in the abstract and some cases demonstrate that its application can also be straightforward. However, this is not always the case.

The most common form of content-neutral restriction is that based on the time, manner, and place of the exercise of free speech rights. The provision in *Police Department of Chicago v Mosley*[60] superficially resembled a content-neutral time, manner and place restriction because it only prohibited picketing within 150 yards of a school and applied only to picketing which occurred within half an hour of when the school was in session. The difficulty was that the provision went on to exempt labour picketing from the general prohibition: an exception based on the content of the speech. Therefore the restriction was struck down. Not all cases, however, contain so clear a line.

One example concerns the constitutionality of the 'must-carry' provisions of the Cable Television Consumer Protection and Competition Act 1992.[61] This legislation required cable television systems to devote a specified portion of their channels to the transmission of local commercial and public broadcast stations. The Act was motivated by congressional concern about the competitive advantage enjoyed by cable operators which was making it increasingly difficult for over-the-air broadcasters to secure a viewing audience and hence adequate operating revenues. A slender majority of the Court rejected a First Amendment challenge by cable operators on the ground that the Act served the important governmental purposes of encouraging competition, preserving free broadcast television, and promoting the widespread dissemination of information for the 40 per cent of Americans without cable.

More importantly for our purposes, the majority held the Act to be content-neutral, emphasizing that it applied to all cable operators over a certain size irrespective of the content of their usual programming and benefited all over-the-air broadcasters whether 'commercial or non-commercial, independent or network affiliated, English or Spanish language, religious or secular'.[62] The minority focused on the congressional findings which referred to the educational and informational content of public television and to its local origins and orientation. They concluded that '[p]references for diversity of viewpoints, for localism, for educational programming, and for news and current affairs all make reference to content' and are therefore unconstitutional.[63]

The narrowness of these findings is revealing in two senses. The division of judicial opinion provides a demonstration of the difficulty of drawing the

[59] *Ward v Rock Against Racism* (quoting *Clark v Community for Creative Non-Violence*) (n 15).
[60] 408 US 92 (1972).
[61] *Turner Broadcasting System, Inc v FCC* (n 14).
[62] ibid 645, per Kennedy J.
[63] ibid 677, per O'Connor J.

https://doi.org/10.1093/iclq/54.1.49 Published online by Cambridge University Press

ostensibly simple line between content-based and content-neutral regulations. The case also reveals the acute focus of all members of the Court on the question of classification which occupies the greater part of all the judgments. As a result, there is relatively little discussion of the extent of the Act's infringement of the cable operators' free speech interests and no attempt to balance these against the strength of the competing governmental interests. This formalism may be to the detriment of a proper judicial engagement with the genuine First Amendment concerns raised by such provisions.[64]

B. Distracting the Court from other free speech concerns

This leads to another difficulty. The focus on whether the restriction is content-based may blind the courts to other potential dangers posed by admittedly content-neutral speech regulations. Marhsall J in *Clark v Community for Creative Non-Violence* argued that the judicial deference, which generally follows the determination that a restriction is content-neutral, might fail to accord sufficient importance to the needed judicial wariness of the 'standardless discretion' which such regulations may vest in public officials. Further, this approach may not acknowledge the extent to which public officials have strong incentives to over-regulate certain forms of expressive behaviour.[65]

Similarly in *Ward v Rock Against Racism*,[66] the minority of the Court argued that the requirement that participants in an open-air music event should use the sound equipment and a sound engineer supplied by the New York authorities violated the First Amendment. They agreed with the majority that the requirement was content-neutral and that the city had a compelling interest in ensuring that users of other areas of the park and nearby residents were not unduly disturbed. However, three members of the Court felt that the majority's focus on the content-neutral nature of the ban had caused it to pay insufficient regard to the fact that the requirement amounted to a prior restraint: a form of restriction which normally carries a strong presumption of constitutional invalidity. The minority also argued that the Court underemphasized the other legal elements needed for a valid time, manner, and place limit on speech. In particular, the minority held that the city had not adopted the least restrictive alternative because its compelling interest could be adequately served by punishing those who exceeded the sound limit. There is thus a danger that the Court's focus on whether a provision is content-based may distract it from the very real dangers to free speech values which are posed by facially content-neutral forms of regulation.

[64] C Edwin Baker 'Turner Broadcasting: Content-Based Regulation of Persons and Presses' (1994) Sup Ct Rev 57.

[65] See (n 15) 314–15 (1984), (in dissent). The case concerned the application of a Park Service regulation prohibiting sleeping in public parks to a demonstration about the plight of the homeless in Lafayette Park and the Mall in Washington DC.

[66] See (n 15).

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C. Problems of discriminatory impact

It is also the case that a content-neutral ban on a certain form of communication may have grossly distorting effects on the ability of certain groups to communicate their concerns. An example is a prohibition on street demonstrations. This applies equally to all individuals and groups and draws no distinction based on the subjects to which the demonstrators wish to draw attention, nor to the views they might express upon them. Nevertheless, in any society where access to the mainstream media is limited and costly, inexpensive forms of protest are particularly important. Thus, a poorly funded group or indigent individuals are likely to suffer a much greater reduction in their ability to communicate their views than individuals or groups who can afford to buy newspaper space or broadcasting time. The Court has, on occasion, been sensitive to these concerns. For example, in *Martin v Struthers*, the Court held that a ban on door-to-door distribution of circulars was unconstitutional in part because this mode or communication is 'essential to the poorly financed causes of little people'.[67]

However, the Court has not been consistent in its willingness to consider the disparate impact of speech regulation on particular groups or viewpoints.[68] *City Council of Los Angeles v Taxpayers for Vincent* is an example of an apparently content-neutral law with potential for discriminatory impact which was nevertheless upheld by a majority of the Court.[69] Here a provision of the Los Angeles Municipal Code which prohibited the posting of signs on public property was challenged by the supporters of a candidate for election to the city council. The majority of the Court held that the municipality's aesthetic interest in removing visual clutter was sufficiently powerful and content-neutral to justify the ban. For the minority, Brennan J argued that the Court was seduced by the ostensibly neutral interest advanced by the authority from examining whether the real motivation for such a ban might have been hostility towards the messages which were usually conveyed in this medium and therefore whether the ban might have a disproportionate impact on certain types of message.

These cases demonstrate the difficulty with judicial inquiries into the discriminatory impact of a content-neutral law: there is no objective point at which this inquiry may cease since almost all laws are likely to have a greater impact on some forms of expression and hence some sorts of speakers than others. This insight may lead to conflicting conclusions. One such is that, given the limitations of the judicial process and the problems that courts

[67] 319 US 141, 146 (1943). See also *March v Alabama* 326 US 501 (1946). Cf *Clark* (n 15). It is noticeable that these case pre-date the development of content-based method. See E Barendt 'Freedom of Assembly' in Beatson and Cripps (eds) *Freedom of Expression* (n 44).

[68] 'The response of the Court may be described, without exaggeration, as schizophrenic' (LH Tribe *Constitutional Choices* (Harvard University Press Cambridge, MA 1985) 195.

[69] 466 US 789 (1984). See further, the dissent of Marshall J in *United States Postal Service v Greenburgh Civic Associations* 453 US 114 (1981).

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inevitably encounter in trying to determine the impact of a provision on parties who are not necessarily before them, it is preferable to confine the inquiry to the provision's facial character. However, this position can be criticized as unduly formalistic and insensitive to the interests of those with limited resources. It also provides no satisfactory solution to the issues raised in the following section where there are powerful grounds for suspecting that a facially content-neutral provision is being manipulated by government to achieve discriminatory purposes. In any event, the present situation is unsatisfactory since the Court has failed to articulate why some forms of discriminatory impact are fatal and others are not.

D. Judicial insensitivity to indirect content-based discrimination

This section carries forward the argument that the Court has developed a method of analysis which is unnecessarily formal in habitually confining judicial scrutiny to the facial characteristics of an impugned provision. Governments keen to insulate their attempts at free speech restriction have learned to play this game by passing facially content-neutral laws (therefore attracting a lower level of judicial scrutiny) which contain functional equivalents to content-based distinctions.[70] Such proxies include directing the regulation at conduct rather than speech or inserting provisions which define the regulated activity by reference to the place at which it may occur or to the identity of the speaker. The Court's reluctance to examine whether a provision has a discriminatory impact on certain categories of speech, or even on certain viewpoints, greatly compromises the effectiveness of the protection afforded by the First Amendment.[71]

A useful introduction to this area is the Court's notorious decision in *US v O'Brien*.[72] In order to influence others to adopt his anti-Vietnam war beliefs (or at least to provoke them to reflect more on their own positions), David O'Brien and some friends famously burned their draft cards on the steps of the South Boston Courthouse. O'Brien was convicted and sentenced to up to six years of supervision and treatment for breach of the recently amended offence committed by any person 'who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate'.

The Supreme Court upheld O'Brien's conviction under its now well-known four-part test governing conduct: a regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important

[70] 'Viewpoint discrimination is so clearly the cardinal First Amendment sin that legislatures now will take pains not to be caught at it' (KM Sullivan 'Discrimination, Distribution and Free Speech' (1995) 37 Ariz L Rev 439, 446).

[71] '[T]he Court has shown little inclination to assess content neutrality in terms of the discriminatory "effects" of a regulation' (R Post 'Recuperating the First Amendment' (1995) 47 Stan L Rev 1249, 1268).

[72] 391 US 367 (1968).

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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. The Court was influenced by the fact that the prohibition applied equally to those who burned their draft cards in private and to those who destroyed them with no expressive purpose in mind. The legal situation was thus thought to be analogous to that of a law prohibiting the destruction of drivers' licences or tax records. The Court went on to accept that the government's interest in maintaining the selective service system was sufficiently important or substantial to justify the incidental restriction on O'Brien's expressive rights.

Analysed in this manner, the provision does indeed withstand constitutional scrutiny. It is true that the law was not viewpoint-based since a supporter of the draft who wished to demonstrate how easily the card could be destroyed might have burned his in order to encourage the government to introduce measures to make the draft more effective. It is also true that the law could be applied in a content-neutral manner to the individual who used his card to light a camp fire with no expressive purpose at all. However, the timing of the amendment[73] and its legislative history[74] suggest powerfully that the government's purpose was to suppress anti-draft expression. Moreover, the neutral interests identified by the Court as justifying the provision cannot be regarded as very compelling.[75] Thus it may be that the facial neutrality of a law in content terms may serve to blind the Court to the fact that its passage was motivated by the desire to suppress a particular viewpoint.[76] Content-based method therefore provides little protection against government attempts to suppress the expression of a particular viewpoint as long as that viewpoint is articulated through conduct rather than pure speech and the State can advance some neutral interests which are at least minimally advanced by its terms.[77]

[73] The amendment was passed in 1965 at a time when the destruction of draft cards to indicate opposition to the Vietnam War was growing and supplemented a previous law which already outlawed non-possession of the card. If this was already an offence, it is difficult to see what purpose (beyond criminalizing the symbolic act of destruction) was served by the amendment.

[74] The Bill passed both Houses and was signed by the President within a month and the only statements from Committee or House considerations refer to the 'contumacious' or 'unpatriotic' conduct of those who were protesting against the conflict.

[75] The Court used a number of expressions to describe the governmental interests involved which demonstrated that the existence of the draft card was facilitative, rather than indispensable, to the operation of the system (n 72) 378–80, per CJ Warren. See LR Velvel 'Freedom of Speech and Draft Card Burning Cases' (1968) U Kan L Rev 149, 163–6.

[76] D Alfange 'Free Speech and Symbolic Conduct: The Draft-Card Burning Case' (1968) Sup Ct Rev 1. The Court refused to inquire into the legislative motivation for the law (n 76) 383–4 per Warren CJ.

[77] See Kagen 'Governmental Motive' (n 2); F Michelman 'Exchange, Property and the Politics of Distrust: Liberties, Fair Values, and Constitutional Method' (1992) 59 U Chi L Rev 91; MC Dorf 'Incidental Burdens of Fundamental Rights' (1996) 109 Harv LR 1176; and SH Williams 'Content Discrimination and the First Amendment' (1991) 139 Pa L Rev 615.

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1. Place as a proxy for content

The recent cases on anti-abortion protest provide an example of direct regulations of place and oblique restrictions on the content of speech being upheld as content-neutral by the Supreme Court. The most remarkable example is *Hill v Colorado*.[78] Here, a statute made it unlawful for any person 'knowingly [to] approach' within eight feet of another person, without that person's consent in order to pass 'a leaflet or handbill to, displa[y] a sign to, or engag[e] in oral protest, education, or counseling with [that] person' within 100 feet of a health care facility's entrance. The majority of the Court held that this was a valid, content-neutral time, manner, and place restriction. The law was also held to be narrowly tailored to serve a significant governmental interest and to leave open ample alternative methods of communication.

The Colorado statute was content-neutral in that it made no reference to the topic which would be the subject of the prohibited protest, education and counselling and applied 'equally to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries'.[79] The statute was also viewpoint-neutral since it would prohibit protest, education, and counselling by pro-life activists and pro-abortion demonstrators.

However, as the minority pointed out, someone approaching another in order to inquire about the time or to seek directions will not be caught and the statute's application does depend on whether you are engaged in protest, education, or counselling, that is, on the content of your speech.[80] The majority analogized this cursory consideration of the content of the speech to that which occurs when the court has to decide whether a particular statement constitutes a 'threat, blackmail, an agreement to fix prices, a copyright violation, a public offering of securities, or an offer to sell goods', which is not thought to raise First Amendment concerns.[81] This analogy is not very powerful: all the examples given involve either speech which has been held to fall outside the First Amendment altogether or which is entitled to a low level of protection. Here the Ordinance applied to expressive activity on one of the great questions of moral and political controversy of our day, occurring in an undeniably public forum.[82]

[78] 530 US 703 (2000). See J Weinstein 'Free Speech, Abortion Access, and the Problem of Judicial Viewpoint Discrimination' (1996) 29 UC Davis L Rev 471 and JB Raskin and CL LeBlanc 'Disfavored Speech about Favored Rights: *Hill v Colorado*, The Vanishing Public Forum and the Need for an Objective Speech Discrimination Test' (2001) 51 Am U L R 179.

[79] See (n 78) 723, per Stevens J.

[80] '[T]he prohibition here is content based: those who wish to speak for purposes other than protest, counsel, or education may do so at close range without the listener's consent, while those who wish to speak for other purposes may not' ibid 746, per Scalia J (dissenting, joined by Thomas J).

[81] See (n 78) 721, per Stevens J.

[82] Kennedy J described it as 'one of the most basic moral and political issues in all of contemporary discourse, a question touching profound ideas in philosophy and theology' (n 79) 768.

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The majority would have been on firmer ground if they had examined the Colorado statute in the light of the rationale for prohibiting content-based distinctions. If the purpose of subjecting content-based distinctions to heightened judicial scrutiny is to ensure that government cannot skew the nature of public discourse by excluding certain topics from debate or by disadvantaging those who adopt a particular position on a matter of controversy, then this legislation is not constitutionally suspect on its face because it draws no such distinctions. In other words, the minority is correct, but not in a relevant way.[83] This part of the Court's reasoning confirms the suspicion that content-based method is sometimes applied formulaically and without reference to the justifications which underlie its development.

The above argument only addresses the constitutionality of the Colorado law when assessed facially, rather than by impact. It will be remembered that the statute applied only to protest, education, and counselling within 100 feet of the entrance to a healthcare facility. The overwhelming impact of a provision such as this will be on the activities of the anti-abortion movement.[84] There is simply very little protest outside healthcare facilities which do not offer abortion services. The Colorado law will therefore have a much greater impact on speech concerning one subject-matter.[85] Moreover, pro-choice activists engage in minimal protest activity outside healthcare facilities. Therefore the law will have a far greater impact on one viewpoint: that of pro-life protestors.

Nevertheless, the majority of the Court upheld the provision on the application of the *Ward* test. The voting record on abortion matters of the members of the majority and minority[86] in *Hill* must undermine the extent to which one can regard these examples of content-based method as objective exercises divorced from the judges' own conceptions of the value of the speech at issue and the governmental interest in regulation. The case also demonstrates that restricting speech in the vicinity of certain types of land-use must in some cases amount to the same thing in practice as prohibiting certain subject-matters of speech.

This is not to say that proximity to certain land-uses is always a surrogate for some kind of content-based discrimination. An ordinance banning picketing before or about the residence or dwelling of any individual may be thought

[83] The dispute is similar to that between J Kennedy and J Brennan in *Kokinda v United States* 497 US 720, 739, 753 (1990) in which the Court upheld a prohibition on soliciting contributions by the entrance to a post office.

[84] Weinstein notes that between 1977 and 1993 there were more than 1,000 acts of violence against abortion service providers, including 36 bombings, 84 assaults, 131 death threats, 81 cases of arson, two kidnappings, 327 clinic invasions and one murder 'Free Speech' (n 78).

[85] Even the majority accepted that the legislative history made it clear that the enactment was primarily motivated by activities in the vicinity of abortion clinics. See (n 78) 715, per Stevens J. Kennedy J makes a similar point in dissent at 767.

[86] Eg Justices Scalia and Thomas have made clear their opposition to the Supreme Court's famous abortion ruling in *Roe v Wade* 410 US 113 (1973).

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to fulfill the legitimate purposes of preserving the home as a place of repose and the privacy of those who dwell in it. Such a law is also entirely content-neutral both on its face and in the impact it is likely to have since protest at an individual's home could relate to any aspect of the occupants' personal or professional lives. For this reason, it is unsurprising that the Court upheld a provision in these terms in *Frisby v Schultz*.[87]

2. Identity of the speaker as a proxy for content

The argument of this section is that the government, aware of the judicial hostility to content discrimination, may also use the identity or status of the speaker to achieve collaterally what the Court has held to be unconstitutional if sought directly.[88] For example, in *Perry Education Association v Perry Local Educators' Association* the Court upheld a provision in a collective bargaining agreement by which the school district granted the bargaining representative exclusive access to teachers' mailboxes and the inter-school mail system. The Court rejected the challenge of a rival union on the ground that since the school mail system was not a public forum, the state was entitled to reserve it for its intended purposes so long as any restriction was reasonable and was not an attempt to suppress expression merely because public officials oppose the speaker's views. For the majority, White J held:

> There is, however, no indication that the school board intended to discourage one viewpoint and advance another. We believe it is more accurate to characterize the access policy as based on the status of the respective unions rather than their views.[89]

This argument is problematic. In a situation where a public body has chosen between rival organizations and then prevents access by the disfavoured party to an important avenue of communication, it is difficult to view the restriction as anything other than based on the content of the rival's speech or even its views.[90]

In certain older decisions the Court *has* regarded the use of the identity of a speaker as merely a surrogate for specifying which views may not permissibly be advanced and hence as a viewpoint-based restriction. For example, in

[87] 487 US 474 (1988). The ordinance made it 'unlawful for any person to engage in picketing before or about the residence or dwelling of any individual'.

[88] 'Restrictions based on the "status" of a speaker, although often upheld, bear a troublesome correlation with viewpoint' (Tribe *American Constitutional Law* (n 33) 803). See SH Williams 'Content Discrimination and the First Amendment' (n 77).

[89] See (n 10).

[90] Contrast *Perry* with *Madison v Wisconsin Employment Relations Commission* 429 US 167 (1976). Like any other, this argument can be overstated: eg the discussion of *Arkansas Educational Television Commission v Forbes,* 523 US 666 (1998) by E Chemerinsky 'Content Neutrality as a Central Problem of Free Speech: Problems in the Supreme Court's Application' (2000) 74 S Cal L Rev 49, 56.

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Niemotko v Maryland,[91] a group of Jehovah's Witness were denied a permit to use a park for Bible talks even though other political and religious groups had been permitted to do so. The Court held that the refusal was motivated by the city's 'dislike for or disagreement with the Witnesses or their views' and therefore violated the right to equal protection in the exercise of the right to freedom of speech.[92] More recently, the Court has held that an attempt by the Massachusetts legislature to limit the amount of expenditure by corporations violated the First Amendment. The Court acknowledged in this case that the provision sought to use the identity of the speaker as a way of advantaging the other side of the debate.[93]

The argument of this section, then, is that the Court has not consistently looked beyond the facial terms of a speech restriction in order to determine its application in practice or what has been described at is 'social meaning'.[94] This introduces an undesirable measure of uncertainty. Some of these cases therefore support the argument that the Court has developed a formalistic concept of content-based method which fails to protect individuals from more subtle, but no less invidious, forms of speech restriction.

E. The introduction of 'secondary effects' analysis

A further development of recent years also illustrates how the distinction between content-based and content-neutral regulations may be manipulated, particularly where it is a disfavoured form of speech which is in issue. The most significant foundation of this development is *Young v American Mini Theatres, Inc*[95] in which the Court was confronted with amendments to Detroit's zoning ordinances. The amendments provided that no adult film theatre could be located within certain distances of other similar establishments or of a residential area.[96] In upholding the ordinance, the Court noted that the ordinance applied whatever social, philosophical, or political message a film might communicate and therefore it could be characterized as viewpoint-neutral. In the light of this classification, the Court held that the city's

[91] 340 US 268 (1951), followed in *Fowler v Rhode Island* 345 US 67 (1953).

[92] ibid 272.

[93] 'In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak *and the speakers* who may address a public issue' *First National Bank of Boston v Bellotti* 435 US 765, 784–6, per Powell J (1978) (emphasis added). See further *Cornelius v NAACP Legal Defense and Educational Fund* 473 US 788 (1985).

[94] Tribe *American Constitutional Law* (n 33) 820.

[95] See (n 8). The earlier decision in *Paris Adult Theatre I v Slaton* 413 US 49 (1973) was clearly relevant, but concerned speech identified as obscene and therefore falling outside of First Amendment protection.

[96] An adult film theatre was defined as one used to present 'material distinguished or characterised by an emphasis on matter depicting . . . "Specified Sexual Activities" or "Specified Anatomical Areas".' The other regulated uses included adult book shopshops, cabarets, bars, taxi dance halls, and hotels.

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interest in the present and future character of its neighbourhoods justified the provision.

A similar analysis was applied to a slightly different ordinance in *Renton v Playtime Theatres, Inc*.[97] The Court again upheld the provision. More importantly for present purposes, the Court also replicated and expanded upon the mode of classification adopted in *Young* in the following terms.

> At first glance, the Renton ordinance, like the ordinance in *American Mini Theatres*, does not appear to fit neatly into either the 'content-based' or the 'content-neutral' category. To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless, as the District Court concluded, the Renton ordinance is aimed not at the content of the films shown at 'adult motion picture theatres', but rather at the secondary effects of such theaters on the surrounding community. The District Court found that the City Council's 'predominate concerns' were with the secondary effects of adult theaters, and not with the content of adult films themselves.[98]

The ordinance described the justifications for restrictions on the secondary effects of adult theatres as including preventing crime, protecting the city's retail trade, maintaining property values, and preserving the quality of neighbourhoods and commercial districts and of urban life generally.

This reasoning is difficult to reconcile with most previous applications of content-based method. When one examines the manner in which the provisions in *Young* and *Renton* were phrased, it is impossible to avoid the conclusion that they were, in fact, content-based. The ordinances in both cases were applied to adult theatres and such theatres were defined by reference to the type of films that they screened, that is, by reference to the content of the expressive activity which was carried on there.[99]

Perhaps the reasoning in *Renton* may not be thought too troubling in practice for so long as it is confined to 'businesses that purvey sexually explicit materials'.[100] However, the Court did not seek to limit the principle to such expression in *Boos v Barry* where the respondents argued that the aim of a provision outlawing demonstrations critical of foreign governments' policies near their embassies was not to suppress speech but to uphold the US's international law obligation to shield foreign diplomats from speech that offends

[97] 475 US 41 (1986). In *Renton* the ordinance applied only to adult film theatres and simply prohibited them to encroach within 1,000 feet of any family dwelling, church, park, or school.

[98] ibid 47, per Rehnquist J. Tribe has described the consideration of the secondary effects of speech as 'an ill-advised dimension' to free speech analysis (*American Constitutional Law* (n 33) 798 n 17).

[99] 'Renton's zoning ordinance selectively imposes limitations on the location of a movie theater based exclusively on the content of the films shown there' *Renton* (n 97) 55, per Brennan J (dissenting, joined by Marshall J). The dissents also questioned whether the ordinances were really viewpoint-neutral since the films shown were almost certain to favour more, rather than less, relaxed sexual mores (ibid 56 n 1, citing Stone (n 2)).

[100] *Renton* (n 97) 49, per Rehnquist CJ.

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their dignity.[101] This creates a real risk that the Court will be distracted from the restrictive impact of speech regulation by government defences based on the alleged secondary effects of speech in a range of areas. Brennan J referred to this risk in his concurrence in *Boos*.

> No doubt a plausible argument could be made that the political gatherings of some parties are more likely than others to attract large crowds causing congestion, that picketing for certain causes is more likely than other picketing to cause visual clutter, or that speakers delivering a particular message are more likely than others to attract an unruly audience.[102]

Indeed the Court's most recent excursus into the field suggests that the effect that speech may have on its audience is, despite *Boos*, becoming a secondary effect which a legislator may legitimately seek to control through legal regulation. The case is *City of Erie v Pap's AM*.[103] Here a challenge was brought to a city ordinance which prohibited public nudity and required erotic dancers to retain some vestiges of clothing. Since dance is a form of expressive conduct, the Court applied the test from *O'Brien* and it concluded that the city's indecency ordinance was valid. The Court held that because the aim of the provision was to prevent the harmful secondary effects of nude dancing rather than to limit the erotic message conveyed by it, the ordinance was content-neutral. The Court went on to cite, without demur, the preamble to the ordinance:

> [T]he Council of the City of Erie has, at various times over more than a century, expressed its findings that certain lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety and welfare, and lead to the debasement of both women and men, promote violence, public intoxication, prostitution and other serious criminal activity.

The kind of secondary effects identified here include precisely the type which the Court has previously treated as unconstitutional: the impact that the expressive activity might have on its audience. *Erie* also marked a departure in that it was the first time that secondary effects analysis has been used in order to prohibit altogether a form of expressive behaviour rather than simply to regulate its location.

Finally, it is difficult to argue that there is a demonstrable or sufficient causal link between the existence of nude dancing (as opposed to other erotic dancing where the dancers are required to retain some clothing) and its effect on the neighbourhood. Surely, the secondary effects on property values and so on arise because of the existence of erotic dance clubs and not because those

[101] See (n 9). On the merits, this argument was rejected on the basis that the impact of speech on its intended audience could not be regarded as the kind of secondary effect referred to in *Renton*.

[102] *Boos* (n 9) 335.

[103] 529 US 277 (2000). See P Rumney '*City of Erie at al v Pap's AM, tdba "Kandyland":* Low-Value Speech and the First Amendment' [2001] PL 158 and Cram 'Beyond Madison?' (n 53).

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who perform there are permitted to remove the last stitch.[104] Secondary effects doctrine is thus an unpredictable and destabilizing influence on free speech doctrine which has the potential to greatly undermine the clarity and objectivity of First Amendment jurisprudence.

F. Distinguishing viewpoint-based from viewpoint-neutral regulations

Viewpoint-based restrictions on speech are a subset of content-based classifications. However, the distinction between them and viewpoint-neutral restrictions is no easier to define than that between content-based and content-neutral regulations. This problem is exacerbated by a judicial tendency to conflate the two. Thus the Court in *Widmar v Vincent*[105] treated a ban by the University of Missouri on the use of its facilities for purposes of religious worship or religious teaching as a content-based restriction on religious speech. However, in the later case of *Lamb's Chapel* a ban on the use of school property by any group for religious purposes was struck down as viewpoint-based.[106] The Court reasoned that although the ban did apply equally to all religions and so did not discriminate against any particular religious group, the rule would permit presentations on family issues and child rearing from a non-religious perspective, but would not allow the applicant group to show a film which addressed these questions from a religious viewpoint. One might argue that this inconsistency is not crucial: after all, in both cases the exclusionary rules were struck down. However, to analyse two apparently indistinguishable forms of regulation by reference to distinct models of classification and different lines of doctrine does not suggest that the Court is applying objective and predictable standards of review.[107]

A more recent example of the Court adopting an unjustifiably narrow definition of viewpoint discrimination is *National Endowment for the Arts v Finley*.[108] The case concerned the constitutionality of a 1990 amendment to the National Foundation on the Arts and Humanities Act 1965. The 1965 Act had vested a broad discretion in the appellants to award financial grants to support artistic endeavour guided by considerations of artistic and cultural significance, creativity and cultural diversity and public education and appreciation of the arts. As a result of controversial exhibitions which were funded by the NEA, Congress amended the Act to direct the chair of the NEA to ensure that 'artistic excellence and artistic merit are the criteria by which

[104] Scalia J (in a concurring opinion joined by Thomas J) appeared to accept this: 'I am highly skeptical, to tell the truth, that the addition of pasties and G-strings will at all reduce the tendency of establishments such as Kandyland to attract crime and prostitution, and hence to foster sexually transmitted disease' (n 103) 310.

[105] See (n 13).

[106] *Lamb's Chapel v Center Moriches Union Free School District* 508 US 384 (1993).

[107] See *Rosenberger v Rector and Visitors of University of Virginia* (n 9) and *Good News Club v Milford Central School* 533 US 98 (2001).

[108] 524 US 569 (1998).

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[grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public'.

A number of artists whose projects had been recommended for approval by an NEA advisory panel before the amendment but whose applications were subsequently disapproved, challenged the change in the law as viewpoint-based. A majority of the Court disagreed, holding that the statutory language does 'not engender the kind of directed viewpoint discrimination that would prompt this Court to invalidate a statute on its face'.[109] This argument is difficult to follow. The amendment clearly has the purpose and effect of making such artistic works as manifest a viewpoint which is decent and which display respect for the diverse beliefs and values of the American people more likely to receive a grant than those which do not, or those which do the opposite. This cannot be classified as other than viewpoint discrimination.[110] The question then becomes whether this is unconstitutional where the government is prescribing relevant factors for the disbursement of funding for an activity rather than prohibiting it.[111]

The difficulty here is that some forms of speech regulation can be analysed in a number of alternative ways and the manner in which the Court poses the question can dictate the result. To take two recent illustrations: flag-burning and hate speech. As will be remembered, in *Johnson* a majority of the Court held that the Texas law prohibiting flag desecration violated the First Amendment because it was a viewpoint-based restriction on political expression and therefore subject to the most stringent form of judicial scrutiny.[112] This was because the majority identified the state's intention as being to maintain the flag as a symbol of nationhood and unity. Thus, one could use the flag to express views supportive of this aim without the risk of prosecution, but if one wished to challenge or reject these views, an offence would be committed.

The minority took the view that the flag was an important symbol to people who held a broad range of political opinions and 'does not represent the views of any particular political party, and it does not represent any particular political philosophy'.[113] The minority therefore held that the law was viewpoint-neutral. It is, of course, true that people from opposite ends of the political spectrum might burn the flag and both be caught by the statute, but this does not make the provision viewpoint-neutral since both groups would still be expressing a view hostile to the flag and what it represents. This is evident

[109] ibid 583, per O'Connor J.

[110] The three justices in the minority defined the amendment as 'unquestionably' (Scalia J) and 'quintessentially' (Souter J, dissenting) viewpoint-based.

[111] This was the basis of the concurrence by Scalia J (joined by Thomas J). As we have seen, he accepted that the provision was unquestionably viewpoint-based, but held that this did not offend the First Amendment in line with *Rust v Sullivan* (n 5).

[112] See (n 20).

[113] ibid 429, per Rehnquist CJ (dissent, joined by White J and O'Connor J). Stevens J also filed a dissenting opinion on the basis that he did not regard the statute as viewpoint-based.

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when one considers the circumstances in which one might burn the flag without violating the Act. An example would be to demonstrate that a certain brand of flag was highly flammable and so might not be suitable for display in the nation's schoolrooms. Given that this conduct would clearly not offend the statute, it is difficult to avoid the conclusion that the majority has the better of this argument. Nevertheless, the case reflects how the nature of viewpoint-based analysis can be manipulated where the governmental interest in suppression is found by some to be overwhelming.[114]

As if these developments were not sufficient, First Amendment doctrine on viewpoint-based discrimination was rendered immeasurably more complex by the decision of the Court in *RAV v City of St Paul, Minnesota*.[115] In this case, the Court was confronted with the following ordinance:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

The Court was unanimous in holding that this law violated the First Amendment,[116] but the approaches of its different members to the question of whether the ordinance was viewpoint-based are revealing. For the majority, Scalia J held that the St Paul Ordinance was viewpoint-based because it would prohibit someone holding up a sign saying, for example, that all papists are misbegotten, but not one which stated that all anti-Catholic bigots are misbegotten.[117] Stevens J took a different view, describing the majority's reasoning as asymmetrical. He emphasized the situation where members of different racial or religious groups are involved in a confrontation. In this scenario the racial or religious epithets and abuse on each side of the exchange (for example, 'all Muslims are misbegotten' or 'all Catholics are misbegotten') would be covered and neither side in the dispute would gain an advantage over the other.[118] Again, the manner in which the judge has phrased the relevant inquiry has effectively determined the outcome of the analysis. Indeed, it is only this subjective element in the method which can explain the views of

[114] The minority's hostility to Johnson's form of expression is evident from the following statement. 'Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people—whether it be murder, embezzlement, pollution, or flag burning' per Rehnquist CJ 435.

[115] See (n 44).

[116] The State Supreme Court had confined the statute to 'fighting words'. However, the majority held that the provision was impermissibly content-based since it singled out only certain kinds of fighting words. The minority held it to be unconstitutionally overbroad since it criminalized expressive conduct which induced only hurt feelings, offence, or resentment.

[117] See (n 44).

[118] ibid 435. A point supported by Greenawalt 'Although the ordinance could sometimes result in viewpoint discrimination, that is far from its main thrust' (K Greenawalt *Fighting Words-Individuals, Communities, and Liberties of Speech* (Princeton University Press Princeton 1995) 57).

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some of the judges who sat in both *Johnson* and *RAV* that desecration of the flag was a profound evil which may legitimately be prohibited, whereas cross-burning is protected political speech.[119]

However, *RAV* presents a further complication to free speech doctrine. It will be remembered that traditional First Amendment method places certain categories of speech presumptively outside of legal protection and that these categories include so-called fighting words.[120] The Minnesotan Supreme Court had held that the St Paul Ordinance was confined to fighting words. As such, orthodox doctrine would suggest that the state was free to regulate such speech in any manner it saw fit. The majority in *RAV* took the opportunity to establish the principle that such speech is not invisible to the First Amendment. Scalia J held that by confining itself to speech which provoked fear or violence on the grounds of race, colour, creed, religion, or gender, the ordinance was founded on governmental hostility to the underlying message conveyed and therefore unlawfully content-based.

This does not exhaust the complexities introduced by *RAV*. Scalia J went on to state that not all content-based classifications of presumptively unprotected speech were unconstitutional. He stated that where

> the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been judged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class.[121]

Scalia J then provided examples. According to these, a state could legitimately prohibit only those forms of obscenity which are the most patently offensive in their prurience or only those threats of violence which are directed at the President. In these illustrations, the reason for the selective prohibition is that the sub-class represents the most extreme form of the justification for the exclusion of the whole class from free speech protection. Therefore the prohibition is not related to the message which is conveyed by the proscribed category of speech and does not offend the rationale behind the prohibition on content-based discrimination. In contrast, a law outlawing only those threats to the President which refer to his policies on, say, the environment would be unconstitutional because it would be based on the message conveyed.

It was this exception which was relied upon by the Supreme Court in upholding the cross-burning statute in the case with which this article began: *Virginia v Black*.[122] This appeal actually consisted of three cases which the

[119] Rehnquist CJ was a member of the minorities in *Johnson* and *Eichman* and yet joined the opinion of Scalia J in *RAV*. There is, of course, an argument based on 'the uniquely universal character of the national flag' (*Washington v Spence* 418 US 405, 414 (1974)).

[120] See (n 44) and associated text.

[121] At 388.

[122] See (n 1). For an analysis of the case, see I Hare 'Inflammatory speech: cross-burning and the first amendment' [2003] PL 408.

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Virginia Supreme Court consolidated. All involved convictions under a state statute which made it a felony 'for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place'. A majority of the State Supreme Court held the statue to be unconstitutional on its face for violation of the First Amendment, essentially on the ground that the statute was indistinguishable from that struck down in *RAV*.[123]

The majority of the Federal Supreme Court overturned this result in reliance on Scalia J's exception to the prohibition on content-based classifications in presumptively protected expression.[124] The majority took the view that cross-burning is a particularly virulent form of intimidation which Virginia might legitimately seek to regulate even if it thereby engaged in content-based discrimination.[125] Further, O'Connor J distinguished the Virginia statute from that in issue in *RAV* on the ground that the former did not specify the basis upon which the victim was selected and hence the Virginia statute could apply to intimidation on grounds of race, gender, religion, political affiliation, union membership, or homosexuality, so long as the use of cross-burning was involved.

This line of reasoning is vulnerable and exposes some of the difficulties inherent in applying *RAV*. There is nothing innately intimidating about burning a cross compared to, say, waving a firearm or carrying a flaming torch: 'The geometric configuration of a single vertical bar traversed by a single shorter horizontal bar has no unusual inherent properties.'[126] It was only by examining the use to which this message has been put in the past that the Court was able to regard it as intimidatory at all; and only by reference to its use in contemporary US society that the majority was able to identify cross-burning as the gravamen of intimidatory expression.[127] The difficulty with this argument is that it permits the Court to examine the message conveyed by the expressive activity. Once this occurs, much of the vaunted objectivity and neutrality of content-based method is lost.

This insight also undermines the Court's attempt to distinguish the Virginia statute from that in issue in *RAV* and to hold it content-neutral. Although it is feasible that someone might burn a cross tomorrow in order to express hostility to union membership, it is only in the context of racial hostility that it can plausibly be regarded as the most intimidating form 'fighting words'.

[123] *Black, Elliott and O'Mara v Commonwealth of Virginia* 553 SE 2d 738 (2001).

[124] The majority consisted of Rehnquist CJ, Stevens, O'Connor, Scalia, and Breyer JJ.

[125] '[W]hen a cross burning is used to intimidate, few if any messages are more powerful' (n 1) 1547.

[126] Donald W Lemons J for the majority in the Virginia Supreme Court in *Black* (n 123) 741.

[127] 'In Klan ceremony, the cross is a symbol of white supremacy and a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other groups hated by the Klan' (*Capitol Square Review and Advisory Board v Pinette* 515 US 753, 770–1 (1995), per Thomas J concurring).

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Once this is appreciated, it is clear that the Virginia statute was not only content-based, but also constituted viewpoint discrimination. To adopt an example I have used elsewhere,[128] imagine a statute which outlawed a symbol which was as closely associated with the black emancipation as cross-burning is with the Klan and black oppression, such as the raised right arm and clenched fist which became a notorious symbol of the black power movement in the 1970s. Can it really be said that this symbol if used, say, by a gang of black youths outside the house of the first white family to move into an all-black neighbourhood, would be less intimidating than the burning cross? If not, then the Virginia statute can be seen to prevent one side in the race debate from using the most potent symbol at its disposal while permitting their opponents a free rein. The correct result of the objective application of content-based method is that the Virginia statute was an unconstitutionally viewpoint-based provision which, for this reason, violated the First Amendment.

The aim of the above section is to demonstrate some of the difficulties which current Supreme Court doctrine on content-based method presents. However, it is important to separate those problems which are of the Court's own making from those which inhere in the nature of this method of adjudication. Thus, secondary effects doctrine, the uncertainties and complexities introduced in *RAV* and the teleological manipulation of content-based method which is evident in *Black* are all creations of the Court which would not necessarily follow from the adoption of such a method in other jurisdictions and should not blind us to its merits as set out in Part II.

VII. DOMESTIC RESPONSES TO CONTENT-BASED METHOD

Over the past two decades English courts have attached growing importance to rights to freedom of expression and, at the same time, have become more willing to countenance the citation of authority from other jurisdictions.[129] In some cases, English courts have gone so far as to incorporate a statement of principle from First Amendment doctrine, as when the House of Lords acknowledged the potential 'chilling effect' of defamation actions on free speech.[130]

Nevertheless, courts and commentators on this side of the Atlantic have generally rejected the method adopted by the Supreme Court to resolve free speech disputes and have strongly criticized many of the substantive outcomes

[128] Hare 'Inflammatory speech' (n 122) 413.
[129] Hare 'English Lessons in Comparative Public Law: Will the First Amendment have the Last Word?' (2000) 10 Trinity Law Review 29.
[130] *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 citing *New York Times v Sullivan* (n 8) and *City of Chicago v Tribune Co* 139 NE 87 (1923).

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it has produced.[131] Some of these critics attack the philosophical basis of the Court's approach or the ideological bias with which it is allegedly applied.[132] Others have pointed to fundamental differences in the willingness of the judiciary in the US and the UK to accept governmental intervention in the marketplace of ideas.[133] What, then, of value to other legal systems (in particular, the United Kingdom) can be drawn from a consideration of this area of First Amendment doctrine?[134] I shall argue below that Parliament and the courts in this country have already adopted much of the substance of content-based method into English law (although so far at an unarticulated and untheorized level) and that explicit incorporation of the method would improve the manner in which free speech disputes are argued and resolved in the United Kingdom.

It is clear that English law contains a number of instances of the content-based regulation of speech including the Official Secrets Acts, the limitations on the political expression of civil servants and local government employees, regulation of campaign expenditure, and the notice and conditions provisions in Part II of the Public Order Act 1986.[135] However, the majority of these provisions do not discriminate on the basis of viewpoint and certain of them would pass constitutional muster even in the United States. There is also a growing awareness that free speech prohibitions based on the content of the expression are vulnerable to challenge on human rights grounds. For example, the first time that a minister made a statement under section 19(1)(b) of the Human Rights Act that the government wished to proceed with a Bill despite not being able to assert that its provisions are compatible with Convention rights relates to the content-based prohibition on political advertising in the Communications Bill.[136]

English law does contain at least one manifest example of viewpoint

[131] Eg, the 'actual malice' rule for defamation claims by public officials and figures was roundly rejected by the House of Lords in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127. For criticism of the rule in *Sullivan*, see, eg, S Kentridge 'Freedom of Speech: Is it the Primary Right?' (1996) 45 ICLQ 253.

[132] Eg, D Feldman 'Content Neutrality' in I Loveland (ed) *Importing the First Amendment—Freedom of Speech and Expression in Britain, Europe and the USA* (Hart Publishing Oxford 1999).

[133] Eg, E Barendt 'The First Amendment and the Media' and S Sedley 'The First Amendment: A Case for Import Controls?' in Loveland *Importing the First Amendment* (n 132).

[134] Some commentators in other parts of the common law world have advocated the wholesale adoption of content-based method: B Harris 'Viewpoint Neutrality and Freedom of Expression in New Zealand' (1996) 8 Otago L Rev 515.

[135] Exceptions or defences to free speech regulation may also be based on the content of the expression, such as s 4(1) of the Obscene Publications Act 1959, s 5 of the Contempt of Court Act 1981, and s 3 of the Data Protection Act 1998. See also s 12(4) of the Human Rights Act 1998.

[136] S 321 of the Communications Act 2003. The apparent incompatibility arises from a decision of the Strasbourg Court that the Swiss national broadcasting ban on political advertising breached the applicant's Art 10 rights (*Vgt Verein Gegen Tierfabriken v Switzerland* (2002) 34 EHRR 4). See the Joint Committee on Human Rights, Nineteenth Report (2002) HC 1102, paras 18–24; First Report of 2002–3, HC 191, paras 11–16; and Fourth Report of 2002–3, HC 397, paras 38–42.

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discrimination in its statutory prohibition on incitement to racial hatred.[137] This is a controversial provision which would be extremely difficult to defend against a viewpoint-based challenge. This vulnerability may partly explain why the recent House of Lords Select Committee was unable to make any recommendation concerning its extension to cover incitement to religious hatred.[138] Parliament has also recently acted to remove one blatant example of viewpoint discrimination from the statute book by abolishing the ban on the promotion by local authorities of homosexuality or the acceptability of homosexuality as a family relationship.[139] There is even a provision of UK legislation which explicitly prohibits viewpoint discrimination. This is the statutory duty on all universities to ensure that the use of their premises is not denied on grounds connected with the beliefs or views of any individual or the policy or objectives of any body.[140]

These developments suggest a nascent legislative understanding of some of difficulties presented by content-based distinctions. The recent decision of the House of Lords with which this article began also indicates that the higher judiciary may be moving towards a similar position.[141] It will be remembered that in *ProLife Alliance*, a majority of the House of Lords rejected a challenge to the broadcasters' decisions to refuse to transmit a party election broadcast submitted by an anti-abortion group on grounds of offensiveness. This result is questionable at best,[142] but the importance of the case for present purposes lies more in its discussion of the general principles of free speech adjudication.

As the majority of the House emphasized, neither the Convention nor domestic law confers a right upon anyone to broadcast time. Rather, the relevance of Article 10 is that it confers a right not have one's access to public media denied on discriminatory, arbitrary, or unreasonable grounds.[143] Lord Hoffmann cited authority from the Privy Council and under the European Convention on Human Rights in support of this proposition.

The Privy Council case was *Benjamin v Minister of Information and*

[137] The Public Order Act 1986, s 18, prohibits the use of threatening, abusive, or insulting words or behaviour with intent to stir up racial hatred or where racial hatred is likely to be stirred up thereby. See W Sadurski 'On "Seeing Speech Through an Equality Lens"' [1997] 16 OJLS 713 and S Coliver (ed) *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (Article 19 London 1992).

[138] House of Lords Select Committee on Religious Offences, First Report, 2003, para 137.

[139] S 2A of the Local Government Act 1986 (inserted by s 28 of the Local Government Act 1988) repealed by s 122 of the Local Government Act 2003.

[140] Education (No 2) Act 1986, s 43. See E Barendt 'Free Speech in the Universities' [1987] PL 344 and *R v University of Liverpool, ex parte Caesar-Gordon* [1990] 3 All ER 821.

[141] *ProLife Alliance* (n 1). See also the Divisional Court's decision in *Percy v Director of Public Prosecutions* [2001] EWHC Admin 1125 in which the defendant's convictions under s 5 of the Public Order Act 1986 for defacing the US flag were held to be incompatible with her Convention rights.

[142] See I Hare 'Debating Abortion—The Right to Offend Gratuitously' [2003] 62 CLJ 525 and E Barendt 'Free Speech and Abortion' [2003] PL 580.

[143] See (n 1) para 8, per Lord Nicholls and para 58, per Lord Hoffmann.

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Broadcasting[144] in which the court quashed the respondent's decision to suspend Mr Benjamin's phone-in programme on Anguillan radio. The Minister's decision was in response to a discussion on Mr Benjamin's radio show of the politically controversial question of whether Anguilla should have a lottery. Although the Privy Council held that Mr Benjamin had no right to broadcast per se, he did have the right not to have his access to the medium denied on arbitrary and capricious grounds.[145] As Lord Slynn noted, this was not a case where the programme was withdrawn because of declining audience interest nor because it was always intended to run for a limited time. Rather, his Lordship noted that:

> As long as people were not criticising the government on sensitive issues, it appears that the government was content for the programme to continue . . .
>
> The government did in fact stop the expression of views on a radio station . . . and on a programme which . . . they initially wished to set up until it became inconvenient to the government.146

It is clear from this quotation that Lord Slynn found the state action to be objectionable because it was prompted by the critical stance which the station had taken of the government. In other words, the state action was unlawfully viewpoint-based.

Lord Hoffmann also referred to two admissibility decisions of the European Commission of Human Rights. Both cases were rejected as manifestly unfounded, but the Commission expressed the view that while Article 10 conferred no 'general and unfettered right . . . to have access to broadcasting time on radio or television in order to forward its opinion',[147] the situation would be different (based on Article 10 alone or in conjunction with Article 14) if one political party was excluded from all such facilities at election time while other parties were permitted access.[148]

Turning to the general nature of broadcasting restrictions, Lord Hoffmann stated:

> The problem about conditions relating to the content of the broadcast, as opposed to conditions depending on such matters as the number of candidates fielded or votes obtained in the last election, is that they run a much greater risk of being considered discriminatory. After all, the government in *Benjamin's* case may be said in effect to have imposed a condition for access to the radio which related to the contents of the broadcast: the broadcaster should not discuss matters to which the government objected. But this was discriminatory on objectionable

[144] [2001] 1 WLR 1040. To similar effect, see *Fernando v Sri Lanka Broadcasting Corporation* (1996) 1 BHRC 104.
[145] ibid paras 26 and 27, per Lord Slynn of Hadley.
[146] ibid paras 49 and 50, per Lord Slynn of Hadley.
[147] *Haider v Austria* (1995) 83 DR 66, 74, quoting *X and the Association of Z v United Kingdom* (1971) 38 CD 86.
[148] *Haider*, above, and *Huggett v United Kingdom* (1995) 82A DR 98.

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> grounds. So conditions which concern the contents of the programmes which will be accepted for broadcasting must be carefully examined to make sure that they are truly neutral between different points of view, or that any lack of neutrality can be objectively justified.[149]

This again is getting close to content-based method, although Lord Hoffmann elides the distinction between content and viewpoint discrimination.[150]

These examples suggest that English courts and the ECtHR are already at least intuitively attracted to arguments based on content discrimination and the combination of Article 10 and Article 14 certainly provides a sufficient textual basis for courts to introduce a prohibition on viewpoint-based discrimination on grounds of political opinion. The ECtHR has, probably for institutional reasons, been reluctant to formulate generalizable methods for free speech adjudication. Yet English courts are not bound to follow the Strasbourg line and the recent reinvigoration of common law rights protection suggests that domestic courts need not be deterred from developing content-based doctrine by the absence of further stimulus from Strasbourg.[151]

Previous academic accounts of content-based method from a UK perspective have proved generally hostile, but for interestingly distinct reasons. Barendt accepts that viewpoint discrimination must be subject to the most searching judicial scrutiny,[152] but he disagrees with the Supreme Court about other content-based restrictions. He argues that legislators may sensibly wish to draw legal distinctions between different forms of speech such as those concerning politics or advertising or pornography and rejects the marketplace of ideas as 'the central tradition' of US free speech jurisprudence.[153]

McCrudden goes even further.[154] He focuses on the *RAV* decision and contrasts it to the approach to racist speech adopted in the United Kingdom, in Canada, and under the European Convention on Human Rights.[155] He agrees

[149] *ProLife Alliance* (n 1) para 63. Lord Nicholls stated: 'A restriction on the content of a programme, produced by a political party to promote its stated aims, must be justified' ibid, para 8.

[150] Certain decisions of the Australian High Court are also motivated by concerns about content-based distinctions. Eg *Australian Capital Television Pty Ltd v The Commonwealth* [1992] 177 CLR 106, 143–6, per Mason CJ.

[151] Laws LJ has argued in favour of the development of autonomous domestic principles of rights protection rather than strict adherence to Strasbourg doctrine (eg *ProLife Alliance* [2002] 2 All ER 756 paras 33–6 and *Runa Begum v Tower Hamlets London Borough Council* [2002] 1 WLR 1249 para 17).

[152] E Barendt 'The First Amendment and the Media' in Loveland *Importing the First Amendment* (n 132) above at 48. Singh also accepts that viewpoint discrimination 'should be the most difficult, if not impossible, to justify', but he exempts speech 'used as a verbal weapon to attack vulnerable minorities' (R Singh *The Future of Human Rights in the United Kingdom: Essays on Law and Practice* (Hart Publishing Oxford 1997) 73).

[153] ibid 43.

[154] C McCrudden 'Freedom of Speech and Racial Equality' in P Birks (ed) *Pressing Problems in the Law Volume 1: Criminal Law and Human Rights* (OUP Oxford 1995).

[155] The decisions of the European Commission and Court of Human Rights in *Glimmerveen*

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with Barendt that the US approach is 'heavily influenced by the "free market-place of ideas"', but rejects the Supreme Court's approach to extreme speech in particular and to content and viewpoint-based speech regulation in general.[156]

The most sustained attack on content-based method, however, is contained in a contribution by Feldman.[157] Feldman counsels against the adoption of this method in the United Kingdom for three reasons. First, he regards it as too rooted in the USA's distinctive political and constitutional ethos. Secondly, Feldman argues that the method fails to attach sufficient weight to the full range of situations and constraints to which a conscientious legislator can have regard. Finally, he concludes by recommending a more sophisticated set of criteria which would distinguish between four different senses in which the term 'content' might be used: the subject-matter addressed in the speech; the narrative or argumentative thread and factual assertions; the viewpoint advanced; and the form of the expression.

This is a nuanced critique which merits a careful response. However, the premise of the argument may be overstated. Feldman is arguing against adoption of an absolute rule of content neutrality.[158] As we have seen (and despite certain loose judicial statements), this has never represented US doctrine: the Court has accepted the validity of certain lines drawn on content grounds so long as they respect viewpoint-neutrality.[159]

Feldman must be correct to point to those aspects of the legal and constitutional ethos of the US which make it distinctive, but the illustrations he chooses are not very compelling. He posits four considerations: the difficulty which the US confronts in maintaining a national identity in the face of greater recognition of cultural diversity; the tension between individual autonomy and collectivism in models of democracy; the relative blindness of US free speech doctrine to threats posed by non-governmental actors; and the failure of First Amendment doctrine to take sufficient account of outcomes as opposed to processes—in particular, its insensitivity to forms of ideological harm or group injuries.[160] As valid as these descriptive claims may be, they are either not unique to the United States or fairly traceable to the Supreme Court's adoption of content-based method.

Many would argue that the history of the United Kingdom since the Second World War has been equally dominated by attempts to maintain or develop a concept of Britishness in the light of the loss of Empire and our re-orientation towards the continent of Europe; the increased ethnic and religious diversity

and Hagenbach v Netherlands, Appn nos 8348/78 and 4806/78, 18 D & R 187 (1979) and *Kosiek v Germany* (1986) 9 EHRR 434 (see now *Jersild v Denmark* (n 56) and the Canadian Supreme Court's decision in *R v Keegstra* [1990] 3 SCR 697.

156 See (n 154) 141.
157 D Feldman 'Content Neutrality' in Loveland, *Importing the First Amendment* (n 132).
158 ibid 139 and 146.
159 See (n 18) and associated text.
160 See (n 132) 141–6.

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of the country; and the changing relationships between England, Scotland, Wales, and Northern Ireland.[161] Feldman's second example is equally open to generalization: all major theories of democracy pose (and seek to reconcile in some form) the competing aims of individual and collective interests. It is probably legitimate to criticize US doctrine for its focus on the risks to free speech posed by government and to argue that this has tended to preclude consideration of the threats from individuals, groups, and corporations. However, this flaw derives from the structure of the Constitution itself and 'state action' doctrine,[162] rather than the adoption by the Court of content-based method. Finally, content-based method is not unusual as a legal doctrine in focusing on process rather than outcome. Moreover, this may be a necessary corollary of the beneficial limitations on judicial discretion which content-based method imposes.[163]

Turning to the four factors which Feldman argues are inadequately represented in current Supreme Court decisions, the core of the argument appears to be that current doctrine is unduly abstract and divorced from the context in which the speech takes place. Also adopting the example of *RAV,* Feldman argues that the Court should have taken into account that burning a cross on the family's lawn was not a reasoned contribution to political debate, but a crude gesture of intimidation which bore little relation to the core values of free speech. He sides with those members of the Court who drew attention to the social and historical context which imparts a particular resonance to cross-burning for African-Americans. Feldman concludes that the decision in *RAV* provides a further illustration of the crude championing of the speaker's interests over those of the intended audience, which is dictated by current content-based method.

The unifying themes of these criticisms are the broad acceptance of a strong prohibition on viewpoint discrimination, but a rejection of content-based method in general as unduly grounded in the distinct normative basis of the marketplace of ideas. It is certain that US free speech doctrine was heavily influenced by theories based on the marketplace of ideas and that this influence was translated into doctrine at an important stage in the development of First Amendment jurisprudence.[164] Indeed, this may still be the best way to explain the Court's approach to the question of campaign finance.[165]

[161] See, eg, N Davies *The Isles: A History* (Macmillan London 1999); H Kearney *The British Isles: A History of Four Nations* (CUP Cambridge 1999) and R Colls *Identity of England* (OUP Oxford 2002).

[162] Tribe, *American Constitutional Law* (n 33) ch 18.

[163] From this perspective, the fact that some judges may be unhappy with the outcomes which the rigours of content-based method require them to reach, may be regarded as an advantage and a demonstration of the power of the doctrine. Feldman cites Bollinger for the proposition, referred to above, that certain of the judges who decided the Skokie controversy were unhappy with the result (see n 41).

[164] Eg the oft-cited judgments of Holmes J in *Abrams v US* 250 US 616 (1919) and of Brandeis J in *Whitney v California* 274 US 357 (1927).

[165] *Buckley v Valeo* 424 US 1 (1976) and *First National Bank of Boston v Bellotti* (n 99), criti-

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However, it is misleading to regard this as the principal motivation behind the development of content-based method for a number of reasons.[166] First, although the Court is not generally reluctant to admit the theoretical and principled justifications which underlie its doctrinal developments, the marketplace of ideas has never been at the core of judicial attempts to explain the development and application of content-neutrality. Rather the Court has proceeded from arguments based principally on the undesirability of the state acting as the censor of the subject-matter of public discourse or of the opinions articulated within it. Thus, it is a method which is not necessarily opposed to all governmental interventions, but only those which seek to perpetuate or create political orthodoxy. As stated above, the real motivation for applying content-based method in the manner which the Supreme Court requires is the perceived need to limit curial discretion: precisely to ensure that the level of judicial scrutiny applied to a governmental regulation of free speech does not depend on the judge's subjective perceptions of how it is expressed and the social and historical context in which it is heard.[167]

VIII. CONCLUSION

This does not, of course, mean that the UK should necessarily adopt content-based method wholesale. As Professor Feldman indicates, it is crucial to acknowledge the significant sense in which the United States provides a singular environment for the consideration of free speech disputes. The institutional judicial structure in the United States provides a greater incentive than in most systems for the Court to adopt rules which it believes will be relatively straightforward for inferior tribunals to apply. This may enhance an existing tendency to favour categorization over balancing. The United States has also had a unique experience in the 20th century in relation to political dissent: a history which is not mirrored in other countries of similar democratic credentials and levels of social and economic development.[168] Some of the formative elements of that history include prosecutions under the

cized in Ingber 'The Marketplace of Ideas: A Legitimizing Myth' (1984) LJ Duke 1 and CR Sunstein *Democracy and the Problem of Free Speech* (Free Press New York 1993). See now the Court's recent decision in *McConnell v Federal Election Commission* 540 US_(2003).

[166] Feldman repeatedly refers to the marketplace of ideas in his account: eg 140, 142, 147, 148, 150, 155, and 169.

[167] One passage suggests that Feldman is aware of this: '[R]eal contextual flexibility may make it impossible to formulate rules for the constitutionality of interferences with speech' (n 157) 154. Weinstein 'Free Speech' (n 78) 473. Some English judges have also warned of the dangers of discretionary balancing in free speech disputes (*R v Central Independent Television Plc* [1994] Fam 192, 202, per Hoffmann LJ).

[168] Most US free speech doctrine dates from the last three-quarters of the twentieth century. For earlier developments, see DM Rabban *Free Speech in its Forgotten Years* (CUP Cambridge 1997).

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Espionage Act 1917, the anti-communism of the McCarthy era, the Civil Rights Movement, protest against the Vietnam War, and the significance attached to certain symbols of nationhood such as the flag.[169] Since we are more concerned with a method of free speech analysis than with the substantive results achieved through its application, we can be more sanguine about a consideration of the value of this line of jurisprudence than would be the case with other areas. However, the failure of the First Amendment to provide meaningful protection to those with unpopular views in the first half of the 20th century must have been a powerful influence on the Court in moving it away from balancing and towards categorization as a method for resolving free speech cases.[170]

Perhaps the most important question is: how well does First Amendment doctrine live up to its promise of clarity and objectivity? One evident conclusion is that the Court has failed to produce a line of doctrine which is as straightforward to expound and apply as the ostensible simplicity of the distinction between content-based and content-neutral forms of regulation would suggest. As we have seen, the Court's acceptance of the 'secondary effects' of certain types of speech as a justification for content-based discrimination, the invention of a new test for the review of judicial line-drawing and subjection of even 'fighting words' to the bar on viewpoint-based regulations have all served to dim the apparently bright-line principle in issue. In this context, it should be borne in mind that those cases which demonstrate the definitional problems of the method in Part V are deliberately chosen as the most difficult to justify and do not represent the majority of line-drawing as engaged in by US courts.

More importantly, though, the Court has undermined the sense in which the application of its content-based method can be regarded as an objective exercise. Some members of the Court may legitimately be accused of relativism in considering the object of the expressive activity (in flag-burning cases), in expressing disapproval of certain messages (as in *Hill* or *O'Brien*), and in treating some forms of protected expression (notably the pornographic, but not obscene) less favourably than others.

However, most of these criticisms can be attributed to the character and approach of the Court rather than any innate flaws in the method itself. Although a lengthy consideration of domestic doctrine is outside the scope of this paper, it is clear that the adoption of content-based method would certainly have improved the analysis of the principles at issue in a number of

[169] Weinstein 'An American's View of the Canadian Hate Speech Decisions' in WJ Waluchow (ed) *Free Expression: Essays in Law and Philosophy* (Clarendon Press Oxford 1994).

[170] '[W]here messages are proscribed because they are dangerous, balancing tests inevitably become intertwined with the ideological predispositions of those doing the balancing—or if not that, at least with the relative confidence or paranoia of the age in which they are doing it . . . ' (Ely 'Flag Desecration' (n 19) 1501).

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recent UK free speech controversies.[171] For example, the reasoning and result in the *ProLife Alliance* case would almost certainly have been different. The ban on offensive material was plainly content-based and its application to political expression should have attracted the most anxious judicial scrutiny. Further, as the examples cited in the Court of Appeal reveal,[172] the standard of offensiveness was sufficiently subjective to shade into discrimination against viewpoints with which the broadcasters disagreed. Another recent and equally unsatisfactory decision on free speech is that of the Court of Appeal in *Farrakhan*.[173] In this case, the Court upheld the Home Secretary's decision to exclude the applicant leader of the Nation of Islam from the country on the ground that his presence would not be conducive to the public good. The basis for the decision was that Farrakhan might address his followers in a manner likely to prejudice relations between the Muslim and Jewish communities. Such reasoning is plainly vulnerable to viewpoint-based analysis and would not survive strict scrutiny.

Content-based method would also have made the attack on the ban on the promotion of homosexuality in 'section 28' vastly more objective and compelling by divorcing the challenge from arguments about the desirability of homosexuality and the sanctity of married life. The debate could then have focused on the crucial question of the state's attempt to prevent the expression of views of which it disapproved and thereby assert an orthodoxy on matters of acute controversy. In addition, the task of the House of Lords Select Committee on Religious Offences would have been much easier had it been able to rely on a tradition of hostility to content-based distinctions. An important part of the argument in favour of the extension of the offence of incitement to religions is the obvious inequity of the current position: those religions which are held to be ethnic groups (such as Sikhs and Jews) can rely on the existing provision whereas others (such as Muslims) cannot. A commitment to content, and specifically viewpoint, neutrality would have made it clearer that the existing provision is anomalous as a matter of free speech principle and that any addition to the breadth of its coverage should be resisted.

These examples demonstrate that the adoption of content-based method (without the unnecessary execresences and formalism described in Part V of the article) would immeasurably improve the quality of domestic free speech adjudication and that the method's contribution to our general understanding of free speech issues is much more profound that some have sought to argue.

[171] This includes the otherwise unsatisfactory decision in *Verein Vgt* (n 136). Although the ban on political advertising was facially viewpoint-neutral, its effect was to prevent those who opposed the consumption of intensively reared meat from expressing their views while permitting those in the meat industry to promote their products through commercial advertising.

[172] Simon Brown LJ gave examples in which these same broadcasters had defended before regulatory bodies their decisions to broadcast graphic depictions of the victims of terrorist bombings or of animals being killed for sport (n 151) para 61).

[173] *R (Farrakhan) v Secretary of State for the Home Department* [2002] QB 1391.

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