DOES THE SUBJECT MATTER? VIEWPOINT NEUTRALITY AND FREEDOM OF SPEECH

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INTRODUCTION

Twenty-five years ago, in a decision concerning the validity of an anti-picketing city ordinance, Justice Marshall wrote the words that became perhaps the most oft-quoted maxim in the voluminous First Amendment literature: "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[1] Taken literally, this proposition sounds almost absurd.[2] Virtually all restrictions (and note that the above-quoted principle applies not just to outright bans but also to less prohibitive restric-

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[1] Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

[2] "[E]very lawyer who has read our Rules, or our cases upholding various restrictions on speech with specific reference to subject matter must recognize the hyperbole in the [*Mosley*] dictum." Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 545 (1980) (Stevens, J., concurring) (footnotes omitted).

tions), which are commonly accepted by even the most orthodox civil libertarians, would have to be invalidated under this formula: the government would not be permitted to restrict blackmail, insider trading, disclosure of military secrets, incitement to crime, or malicious defamation. The only restrictions which would survive would be those analogous to limits upon the size of the roadside billboards or upon the level of noise emitted by loudspeakers.

That Marshall might have actually *meant* what he said seems to be confirmed by another extraordinary hyperbole that follows soon after the above quoted formula: "*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.'"[3] However, there are at least three reasons why Marshall could not, and did not, mean to announce a complete ban on content-related restrictions on expression. These reasons are evident not only in the First Amendment jurisprudence which directly preceded and followed *Mosley* (and to which Justice Marshall was a prominent contributor), but also in Marshall's opinion in *Mosley* itself.

First, and perhaps most obviously, any system of protection of freedom of expression must accept a hierarchy of categories of speech that call for varying degrees of legal protection. It is clear that a law that would attach equal importance to a political speech in an election campaign and to a graphic depiction of sexual intercourse with a minor by a pedophile, would be morally unacceptable. This is not to say that the latter expression must necessarily be banned, but rather that the harm-related arguments in favor of restriction would at least have a greater weight in the latter than in the former case. The argument has been frequently and convincingly made that an attempt to disregard a hierarchy of categories of speech, and to apply a uniform level of protection to all speech, would inevitably result in a lowering of the level of protection across the board.[4] In any event, the First Amendment doctrine crucially relies upon a distinction between "protected" and "unprotected" speech and, within the former class, upon the ranking of different categories of speech which deserve varying degrees of protection. This distinction and ranking is based upon various criteria of "content" and, for this reason, Justice Marshall's wholesale

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[3] *Mosley*, 408 U.S. at 96 (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)) (emphasis added).

[4] "If all expressive activity must be accorded the same protection, that protection will be scant." R.A.V. v. City of St. Paul, 505 U.S. 377, 415 (1992) (Blackmun, J., concurring); *see* Cass R. Sunstein, *Low Value Speech Revisited*, 83 NW. U. L. REV. 555, 557-58 (1989).

condemnation of all content-related restrictions cannot be taken literally. Indeed, the special position of speech related to "public issues," mentioned in Marshall's own quotation from *New York Times v. Sullivan*, is a prima facie indication that at least some restrictions of expression on "non-public" issues (an arguably content-related description) may be tolerable under the First Amendment.

The second reason why the sweeping *Mosley* formula cannot be taken literally has nothing to do with speech itself, but rather with the strength of the prohibition upon governmental restrictions. The sentence reads as if it contained an absolute ban on such restrictions, and this is reinforced by Marshall's declared hostility towards "*[a]ny* restriction on expressive activity"[5] and by his announcement that a regulation which is not neutral but content-related "is *never* permitted."[6] But no such absolute ban has ever been in operation under the First Amendment: invalidity of content-related restrictions is only presumptive, and the presumption may be rebutted by sufficiently strong arguments about the importance of the governmental purposes served by the restriction, and the close fit between the restriction and these purposes. What Marshall presents as an absolute prohibition is merely a manner of describing a very exacting scrutiny of governmental regulations. By its very nature, strict scrutiny suggests the less-than-absolute character of a principle against content-based regulations. It would be somewhat deceptive to postulate "strict scrutiny" if one knows in advance that no governmental restriction can ever survive it. Indeed, Marshall's opinion in *Mosley* explicitly states: "Because picketing plainly involves expressive conduct within the protection of the First Amendment . . . discriminations among pickets must be tailored to serve a substantial governmental interest."[7] The specific distinction under challenge in *Mosley* (between labor and non-labor peaceful picketing) has not survived such a test but, by positing the test, Marshall envisages that under some circumstances a content-related regulation may be upheld.

The third reason for not taking the Marshall formula literally is directly connected to the subject of this Article. Almost immediately after announcing an absolute prohibition of content-related regulations, Marshall goes on to say, "[n]ecessarily, then . . . government may not grant the use of a forum to people whose views it

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[5] *Mosley*, 408 U.S. at 96 (emphasis added).

[6] *Id.* at 99 (emphasis added).

[7] *Id.*

finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities."[8] He then describes two ways in which content may improperly (in Marshall's view) enter into the legislators' reasons for prohibition. First, legislators may exclude some speakers because of dislike for their message; second, legislators may exclude some issues as less worthy of public discussion than others. This is a distinction between what has been labeled viewpoint-based restrictions and subject matter restrictions. But while Marshall's equal condemnation of both these types of regulation may be valid in the context of a "public forum" (which is a term of art, and which has a narrower meaning than "public facilities"), as was the case in *Mosley* (a street), it does not apply to those "public facilities" which, under a "forum analysis,"[9] constitute a so-called nonpublic forum even though they still *are* public facilities. In cases concerning access to a school mail system,[10] advertising space on city buses,[11] military bases,[12] or the after-hours use of public school premises,[13] subject matter distinctions are permissible but viewpoint-based distinctions are not.[14]

The meaning of this dichotomy, and the reasons for upholding it, constitute the focus of this Article. The Article's most direct inspiration is a Supreme Court decision, handed down in June 1995, in which the difference between these two types of content-related considerations acquired a crucial constitutional importance. In *Rosenberger v. Rector and Visitors of the University of Virginia,*[15] the question of whether the denial of funding for a particular religious student newspaper was a subject matter regulation (as Justice Souter claimed in his dissent) or a viewpoint-based regulation (as Justice Kennedy claimed in the opinion of the Court), distinguished between the validity and invalidity of an action under the First Amendment's free speech clause.

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8 *Id.* at 96.

9 *See* Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 800-01 (1985).

10 *See* Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37 (1983).

11 *See* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

12 *See* Greer v. Spock, 424 U.S. 828 (1976).

13 *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

14 Rosenberger v. Rector and Visitors of the Univ. of Virginia, 115 S. Ct. 2510 (1995). However, note that as late as 1979, in a case concerning the placement of politically controversial inserts in envelopes containing bills sent by a public utility (somewhat resembling a non-public forum over which the government has legitimate regulatory interests), the Court proclaimed that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co.*, 447 U.S. at 537.

15 115 S. Ct. 2510 (1995).

In the twenty-three year period between *Mosley* and *Rosenberger*, there have been a number of important Supreme Court decisions that have reinterpreted the limits upon the ban on content-based restrictions, and refined the distinction between viewpoint-based regulations and regulations based on subject matter.[16] A study aiming to trace the United States judicial development of this idea would have to analyze the doctrinal evolution in detail. But this Article has no such ambitions. Rather, its aim is to elucidate the nature of the principle in its most recent embodiment in *Rosenberger*, and to reflect upon its justification. The underlying belief is that, properly understood, a reluctance to regulate speech in a way that disadvantages some viewpoints more than others is a powerful and persuasive idea of a robust system of freedom of expression. Indeed, the rationale for this idea is so substantial that it is important to keep it distinct from the rationale for content-neutrality.

This suggestion is contrary to the *Rosenberger* decision, which largely blurs the distinction between the two types of neutrality. Part I of this Article criticizes Justice Kennedy's reasoning in *Rosenberger* and argues that Justice Souter's dissenting views are more convincing. It also argues that a distinction between "viewpoint-based" and "content-based" regulations is tenable only if founded upon a distinction between regulations based on intolerance and those based on paternalism. These two rationales for regulations of speech are discussed in Part II, which argues that there is indeed such a parallelism between these two types of regulations, which are usually taken as impermissible.

Part III discusses the speech-harm connection, and argues that harm-related arguments for suppression of speech that are intuitively convincing tend to support our general hostility towards viewpoint-based (although not necessarily content-based) restrictions

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[16] As a matter of terminology, I will use the notion of "content distinction" (and "content neutrality") interchangeably with "subject matter distinction" (or "subject matter neutrality"). This is consistent with some judicial and scholarly usages. For example, "in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, . . . and, on the other hand, viewpoint discrimination." *Rosenberger*, 115 S. Ct. at 2517; *see* Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 796 (1993) (listing three kinds of restrictions on speech: viewpoint-based, content-based, and content-neutral); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 610. This is different from the usage which treats "content distinction" as a broader category encompassing the two sub-categories of "subject matter distinctions" and "viewpoint distinctions." For an example of such usage, see Luba L. Shur, Note, *Content-Based Distinctions in a University Funding System and the Irrelevance of the Establishment Clause: Putting Wide Awake to Rest*, 81 VA. L. REV. 1665, 1692 (1995). Of course, this terminological convention does not preempt any normative judgment about the distinctiveness or otherwise of content distinctions and viewpoint distinctions.

on speech. This is because proposed restrictions based on viewpoint correspond generally to those situations in which the linkage between speech and harm can be mitigated by a number of factors related to the persuasion of the audience to the speaker's views. Part IV shows that the very characterization of a restriction as viewpoint-based or as content-based depends largely on the level of generality of the question asked, but at the same time I argue that this does not render the distinction meaningless. Nor is it meaningless by virtue of the phenomenon of "indirect" viewpoint discriminations, which I discuss in Part V. I argue that restrictions based on subject matter, on a speaker's status, or on means of communication, are sometimes viewpoint regulations in disguise.

In the concluding section of the Article, I suggest reasons why viewpoint distinctions, if they are indeed clearly distinguishable from content distinctions, are more objectionable in speech regulation than those based on subject matter.

I. TWO VIEWPOINTS ON "VIEWPOINTS": KENNEDY VERSUS SOUTER IN *ROSENBERGER*

Rosenberger, which has been hailed by some commentators as a decision which "will provide stronger protection of free speech,"[17] was at the intersection of the Free Speech Clauses and the Religion Clauses of the First Amendment. At issue was a policy of the University of Virginia, which denied a subsidy to the religious student newspaper *Wide Awake: A Christian Perspective at the University of Virginia*. The University defended this exclusion under the Establishment Clause[18] while the newspaper complained that the University's refusal to subsidize *Wide Awake* violated their rights under the Speech Clause.[19]

From its Student Activities Fund (SAF) the University subsidized a wide range of student newspapers. However, under the SAF Guidelines, the University was prohibited from supporting

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17 Note, *The Supreme Court, 1994 Term: Leading Cases* 109 HARV. L. REV. 111, 214 (1995); *see* Charles Fried, *The Supreme Court, 1994 Term: Foreword: Revolutions?* 109 HARV. L. REV. 13, 68-73 (1995) (presenting *Rosenberger* as a step in the Court's "increasingly libertarian and uncompromising line on freedom of speech" *Id.* at 68, and applauding *Rosenberger* for resolving the conflict between the Establishment Clause and Free Speech Clause "in favor of freedom of speech" *Id.* at 70); Richard M. Paul III & Derek Rose, Comment: *The Clash Between the First Amendment and Civil Rights: Public University Nondiscrimination Clauses*, 60 MO. L. REV. 889, 904 (1995) ("freedom of speech triumphed in the end of the First Amendment battle").

18 "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

19 "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

religious organizations and activities, understood as those which "primarily promote or manifest a particular belief in or about a deity or an ultimate reality."[20] On this basis, the University denied the subsidy to *Wide Awake*. The Supreme Court (divided five to four) decided that the refusal to subsidize the Christian newspaper indeed amounted to a denial of the right of free speech.

An important part of this conclusion was the characterization of the University's denial of funding as viewpoint discrimination. Rather than openly challenging the legal significance of the viewpoint/content distinction, the *Rosenberger* Court reinterpreted and broadened the concept of "viewpoint" in a way that made it virtually indistinguishable from "content." At the same time, the majority did not think that the Establishment Clause compelled the University to deny the payment to a religious student organization. In this regard, it disagreed with the Court of Appeals judgment which had held that, while the University's invocation of viewpoint discrimination to deny the subsidy violated the Speech Clause it was nevertheless justified by the necessity of complying with the Establishment Clause.[21]

One aspect of the disagreement between the majority and Justice Souter's dissenting opinion concerned the interpretation of the Establishment Clause: whether the rule against direct government funding of religious organizations was preeminent (as Souter suggested) or whether all the Clause required was neutrality and even-handedness in extending governmental benefits (as Kennedy suggested). This is, however, of only marginal interest to this Article, and the treatment of the Establishment Clause in *Rosenberger* will be mentioned only when it has direct implications for a discussion of the Free Speech Clause and, more particularly, of its requirement of viewpoint neutrality.

In the majority opinion, Kennedy rejects the argument "that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints."[22] Kennedy sees this fallacious (as he claims) argument as based upon "an insupportable assumption that all debate is bipolar and that anti-religious speech is the only response to religious speech."[23] But is the former conclusion necessarily based upon the latter "insupportable assumption?" And what is the reason to deem the assumption "insupportable?" Consider a case of a Muslim view on a given subject

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20 *See Rosenberger*, 115 S. Ct. at 2515.
21 Rosenberger v. Director and Visitors of Univ. of Va., 18 F.3d 269 (4th Cir. 1994).
22 *Rosenberger*, 115 S.Ct. at 2518.
23 *Id.*

being restricted while the Christian perspective is allowed. Surely this would constitute objectionable viewpoint discrimination. And, from the point of view of freedom of speech, the restriction would be as speech-threatening as the prohibition of a religious response (which may comprise "an entire class of viewpoints") to an atheistic point of view.

This is uncontroversial, but how does it defeat the "insupportable assumption" of "bipolarity?" Kennedy's example does not help solve the puzzle. "If the topic of the debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one."[24] Yet this is not a proper characterization of the alternative to the view defended by Kennedy. The alternative is not so much an "exclusion of several views on that problem" but the removal of the subject matter from the permissible agenda. If the University decided that the discussion of race would not have the financial backing of the University, that might impoverish the overall public debate at the University, but it would not involve the sort of partisanship or censorship that is the evil targeted by the principle of viewpoint neutrality. The objectionable position would be if, for example, the University expressed its disapproval (and thus, refused funding) of a newspaper that argued for differential treatment on the basis of alleged genetic inferiority while supporting (by funding) all other views on the issue.

What Kennedy is trying to say is probably that religious and anti-religious viewpoints are not the only viewpoints one can have on a given issue; and if there are some other viewpoints left, then an even-handed restriction upon religious and anti-religious viewpoints still constitutes viewpoint discrimination because it does not cover the entire subject matter. But, obviously, a dispositive issue here is the characterization of the "subject matter" in this particular case. If the subject matter is religion itself, then religious and anti-religious (and agnostic) viewpoints *do* cover the field. If the subject matter is race, then racist and anti-racist viewpoints cover the entire subject matter. The nature of the regulation (for example, whether it is a content-based or a viewpoint regulation) seems to depend upon whether all viewpoints on the topic are equally prohibited from the forum or whether some can be expressed while others are disfavored or suppressed. As will be shown below, this is more difficult to establish than it sounds. But the difficulty has nothing to do with the alleged "bipolarity" of the view that

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[24] *Id.*

equated an even-handed exclusion of all the main viewpoints with a restriction on content.

However, the issue at hand *is* religion, and it is not irrelevant to the discussion. Kennedy returns to the topic directly after the just mentioned racism example and states, "[i]t is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint."[25]

"Exclusion of both a theistic and an atheistic perspective" is equivalent to suppression of the debate about religion—it is another manner of speaking about the removal of one topic from the agenda. Whether it is objectionable depends on two issues: the wisdom of the decision that a particular topic lends itself to harmful consequences (such as divisiveness) and the institutional authority of a particular body to make and enforce such a judgment. In the specific setting of the *Rosenberger* debate, the crucial issue is whether the financial sponsorship of a debate would implicate the Establishment Clause of the First Amendment.

But these are the issues that we can put aside for the purposes of our current discussion because one thing that *is* clear is that such an "exclusion," can only be objectionable for reasons other than "the exclusion [of] one, the other, or yet another political" viewpoints. Depending upon the context, the former exclusion (that is, suppression of the subject matter) may be more or less objectionable than skewing the debate by disfavoring one particular viewpoint or a number of viewpoints that do not exhaust all the viewpoints on the subject. But, in any event, an altogether different harm is inflicted on freedom of speech by shrinking the agenda.

Consider the example of a debate about sex. A university announces that it will not subsidize student newspapers which have, as their primary agenda, promotion of debate about sexuality. The restriction would strike us as patently silly, but it is useful to compare this hypothetical decision with a hypothetical refusal to support periodicals advocating a "permissive" perspective on sex while at the same time supporting journals manifesting a conservative approach.

The difference is clear. While the former regulation may result in the impoverishment of the public debate in the given community (in this example, a university), the latter restriction actually skews the debate in a particular direction: a powerful agent allo-

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[25] *Id.*

cates its resources to support one side of the controversy, thus facilitating its success in the battle for the minds of readers.[26] A university where publications avoid any mention of sexual issues (in order not to lose eligibility for funds) may be an anomaly, but the anomaly does not favor any of the parties to the controversy. It merely deprives all the parties of one possible forum for debate in which they would otherwise engage. This is a manifestation of *paternalism* on the part of the University because its underlying notion is that the restriction of the scope of subsidized speech benefits those whose speech is regulated in this way. But it is not a manifestation of *intolerance* because no restrictions of non-favored viewpoints takes place.[27]

Note that the discussion so far has assumed that no outright *prohibition* of a given expression is envisaged: the favoring of the expression is through the granting of a subsidy and the disfavoring is through a denial of a subsidy. In consequence, although there may be a debate on the disfavored subject, the speakers will not benefit from the support that speakers on other subjects may get. This fact takes away much of the gravity of limiting the agenda. At the same time, the skewing of the debate by imposing a viewpoint constraint strikes me as outrageous because the deplorable aspect of viewpoint discrimination is the symbolic (as much as any other) endorsement by the authority of one side of the controversy. The upshot is that, when no outright prohibition is involved (as in *Rosenberger*, and in contrast to *R.A.V.*,[28]) the contrast between the low moral significance of content discrimination and the high moral significance of viewpoint discrimination is more acute.

This partly explains why Kennedy has a rhetorical stake in blurring the line between these two types of speech regulation. Kennedy suggests that "discrimination against one set of views or ideas is *but a subset* or particular instance of the more general phenomenon of content discrimination"[29] and that "the distinction is not a precise one."[30] The rhetorical gain consists in using the

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[26] *Id.* On the distorting effect of viewpoint-based regulations, see generally Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject Matter Restrictions*, 46 U. CHI. L. REV. 81, 101-107 (1978) [hereinafter Stone, *Subject Matter Restrictions*]; Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 198-99 (1983) [hereinafter Stone, *Content Regulation*]; *but see* Martin Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 130-131 (1981). Redish argues that "[t]here is no way of knowing that content-neutral restrictions will have an equally negative impact on all competing views." *Id.* at 130-31.

[27] This distinction will be discussed further in part II of this Article.

[28] *R.A.V.*, 505 U.S. at 377.

[29] *Rosenberger*, 115 S.Ct. at 2517 (emphasis added).

[30] *Id.*

moral outrage caused by viewpoint discrimination against the regulation which, superficially at least, appears to be based on subject matter. But the strategy of blurring the borderline between the two types of regulation has its costs and Kennedy's position is rendered unusually hard to defend because *Rosenberger* is a case about more than freedom of speech. *Rosenberger* is at the intersection of the Establishment of Religion Clause and Free Speech Clause, and the two clauses pull in opposite directions.

I have already indicated why Kennedy insists on the uncertain character of the content/viewpoint distinction. If a regulation which is prima facie content-based can be characterized as being viewpoint-based (because of the uncertain distinction between the two), then all the serious moral objections generated by viewpoint discrimination (but largely absent in the cases of content restriction) apply. But here is the conundrum faced by Kennedy: the more he insists on the viewpoint-based character of a regulation, the more likely it is that the regulation is *mandated* by the Establishment Clause. If the denial of a subsidy to a journal was in fact viewpoint-based then it must mean that the journal expressed an identifiable viewpoint on religion (rather than merely discussing religion generally, or being "about" religion). But expressing a clear viewpoint on religion is equivalent to proselytizing, that is, to advocating one correct perspective on religious matters—either in a pro-religious or anti-religious manner. A subsidy to a periodical characterized as advocating a particular religious perspective obviously clashes with the principle of religious neutrality of law.

The dilemma for Kennedy is that he cannot have it both ways: characterizing a student periodical as being merely *about* religion, for the purposes of the Establishment Clause analysis, so that a direct subsidy would not destroy the religious neutrality credentials of the subsidizer and, at the same time, characterizing this journal as advocating a particular religious viewpoint so that a refusal of a subsidy would make the would-be subsidizer vulnerable to the charge of supporting one viewpoint in a religious debate.

One possible lesson to be drawn from this conundrum is that there is an inherent tension between the Establishment Clause and the Free Speech Clause. In itself, this is not surprising—it is a reflex of an internal tension between the two Religion Clauses in the First Amendment.[31] The Free Exercise Clause demands that the

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[31] For a discussion of this clash, see SADURSKI, Introduction, *in* LAW & RELIGION (Wojciech Sadurski ed., Dartmouth 1992), xi-xxi; *see* WILLIAM B. LOCKHART ET AL., THE AMERICAN CONSTITUTION 914-24(7th ed., 1991); GERALD GUNTHER, CONSTITUTIONAL LAW 1501-02 (12th ed., 1991). The Court of Appeals decision in *Rosenberger* rested upon the

state facilitates an individual's pursuit of his or her religious activity if secular duties hinder such an exercise, while the Establishment Clause disables the state from allocating its resources, or imposing rights and duties, based upon the religious status of an individual. By analogy to the Free Exercise Clause, the Free Speech Clause may demand that the government facilitate religious speech to the same degree as any other speech—and this is precisely what the Establishment Clause prohibits.

But the prohibition makes sense if the speech is characterized as expressing a religious viewpoint rather than simply discussing religious issues. Government support of speech that is merely *about* religion (rather than proselytizing) need not implicate the Establishment Clause—it does not raise the specter of favoritism. That is why it is so important to see whether the contrast between the two types of speech restrictions can be maintained. Kennedy's uncertainty about the distinction is evident from his ambiguity on the "religion as a viewpoint" issue. He firmly declares that a religious perspective is a viewpoint when this characterization serves his aim to invalidate the University's decision to deny funding to *Wide Awake*. But he also admits that "[i]t is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought."[32] He would conclude, "nevertheless," that "viewpoint discrimination is the proper way to interpret the University's objections to Wide Awake" because the University did not "exclude religion as a subject matter" but rather "select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints."[33]

This sounds like an ad-hoc judgment. On one hand, we are told, religion is not "just a viewpoint," on the other, it can be characterized as a viewpoint for the purposes of this decision. But, as we will see below (when discussing Souter's dissenting argument, and in particular the analogy with *Lamb's Chapel*),[34] religion can be represented either as a subject matter or as a viewpoint, depending on the aims one wishes to achieve, and keeping in mind the greater likelihood of a legal prohibition of the latter but not of the former. This is because even the most directly proselytizing talk about religion (as a subject matter) can be always characterized *as*

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apprehension of a collision between the Establishment Clause and the Free Speech Clause, and the judgment that the University's refusal to subsidize *Wake Awake* "serve[d] the compelling interest of preventing the University of Virginia from an excessive entanglement with religion." *Rosenberger*, 18 F.3d at 288.

[32] *Rosenberger*, 115 S.Ct. at 2517.

[33] *Id.*

[34] *Lamb's Chapel*, 508 U.S. 384.

being about something else (salvation, peace of mind, human perfection, child rearing, community duties), with "religion" providing merely a "perspective."[35] Therefore, what could otherwise be properly regulated under the "subject matter" heading, will easily obtain protection under the prohibition of "viewpoint" regulation.[36]

The subject of "political speech" provides a useful analogy. Is "political speech" viewpoint or subject matter related?[37] It would seem that "political speech" describes a subject matter, because one would be hard pressed to explain what is a distinctive "viewpoint" of politics. The exclusion of the whole category of "political speech" would impoverish the debate but not necessarily skew it, in the sense that some protagonists in actual discussions and controversies would gain unfair advantages over others. In any event, the Supreme Court characterized exclusion of political speech from various fora as a subject matter regulation when it declared such exclusions constitutional.[38] But if "political" describes a subject matter, then why would "religious" describe a viewpoint?[39] Obviously, the two descriptions are open to verbal manipulation. Just as is the case with "translating" religious content restrictions into viewpoint restrictions (as mentioned above), so one may turn an exclusion of political speech into a viewpoint exclusion by saying: this is a speech about something other than politics (for example, about health care or military defense) but viewed from a "political" perspective.[40]

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35 *See* Shur, *supra* note 16, at 1682.

36 In a Seventh Circuit decision based partly upon *Rosenberger*, in which religious displays in a city hall were characterized not as pertaining to the "subject matter" of "religion" but as providing a "viewpoint" on the "subject matter" of "holiday season." Grossbaum v. Indianapolis-Marion County Bldg. Auth., 63 F.3d 581 (1995).

37 *See* Shur, *supra* note 16, at 1698-99.

38 *See, e.g., Lehman*, 418 U.S. at 304 (upholding a municipal public transit system ban upon political advertisements on its car cards, while allowing an array of other advertisements on its car cards); Greer v. Spock, 424 U.S. 828 (1976) (upholding a ban on entry by political speakers onto a military base, while allowing entry by non-political speakers, including clergymen); Cornelius v. NAACP Legal Defense & Ed. Fund, 473 U.S. 788 (1985) (upholding an exclusion of political speech from a charity drive in a federal workplace).

39 I will put to one side the irony resulting from characterizing "politics" as a subject matter and "religion" as a viewpoint—political speech would, as a consequence, receive inferior protection compared to religious speech, notwithstanding numerous declarations that political speech ranks highest on the hierarchy of speech under the First Amendment, and notwithstanding that the Establishment Clause seems to mandate at least some avoidance of governmental support for religious expression.

40 For a view that "politics" describes a viewpoint rather than a subject matter, see Carolyn Wiggin, Note, *A Funny Thing Happens When You Pay for a Forum: Mandatory Student Fees To Support Political Speech at Public Universities*, 103 YALE L.J. 2009, 2033-37 (1994). Her argument, however, fails to prove that characterization of speech as "political" identifies a viewpoint. All she demonstrates is that content regulations may be an indirect way of adversely affecting a particular viewpoint. This does not undermine the content/viewpoint distinction. *See infra* Part V(A).

The conclusion one might draw is not necessarily that the distinction is eminently worthless—such conclusion would serve neither side of the debate in *Rosenberger*—but rather, that it cannot be drawn unless one compares the evil captured by the "content regulation" category with that described by the "viewpoint regulation" category. This is the burden of Souter's argument in the section of his dissent that addresses the Free Speech Clause.[41] He is at pains to emphasize that the relevant inquiry in *Rosenberger* is "not merely whether the University bases its funding decisions on the subject matter of student speech" but, rather, whether the University is "impermissibly distinguishing among competing viewpoints."[42] He also states that, in distinguishing between the two forms of regulation, "'the government's purpose is the controlling consideration.'"[43] He also implies that the disproportionate impact upon different viewpoints does not render a regulation viewpoint-discriminatory as long as the motive for regulation is not related to a viewpoint (because "the issue . . . turns on whether the burden on speech is explained by reference to viewpoint").[44]

Furthermore, throughout his dissent, Souter makes a clear distinction between the constitutional *weight,* or significance, of content discrimination and viewpoint discrimination. In the context of the *Rosenberger* facts, Souter states that when a public university's funding determinations are made "on the basis of a reasonable subject matter distinction, but not on a viewpoint distinction," there is no violation of the Free Speech Clause.[45] This does not imply, he says, that every viewpoint-based distinction by a public university violates the Free Speech Clause, but rather, that no "reasonable" content-based regulation is ever violative of the Clause.

This may seem a rather cryptic suggestion and the force of the distinction between the constitutional significance of the two types of speech regulation is uncertain. If *all* reasonable content regulations are permissible and, in addition, *some* viewpoint regulations *may be* permissible as well, then a great deal depends on the criteria

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[41] *See Rosenberger,* 115 S. Ct. at 2533-44. However, note that Souter's discussion of free speech in his dissent in *Rosenberger* is of only secondary importance in the structure of his dissent. His discussion of the Establishment Clause has a dispositive effect for defending the University's action even without reaching the free-speech argument, because he believes that the no-direct-funding principle has priority over the principle of evenhandedness. In contrast, Kennedy's opinion rests crucially upon free speech grounds.

[42] *Rosenberger,* 115 S. Ct. at 2548.

[43] *Id.* (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

[44] *Id.*

[45] *Id.* n.12. Souter declines to elaborate on how the "reasonableness" of the content distinction would be evaluated because "petitioners have not challenged the University's Guideline as unreasonable." *Id.*

determining the reasonableness of content regulations. After all, one may suspect that the criterion for permissibility of viewpoint distinctions in this particular setting (a public university's funding decisions) does meet the test of "reasonableness." For example, suppression of racist, bigoted remarks may be seen as "reasonable" from the point of view of the University's educational mission. But in this case, it would not be a viewpoint/content distinction that would be crucial for the permissibility of regulation of speech, but a much more open-ended "reasonableness" criterion. This would undermine much of the content/viewpoint distinction because the operative reasonableness criterion would cut across the two.

The only hint given by Souter about the reasonableness requirement for a content-based distinction is his citation of the doctrine of what he calls a "limited-access forum" where, in order to pass constitutional muster, a restriction must be "'reasonable in light of the purpose served by the forum.'"[46] In the classification of various fora, this had, perhaps misleadingly, been labelled a "non-public forum" in order to distinguish it from the so-called "traditional public forum" and a "designated public forum."[47] The reasonableness is thus judged directly by the relevance of the distinction to the particular purpose of the forum—the purpose that justifies the rendering of the access to the forum "limited." Assum-

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[46] *Id.* at 1248 (quoting *Cornelius*, 473 U.S. at 806).

[47] The Supreme Court developed a "forum analysis" under which "the extent to which the Government can control access depends on the nature of the relevant forum" *Cornelius*, 473 U.S. at 800. In a "traditional" public forum (a place that "by long tradition or by government fiat [has] been devoted to assembly and debate," *Perry*, 460 U.S. at 45 (1983)) and in a "designated" public forum (one "created by government designation of a place or channel of communication for use by the public at large for assembly and speech") regulations of access survive only if they are narrowly drawn to achieve a compelling state interest. *Cornelius*, 473 U.S. at 802. But with respect to public property that is not a traditional or "designated" public forum, access regulations can be based on subject matter as long as they are reasonable and viewpoint-neutral. *Cornelius*, 473 U.S. at 806. The distinction between the second and third category is not very precise, nor is the terminology. *See Cornelius*, 473 U.S. at 819-20 (Blackmun, J., dissenting). The second category (public forum by government designation) has been sometimes labeled "a limited public forum." *See Cornelius* 473 U.S. at 818-819 (Blackmun, J., dissenting); *Lamb's Chapel*, 959 F.2d at 386. This is perhaps because, as Justice Blackmun explains, some subject matter restrictions that would not survive strict scrutiny in a traditional public forum may be found to be necessary to serve a compelling purpose in a public forum created by government designation. *Cornelius*, 473 U.S. at 818-9 (Blackmun, J., dissenting). But "limited-access forum" in Souter's dissent in *Rosenberger*, 115 S. Ct. at 2548 n.12, seems to apply to the third category (a nonpublic forum), as is clearly indicated by his application of "reasonableness" and viewpoint neutrality tests to such fora, and by the citation of that dictum in *Cornelius* which describes a test for a nonpublic forum. *Rosenberger*, 115 S. Ct. at 2548 n.12, citing *Cornelius*, 473 U.S. at 806. One should therefore be warned against confusing a "limited public forum" (in Blackmun's dissent in *Cornelius*, which is a "second" category in forum analysis), with the "limited-access forum" in Souter's dissent in *Rosenberger* (which is a third category). For an excellent recent analysis of the forum doctrine, see G. Sidney Buchanan, *The Case of the Vanishing Public Forum*, 1991 U. ILL. L. REV. 949.

ing that the analogy to the limited-access forum holds (and Souter refuses to say whether "the reasonableness criterion applies in speech funding cases in the same manner that it applies in limited-access forum cases"),[48] how would the test of reasonableness apply to content-based and viewpoint-based distinctions?

Lamb's Chapel, the case that Souter cites approvingly in this context,[49] does not go beyond reciting the *Cornelius* principle that "'control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.'"[50] But, since Justice White (who delivered the opinion for the Court) found the exclusion of a religious group from school premises to be viewpoint-based, there is no elaboration of the "manner" in which the "reasonableness" test operates.[51] So the hint given by Souter about his understanding of "reasonableness" in this context is not of much value after all.

Nevertheless, the distinction in the weight of viewpoint-based and content-based regulations stands, despite the subjection of the two types of regulations to a seemingly uniform reasonableness requirement. By analogy to the limited-access forum, one may say that a content regulation is reasonable if it is rationally related to the purpose of the forum (or, as the Court once said, if the topic is "encompassed within the purpose of the forum").[52] This means that, once the purpose is correctly ascertained, the judgment about the reasonableness of a restriction is a relatively straightforward means-ends relationship. A bulletin board in a library has a different purpose than one at a police station, and what "reasonably" belongs in the former may be properly denied access to the latter. Of course, the more comprehensive the purposes of the forum are, the higher the correlation between content and the purpose.

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48 508 U.S. 384 (1993).

49 115 S. Ct. at 2548 n.12 (quoting *Lamb's Chapel*, 508 U.S. at 392-93).

50 *Lamb's Chapel*, 508 U.S. 384, 392-93 (1993) (quoting *Cornelius*, 473 U.S. at 806).

51 In *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983), the Court established that in a public property which is neither a traditional nor a "designated" public forum,

> [i]n addition to time, place and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.

Id. at 46. It further explained that the differential access to the interschool mail system provided to rival teacher unions was reasonable because it was "wholly consistent with the [School] District's legitimate interest in 'preserv[ing] the property . . . for the use to which it [was] lawfully dedicated.'" *Id.* at 50-51 (quoting United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129-130 (1981) (quoting Greer v. Spock, 424 U.S. 828, 836 (1976))).

52 *Cornelius*, 473 U.S. at 806.

But what would constitute a reasonable viewpoint-based regulation? The relationship to the purpose would mean that the purpose of the institution is defined by reference to a particular ideology, point of view, or opinion. In such cases, the purpose would determine whether an exclusion of particular viewpoints is "reasonable." The reasonableness of the exclusion would, in other words, signify hostility by the forum-controlling authority to a particular viewpoint. Such hostility is at odds with the character of fora (such as public universities) that, under the prevailing liberal ideology, are devoted to neutrality between viewpoints. The restriction, however, would be perfectly reasonable if the institution had an explicit ideological purpose, as is the case with religious colleges. The exclusion of anti-religious teaching from such colleges is a reasonable viewpoint regulation. But this is no model for public institutions in a liberal-democratic state. The upshot is that hardly any viewpoint-based regulations would survive the test of reasonableness in public fora and so the distinction between content and viewpoint regulations, as far as the constitutional weight is concerned, is unquestionable.

Finally, Souter clearly spells out the moral rationale behind the hostility towards viewpoint regulations: "[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."[53] He further explains that "viewpoint discrimination occurs when the government allows one message while prohibiting the messages of those who can be reasonably expected to respond," and adds that "[i]t 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."[54]

Governmental partisanship is thus the main First Amendment sin targeted by the principle of viewpoint neutrality. It is one thing for the government to compress the scope of the debate—though this may be lamentable and threatening through its reduction of the overall amount of speech. It is another thing to favor one side in the debate by silencing or more indirectly disadvantaging the likely opponents of the favored speakers. The problem is that, at times, it may be difficult to tell whether a particular regulation affects the scope of the agenda or the competitive chances of particular viewpoints. The difficulties are displayed in Souter's own characterization of the funding restriction challenged in *Rosenber-*

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[53] *Rosenberger*, 115 S. Ct. at 2548.
[54] *Id.* at 2548-49.

ger. The University guidelines, it should be remembered, denied funding to a newspaper which "primarily promotes or manifests a particular belief on or about a deity or an ultimate reality." In the earlier part of his dissent, dealing with the Establishment Clause scrutiny, Souter quite convincingly showed that *Wide Awake* was engaged in vigorous proselytizing: it was a preaching newspaper not involved in "merely descriptive examination of religious doctrine."[55] The question is, how is this evidence of the newspaper's distinctive viewpoint to be reconciled with the conclusion that "[t]here is no viewpoint discrimination in the University's application of its Guidelines to deny funding to Wide Awake?"[56]

Souter's argument is that while *Wide Awake* was denied funding because it manifested *a* religious viewpoint, the denial was not based on *that particular* viewpoint—any religious viewpoint would disqualify it from a subsidy. He suggests that the funding limit would apply "to Muslim and Jewish and Buddhist advocacy as well as to Christian" and, since the wording of the SAF Guidelines mention not only belief *in* a deity but also *about* it, the inference is that it would apply also to agnostics and atheists.[57]

But does it render the restriction content-based? A clear implication of Souter's argument is that a "subject matter" is constituted by a sum of "viewpoints"—if we put together all the viewpoints on a given issue, we produce an entire "subject matter." A restriction that affects *all* viewpoints effectively becomes a content-based, but viewpoint-neutral, restriction.

This may strike one as a mechanical and simplistic picture. It may also be hard to implement. For a start, it calls for a test of a hypothetical nature (would the same restriction apply to a publication that represented a different viewpoint?) that may be difficult to apply. In addition, the definition of "subject matter" (consisting, in Souter's opinion, of a sum of "viewpoints") relies upon a questionable distinction between a "neutral" discussion of religious matters and advocacy of one or another view on these matters. Arguably, a publication that exhibited a neutral and descriptive approach (such as a journal concerned with the history of religious thought or discussion of contemporary religions from a sociological standpoint) would not, for this reason, be disqualified from subsidization. Otherwise, it is hard to see why Souter insists so much on the proselytizing character of *Wide Awake.* One might

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[55] *Id.* at 2535.
[56] *Id.* at 2549.
[57] *Id.*

speculate that such a neutral publication would not come under the Guideline's definition of "religious activity" as an activity "which primarily promotes or manifests a particular belief in or about a deity or an ultimate reality." A sociological survey of contemporary religions or a historical discussion does not, it appears, primarily "promote or manifest" any particular belief in the deity. But, then, how is this "subject matter" different from a "subject matter" emerging from the adding together of several "viewpoints?"

Souter's response is apparently that the subject matter properly targeted by the University's Guidelines is "hortatory speech that 'primarily promotes or manifests' any view on the merits of religion" and he adds that the Guidelines deny funding "for the entire subject matter of religious apologetics."[58] But "hortatory speech" and "religious apologetics" are loaded notions. Can an agnostic argument (that would be one of the "viewpoints" on Souter's list which would be disqualified from funding) be properly characterized as "religious apologetics?" This is more than a semantic problem: if the line between an impermissible subject matter (that consists of several "viewpoints," and that includes also atheistic and agnostic speech) and a permissible one (which would dispassionately describe religious matters) is that the latter involves no viewpoint at all, then it seems that the distinction is untenable. This is because the "subject matter" in both these cases is exactly the same, and the constitutional test is the presence or absence of *a* viewpoint. After all, how many viewpoint-free writings about religion have you seen lately?

The difficulty in Souter's dissent is somewhat compounded by the way he distinguishes *Rosenberger* from *Lamb's Chapel*. Under challenge in *Lamb's Chapel* was a school board's prohibition of the after-hours use of school premises for religious purposes, even though the premises were otherwise open for a variety of social, civic, and recreational purposes. Souter characterizes that restriction in the following way, "'Religious' was understood to refer to the viewpoint of a believer, and the regulation did not purport to deny access to any speaker wishing to express a non-religious or expressly antireligious point of view on any subject."[59] Hence the ban can be presented as a case of viewpoint-based discrimination. But how does it differ from the exclusion of the religious publication in *Rosenberger*? This is the point of Kennedy's argument on the

58 *Id.*
59 *Id.* at 2550.

analogy between the two cases: Kennedy concludes that "here [in *Rosenberger*], as in *Lamb's Chapel*, viewpoint discrimination is the proper way to interpret the university's objections to Wide Awake."[60] This is because, he claims, "the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints."[61] Isn't it just the same as in *Lamb's Chapel*, where the school board "select[ed] for disfavored treatment" those groups which wanted to address various questions (in this case, about child rearing) from a religious viewpoint?

Souter claims that this analogy does not hold. It is important to ascertain what criteria he uses to distinguish the two regulations, because these criteria seem to draw a crucial constitutional distinction between impermissible viewpoint regulation and permissible content regulation. Therefore, the question is, why (in Souter's eyes) was "religion" a viewpoint in *Lamb's Chapel* and a subject matter in *Rosenberger*?

One indication offered by Souter is found in the suggestion that under the school board's regulation in *Lamb's Chapel*, an "expressly antireligious point of view on any subject" would not have been denied access to the premises.[62] Souter even cites, in a footnote, an excerpt from the transcript of the oral argument in *Lamb's Chapel* as evidence that anyone "with an atheistic or antireligious message would be permitted to use school property."[63]

This may be a strong indication of viewpoint discrimination behind the regulation, but it is not clear how easy it is to apply this test in practice. Imagine a particular religious group wanting to address an issue from a religious perspective. Should the validity of its exclusion depend upon whether an atheistic group would be permitted or excluded? What if no such other group ever applies? The use of a hypothetical test to judge an actual request is notoriously unreliable, and there are additional complications. If an atheistic group *is* excluded, how do we know that the exclusion is based on its subject matter rather than on its viewpoint, unless the topic of the atheistic group's meeting is exactly the same as the religious one's? Because, of course, if the topic is somewhat different, its exclusion may still be content-based, but this would not be *the same* content as in the case of the religious group's exclusion. The suspicion may still linger that the latter exclusion was view-

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60 *Id.* at 2517.
61 *Id.*
62 *Id.* at 2550.
63 *Id.* at 2550 n.13.

point based. For example, under the facts of *Rosenberger*, imagine that *Wide Awake* discussed a number of social matters from a religious perspective and no atheistic newspaper ever discussed the same issues. How do we know that *Wide Awake's* exclusion was content-based? Under the "treatment of antireligious application" test, this is unverifiable.

This is not the only, and perhaps not the most important, criterion for Souter in distinguishing the two cases. For him, the main distinction seems to be that in *Lamb's Chapel* the access was denied to "those who discuss issues in general from a religious viewpoint," while in *Rosenberger* the funding was denied "to those engaged in promoting or opposing religious conversion and religious observances as such."[64] Souter clearly places great weight on this distinction. If the latter denial of funding were to amount to viewpoint discrimination, he warns, it would mean that the Court would have "all but eviscerated the line between viewpoint and content."[65]

But the line of distinction seems too weak to carry such great constitutional weight. It seems that what is really crucial for Souter is that, in *Lamb's Chapel*, a group tried to discuss a "primarily nonreligious" topic from a religious perspective while, in *Rosenberger*, a newspaper had religion as its subject matter. This must be the distinction between "discussing issues in general from a religious viewpoint" (in *Lamb's Chapel*) and "promoting or opposing religious conversion and religious observances."[66] The regulation burdening the former is content-based, while the regulation affecting the latter is viewpoint-based. That this is crucial for Souter is emphasized by his hypothesis that, if Kennedy's argument was right (for example, if the exclusion of funding for *Wide Awake* was viewpoint-based) then "a university that funds private publications about any primarily nonreligious topic [would also have] to fund publications primarily espousing adherence to or rejection of religion."[67] This consequence would be absurd, as it is not the case that for every secular discussion there is an opposing religious speech. For example, it would not be viewpoint-discriminatory for a university "to fund a magazine about racism, and not to fund publications aimed at urging repentance before God."[68]

The problem is that such a clear-cut distinction can rarely be

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64 *Id.* at 2550.
65 *Id.*
66 *Id.*
67 *Id.* at 2551.
68 *Id.*

made, as is evidenced by the confrontation of *Rosenberger* with *Lamb's Chapel*. The two cases do not correspond neatly to a distinction between "promoting religious conversion"[69] and "discussing issues in general from a religious viewpoint."[70] Indeed, it is difficult to imagine a promotion of religious conversion other than through a discussion of various issues (not "primarily religious") from a religious perspective: the proselytizers know that the best way to gain adherents to their faith is to show people that with the religious perspective they will gain a better insight into the various issues that matter to them. As Souter's brief discussion of *Wide Awake's* content suggests, apart from articles on purely religious themes, there were also "essays on facially secular topics," such as racism or eating disorders, written from a Christian perspective. On the other hand, the group in *Lamb's Chapel* sought to discuss child-rearing from a Christian perspective. But how do we know that they were not trying to use this opportunity in order to promote religious conversion of non-Christians among the audience, or to strengthen their own religious observance by their adherence? Indeed, it would be strange if they did not.

In fact, on the reading of *Lamb's Chapel* it seems clear that this was precisely one of the aims of an evangelical church called Lamb's Chapel, in the community of Center Moriches, which applied for permission to use school facilities to show a film series dealing with family and child-rearing issues from a Christian perspective. One of these films, as described in a brochure entitled *Overcoming a Painful Childhood,* featured a Mrs. Shirley Dobson who "recalls the influences which brought her to a loving God who saw her personal circumstances and heard her cries for help."[71] It is very doubtful if the degree of "religious apologetics," hortatory religious speech and straightforward proselytizing involved there was qualitatively lower than in *Wide Awake's* articles about racism or eating disorders viewed from a Christian perspective.

The upshot is that the distinction between viewpoint regulation and content regulation drawn along the lines of the difference between a discussion of a "secular" topic from a religious perspective and a speech aimed at promoting religious conversion is rather unreliable. Souter's own example can hardly be squared with this criterion. But this is not fatal for the distinction—it only shows the unhelpful character of the specific criteria used by Souter. What

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69 *Id.*

70 *Id.*

71 *Lamb's Chapel*, 508 U.S. at 389 n.3.

does seem to be crucial is the reason for, and the effect of, a regulation, rather than the character of the speech itself. The primary motive for and/or effect of some regulations, is to "skew" the debate. On the other hand, there are regulations which are mainly motivated by, and/or result in, the removal of some items from the agenda. These two types of regulation have distinctive and different prima facie moral defects, and the distinction between viewpoint and subject matter regulations is a shorthand for this moral distinction. At this point this is just an assertion, and it is the task of the next section of this Article to discuss in more detail the moral basis of hostility to these two types of regulation.

II. Rationales for Viewpoint Neutrality and Subject Matter Neutrality

In a recent article, Nadine Strossen links "'viewpoint neutrality' or 'content-neutrality'" (two concepts which she blends) with the general idea that the government may not suppress any opinions merely on the basis that they are unpopular, or offensive to the community, or repugnant to the majority of people.[72] But this general idea gives effect to the principle of viewpoint-neutrality, not to the principle of content-neutrality. Opinions and viewpoints *can* be repugnant or offensive, but topics or subject matters cannot. Significantly, the general idea endorsed by Strossen is not anti-paternalistic. There is nothing paternalistic about the principle that the majority's dislike of an opinion *is* sufficient to warrant a prohibition. Paternalism is typically involved when someone's liberty is restricted on the basis of an argument about *this agent's* own good. However, protecting the majority against offense restricts *one* agent's liberty (the speaker's) for the benefit of *the other* agent (the hearer). Paternalism therefore is not a typical motive behind viewpoint regulation. By contrast, paternalism may be involved in content discrimination because it *might* be claimed (as a possible argument for a content restriction) that discussing certain matters is bad for the discussants themselves, regardless of the viewpoint they wish to express (this was the case in my hypothetical example of a university's paternalistic policy that would deny support to student publications about sex).

The general principle of not allowing the majority's repugnance to warrant prohibitions on speech, is a principle activated by intolerance, not by paternalism. The example Strossen has given to illustrate this principle (namely, the cross-burning ban in

[72] Nadine Strossen, *Civil Liberties*, 4 Geo. Mason U. Civ. Rts. L. J. 253, 267-68 (1994).

R.A.V.)[73] is certainly not a case of a paternalistic regulation—the St. Paul's ordinance in *R.A.V.* was not paternalistic because it did not restrict speakers' expressive liberties for their own good. If anything, it was a case of regulation-based on intolerance for racism. Whether such intolerance should properly be enforceable through punishment is another matter. For our purposes it is important to realize that the moral principle at work behind viewpoint neutrality is distinct from, and often viewed as more serious than the moral principle at work in content restriction. Strossen is wrong in lumping content-based and viewpoint neutrality together, when both the general principle and the example she supplies are relevant to viewpoint discrimination only.

We now need to consider more carefully the proposition that the distinction between content-based restrictions and viewpoint-based restrictions corresponds to the distinction between paternalism and intolerance.[74] The first claim is that the most plausible reason for legally restricting an agenda (content regulation) is the belief that exclusion of the prohibited subject matter would be beneficial to the speakers themselves. This is obviously not the only reason why the government would engage in agenda restriction. There are reasons that are more or less invidious than this paternalistic reason.

On the less invidious side, issue suppression may be justified by an attempt to facilitate the debate.[75] "Gag rules" are often a way of making the debate orderly, and indeed, of making it possible[76]—at any public meeting, the agenda must be restricted to some extent, in order to get the discussion going in an orderly fashion. Of course, these restrictions may be excessive and irrational, but there is no reason to believe that an ordinary reasonableness-based scrutiny is unable to separate unreasonable from reasonable agenda limitations.

On the more invidious side, there may be agenda restrictions motivated by the government's hostility to a given topic. An obvious example is when a government does not want to have politics discussed in a particular forum, or by a particular group of speak-

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[73] *R.A.V.*, 505 U.S. at 377.

[74] For a distinction between paternalism and intolerance in the context of restrictions on "fighting words," see Steven H. Shiffrin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America*, 80 CORNELL L. REV. 101, 126-27 (1995).

[75] "As is true of many other aspects of liberty, some forms of orderly regulation actually promote freedom more than would a state of total anarchy." *Consolidated Edison Co.*, 447 U.S. 546 (Stevens J., concurring) (footnote omitted).

[76] On various benign uses of "gag rules," see Stephen Holmes, *Gag Rules or the Politics of Omission*, *in* JON ELSTER & RUNE SLAGSTAD, CONSTITUTIONALISM AND DEMOCRACY 19-58 (1988).

ers, because it fears that the views expressed will be unfavorable to the government. Prevention of a critique of those in power is certainly a more invidious than paternalistic motive. But such a motive is highly unlikely to be behind a subject matter restriction—hostility to a topic is often an irrational attitude. Indeed, it is hard to ascertain what a "hostility to a topic" (as opposed to a hostility to an idea, or a viewpoint) might mean. In any event, the avoidance of an idea disliked by the government is much more easily achieved through a viewpoint-based restriction. To be sure, one may imagine a government that precludes discussion of "politics" from a forum in order to preclude an expression of views critical of the government. But in a democratic country (the only context in which these arguments apply) such a move by a government would also preclude the expression of viewpoints criticizing the opposition. And one would think such viewpoints are something that a government would wish to encourage. Hence, a subject matter exclusion of political debate would be, even from the egoistic point of view of the rulers, irrational. In any event, a subject matter restriction motivated by (and/or having the effect of) suppressing only critical views, would constitute a case of indirect viewpoint discrimination.

The second main claim is that viewpoint-based restrictions may be explained by reference to a government's hostility to the idea expressed. But this is not the only plausible explanation. Can viewpoint-based restrictions be based on a paternalistic motive? It is highly unlikely. An important exception to this proposition will be discussed below, but first, it is necessary to re-emphasize that paternalism occurs when a government restricts the action of those very people whose interests are alleged to be served by the restriction. Alternatively, there may be cases of "impure" or "two-party" paternalism, where the government restricts the actions of people other than those in whose interests the legislation is passed, but who would act with the permission of the legislation's beneficiaries.[77] It is hard to see how viewpoint-based restrictions can be based upon a genuine concern for the speakers rather than the hearers. If expressing a view is seen as harmful to the speaker (a condition of the paternalistic intervention), then it must be either: (1) because the rule-makers believe that acting upon a given view will be harmful to the speakers; or, (2) because they believe that

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[77] For a distinction between these two forms of paternalism, see JOEL FEINBERG, 4 THE MORAL LIMITS OF THE CRIMINAL LAW 9, 172-76 (1986) (distinguishing between "one party" and "two party" cases) and GERALD DWORKIN, PATERNALISM, *in* ROLF SARTORIUS, ed., PATERNALISM 22 (1983) (distinguishing between "pure" and "impure" paternalism).

the view is so immoral that the very act of expressing it causes a self-inflicted moral harm. The former motivation seems irrational—we may well protect agents from self-inflicted harms by prohibiting an action (for example, riding a bicycle without a helmet) but not by prohibiting an expression of support for an action. And the second motivation is not genuinely paternalistic but moralistic—to prevent self-inflicted "moral harm" is only a manner of speaking about prohibiting an action because it is immoral *tout court.*[78]

Restrictions upon expressions of a particular view, in order to prevent harm resulting from acting upon that view, may be rational insofar as we want to protect the hearer (who may be persuaded to take a harmful action), but not the speakers. It is obvious that if we prohibited the advocacy of riding without a helmet, we would have in mind the good of those who might be convinced to act on the basis of these arguments, rather than the welfare of those who advocate the action. However, a restriction upon the speakers, motivated by concern for the hearers, is not paternalistic unless we have a good reason to believe that the hearers are willing and consenting receivers of the messages from which we want to protect them (in which case it could be characterized as "impure" or "two-party" paternalism). However, this is rarely a reasonable belief. In order for a hearer to "consent to" receiving a message (much less, to request a message), she must know what the content of the message is—otherwise it is not an informed consent. But once she has acquired the knowledge of the message, it is too late for the authorities to protect her against it.

The need to avoid imprecise use of the notion of "paternalism" with respect to speech restrictions, can be illustrated by Justice Brennan's dissenting opinion in *United States v. Kokinda.*[79] Brennan considers, *inter alia,* the Post Office's argument for a ban on the solicitation of money on the sidewalk outside a post office, and discusses the claim that such solicitation causes access difficulties to customers of the post office, in particular, because it may annoy or embarrass some people. "Although the Service's paternalism may be well intended, it is axiomatic that a listener's reaction to speech is not a content-neutral basis for regulation."[80] Whether the regulation is content-based or not, and regardless of whether it is well intended, the intention attributed by Brennan to the Post Office is not paternalistic. Protecting the hearers from annoyance or em-

78 497 U.S. 720 (1990).

79 *Id.*

80 *Id.* at 754.

barrassment caused by the speakers cannot be characterized as paternalistic because the class of people whose liberty is being restricted is not the same as the class of people whose interests justify the restriction—an indicium of a truly paternalistic intervention. The intervention might be characterized as paternalistic if the suggestion was that the hearers knowingly made themselves vulnerable to the risk of embarrassment by, for example, going to places about which they had been warned of the potential for embarrassment. But certainly no such case can be made with regard to the patrons of post offices.

There seems to be one significant exception to the proposition that viewpoint restrictions are not typically paternalistic. This is when the restriction is motivated by the desire to prevent harm to a speaker that would probably result from audience anger in reaction to the speech. Such a restriction seems to be genuinely motivated by paternalistic considerations. When a true motive for the suppression of a particular opinion is neither to prevent the harm to others resulting from acting upon the opinion nor to protect the hearers against feelings of hurt, but rather to protect the speakers from the audience, there is a complete correlation between the agent whose liberty is restricted and the agent whose interests motivate the restriction.

It is, of course, an established First Amendment principle that fear of disruption flowing from others' opposition to the speaker's viewpoint is not a good reason for restricting the speech. Thus, it is important to canvass reasons for the exclusion of this ground for suppression. In one of the classical statements of a rationale for this exclusion, the Court in *Terminiello v. Chicago* said:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.[81]

This is a rather typical example of reasoning showing why the anger of hearers against the speakers should not count as a reason for restriction. It has been also said that to allow such anger to trigger a prohibition would amount to a "heckler's veto," and that the burden in such situations should be upon the hearers to restrain them-

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[81] Terminiello v. Chicago, 337 U.S. 1, 4 (1949). *See* Buchanan, *supra* note 47, at 975; *see* United States v. Cohen, 403 U.S. 15, 24-25 (1971).

selves—to avert their eyes—rather than upon the speakers to moderate their speech.[82]

It is therefore clear that the force of the principle that hostile reactions against the speaker should not justify a restriction of the speech does *not* rest upon any fundamental dislike of paternalism, that is, it is not based on a principled objection to protecting the speakers against their will. It rests, rather, upon two other rationales: (1) unwillingness of the legislators to give effect to hearers' intolerance; and, (2) a general belief that conflict and disagreement is a good thing in the realm of speech. The first rationale boils down to a general presumption against intolerance as a motive for legislation, and it further confirms that hostility to viewpoint restrictions is based upon hostility to intolerance. The word "intolerance" is used here in a broad sense, which encompasses intolerance for truly intolerable ideas—ideas that should be condemned and rejected, such as fascism or racism. Still, the principle is that a dislike for the speakers and for their views, without more, is not a sufficient reason to enlist the state's coercive powers against them.[83] The latter rationale, building upon a Millian philosophy of the beneficial role of moral and intellectual conflict,[84] so clearly captured in the *Terminiello* passage quoted above,[85] reflects a gen-

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[82] *See Cohen*, 403 U.S. at 21 (placing the burden upon viewers to "avoid further bombardment of their sensibilities simply by averting their eyes"); Village of Skokie v. Nat'l Socialist Party of America, 373 N.E.2d 21 (1978) (it is the burden of citizens of a Jewish-populated suburb of Chicago "to avoid the offensive symbol [a swastika displayed by during a march by neo-Nazis] if they can do so without unreasonable inconvenience"); Collin v. Chicago Park District 460 F.2d 746, 754 (7th Cir. 1972) (a hostile audience is not a basis for restraining otherwise legal First Amendment activity). Perhaps the most eloquent defence of the doctrine was given by a New York court in Rockwell v. Morris, 211 N.Y.S.2d 25, 35-36 (1961):

> [T]he unpopularity of views, their shocking quality, their obnoxiousness, and even their alarming impact is not enough. Otherwise, the preacher of any strange doctrine could be stopped; the anti-racist himself could be suppressed, if he undertakes to speak in 'restricted' areas; and one who asks that public schools be open indiscriminately to all ethnic groups could be lawfully suppressed, if only he chooses to speak where persuasion is needed most.

For a more general discussion about an "offensiveness" basis for suppression, see Erznoznik v. City of Jacksonville, 422 U.S. 205, 210 (1975) ("[T]he Constitution does not permit government to decide which type of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.").

[83] *See* Stone, *Content Regulation*, *supra* note 26, at 214-16.

[84] *See* Jeremy Waldron, *Mill and the Value of Moral Distress*, 35 POLITICAL STUDIES 410 (1987).

[85] Bates v. State Bar of Ariz., 433 U.S. 350, 383 (1977). In *Bates* the Court invalidated a state bar disciplinary rule which barred truthful advertising by lawyers, but at the same time Justice Blackmun, who delivered the opinion of the Court suggested that (stated with respect to false advertising): "Because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." *Bates*, 433 U.S. at 383 (footnote omitted).

eral conception of the benefits of diversity in the realm of expression. For our purposes, it is sufficient to establish that neither rationale has a significant paternalistic ingredient. By implication, if hostility to viewpoint restrictions is not based on anti-paternalistic sentiments, then it might suggest that viewpoint restrictions are not usually motivated by paternalism.

III. Content Neutrality, Viewpoint Neutrality, and Harm of Speech

Subject matter regulations are often based on the distinctiveness and severity of harm of a particular category of speech. For example, the Supreme Court declared that a state could regulate false, deceptive, or misleading advertising by lawyers without also regulating other professions.[86] It upheld a state law that banned advertising of casino gambling, while advertising for other forms of gambling remained legal.[87] There is no reasonable suspicion that a selective ban is, in these cases, dictated by a dislike of a particular opinion. However, in the case of viewpoint-based regulations the relevance of the harm-prevention motive is much less obvious, and the suspicion that the restriction is motivated by a dislike of the message (regardless of further harms) is more justified.

R.A.V. is a good illustration. In this decision the Supreme Court struck down a city ordinance under which a teenager was prosecuted for burning a cross inside the fenced yard of a black family. The City of St. Paul's ordinance made it a misdemeanor for anyone to place 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."[88] As Steven Shiffrin correctly observes, "[o]f course, St. Paul was hostile to the messages it sought to criminalize."[89] But it was not the hostility to the racist message *per se*, which provided the best justification for the ban. The ban might have been equally well (or better)

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86 Posadas de Puerto Rico Assoc. v. Tourism Co., 478 U.S. 328 (1986). In the opinion of the Court, the then Justice Rehnquist deferred to the state legislature's opinion that "for Puerto Ricans the risks associated with casino gambling were significantly greater than those associated with the more traditional kinds of gambling in Puerto Rico," and that residents of that state would be "induced by widespread advertising to engage in such *potentially harmful* conduct." *Posadas*, 478 U.S. at 343-44 (emphasis added).

87 *R.A.V.*, 505 U.S. at 380.

88 *Id.*

89 *Id.* at 392-93.

defended on the basis of the special severity of injuries caused by fighting words related to race, color, creed, religion, or gender.

Justice Scalia responded to the special-harm argument in the following way:

> This is word-play. What makes the anger, fear, sense of dishonor, etc. produced by violation of this ordinance distinct from the anger, fear, sense of dishonor, etc. produced by other fighting words is nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message.[90]

But the "distinctiveness" of the idea banned by St. Paul collapses into one distinctive harm. That is, people are more severely injured by verbal assaults citing their race than those citing their political affiliation or physical appearance. In this way, there is an analogy between St. Paul's selective ban on some fighting words and the regulation of deceptive advertising by lawyers or of casino advertising.

St. Paul's ban has been characterized by Scalia as viewpoint-based, but a subject matter characterization seems more accurate. As he sees it, no particular view has been selected by St. Paul for a legal restriction. Rather, the fighting words "theme" has been selected on the basis of its greater likely harm. The very characterization of "fighting words" is neutral as between different (and mutually conflicting) opinions that may be employed in the process of uttering "fighting words." What matters is the likely effect upon a hearer, which makes these words more akin to an assault than to the communication of an idea.[91] Scalia's attempt to show that only one side would be restrained as a result of the ordinance is not convincing. One can well imagine a set of mutually conflicting fighting words equally prohibited by the ordinance, such as verbal assaults by white supremacists and black racists. If, in practice, the former would be more likely to be punished under the ordinance than the latter, it would not be the result of greater legislative hostility towards anti-black than towards anti-white racism that was somehow encoded into the ordinance. Rather, it would be the result of a reasonable judgment made in the process of enforcing the ordinance that, in each specific social context, the former caused more injury than the latter.

The viewpoint/content distinction was subjected to rough treatment in Scalia's opinion in *R.A.V.* Two questions arise in this regard: (1) Is the distinction under challenge in *R.A.V.* viewpoint-

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[90] Shiffrin, *supra* note 74, at 119.
[91] *R.A.V.*, 505 U.S. at 391-92.

based or content-based? (2) Does it really matter in the specific context of *R.A.V.*?

As to the first question, I have already suggested that it is more natural to characterize St. Paul's selective treatment of fighting words related to "race, color, creed, religion or gender" as a subject matter distinction, and that no clear viewpoint is captured by this selectivity. Scalia responds with two bizarre hypotheticals meant to illustrate the viewpoint-discriminatory effect of the ordinance:

> "[F]ighting words" that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person's mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color etc. tolerance and equality, but could not be used by that speaker's opponents. One could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion." St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules.[92]

But these alleged consequences of St. Paul's ordinance do not follow from the prohibition under challenge, and so the hypotheticals fail. They would be effective if they could show that the ordinance handicaps one viewpoint, but not another viewpoint, on the same subject. But this is not the case in Scalia's examples. In the former one, a "fighting words" utterance based on a ground other than the prohibited ones and aimed at supporting the argument in favor of racial tolerance (a convoluted and arguably unlikely rhetorical situation—"fighting words" employed to serve a pro-tolerance argument!) is not being "responded to" by an utterance based on race, color, etc., arguing in favor of racial intolerance but, rather, by other fighting words based on a non-prohibited ground used to support an anti-tolerance argument. Such utterances would not be captured by the ordinance. The ordinance prohibits fighting words which arouse "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[93] Whether the fighting words are used by someone who wants to argue for or against tolerance (racial or otherwise) is irrelevant here. What is relevant is whether the hearer's anger, alarm, or other emotion is caused by expressions related to his or her race, or color. It is therefore conceivable that someone who makes a pro-tolerance ar-

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92 On fighting words, see *infra* text accompanying note 103.

93 *Id.* at 377.

gument by attacking an anti-tolerance person's race in a way that meets the criteria for fighting words will be prosecuted under the ordinance. And, on the other hand, it is conceivable that an anti-tolerance use of fighting words will be non-prosecutable because speakers refer not to the hearer's race, but make, for example, "aspersions upon a person's mother." This shows that, contrary to Scalia's suggestion, no particular viewpoint in the controversy concerning racial tolerance is being adversely affected by the ordinance. So the two hypothetical verbal assaults that he compares are not equivalent to each other.

The same applies to the second hypothetical. According to Scalia, a sign attacking all "anti-Catholic bigots" would have to be tolerated while a sign attacking the "papists" would be prosecuted under the ordinance, because only the latter would be based on "religion," which is one of the ordinance's prohibited subjects.[94] It takes some imagination to suspend one's disbelief about someone being stirred to anger and alarm by a placard proclaiming "[a]ll anti-Catholic bigots are misbegotten." But even leaving the unreality of the hypothetical aside, the verbal assaults upon "anti-Catholic bigots" and "papists" are not two opposed viewpoints in one controversy. An assault upon "anti-Catholic bigots" reflects a viewpoint in a controversy about religious tolerance and bigotry.[95] But an assault upon "papists" is a viewpoint in a religious controversy within organized Christianity. The proper response to the first placard would be one insulting "all anti-Catholic tolerationists" (that is, those who object to what they see as Catholic bigotry and intolerance). Thus, there is no equivalence between the two placards imagined by Scalia. But if there was one, that is, if the Court found that an assault upon "anti-Catholic bigots" was a disguised verbal assault upon non-Catholics because of their religion, then the placard would include prohibited fighting words and would be liable to prosecution under the ordinance. Either way, the validity of Scalia's hypothetical would be undermined.

Now to the second question: what is the significance of characterizing the St. Paul's ordinance as viewpoint-based? One would expect that such a characterization, though strained and improbable, would be important for Scalia when denying the validity of the ordinance. The argument accompanying such a denial would be Scalia's contribution to the doctrine of a special rationale for rejecting viewpoint distinctions but not subject matter distinctions.

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94 *Id.* at 391-92.

95 *Id.* at 391 (references omitted).

But what is puzzling is that the characterization of the ordinance comes after Scalia announced that St. Paul's ordinance is subject matter-based, and that there is a strong First Amendment presumption against such subject matter distinctions: "[T]he First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on *disfavored subjects*."[96] This sounds like a return to the non-differentiated treatment of all content distinctions in *Mosley*. It gave rise to a response by Stevens, in his dissent in *R.A.V.*, that "[n]ot all content-based regulations are alike . . . [and] that some content-based restrictions raise more constitutional questions than others"[97] and that the *R.A.V.* decision failed "to follow through on its insight that content discrimination is not the same as viewpoint discrimination."[98]

This "insight" is ignored in the crucial parts of Scalia's opinion, where he establishes the main legal principle for which *R.A.V.* stands as the main authority. The principle is, content distinctions are not permitted even with regard to otherwise unprotected categories of speech such as fighting words.[99] The rule of content neutrality has now been extended to categories of proscribable speech (which include, under the First Amendment current doctrine, fighting words, as well as obscenity and defamation). In Scalia's view (shared by four other Supreme Court justices), these categories are not "entirely invisible to the Constitution"[100] and "content discrimination unrelated to their distinctively proscribable content" is not permitted.[101]

Partly as a result of the non-differentiated treatment of content neutrality (that is, without drawing a line between viewpoint neutrality and subject matter neutrality) in this central part of his opinion, there is a strange myopia in *R.A.V.* towards the relations between the subject matter distinctions and injury caused by speech. As one exception to the prohibition against content discrimination, Scalia posits a situation "[w]hen 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."[102] An obvious response would be that this is precisely the case with the St. Paul's ordi-

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96 *Id.* at 435 (Stevens, J., concurring in judgment).
97 *Id.* at 429 (Stevens, J., concurring in judgment).
98 John Paul Stevens, *The Freedom of Speech*, 102 YALE L. J. 1293, 1309 (1993).
99 *R.A.V.*, 505 U.S. at 393.
100 *Id.* at 383.
101 *Id.* at 384.
102 Shiffrin, *supra* note 74, at 118. *See also* KENT GREENWALT, FIGHTING WORDS 57-58 (1995).

nance, which proscribed an entire class of fighting words to avoid severe psychological injury to hearers. This very reason (injury avoidance) forms the basis of "content discrimination" manifested in the selective treatment of fighting words based on race, color, religion, and gender. The same argument applies to another possible reason for proscribing "fighting words," namely, the avoidance of violent responses which are likely to be provoked by such words. On the basis of real-life experience, the legislator found that fighting words citing race, color, religion, or gender inflict more severe injury, and tend to be more fight-provoking, than fighting words based on other characteristics. It is difficult to impeach this diagnosis. As Shiffrin points out, in a prosecution under a nondiscriminatory fighting-words statute (that is, one which does not specify the grounds on which the fighting words are proscribed), "a jury could determine that racist speech was especially damaging" and so "[t]he puzzle is why the St. Paul City Council could not do the same."[103]

The rationale that Scalia produces for this exception which renders the entire class of speech proscribable is as follows: "[s]uch a reason, having been adjudged 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."[104] This proposition implies that Scalia would attribute the virtue of neutrality to a distinction between proscribable and protected categories of speech if there is a good basis for the distinction, such as where severe harm is expected to follow from a particular speech. The following example illustrates the operation of this principle:

> [T]he Federal Government can criminalize only those threats of violence that are directed against the President . . . since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President.[105]

The difference between this example and St. Paul's ordinance is questionable. One can, without any implausibility, paraphrase Scalia's defense of the special penalty for threats against the President in the following way:

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[103] *R.A.V.*, 505 U.S. at 388.
[104] *Id.*
[105] *Id.* at 407-09 (White, J., concurring); *id.* at 415-16 (Blackmun, J., concurring).

> The government can criminalize only those fighting words that are based on race, color, creed, religion or gender since the reason why fighting words are outside the First Amendment (that is, protecting individuals from anger, alarm or resentment, from the disruption that such emotions engender, and from the possibility that violence will occur) have special force when verbal assault uses the victim's race, color, creed, religion or gender.

Indeed, this is suggested separately by Justices White and Blackmun in *R.A.V.*[106]

It is perhaps important to emphasize that the burden of this part of this Article has not been to suggest that subject matter distinctions are more likely to identify a real harm arising from an utterance than are viewpoint-based distinctions. The relationship between speech and harm is independent of the classification into content-neutral, subject matter-based, and viewpoint-based regulations.[107] The reason why content-neutral regulations are more palatable than content-based regulations is not because the former tend to capture the harmful speech better than the latter—this would be an unprovable assertion. Rather, content-neutral regulations have less impact on the values served by freedom of speech principles. The same applies to a distinction within the category of content-based regulations. Thus, restrictions based on subject matter may not be more capable of reducing the harm of the speech than restrictions based on a viewpoint, but the motivations and effect of the former type of restrictions are less problematic than is the case with the latter ones. As far as motivations are concerned, it is less likely that a subject matter regulation is triggered by the legislator's intolerance of a particular idea or opinion. A content-based motivation taints a regulation more than motivations which are likely to trigger subject matter regulations, and in particular, paternalistic motivations.[108] As far as the effects are concerned, shrinking the agenda of a debate in a particular setting is less harmful to free debate within a society than official discrimination against a particular side in a given controversy.

Harms caused by speech that is adversely affected by both types of regulations may be equal—there is no apparent correlation between the nature of the regulation and the severity of the harm avoided. In *R.A.V.*, characterization of St. Paul's ordinance

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106 *Id.* at 388 (reference omitted).

107 For a good discussion of various aspects of relations between viewpoint regulation and harm-based regulation, see STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 17-23 (1993).

108 *See supra* Part II of this Article.

as subject matter-based (contrary to Scalia's characterization) does not necessarily add anything to the justification of the selective prohibition to prevent harm caused by those fighting words which come within the ambit of the prohibition. Indeed, one may claim that an openly viewpoint-based regulation would capture even more harmful speech-acts than one which merely penalizes those speech-acts defined selectively through their subject matter. The subject matter definition was built on a judgment that assaultive expressions based on race or religion are more harmful than others. The argument could be made that assaultive expressions which are based on claims about the racial inferiority of a traditionally under-privileged group are *even more* harmful than all other race-related fighting words. The fact that such a viewpoint-based regulation would apply to "fighting words" which are more like assaults than like communication of ideas, and therefore which inflict a proscribable harm on their victims, removes the usual concerns which accompany viewpoint regulations. But such a viewpoint-based regulation of fighting words would certainly be much less politically palatable to the community than the subject-based regulation which is immune to a claim that the state is siding with one racial group against another, or that it affords different levels of protection to different groups.

The "fighting words" example may be atypical from the perspective of the relationship between viewpoint regulation and harm, because "viewpoint" and "content" count for very little in "fighting words." By its nature, the communicative ingredient (which is a vehicle of a viewpoint or a subject matter) of such expressions is minimal, and what matters in characterizing an expression as "fighting words" is the context and form of the expression. These are personally abusive words directly targeted at a particular individual of whom they are descriptive, and the target of the assault is unable to readily avoid the assaultive message.[109] A somewhat different situation occurs when an expression has a highly communicative ingredient (for example, in a speech given to a wide audience, where any particular hurtful or shocking words cannot be seen as a targeted assault upon an individual), and yet the proximity and severity of the harm produced by the expression

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109 This characterization is based, with modifications, on the analysis of "fighting words" of Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531, 536-64 (1980). For an explanation of my modifications of Gard's criteria see Wojciech Sadurski, *Racial Vilification, Psychic Harm, and Affirmative Action*, *in* TOM CAMBELL & WOJCIECH SADURSKI, FREEDOM OF COMMUNICATION 77, 88-89 (1994). For a *locus classicus* of the judicial concept of "fighting words," see Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

may be a reason for a legitimate suppression. Can one make a meaningful distinction between a viewpoint regulation, which should be avoided, and a harm-based regulation, which may be justified if precautions are taken to ensure the harm is sufficiently imminent and severe (as captured, for example, by the "clear and present danger" requirement for outlawing advocacy of violence)?[110]

The argument against drawing such a distinction might run as follows: suppressing an expression based on the alleged harm produced by this expression reflects a viewpoint that the expression is indeed harmful. Since the characterization of a given effect as "harmful" is morally-laden, and thus necessarily controversial, it reflects a viewpoint which may not be (and is usually not) shared by all. A harm discourse, when applied to expressions, must therefore collapse into a viewpoint discourse.[111] And, vice versa, a viewpoint regulation is usually supported by an alleged harm. Points of view that trigger calls for the legal suppression of expression identify harms seen to result from such expression. A viewpoint discourse therefore collapses into a harm discourse—or so the argument goes.[112]

But this argument proceeds too quickly. The role of the free-speech principle is to insulate the sphere of expression from legal restrictions based on an ordinary harm calculus—that is, on the determination that the negative consequences of an act prevail (even if only marginally) over the positive ones. No robust regime of speech protection would survive if a finding of a net harm were sufficient to justify a restriction. Harm resulting from an expression may be mitigated by counter-expressions, by the fact that people have enough good sense and sufficiently robust moral values not to adopt harmful views, and by the fact that harmful opinions will disqualify themselves from general acceptance when people realize the consequences of acting on them. To be sure, these are not foolproof guarantees that would eliminate the harm of an expression, but they at least mitigate the harm.

However, these mitigating effects apply only to some types of speech-harm linkages, namely those where the harm results from

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110 *See* Schenck v. United States, 249 U.S. 47, 52 (1919); Brandenburg v. Ohio, 395 U.S. 444, 447; LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 841-61 (2nd ed., 1988).

111 *See* Wojciech Sadurski, *Offending with Impunity: Racial Vilification and Freedom of Speech*, 14 SYD. L. REV. 163, 170-73 (1992). I recognize now that this view was simplistic. *See also* Frederick Schauer, *The Aim and the Target in Free Speech Methodology*, 83 NW. U. L. REV. 562, 566 (1989).

112 For an argument that "[a]ll viewpoint-regulations are targeted at some supposed harm," see TRIBE, *supra* note 110, at 925.

the fact that a large number of people may be persuaded to accept the view expressed and act on it. "Revealing military secrets to the enemy of your nation is a right thing to do." "Our President is a crook." "Having sex with minors is legitimate." All these views may be harmful when expressed to others, but their harm occurs as a result of them being believed and (possibly) acted upon by the hearers. A number of intervening factors, such as counter-speech or prior beliefs by the hearers, can do much to mitigate the harm. This way of causing harm (through mental intermediation of the hearers) is well captured by the "viewpoint" discourse. "Viewpoints" produce harm by persuading the hearers to adopt one of a number of competing opinions about a given thing. The fact that viewpoints are subject to a number of harm-mitigating factors supports the idea that legislators should abstain from regulating viewpoints—the net harm of viewpoints expressed is usually low.

But there are many other ways in which expressions produce harm. A *modus operandi* of fighting words is one such way—injury inflicted upon a hearer by assaulting him or her with an unexpected or difficult-to-escape verbal attack is not subject to mitigation before the actual injury occurs. This is well captured by the original characterization of "fighting words" in *Chaplinsky*: "[t]hose which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[113] Strictly speaking, it is untrue that fighting words inflict injury "by their very utterance" (they must be received to create a harmful effect), yet it is correct to say that they do not have to be heard, understood, and accepted by third parties to victimize the hearers. Other ways of producing harm include issuing a threat that immediately causes fright; advocacy to violence where there is a reasonable likelihood that imminent and grave violence will follow; false commercial advertising where the hearers have little means to verify its truthfulness; disclosure by verbal means of important and damaging private information about a person whose privacy is thus violated, and so on. The absence or ineffectiveness of mitigating factors can be due to different reasons in these various cases. For example, in some cases the harm occurs in the very moment and by the very fact of an expression, or it may be so imminent that there is no time or means to counteract it, or there may be no practicable way for the hearers to check the facts stated in the expression (this explains why, in a classical formulation, actionable libel concerns only statements of fact and not of opinions). But the common ground is that the harm does not oc-

[113] *Chaplinsky*, 315 U.S. at 572.

cur through the hearers being persuaded to adopt an expressed opinion. In such circumstances, there are no mitigating factors and the harm is more severe. Therefore, such expressions are not easily characterized as viewpoint regulations because there is no phenomenon of being persuaded of an opinion on a given issue so as to produce harm.

A ban upon child pornography is a good example.[114] A restriction on written material which describes and advocates sex with minors might be construed as a viewpoint regulation because a number of factors which mitigate harm produced by dissemination of the material are likely to intervene. For example, strong social reprobation against such views or readers' own pre-existing contempt towards this attitude may nullify the harmful effect of dissemination of such materials. But a ban upon the production and dissemination of films or photos depicting sex with minors is justified by the injury already inflicted upon the children used to produce these pictures, and neither counter-arguments nor the revulsion provoked by the pictures can ever erase this injury. Even if it may be said that these materials express a viewpoint, what legislators are attacking here is not a viewpoint-related harm (that is, not a harm produced by the fact that readers will be persuaded that sex with minors is a right thing to do) but rather the harm that has been already inflicted upon some children, and which is unrelated to the "perlocutionary"[115] power of the material. The ban upon the possession, viewing, and distribution of such material may therefore be seen as an indirect, but effective, way of banning the production of it, and preventing the harm inflicted upon the child models—independent of any persuasion-related harm.[116]

This is not to say that no persuasion-related harm is ever justified. Hostility to viewpoint regulation is not absolute, and neither is hostility to legal action taken to avoid the harm produced by persuading listeners to adopt the views expressed. The rationale for hostility towards viewpoint regulation is related to the distorting effects of governmental interference with public debate. But when this rationale does not apply, or poses an insignificant danger compared to the harm avoided by the interference, legal attack upon the persuasion-related harm may be justified. As an example, one may posit restrictions on tobacco advertising. This is arguably a

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114 "Perlocutionary" effects are defined as the consequences that speech acts have on the beliefs, thoughts, and acts etc. of hearers. JOHN R. SEARLE, SPEECH ACTS 25, 45-47 (1969).

115 *See* New York v. Ferber, 458 U.S. 747 (1981).

116 This view was endorsed by the Supreme Court in *Ferber*, 458 U.S. at 761-62.

case of viewpoint regulation and also of regulation aimed at the persuasive force of the viewpoint, rather than one, for example, aimed at preventing possibly false factual claims by advertisers. Anti-smoking advertisements are legal, while the opposite viewpoint is banished. This is because the gravity of harm is high, the effectiveness of mitigating factors is limited (due to factors such as the prevalence of pro-smoking messages in the mass culture, older films, and entrenched habits), and the distorting function of the ban is minimal. Rather than skewing the debate against the pro-smoking viewpoint, the ban may be seen as preventing the distortion resulting from the dominance of the tobacco industry's financial might over the more meager means of the anti-smoking lobby. The combination of these characteristics suggests that the rationale for disliking the persuasion-related viewpoint in the anti-smoking advertising legislation is less justified than usual.

IV. Content/Viewpoint Distinction and the Level of Generality

One way of viewing the difficulties in characterizing a regulation as content-neutral, content-based, or viewpoint-based is that it largely depends on the level of generality of the question asked. Consider a distinction between content-neutral and content-based restrictions first. Whether a regulation is content-neutral (that is, in the First Amendment parlance, when it constitutes a "time, place or manner" regulation) or content-based, depends upon the generality of the "baseline" against which we judge the nature of a regulation in question. A good example is provided by the restriction challenged in *Kokinda*,[117] where members of a political advocacy group were not permitted to solicit contributions on a sidewalk near the entrance to a post office. They were prosecuted on the basis of a rule which prohibited solicitation on postal premises. The Court upheld the rule on the basis of the "non-public forum" doctrine. The majority found that the regulation did not discriminate on the basis of content or viewpoint, and that it passed the test of reasonableness applicable in such circumstances. But Justice Kennedy, in his concurrence, found it unnecessary to resort to the "non-public forum" doctrine because he asserted that the restriction in question was merely a "time, place or manner" regulation which would normally warrant a reasonableness test.[118] The only speech prohibited in this case was an "in-person solicitation for im-

[117] *Kokinda*, 497 U.S. 720.
[118] *Id.* at 739 (Kennedy, J., concurring).

mediate payments on the premises,"[119] said Kennedy, and the restriction had nothing to do with the content of the speech.

Justice Brennan disagreed with this characterization. The restriction, he claimed, was not content-neutral:

> [I]ndeed, it is tied explicitly to the content of speech. If a person on postal premises says to members of the public, "Please support my political advocacy group," he cannot be punished. If he says, "Please contribute $10," he is subject to criminal prosecution. His punishment depends entirely on what he says.[120]

The disagreement between Kennedy and Brennan is about what it means to say that a regulation is "tied . . . to the content of speech." In one sense, Kennedy is right: regardless of the subject matter, all solicitation is equally prohibited. But "solicitation" itself is a term which applies to the content of speech (in a way in which, for example, loudness does not) and, in that sense, Brennan is right: the punishment depends on what the speaker says. The ambiguity arises because of different perceptions about the placement of the baseline for comparison. Brennan compares the restriction with a regulation in which the meaning of speech is irrelevant to the restriction; Kennedy compares it to a restriction in which the meaning is relevant but the sphere of life to which the meaning applies, is irrelevant to the restriction.

Consider an analogy with blackmail. Is a prohibition on blackmail a subject matter restriction? If the baseline is placed at the highest level of generality, at which we have to compare the regulation with a prohibition that applies regardless of the meaning of the words uttered, then obviously prohibition of blackmail is content-based—we cannot tell whether the utterance constitutes blackmail unless we understand it. But if we place the baseline of comparison at a lower level of generality and compare the restriction with a regulation that defines only the particular sphere of life to which it applies, then it is content neutral—because any blackmailing words (regardless of the sphere to which they apply) will be captured by the prohibition.

Since a solution to the disagreement cannot be found in the very nature of the speech, a more fruitful method of deciding about the meaning of "content neutrality" is by reference to justification of the general rule against content-based restrictions. One judicial formulation makes it explicit that it is the justifications, rather than the characteristics of speech, which are crucial. In

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119 *Id.*

120 *Id.* at 753 (Brennan, J., dissenting).

Ward v. Rock Against Racism[121] the Court stated,"even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are *justified* without reference to the content of the regulated speech.'"[122] Interestingly, Kennedy quotes this formula in his concurring opinion in *Kokinda*,[123] but he does not offer any justification for the restriction. He only asserts that the no-solicitation rule does not refer to the content of speech—but this is not what the *Ward* test demands. What it demands is to see whether the regulation is *justified* without reference to the content.

What sort of justification would suit Kennedy's purposes? Arguably he would have to show that there is a convincing rationale for the rule—a rationale that does not refer to a distinction between solicitation of money for political causes and for any other causes. In other words, any solicitation, no matter what its subject matter, would have to figure in the description of a rationale for the restriction. The arguments about "convenient and unimpeded access for postal patrons"[124] or "facilitating [the] customers' postal transactions"[125] seem to fit the prohibition reasonably well. To be sure, they seem to be under-inclusive because other forms of speech may impede access for postal patrons as well, but this is not to deny that there is no reference to content in the rationale for a restriction.

In turn, Brennan's argument, emphasizes the communicative impact of the expression upon customers as the rationale for the restrictions. As Brennan says, the fear on the part of the government is that "solicitation is bothersome because of its content: the post office is concerned that being asked for money may be embarrassing or annoying to some people, particularly when the speaker is a member of a disfavored or unpopular political advocacy group."[126] The alleged danger that "solicitors might annoy postal customers and discourage them from patronizing postal offices"[127]—which Brennan discerns as the genuine rationale for the restriction—can arise only because of the content of the speech heard by postal patrons (or even, as Brennan's mention of "disfa-

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121 491 U.S. 781 (1989).

122 *Id.* at 791 (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)) (emphasis added).

123 *Kokinda*, 497 U.S. at 738 (Kennedy, J., concurring).

124 *Id.* at 737 (Kennedy, J., concurring).

125 *Id.* at 739 (Kennedy, J., concurring).

126 *Id.* at 754 (Brennan, J., dissenting).

127 *Id.*

vored or unpopular" groups suggests, because of the viewpoint manifested by the speech).

It is not necessary, for my purposes, to weigh the merits of the respective arguments about the grounds of customers' annoyance in American post offices. My point is that the best way of making sense of the "content-based" nature of the restriction is not by looking at the character of speech restricted (because at this level, characterization depends crucially upon the level of generality) but rather at a rationale for the restriction, and whether this rationale refers to the content of the speech.

Can a similar conclusion be drawn with respect to the distinction between content-based and viewpoint-based restrictions? Consider again the *Rosenberger* disagreement between Souter and Kennedy about whether the denial of funding for a religious newspaper is viewpoint-based. If the baseline for comparison is a restriction to which a viewpoint is not at all relevant, then Kennedy's claim that this restriction is not viewpoint neutral is correct. This is for the obvious reason that, on any topic, views with a religious perspective may be disfavored while views without such a perspective (but at the same time not activated by an anti-religious perspective) will not. However, compared to restrictions that favor or disfavor specific sectarian viewpoints within a general category of religious speech, this particular restriction in *Rosenberger* is viewpoint neutral, as Souter suggests. This is because, in this case, no single religious viewpoint will receive less favorable treatment.

The most fruitful way of distinguishing the two types of restrictions may be to appeal to a rationale that asks whether the restriction is *justified* with or without reference to a viewpoint. Under this interpretation, Kennedy's argument would have to be read as showing that the refusal of funding cannot be justified except by the viewpoint of the speakers. But this is merely an assertion. What would a specific viewpoint-related rationale be? The rationale produced by the University was about avoiding conflict with the Establishment Clause—a clause which does not disfavor any religious viewpoint. Even if (as Kennedy believes) the University has a mistaken understanding of what the Establishment Clause demands, he has not suggested that there is a viewpoint-based justification at work.

In contrast, Souter presents a convincing case for the argument that the University's rationale for excluding funding for *Wide Awake* is viewpoint neutral, claiming the denial of funding is not based on any hostility towards religion but only on what, the University believes, would be an impermissible violation of the neutral-

ity of state towards religion as mandated by the Establishment Clause. As Souter repeatedly makes clear, the rationale of the rule against viewpoint discrimination is to prevent the government from skewing public debate—the harm to be avoided is the situation "when government allows one message while prohibiting the messages of those who can reasonably be expected to respond."[128] No such effect is likely to occur here, as the rationale for the general distrust of viewpoint distinctions does not apply to these circumstances.

A similar analysis, focusing on the question of the level of generality can be made with respect to a recent Seventh Circuit decision,[129] which largely relied upon *Rosenberger*. Under challenge in *Grossbaum* was a policy, adopted by the City-County Building's proprietors in Indianapolis, which proclaimed that no religious displays and symbols were to be permitted in the lobby of the building. The lobby was otherwise open to a number of other public and private speakers. As a result of this policy, a display of a menorah during the Jewish Chanukah holiday was not permitted.

Rabbi Grossbaum and a Jewish Lubavitch group, who complained about the policy, characterized it as viewpoint-based. They argued that the "holiday season" was a subject matter for "discussion in the City-County Building lobby"[130]—this enabled Grossbaum to present an even-handed ban upon all religious displays as a viewpoint-based prohibition. But the building's authorities claimed that the "holiday season" was not a "meaningful" subject matter: "[b]y creating a policy which prohibits *all* religious displays and symbols, the Building Authority submits, it properly exerted its right to exercise control over the . . . lobby in a reasonable and viewpoint-neutral manner."[131] In effect, they claimed that it was "religion" which was a proper subject matter affected by prohibition, and consequently that all the viewpoints comprising the subject matter of religion were equally affected.

Again, it is a controversy that is unresolvable unless we settle upon a proper level of generality, which is a largely arbitrary decision. Grossbaum identifies as "subject matter" a theme about which both religious and non-religious ideologies may offer opinions. As a result of this enterprise, all religions, taken together, are represented as viewpoints. But the building's authorities draw their conceptual picture at a lower level of generality, so that "sub-

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128 *Rosenberger*, 115 S. Ct. at 2548-49.
129 *Grossbaum*, 63 F.3d 581.
130 *Id.* at 588.
131 *Id.*

ject matter" is constituted by all religions, and "viewpoint" by any one particular religion. Again, the best way of deciding between these two characterizations is by inquiring into whether the ban was likely to have been triggered by hostility towards religious messages or, rather, by a justified fear by the decision-makers that permitting religious displays would run them into conflict with the Establishment Clause of the First Amendment.

The following non-exhaustive list of factors may help to ascertain which of these two explanations is more plausible. Has the complaining group been subjected to a history of persecution and discrimination by a ruling majority in this community? Is the complaining group deprived of equally effective means of popularizing its viewpoint? Is it highly improbable that the display of the symbol would be taken by some members of the public as an endorsement of the viewpoint by the authority? Positive answers to these questions support the hostility-towards-a-viewpoint explanation while negative answers support an explanation that the denial of access was triggered by a viewpoint-neutral reluctance to get embroiled in Establishment Clause problems.

V. Indirect Viewpoint Discrimination

A regulation may be viewpoint discriminatory even if, on its face, it regulates an entire subject matter, and even if it picks up content-neutral characteristics of speech, such as the status of speakers or the manner of communication. If a regulation is viewpoint discriminatory in its effect, then all the reasons that justify hostility to open viewpoint discrimination apply.

A. *Subject Matter Restrictions*

A prohibition upon a subject matter may in fact disguise a ban upon a viewpoint. This situation has to be distinguished from cases in which there is controversy as to whether a particular regulation is really based upon a subject matter or upon a viewpoint, as the *Rosenberger* case illustrates. But there may be bans which are unquestionably addressed to a particular subject matter although they in fact disadvantage only one point of view within the subject matter. In *Mosley*—that locus classicus for the argument about content neutrality—the Court invalidated a city ordinance prohibiting all picketing near the school, except for peaceful labor picketing. The Court decided that the distinction between labor and nonlabor pickets (arguably, a clear subject matter distinction) did not further any of the goals cited as justifications for the ban. It states:

"[I]f peaceful labor picketing is permitted, there is no justification for prohibiting all nonlabor picketing, both peaceful and nonpeaceful."[132] Marshall explicitly characterized the ordinance as describing impermissible picketing "in terms of subject matter"[133] and he made no use of the principle of viewpoint neutrality to condemn the ordinance.

And yet, the facts of the case suggest that the ban might have had a clear viewpoint-discriminatory effect. The suit was brought by Earl Mosley, a postal employee, who for seven months prior to the enactment of the ordinance had frequently picketed Jones High School in Chicago carrying a sign protesting against an allegedly racially discriminatory policy of the school. Under the ordinance, teachers at the school were allowed to express their views about their conditions of employment (labor picketing), but others who wished to picket the school on issues not characterized as "labor disputes" could not. But who would want to picket the school, apart from currently employed teachers? Most obviously, these picketers would be parents, prospective teachers, and other people concerned about aspects of school's policy. These people, in contrast to the actually employed teachers, would be more likely than not to criticize the school's policies which favored the actually employed teachers. This was indeed the situation of Mosley himself. The exclusion of nonlabor picketing, therefore, disadvantages viewpoints critical of the status quo that favored the currently employed teachers.[134]

The lesson from this is that a distinction between content-based and viewpoint regulation is highly context-sensitive. It depends upon the specific facts of a case which may suggest to us whether, due to the relative vulnerability of certain viewpoints, content regulation may have such an adverse effect upon some viewpoints that it will amount to viewpoint regulation. But it does not follow that any content regulation can be presented as a viewpoint regulation, as the effective blurring of the line between two regulations by Kennedy in *Rosenberger* would suggest. A Harvard Law Review Note, praising Kennedy's reasoning and hailing *Rosenberger* for its broadening of the traditional concept of viewpoint discrimination, concludes that virtually all "bans on religious content" amount to viewpoint regulation.[135] The weight of this conclusion

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[132] *Mosley*, 408 U.S. at 100.

[133] *Id.* at 99.

[134] *See* Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 233-34 (1982).

[135] Note, *supra* note 17, at 215 n.43.

rests upon the following analogy to a restriction based on the topic of sexual orientation:

> For example, a prohibition of literature discussing sexual orientation might be deemed content-based but not viewpoint-based because it forbids discussion of any viewpoint about sexual orientation. But because mainstream culture revolves round heterosexuality, heterosexuals tend not to discuss the subject of their sexual orientation at all; thus, only those offering a homosexual viewpoint have their speech suppressed.[136]

The conclusion does not follow. It is a matter of context whether the motives and/or the effects of a ban on the discussion of sexual orientation are indeed such that "only those offering homosexual viewpoint" will have their speech suppressed. Consider a case of a highly bigoted, homophobic milieu with a strong tradition of general acceptance of verbal attacks on gay men and lesbians (say, a small college in a very traditionalist area). A decision to suppress (or otherwise regulate) discussion of sexual orientation may have nothing to do with intolerance of homosexuality. To the contrary, it may be motivated by a will to protect those holding an unpopular view on sexual orientation. While they will be denied the right to raise the issue in that particular limited forum, so too will their opponents. On balance, the minority may benefit from the restriction. The restriction would admittedly be somewhat paternalistic (which would confirm a suggestion that content regulations are typically paternalistic), but not intolerant. The argument that "because mainstream culture revolves round heterosexuality, heterosexuals tend not to discuss the subject of their sexual orientation at all" is a *non sequitur.* Precisely because "mainstream culture revolves round heterosexuality," heterosexuals—in some contexts, when faced with a challenge to their positions—tend to discuss (often, quite violently) the topic of sexual orientation, though not necessarily their own but that of sexual minorities. Hence, there is no reason to believe that a subject matter restriction of speech based on sexual orientation will inevitably, or even typically, constitute a viewpoint restriction favoring a heterosexual perspective.

Consequently, the analogy that the Harvard Law Review Note draws between the sexual orientation example and the *Rosenberger* situation does not prove the point that "the same could be said of bans on religious content."[137] According to the author[s] of the Note: "[a] ban that includes atheistic and religious viewpoints is

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136 *Id.* at 214-15 (footnote omitted).
137 *Id.* at 215 n.43.

virtually identical to a ban on religious viewpoints alone because, rather than pointedly questioning the existence of a Supreme Deity, agnostic and atheist writers in general ignore the question and focus on specific secular controversies."[138] But agnostic and atheist authors *do* often directly discuss the question of religion. They discuss it from their own perspective, and it is *these* discussions which will be suppressed under a subject matter regulation based on religion. These suppressions may in principle work equally against religious viewpoints, on one hand, and atheistic and agnostic on the other. Indeed, in a community saturated with humanistic, rationalist, or skeptical traditions, the primary effect of a ban on discussion of religious issues will be to protect believers against attacks on their religious convictions. But when religion (or the existence of Supreme Being, etc.) is not the subject matter of a discussion, it is not the case that the existence of a religion-based subject matter regulation will disfavor those with religious perspectives because "agnostic and atheist writers in general ignore the question [of the existence of a Supreme Deity] and focus on specific secular controversies."[139] There is no such thing as "specific secular controversies" defined allegedly by the irrelevance of the issue of Deity to a discussion. There is nothing "secular" or "non-secular" in the discussion of a number of issues to which religion is irrelevant. To presume otherwise would be to adopt a "bipolar" view of public discourse (to every "secular" discussion of any issue there exists a religious viewpoint)—a view criticized by Kennedy in *Rosenberger* whom, ironically, the Harvard Law Review Note praises so much for his opinion in that case.

The perception that in *Rosenberger* subject matter regulation is a disguised viewpoint regulation may stem partly from a belief about the relative powerlessness of a viewpoint which is affected by a subject matter regulation. If one of the viewpoints affected adversely by a subject matter regulation is socially vulnerable and unpopular, then even if other viewpoints comprising the subject matter are also regulated, the adverse effect of the unpopular viewpoint triggers our concern that the regulation may be motivated by intolerance of that viewpoint. That is why the example about a ban on the discussion of sexual orientation may plausibly be represented in many contexts (though not in all, as suggested above) as viewpoint-based. However, to apply the same moral concern to a religion-based ban, and to see a *Rosenberger* type of regulation as a

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138 *Id.*
139 *Id.*

discrimination against a religious viewpoint, assumes that the religion affected by the ban is an unpopular, vulnerable, and powerless perspective in this context. This, rather incredibly, is being suggested by the Harvard Law Review Note. The University of Virginia regulation is given as an example of a ban "used to silence speakers with disfavored viewpoints."[140] The Note complains that the University was willing "to provide funding to journals with religious perspectives, as long as that perspective was not Christian,"[141] and the Court's decision is hailed as restricting the University officials' discretion "to decide which perspectives are sufficiently politically popular to warrant funding."[142] If one's diagnosis is that religion in general, and Christian religion in particular, is disfavored and politically unpopular in the United States or some specific forum (such as the University of Virginia), then a subject matter regulation limiting discussion of religion may raise concerns analogous to those which are triggered by viewpoint discrimination (namely, that it is yet another exercise in intolerance). But it would take some explaining to convince one about the accuracy of such a characterization of Christian religion in American public life today.

B. *Speakers' Status Restrictions*

In *Perry*,[143] the Court reviewed a restriction on access to the interschool mail system and teacher mailboxes in the Perry Township schools. Under a collective-bargaining agreement between the Board of Education and Perry Education Association ("PEA"), PEA (as the exclusive bargaining representative for the teachers) was granted access to the internal mail system—access which was denied to any rival union.

Justice White, who delivered the opinion of the Court, claimed that the internal mail system in public schools was not a "public forum" and, therefore, it could be reserved "for its intended purposes, communicative or otherwise, as long as the regulation on speech [was] reasonable and not an effort to suppress expression merely because public officials oppose[d] the speaker's view."[144] As to the first criterion, he accepted the School District's arguments about the reasonableness of an exclusion of any teacher's union other than PEA, such as submission about the special re-

140 *Id.* at 216.
141 *Id.* (footnote omitted).
142 *Id.* at 217.
143 *Perry Educ. Ass'n*, 460 U.S. 37.
144 *Id.* at 46.

sponsibilities of PEA[145] and ensuring labor peace within the schools.[146] As to the requirement of viewpoint neutrality, White claimed that it was "more accurate to characterize the access policy as based on the *status* of the respective unions rather than their views."[147]

This is, however, often a distinction without a difference. If, as often happens, particular viewpoints can be reliably attributed to the "status" of a particular social actor, then a status-based exclusion is equivalent to viewpoint discrimination. According to Brennan, who wrote a dissenting opinion, this was the case in *Perry*. Brennan quotes with approval the Court of Appeals' decision in *Perry's* case, based, *inter alia*, on a judgment that the exclusion under challenge "favors a particular viewpoint on labor relations in the Perry schools" because "the teachers inevitably will receive from [PEA] self-laudatory descriptions of its activities on their behalf and will be denied the critical perspective offered by [PEA]."[148] And Brennan states persuasively that "access is denied to the respondents because of the likelihood of their expressing points of view different from the petitioner's on a range of subjects."[149]

But in many cases, the characteristics of the speaker do not have to be correlated with the viewpoint so strongly as to raise the fear of indirect viewpoint discrimination.[150] Furthermore, even if there is such a likelihood of discrimination, the reasons for restricting access to some speakers based on their status may be compelling. Think of a group of non-faculty members claiming the right to speak at a faculty meeting of a public university. Clearly, in a "non-public forum" the test for a justification of exclusion needs to be less rigorous than in public fora such as streets and parks. This conclusion is reflected in the lenient requirement of reasonableness, which is applied in non-public fora under the First Amend-

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145 *Id.* at 52.

146 *Id.*

147 *Id.* at 49.

148 *Id.* at 65 (Brennan, J., dissenting).

149 *Id.*

150 It is therefore a mistake to equate regulations based on a speaker's identity with viewpoint regulations. Stevens is guilty of such an equation when he says:

> A regulation of speech that is motivated by nothing more than a desire to curtail expression *of a particular point of view* on controversial issues of general interest is the purest example of a 'law . . . abridging the freedom of speech, or of the press.' A regulation that denies *one group of persons* the right to address a selected audience on 'controversial issues of public policy' is plainly such a regulation.

Consolidated Edison Co., 447 U.S. at 546 (Stevens, J., concurring) (quoting U.S. CONST. amend. I) (footnote omitted) (emphasis added).

ment forum doctrine. Nevertheless, one should be aware of the risk of viewpoint discrimination resulting from a prima facie neutral, status-based distinction, as is illustrated by *Perry*.

C. *Means-of-Communication Restrictions*

Regulations which close off an entire medium of communication may or may not have a disproportionate impact upon a particular viewpoint. A law prohibiting all leafleting would have a more severe impact upon those who do not have easy access to more effective means of mass communication,[151] and often these will be viewpoints critical of the current social status quo. A ban on anonymous leaflets[152] would understandably disadvantage those who might have a reason to fear readers' reactions to the content, and hence affect those who may reasonably expect their views to be controversial and unpopular. As Justice Stevens mentioned in obiter, "the disclosure requirement places a more significant burden on advocates of unpopular causes than on defenders of the status quo."[153]

It is controversial whether such a correlation could have been established in *Lehman*.[154] In that decision, the Supreme Court upheld a city ban on political ads in advertising spaces on public transit vehicles. It would be hard to say that such a ban affects one particular political group or ideology more than others, as the advertising spaces could have been used by all sorts of parties and groups. They are, one would imagine, neither so expensive as to be available only to the wealthiest groups (to which one might attribute a by-and-large conservative attitude) nor so very cheap as to be attractive to very poor groups which, as one might speculate, tend to represent more critical social viewpoints. One may perhaps detect, as did Brennan in his dissent, dangers of viewpoint discrimination inherent in the very distinction between political advertising and commercial advertising. Brennan offers the following hypothetical: "[A] commercial advertisement peddling snowmobiles would be accepted, while a counter-advertisement calling upon the public to support legislation controlling the environmental destruction and noise pollution caused by snowmobiles would be re-

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151 *See* Stone, *Subject-Matter Restrictions*, *supra* note 26, at 102.

152 *See* McIntyre v. Ohio Elections Commission, 115 S. Ct. 1511 (1995).

153 *Id.* at 1518 n.8. Stevens, however, did not rest his decision, invalidating the disclosure requirement, upon the argument of viewpoint discrimination. Rather, the invalidation resulted from his strict scrutiny of the speech covered by the disclosure requirement—namely, speech on public issues. He also found virtues in anonymity as a "shield from the tyranny of the majority." *McIntyre*, 115 S. Ct. at 1524.

154 *Lehman*, 418 U.S. 298.

jected."[155] But there is no reason to believe that the political advertisements would systematically take an anti-consumerist line. While nearly all commercial ads implicitly rely upon a "viewpoint" that the consumption of material goods is worthwhile, and in this sense rely upon a non-critical attitude towards free markets and capitalism, there is no reason to believe that the category of expression excluded under the ordinance (that is, political advertisement) would generally take an opposing viewpoint.

CONCLUSION: THE MORAL SIGNIFICANCE OF A DISTINCTION BETWEEN SUBJECT MATTER REGULATIONS AND VIEWPOINT REGULATIONS

In his dissenting opinion in *Perry*, Justice Brennan insists that the government must not discriminate among viewpoints on a particular topic, even if it "may entirely exclude discussion of the subject from the forum."[156] This raises an apparent paradox: "[T]he greater power does not include the lesser"—the government may prohibit more but not less speech. This is, Brennan says, "because for First Amendment purposes exercise of the lesser power is more threatening to core values."[157] But why is viewpoint discrimination more threatening to the core values of freedom of speech than an exclusion of the subject from a forum?

If the argument in Part II of this Article is correct, this question translates into another question: why is paternalism less dangerous than intolerance in the area of restrictions on freedom of expression? Put at this level of generality, the question does not allow for any satisfactory answer. There may be some paternalistic restrictions which are intolerable and, on the other hand, there may be restrictions which express an intolerance so mild, or so justifiable, as to be acceptable. As a general and abstract proposition, it may therefore be correct to deny—as some scholars and judges do—that subject matter distinctions are less objectionable than viewpoint distinctions.[158]

This is because paternalism, in general terms, is an attitude essentially foreign to the core values of freedom of speech. These

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155 *Id.* at 317 (Brennan, J., dissenting).

156 *Perry Educ. Ass'n*, 460 U.S. at 62 (Brennan, J., dissenting).

157 *Id.*

158 *See, e.g.*, Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VANDERBILT L. REV. 265, 285 (1981) ("If the First Amendment is in fact designed in theory to protect discussion over a wide area, a subject matter restriction is no more justifiable than a viewpoint restriction."). *See also Consolidated Edison Co.*, 447 U.S. at 537 ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.").

central values have been acknowledged in the First Amendment jurisprudence as, among other things, the principle of individual autonomy and self-mastery ("people will perceive their own best interests if only they are well enough informed"),[159] and as the principle of democratic self-government ("the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments").[160] But there are some cases where paternalism is triggered not by the legislators' distrust in individuals and perception of a "danger that the people cannot evaluate . . . information,"[161] but rather by the opinion that, *for some reasons other than an alleged incapacity of people to evaluate information*, participants in a given forum will be better off if a given subject matter is excluded from debate.

Consider *Rosenberger* again. Whatever the reasons were for excluding financial support for a religious newspaper, distrust of the audience based on suspicions that students would not be able to evaluate the information did not figure among them. If, *arguendo*, the University was right in interpreting the Establishment Clause as not permitting the direct funding of a religious newspaper, and if such a denial amounted to a regulation of subject matter rather than of a viewpoint (as it was argued in Part I of this Article), then the rationale behind that regulation is different to the rationale which would make a paternalistic restriction morally offensive—namely, suspicion about the incapacity of the audience to evaluate the information and arguments. The point now is not to evaluate the merits of the University's argument under the Establishment Clause, but to say that even if they were wrong, the wrongness did not stem from a paternalistic motive. Rather, thus interpreted, the Establishment Clause might be justified by the fear of divisiveness stemming from religious controversies in a given forum.

In his essay on "gag rules," Stephen Holmes states,"[n]o issue is more frequently classified as "worthy of avoiding" than religion. Sectarianism is understandably considered to be divisive, a serious threat to communal cooperation."[162] The threat of divisiveness has been explicitly cited by the Court as a major evil targeted by the Establishment Clause.[163] Strictly speaking, a speech restriction mo-

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159 Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 770 (1976).

160 First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 791 (1978) (footnote omitted).

161 *Id.* at 792.

162 Holmes, *supra* note 76, at 23.

163 "[P]olitical division along religious lines was one of principal evils against which the First Amendment was intended to protect . . . [t]he potential divisiveness of such conflict is a threat to the normal political process," Lemon v. Kurtzman, 403 U.S. 602, 622 (1971) (footnotes omitted).

tivated by a will to avoid divisiveness may also be seen as paternalistic because it limits individuals' expressive freedom in pursuit of their own good. But it is not the paternalism of the offensive sort which presumes that people will be incapable of properly using their freedom, including their free access to information and different arguments. Rather, it is the sort of paternalism that imposes constraints upon an individual action in order to produce a collective good (or to avoid a collective harm—in this case, encapsulated by the concept of "divisiveness"). Or, to put it more specifically, it consists of a foreclosure of certain individual actions which, if taken generally, would make everybody or nearly everybody worse off, but which people have an incentive to take unless assured that others will also abstain. This variety of "paternalism" has been recognized as not exactly fitting the usual premonitions against forcing people for their own good.[164] For it is very likely that most (if not all) people whose freedom of action is restricted by a regulation would recognize that they are all better off thanks to a universal compliance with the rule. The constraint is paternalistic in one sense. Its effect is to restrict the choices open to individuals for their own good. But its motivation is not paternalistic. That is, it does not depend on the argument that those people who are controlled by the rule cannot recognize what is really good for them. Instead, it gives effect to their actual choice which can operate only where there is mutual compliance enforced by the existence of a legal constraint.

One major argument of this Article has been that this feature explains why subject matter regulations may be seen as morally less objectionable than viewpoint regulations. The general argument can be sustained only if three more specific arguments can be sustained: (1) that a meaningful distinction can be drawn between viewpoint neutrality and subject matter neutrality in speech regulations; (2) that subject matter neutrality is often based upon paternalism while viewpoint neutrality is usually triggered by intolerance; and (3) that paternalism is less problematic as a legislative motivation than intolerance.

None of these three arguments allows for a confident, unambiguous and exceptionless defense. But with all the qualifications, reservations and caveats put forward in the earlier parts of this Article, the arguments (I hope) can be sustained. If so, they illuminate the moral force of the principle of content neutrality as a major

164 *See* DWORKIN, *supra* note 77, at 23; Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1140-45 (1986).

regulative principle of freedom of speech, as announced with such extravagant exaggeration by Justice Marshall in *Mosley*.