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University of Chicago Law Review

Spring, 1996

63 U. Chi. L. Rev. 413

*been  
main article*

LENGTH: 28101 words

ARTICLE: Private Speech, Public Purpose: The Role of Governmental Motive in  
First Amendment Doctrine

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-----Footnotes-----

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-----End Footnotes-----

TEXT:  
[\*413]

[EDITOR'S NOTE: PART 1 OF 2]

Introduction

In one of the most frequently quoted passages of one of the most frequently cited First Amendment decisions, the Supreme Court declared that "the purpose of Congress . . . is not a basis for declaring [ ] legislation unconstitutional."  
n1 Noting several hazards of attempting to ascertain legislative motive, the Court in *United States v O'Brien* n2 eschewed this endeavor in First Amendment cases, as well as in other constitutional adjudication. It was no task of the judiciary to discover or condemn "illicit legislative motive" relating to the freedom of speech; the question for courts was only whether a challenged statute, by its terms or in its application, had an "unconstitutional effect" on First Amendment freedoms. n3

-----Footnotes-----

n1 *United States v O'Brien*, 391 US 367, 383 (1968).

n2 391 US 367 (1968).

n3 *Id* at 383, 385. In the *O'Brien* inquiry, the nature of the governmental interest asserted played an important role. See *id* at 380-82; text accompanying notes 237-38. But the *O'Brien* Court cared not at all--or at least

professed to care not at all--whether the asserted governmental interest matched, or even resembled, the actual interest underlying the enactment or enforcement of the legislation. O'Brien, 391 US at 383-85.

- - - - -End Footnotes- - - - -

In keeping with this approach, most descriptive analyses of First Amendment law, as well as most normative discussions of the doctrine, have considered the permissibility of governmental regulation of speech by focusing on the effects of a given regulation. This focus on effects comes in two standard varieties. In one, the critical inquiry relates to the effect of a regulation on the speaker's ability to communicate a desired message. In the other, [\*414] the critical inquiry relates to the effect of a regulation on the listener's ability to obtain information. In either case, however, what matters is the consequence of the regulation.

This Article shifts the focus from consequences to sources; I argue, notwithstanding the Court's protestations in O'Brien, that First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives. The doctrine comprises a series of tools to flush out illicit motives and to invalidate actions infected with them. Or, to put the point another way, the application of First Amendment law is best understood and most readily explained as a kind of motive-hunting.

This claim stands in need of much explanation, for as O'Brien indicates, even the attentive observer rarely catches a glimpse of the Court inquiring directly into governmental purpose. But assume for a moment that discovering impermissible motive stood as the Court's overriding object in the consideration of cases involving the First Amendment. Would the Court then charge itself with the task of dissecting and analyzing in each case the reasons animating the action of a governmental official or body? Not likely, for obvious reasons relating to the ease of legislatures' offering pretextual motives and the difficulty of courts' discovering the real ones. Would, then, the Court have to surrender its concern with motive? Not at all. The Court could construct and use objective tests to serve as proxies for a direct inquiry into motive. It could develop rules that operated, like certain burden-shifting mechanisms or presumptions, to counter the difficulties involved in determining motive and to enable the judiciary to make, if only indirectly, that determination.

The most important components of First Amendment doctrine--indeed, the very structure of that doctrine--serve precisely this function. If a court were to attempt to devise easily manageable rules for ferreting out impermissible governmental motives in the First Amendment context, it first would create a distinction between speech regulations that are content neutral and those that are content based. It then would develop a series of exceptions to that distinction in order to handle unusually suspicious kinds of content-neutral regulations and unusually trustworthy kinds of content-based restrictions. (This effort might give rise, for example, to the doctrine of so-called low-value speech.) It would add a division of great import between generally applicable regulations, only incidentally affecting speech, and regulations specifically targeted at expressive activity. If, in other words, a [\*415] court wished to construct a set of rules to determine impermissible motive in the First Amendment area, it might well devise the complex set of distinctions and categories currently governing First Amendment law. And conversely, if a

court could determine governmental purpose directly, these rules, principles, and categories might all be unnecessary.

Courts, of course, rarely construct law in so deliberate a fashion: at least, the current Supreme Court--fractured, clerk-driven, and uninterested in theoretical issues as it is--rarely does so. The self-conscious rationalization and unification of bodies of law is not something to expect from the modern judiciary. So I do not mean to stake a claim that individual Justices, much less the Court as a whole, have set out intentionally to create a doctrinal structure that detects illicit motive by indirect means. The story I tell about purpose in the law does not depend on any assertion about the purpose of the Court. What I provide is simply a reading--I think the best reading--of the Court's First Amendment cases. I contend not that the Court self-consciously constructed First Amendment doctrine to ferret out improper motive, but that for whatever uncertain, complex, and unknowable reasons, the doctrine reads as if it had been so constructed.



I do not wish to overstate the case here, though perhaps I already have done so; I am not about to craft (yet another) all-encompassing--which almost necessarily means reductionist--theory of the First Amendment. First, what follows is primarily a descriptive theory; although I discuss its normative underpinnings, I make no claim that a sensible system of free speech should be concerned exclusively with governmental motivation. Second, even seen as descriptive, the theory has limits. Some aspects of First Amendment law resist explanation in terms of motive; other aspects, though explicable in terms of motive, are explicable as well by other means; and sometimes, the concern with governmental motive is itself intertwined with other apprehensions. And yet, all these qualifications notwithstanding, the concern with governmental motive remains a hugely important--indeed, the most important--explanatory factor in First Amendment law. If it does not account for the whole world of First Amendment doctrine, it accounts (and accounts alone) for a good part of it.

Section I of this Article introduces the discussion by using a recent case--R.A.V. v City of St. Paul n4 --to explore how a concern [\*416] with impermissible motive underlies First Amendment doctrine. Section II moves backward to address the prior questions of what motives count as impermissible under the First Amendment and how such motives differ from legitimate reasons for restricting expression. Section III demonstrates how a wide range of First Amendment rules--indeed, the essential structure of the doctrine--are best and most easily understood as devices to detect the presence of illicit motive. Section IV concludes with some thoughts on the normative underpinnings of the Court's unstat- ed, perhaps unrecognized, but still real decision to treat the ques- tion of motive as the preeminent inquiry under the First Amend- ment.

-Footnotes-

n4 505 US 377 (1992).

-End Footnotes-

I. An Example: The Puzzle of R.A.V. v City of St. Paul

Consider first the recent, important, and hotly debated Supreme Court decision of R.A.V. v City of St. Paul. The decision, invalidating a so-called hate speech ordinance, raises many ques- tions about what counts, or should

count, as the core concern of the First Amendment. An exploration of some of these questions shows in dramatic form the importance of governmental motive in the Court's First Amendment analysis.

R.A.V. arose from St. Paul's decision to charge a juvenile under its Bias-Motivated Crime Ordinance for allegedly burning a cross on the property of an African-American family. The ordinance declared it a misdemeanor for any person to "place[ ] on public or private property a symbol . . . 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 . . . ." n5 In an effort to avoid constitutional problems, the Minnesota Supreme Court interpreted this statute narrowly to apply only to "fighting words" based on race, color, and so forth. n6 Courts long have considered fighting words to be unprotected expression--so valueless and so harmful that the government may ban them entirely without abridging the First Amendment. n7 The question thus raised by the state court's decision was whether St. Paul constitutionally could prohibit some, but not all, un- [\*417] protected speech--more specifically, fighting words based on race and the other listed categories, but no others. n8

-Footnotes-

n5 St. Paul, Minn, Legis Code section 292.02 (1990).

n6 See In re R.A.V., 464 NW2d 507, 510-11 (Minn 1991). In Chaplinsky v New Hampshire, the United States Supreme Court defined "fighting words" as words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." 315 US 568, 572 (1942).

n7 See Chaplinsky, 315 US at 571-72.

n8 Four Justices believed there was no need to reach this question because the Minnesota Supreme Court had failed in its effort to limit the ordinance to fighting words, and the ordinance thus remained overbroad. See R.A.V., 505 US at 413-14 (White concurring). The majority of the Court, however, declined to consider this argument, R.A.V., 505 US at 381, and the dispute in the case focused on the question set out in the text.

-End Footnotes-

A majority of the Court, speaking through Justice Scalia, held that St. Paul could not take this action because it violated the principle of content neutrality. No matter that a city may ban all fighting words; it may not (as, the majority held, St. Paul did) ban only fighting words that address a particular subject or express a particular viewpoint. Although the category of fighting words is unprotected--although it has, "in and of itself, no claim upon the First Amendment"--the government does not have free rein to regulate selectively within the category. n9 Even wholly proscribable categories of speech are not "entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination." n10 To sustain such discrimination within categories of speech, just because the categories as a whole are proscribable, would be to adopt "a simplistic, all-or-nothing-at-all approach to First Amendment protection." n11

-Footnotes-

n9 R.A.V., 505 US at 386.

n10 Id at 383-84.

n11 Id at 384.

- - - - -End Footnotes- - - - -

Three explanations for the Court's decision offer themselves, the first two relating to different effects of the St. Paul ordinance, the last relating to its purpose. First, the Court might have held as it did because the St. Paul ordinance too greatly interfered with the opportunity of speakers to communicate their desired messages. Second, the Court might have reached its decision because the ordinance harmed the ability of the public--that is, the audience--to become exposed to a desirable range and balance of opinion. Third, the Court might have invalidated the ordinance because regardless how (or whether) it affected either speaker or audience, it stemmed from an improper purpose on the part of the government. Which of these three possibilities best explains the R.A.V. holding?

Not the first--not, that is, a perspective focusing on the speaker's opportunity to engage in expression. As all of the Justices agreed, St. Paul could have enacted a statute banning all fighting words--a statute, in other words, imposing a more expansive restriction on speech than did the ordinance in question. [\*418] If St. Paul could have passed this broad limitation, silencing both the speakers affected by the actual ordinance and a great many others, then the flaw in the ordinance must have arisen from something other than its simple curtailment of expression. Consider here the views of Justice White, who wrote that "it is inconsistent to hold that the government may proscribe an entire category of speech . . . but that the government may not proscribe a subset of that category . . ." n13 If expressive opportunities were the only constitutional interest, Justice White would be correct that the greater restriction includes the lesser. If he erred--if the greater does not, or does not always, include the lesser--it must be because of another interest.

- - - - -Footnotes- - - - -

n12 Id at 383-84; id at 401 (White concurring); id at 415-16 (Blackmun concurring); id at 417-18 (Stevens concurring).

n13 Id at 401 (White concurring).

- - - - -End Footnotes- - - - -

Perhaps, then, the interest protected in R.A.V. is the interest of listeners in a balanced debate on public issues. The argument, initially plausible, goes as follows. The St. Paul ordinance on its face restricted speech on the basis of subject matter; fighting words based on race, but not on other topics, fell within its coverage. More, and more nefariously, the ordinance discriminated in its operation on the basis of viewpoint; the law effectively barred only the fighting words that racists (and not that opponents of racism) would wish to use. n14 The ordinance, while not restricting a great deal of speech, thus restricted speech in a way that skewed public debate on an issue by limiting the expressive opportunities of one side only. The reason the St. Paul ordinance

posed a greater constitutional difficulty than a ban on all fighting words related to this skewing effect; the ordinance ensured that listeners would confront a distorted debate, thus interfering with "the thinking process of the community." n15

-Footnotes-

n14 The question whether the St. Paul ordinance, in operation, discriminated on the basis of viewpoint divided the Justices, as it has divided commentators. Contrast the majority opinion, R.A.V., 505 US at 391-92 (holding that ordinance was viewpoint discrim- inatory), with the concurring opinion of Justice Stevens, id at 434-35 (arguing that ordi- nance was not viewpoint discriminatory). Contrast also Cass R. Sunstein, On Analogical Reasoning, 106 Harv L Rev 741, 762-63 & n 78 (1993) (no viewpoint discrimination), with Elena Kagan, The Changing Faces of First Amendment Neutrality: R.A.V. v St. Paul, Rust v Sullivan, and the Problem of Content-Based Underinclusion, 1992 S Ct Rev 29, 69-71 (viewpoint discrimination). It is not necessary to resolve this issue here. If the ordinance, in application, did not amount to viewpoint discrimination, then the rationale based on skewing effects becomes much weaker. To best present the claim that the effects of the ordinance justify the R.A.V. decision, I assume the ordinance was viewpoint discrimina- tory.

n15 Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People 27 (Harper 1960) (emphasis omitted). Geoffrey Stone made this argument with respect to content-based regulation generally in Content Regulation and the First Amendment, 25 Wm & Mary L Rev 189, 198 (1983). I used the argument with respect to R.A.V. in Kagan, 1992 S Ct Rev at 63-64 (cited in note 14). As will become clear, I now find the argument unpersuasive, both in its application to R.A.V. and more broadly.

-End Footnotes-

[\*419]

But on close inspection, this argument appears contrived. Even if the St. Paul statute distinguished between viewpoints on racial issues, several considerations, detailed here in ascending order of importance, suggest that the statute would not danger- ously have distorted public debate.

First, the Court repeatedly has suggested that the expressive content of fighting words is, in Justice White's words, "worthless" or "de minimis." n16 If this understanding is accepted, a concern with the distortion of public debate in a case like R.A.V. looks awkward, even wholly misplaced. Assuming that fighting words have no expressive value--that they are not a part of public de- bate because not in form or function true communication--then the restriction of some fighting words, even if all on one side, cannot easily be thought to distort discussion. True, a law of this kind subtracts from one side only, but it subtracts a thing valued at zero and thus cannot change the essential equation.

-Footnotes-

n16 R.A.V., 505 US at 400 (White concurring).

-End Footnotes-

I do not mean to claim that the distortion argument has no meaning in a sphere of unprotected expression. For one thing, any restriction on racist (but only racist) fighting words inevitably will chill racist (but only racist) speech outside the fighting words category; the chilling effect of such a regulation thus will cause some distortion in the realm of protected expression. More important, though courts often claim that fighting words and other unprotected speech have no expressive content or function, these claims ought not to be taken at face value. As Justice Scalia noted, "sometimes [fighting words] are quite expressive indeed."<sup>n17</sup> Claims to the contrary serve as shorthand for a complex calculation that the harms of such speech outweigh their contribution to the sphere of expression. Thus, the subtraction of fighting words from one side of a debate is the subtraction not of a void, but of something quite tangible. And yet, in such a case, the concern with skewing the deliberative process continues to ring oddly, as it might if a law prevented one side of a debate from throwing brickbats at the other (an activity that also might be "expressive indeed"). A law of this kind would be unconstitutional,<sup>[\*420]</sup> but there is something peculiar in saying that this is because the law harms the thinking process of the community.

-Footnotes-

n17 R.A.V., 505 US at 385.

-End Footnotes-

Second, even putting aside this objection, the skewing effect in a case like R.A.V. is very modest. Racists can continue to communicate their message in many ways; we need have no worry that the St. Paul ordinance will excise the idea of racism from public discourse, or indeed that the ordinance will noticeably cut into the idea's incidence. Of course, a flat rule, excluding case-specific inquiry of this kind, may have benefits. Judges, some will say, cannot reliably determine whether a given viewpoint-based law works only a modest distortion: the matter is one of degree and difficult to measure; perhaps, for example, the particular means restricted, though apparently modest, constitute the most effective way of delivering the message.<sup>n18</sup> But this insight, and the preference for rule-based approaches that goes with it, cannot explain the R.A.V. decision. Within a sphere of unprotected speech (such as fighting words or obscenity), the most accurate generalization is that viewpoint distinctions will not significantly distort public discourse. Were skewing effects all that mattered, the R.A.V. Court thus would have established a bounded exception to the usual rule against viewpoint discrimination, applying in spheres of unprotected expression.

-Footnotes-

n18 See Stone, 25 Wm & Mary L Rev at 225-27 (cited in note 15).

-End Footnotes-

Finally, the notion of a skewing effect, as an explanation of R.A.V. or any other case, rests on a set of problematic foundations. The argument assumes that "distortion" of the realm of ideas arises from--and only from--direct governmental restrictions on the content of speech. But distortion of public

discourse might arise also (or instead) from the many rules of property and other law that, without focusing or intending to focus on any particular speech, determine who has access to expressive oppor- tunities. n19 If there is an "overabundance" of an idea in the ab- sence of direct governmental action--which there well might be when compared with some ideal state of public debate--then action disfavoring that idea might "unskew," rather than skew, public discourse. n20 Suppose, for example, that racists control a [\*421] disproportionate share of the available means of communication; then, a law like St. Paul's might provide a corrective.

-Footnotes-

n19 See Cass R. Sunstein, Democracy and the Problem of Free Speech 178-79 (Free Press 1993); Owen M. Fiss, Why the State?, 100 Harv L Rev 781, 786-87 (1987).

n20 See Sunstein, Democracy and the Problem of Free Speech at 178-79 (cited in note 19); Fiss, 100 Harv L Rev at 786-87 (cited in note 19). The formulation in the text sug- gests that there is such a thing as an ideal speech environment and may suggest, further, that we can describe its appearance. For doubts as to whether it is possible to provide an account of an optimal speech market, see David A. Strauss, Rights and the System of Freedom of Expression, 1993 U Chi Legal F 197, 205-07. The argument here does not rest on an ability to define fully an ideal state of debate; it rests only on the claim that the distribution of speech prior to direct governmental regulation need not, and usually will not, constitute such an ideal, or even something close to it.

-End Footnotes-

A court well might--as the R.A.V. Court did--refuse the government the power to provide this corrective, but to do so, the court must discard a rationale focused purely on effects and adopt a rationale focused on motive. In denying the government a power of this kind, a court effectively determines that the "appro- priate" distribution of speech is the distribution existing prior to direct governmental action. This determination, as I have noted, cannot be based on the view that the "preregulatory" distribution represents some platonic ideal of public discourse. It must be based on the view that whatever the existing state of affairs, direct restrictions, such as the St. Paul law, probably would worsen matters. And this thinking--the use of a presumption that governmental regulation will exacerbate, rather than ame- liorate, distortion--is most naturally viewed as arising from a concern with the motives that underlie the regulation. n21 The worry in a case like R.A.V. is not with skewing effects per se; the fear of skewing effects depends upon, and becomes meaningless without, the fear that impermissible considerations--call them for now "censorial" or "ideological" considerations--intruded on the decision to restrict expression.

-Footnotes-

n21 The presumption also might be thought to arise from a view of governmental incapacity to promote a healthier or more balanced speech market. I reject this alterna- tive explanation in Section III.A, arguing that even if this general incapacity existed (which I doubt), it would provide insufficient reason to adopt the presumption.

-End Footnotes-

The R.A.V. Court made this concern about illegitimate, censorial motives unusually evident in its opinion, all but proclaiming that sources, not consequences, forced the decision. The First Amendment, the majority stated, "prevents government from proscribing speech . . . because of disapproval of the ideas expressed." n22 And again: "The government may not regulate speech based on hostility--or favoritism--towards the underlying message expressed." n23 The Court maintained that the structure of the ordinance--the subject-matter distinctions apparent on its face, the viewpoint distinctions apparent in operation--suggested illicit motive: "the nature of the content discrimination," in the Court's view, posed a "realistic possibility that official suppression of ideas was afoot." n24 And going beyond the structure of the law, the Court found that "comments and concessions" made by St. Paul in the case "elevated the possibility to a certainty" that St. Paul was "seeking to handicap the expression of particular ideas" because of hostility toward them. n25

- - - - -Footnotes- - - - -

n22 R.A.V., 505 US at 382.

n23 Id at 386.

n24 Id at 390.

n25 Id at 394. The Court noted especially a statement in St. Paul's Supreme Court brief that the purpose of the law was to show that the prohibited speech "is not condoned by the majority." Id at 392-93 (citations omitted).

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Indeed, half hidden beneath a swirl of doctrinal formulations, the crux of the dispute between the majority and the concurring opinions concerned the proper understanding of St. Paul's motive in enacting its hate-speech law. n26 The majority understood this motive as purely censorial--a simple desire to blot out ideas of which the government or a majority of its citizens disapproved. The concurring Justices saw something different: an effort by the government, divorced from mere hostility toward ideas, to counter a severe and objectively ascertainable harm caused by (one form of ) an idea's expression. n27 In part, this different understanding of motive emerged from a different view of the structure of the ordinance: in arguing that the ordinance did not discriminate on the basis of viewpoint, Justice Stevens suggested that the Court need not fear illicit purpose. n28 In part, the divergent interpretations of St. Paul's purpose reflected varying levels of sensitivity to the harms such speech causes. n29 In any event, the dispute was clear. "This case does not concern the official suppression of ideas," said Justice White, but only a reasonable response to "pressing public concerns." n30 And Justice Stevens agreed that the ordinance had its basis not in "censorship," but in "legitimate, reasonable, and neutral justifications." n31

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n26 For a similar point, see Akhil Reed Amar, The Case of the Missing Amendments: R.A.V. v. City of St. Paul, 106 Harv L Rev 124, 146-51 (1992).



n27 The line between regulation based on hostility and regulation based on harm may be exceedingly fine. I discuss this distinction further in Section II.C.

n28 See R.A.V., 505 US at 435 (Stevens concurring).

n29 Compare R.A.V., 505 US at 393 ("St. Paul has not singled out an especially offensive mode of expression--it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner."), with id at 408 (White concurring) ("A prohibition on fighting words . . . is a ban on a class of speech that conveys an overriding message of personal injury and imminent violence, . . . a message that is at its ugliest when directed against groups that have long been targets of discrimination.").

n30 R.A.V., 505 US at 411, 407 (White concurring).

n31 Id at 434, 416 (Stevens concurring).

- - - - -End Footnotes- - - - -  
[\*423]

The R.A.V. decision thus serves as a stark example of the importance of governmental motive in the Court's First Amendment analysis. Here, a debate about motive occurred in the open, revealing how a desire to punish impermissible purpose may explain and animate the Court's elaboration of doctrine. In the usual case, no such discussion occurs, but still the motive inquiry retains its power. The concern with filtering out illicit motive, though in these cases hidden, determines the content of the categories and rules that constitute First Amendment doctrine.

II. The Concept of Impermissible Motive

What exactly does it mean to say that an effort to filter out impermissible motive animates and explains First Amendment doctrine? In part, the question will have its answer only after I show how particular categories and rules of First Amendment law reflect a concern with governmental motive. But before taking on that task, I must discuss in a more general way the nature of the concern with motive and the kinds of legal tools suited to address it. In this Section, I first compare an approach to the First Amendment focused on motive with two approaches focused on effects. I next attempt to define and delimit what motives count as improper under the First Amendment. Here, I describe the concept of impermissible motive operative in the doctrine, while deferring to Section IV a discussion of why this concept might have become central. Finally, I examine methods a legal system can use to address the question of impermissible motive, given the difficulties of proof (and, some might say, the problems of coherence) such an inquiry raises. In much of this Section's discussion, the reader will hear echoes of R.A.V., as the concerns and strategies of the Court in that case assume a more general shape and structure.

A. Three Perspectives on the First Amendment

In recent scholarship, a trend has developed to distinguish between two approaches to the First Amendment, which are sometimes complementary but often

conflicting. n32 According to [\*424] this scholarly scheme, one conception of the First Amendment focuses on expanding the expressive opportunities open to speakers, whereas another focuses on improving the sphere of discourse encountered by the public "audience." To these two conceptions, which turn on different effects of speech regulation, I here juxtapose a third, which turns on the regulation's reasons.

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n32 See Strauss, 1993 U Chi Legal F at 199-202 (cited in note 20) (contrasting an approach based on speakers' rights to a structural approach); Fiss, 100 Harv L Rev at 785-86 (cited in note 19) (contrasting an autonomy principle to a public debate principle); Robert Post, Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse, 64 U Colo L Rev 1109, 1132-33, 1136-37 (1993) (contrasting an autonomy theory to a collectivist theory).

-----End Footnotes-----

The first approach--call it the "speaker-based" model--understands the primary value of the First Amendment to reside in its conferral of expressive opportunities on would-be communicators. A system of free expression, in allowing individuals to communicate their views, enhances their "autonomy" or "self-respect" or "self-development" or other (equally amorphous but desirable) human quality. n33 Under this theory, any limitation of expressive opportunities constitutes a harm because it interferes with some speaker's ability to communicate to others and with the benefit that speaker thereby derives. Moreover, the greater the limitation on speech, the greater the harm; under this theory, a broad restriction always poses greater constitutional concerns (because it interferes with more expressive activity) than a narrow one. Quantity, in other words, is of the essence; as one proponent of this model has stated, First Amendment doctrine should concern itself with how much a law "reduces the sum total of information or opinion disseminated." n34

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n33 For versions of this approach, see C. Edwin Baker, Human Liberty and Freedom of Speech 47-69 (Oxford 1989); Martin H. Redish, The Value of Free Speech, 130 U Pa L Rev 591 (1982); David A.J. Richards, Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment, 123 U Pa L Rev 45, 59-70 (1974).

n34 Martin H. Redish, The Content Distinction in First Amendment Analysis, 34 Stan L Rev 113, 128 (1981).

-----End Footnotes-----

By contrast, the second approach to the First Amendment--call it the "audience-based" model--focuses on the quality of the expressive arena. A system of free expression, under this theory, has value because it enables the public--the audience for the speech--to arrive at truth and make wise decisions, especially about matters of public import. n35 In order best to fulfill this function, a system of free expression should promote not speech alone, but speech of a certain kind and mixture. Rich public debate is the goal; the concern is the expressive realm as a whole, rather than each opportunity for

expression. Under this theory, restrictions on speech pose more or less danger depending not on [\*425] the sum total of speech prevented, but on the extent to which the restrictions distort or impoverish the realm of discourse. Further, some restrictions on speech are preferable to none, given that some enhance public discussion--for example, by preventing a few voices from drowning out others. n36 The purpose of the First Amendment--the goal against which regulation must be measured--is the protection of what Alexander Meiklejohn called the public's "thinking process" from injury or "mutilation." n37

-Footnotes-

n35 See Meiklejohn, Political Freedom at 19-28 (cited in note 15); Sunstein, Democracy and the Problem of Free Speech at 53-77 (cited in note 19); Fiss, 100 Harv L Rev at 787-94 (cited in note 19).

n36 It is possible to contend that direct speech regulation never will serve the goal of rich public debate, or that it will so rarely serve that goal as to allow courts to assume that it never will do so. In some sense, the classic "marketplace of ideas" theory takes this position: the goal is to have a realm of discourse that leads to truth, but the means is a laissez-faire system. For this view to make sense, however, there must be a reason to think that the absence of regulation will lead to better results--here, a truth-producing market--than the allowance of regulation designed (or purportedly designed) to achieve this object. The most powerful such reason has to do with the government's other motives for curtailing speech. (I reject in Section III.A an alternative reason, relating to the sheer incapacity of government to improve the speech market.) In this sense, any argument that advances the quality of debate as a goal, but assumes that an absence of regulation will best achieve this object, should be seen as an argument about governmental motive. The point here resembles the one made in considering R.A.V.: there is little reason to think a speech restriction necessarily will skew, rather than balance, public debate in the absence of a concern about governmental motive.

n37 Meiklejohn, Political Freedom at 27 (cited in note 15) (emphasis omitted).

-End Footnotes-

The differences between these two approaches are captured in another of Meiklejohn's sayings. "What is essential," he wrote in support of the audience-based model, "is not that everyone shall speak, but that everything worth saying shall be said." n38 Place to one side Meiklejohn's view of the essential, and what remains in this aphorism is the core divergence between the models: one focuses on the effects of regulation on who speaks, the other on the effects of regulation on what is spoken. But this statement of the models' disparity reveals also their likeness: both make critical an action's consequences.

-Footnotes-

n38 Id at 26.

-End Footnotes-

The third approach to the First Amendment--call it the "government-based" or "motive-based" model--claims that what is essential is not the consequences of a regulation but the reasons that underlie it. n39 The point of attention is neither the [\*426] speaker nor the audience, but the governmental actor standing in the way of the communicative process. Under this model, an action may violate the First Amendment because its basis is illegitimate, regardless of the effects of the action on either the sum of expressive opportunities or the condition of public discourse. Conversely, an action may comport with the First Amendment because legitimate reasons underlie it, again regardless of its range of consequences. The critical inquiry concerns what lies behind, rather than what proceeds from, an exercise of governmental power. n40

-Footnotes-

n39 Of the three approaches, the government-based approach is least represented in the literature. Frederick Schauer is the principal proponent of an approach of this kind; he has emphasized the danger of illicit governmental motive as part of a normative defense of providing heightened protection for expression. See Frederick Schauer, *Free speech: a philosophical enquiry* 80-86 (Cambridge 1982). Geoffrey Stone and Cass Sunstein both have included considerations of motive in broader analyses of First Amendment law. See Stone, 25 *Wm & Mary L Rev* at 227-33 (cited in note 15); Sunstein, *Democracy and the Problem of Free Speech* at 154-59 (cited in note 19). Finally, advocates of so-called listener-autonomy theories of the First Amendment, such as David Strauss and (at one time) Thomas Scanlon, may be engaged in a form of motive analysis, in that they appear to contest the legitimacy not of speech regulations themselves, but of certain (autonomy-infringing) justifications for them. See David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 *Colum L Rev* 334, 353-60 (1991); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 *Phil & Pub Aff* 204, 209 (1972). The authors of such theories, however, do not speak in terms of motive and might well contest my characterization. See Strauss, 1993 *U Chi Legal F* at 201 (cited in note 20) (asserting that listener autonomy theories fall under what I have called an "audience-based" approach).

n40 As should be obvious by now, I make no distinction between such terms as "purpose," "intent," "motive," "basis," and "reason." The Court has used these terms interchangeably, both in First Amendment jurisprudence and elsewhere; in *O'Brien*, for example, the Court treated the terms "motive" and "purpose" as synonymous. See 391 *US* at 383. See also David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 *U Chi L Rev* 935, 951 (1989) (noting the interchangeable use of these terms in equal protection law). Moreover, attempts by scholars to distinguish among these terms have proved unhelpful. See John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *Yale L J* 1205, 1217-21 (1970) (criticizing such efforts).

-End Footnotes-

The divide between the model based on motive and the models based on effects can be overstated. n41 One reason for First Amendment law to worry about governmental motive is itself consequential in nature; it refers to the predictable tendency of improperly motivated actions to have certain untoward effects. n42 To say this is not to collapse the distinction I have offered. First, the government- or motive-based model may emerge as well from nonconsequential, deontological considerations, relating to the stance or

attitude we expect the government to adopt in relation to its citizens. Second, the government-based approach--even if in an ultimate sense inspired by a concern for consequences--very often will lead to different doctrinal rules, producing different results, than an approach that focuses on effects, whether on the speaker or the audience. Still, this analytic relationship between a motive-based approach and effects-based approaches should not be disregarded; I do not want to suggest that these approaches exist hermetically sealed from each other.

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n41 So too can the divide between the two models based on effects. For example, protection of audience-based interests demands that the government accord some substantial rights to individual speakers. Conversely, protection of speaker-based interests may demand some attention to the condition of public discourse, to prevent opportunities for expression from becoming purely formal and ineffective. A set of complicated relations exists among all these models, as well as among the concerns that underlie them.

n42 For further discussion of the points made in this paragraph, see text accompanying notes 257-78.

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Further, the motive-based model and the effects-based models can operate in confluence with each other, except in their starkest forms--each contributing something to First Amendment doctrine. A body of law predominantly concerned with effects (whether on the speaker or audience) can make some place for considerations of governmental purpose; so too, but conversely, for a body of law predominantly concerned with motive. I have no doubt that current doctrine responds, in some manner and at some times, to all the concerns I have mentioned. The government-based approach does not wholly exclude the others.

The delineation of the three approaches, however, remains important. The approaches often will point in divergent directions, prescribing both different rules of law and different outcomes. And the pattern of decisions where such conflicts take place says much about the concerns that drive the law of free speech. To prepare the way for showing that among the potential concerns, illicit motive takes pride of place, I turn now to the meaning of illicit motive in First Amendment analysis.

B. Defining Impermissible Motive

Assuming for now that First Amendment law constitutes an attempt to flush out impermissible motives, what motives count as impermissible? The Court has not fully addressed, much less resolved, this question. Despite the proscription in O'Brien, the Court sometimes has probed the government's reasons for restricting expression; n43 too, the Court has articulated several statements of First Amendment principle that sound in terms of [\*428] motivation. n44 But the Court, as the edict in O'Brien shows, usually has hesitated to discuss the issue of illicit motive in any detail or with any directness. The effort to define the concept of illicit purpose operative in First Amendment law thus must depend on a fair amount of extrapolation, as well as on a "reading backwards" from the doctrines discussed later in this Article.

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n43 The Court most recently inquired into legislative motive in *R.A.V. and Turner Broadcasting System, Inc. v FCC*, 114 S Ct 2445, 2461-62 (1994). A much earlier example of such an examination appears in *Grosjean v American Press Co.*, 297 US 233, 250 (1936). In cases involving executive action, the Court routinely speaks in terms of motive. For example, in addressing a First Amendment challenge brought by a discharged employee of the government, the Court will ask whether the government fired the employee because it disapproved of her expression. See, for example, *Connick v Myers*, 461 US 138, 143-46 (1983). The Court apparently sees the examination of motive in such cases as different in kind from--and less problematic than--the examination of the motives underlying legislation.

n44 See notes 45, 48-49.

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The definition of illicit motive that this effort reveals is in certain respects imprecise and conceptually puzzling. It is not necessary, given my purpose, to untangle all the complexities this definition raises; what matters for this Article is that the doctrine emerges from an understanding of illicit motive, however inexact or enigmatic. This Section, then, provides only a sketch of the definitional issues. I first lay out the concept of impermissible motive evident in the law, in part describing it in terms of a neutrality principle. I then consider both a limitation on and an objection to the definition I have offered, and I finally compare that definition with some alternatives.

#### 1. A definition.

Consider the following snapshot of impermissible motives for speech restrictions. First, the government may not restrict expressive activities because it disagrees with or disapproves of the ideas espoused by the speaker; it may not act on the basis of a view of what is a true (or false) belief or a right (or wrong) opinion. n45 Or, to say this in a slightly different way, the government cannot count as a harm, which it has a legitimate interest in preventing, that ideas it considers faulty or abhorrent enter the public dialogue and challenge the official understanding of acceptability or correctness. Second, though relatedly, the government may not restrict speech because the ideas espoused threaten officials' own self-interest--more particularly, their tenure in office. n46 The government, to use the same construction as above, cannot count as a harm, which it has a legitimate interest in preventing, that speech may promote the removal of [\*429] incumbent officeholders through the political process. Third, and as a corollary to these proscriptions, the government may not privilege either ideas it favors or ideas advancing its self-interest--for example, by exempting certain ideas from a general prohibition. n47 Justice Scalia summarized these tenets in *R.A.V.*: "The government may not regulate speech based on hostility--or favoritism--towards the underlying message expressed." n48

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n45 See *City Council v Taxpayers for Vincent*, 466 US 789, 804 (1984) (asking whether a law "was designed to suppress certain ideas that the City finds distasteful"); *Consolidated Edison Co. v Public Service Commission*, 447 US

530, 536 (1980), quoting *Niemotko v Maryland*, 340 US 268, 282 (1951) (Frankfurter concurring) (asking whether speech was barred " 'merely because public officials disapprove the speaker's views' "); Stone, 25 Wm & Mary L Rev at 227-28 (cited in note 15).

n46 See Stone, 25 Wm & Mary L Rev at 228 (cited in note 15); Sunstein, *Democracy and the Problem of Free Speech* at 155 (cited in note 19).

n47 See John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv L Rev 1482, 1506-07 (1975); Stone, 25 Wm & Mary L Rev at 227-28 (cited in note 15).

n48 505 US at 386. See also *Young v American Mini Theatres, Inc.*, 427 US 50, 67 (1976) ("Regulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator.").

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To this statement of illicit motive, one further gloss must be added: the government may not limit speech because other citizens deem the ideas offered to be wrong or offensive n49 --or for that matter, because they see the ideas as threatening to incumbent officials. This ban echoes those just stated, except for the identity of the party (above the government, now the public) that disapproves the ideas; the theory is that this substitution of party name should make no constitutional difference. Some of course may argue that restrictions based on public dislike boast a democratic legitimacy separating them from restrictions based on governmental hostility. But this distinction falters on the difficulty of disentangling the actions of officials from the desires of constituents. When the government acts, its reasons for doing so usually reflect the views of some part of the public. Distinguishing between public and governmental hostility thus seems hopeless as a practical matter. Further, the distinction shatters on the Court's longstanding view that the First Amendment protects [\*430] no less against majority oppression than against runaway government. n50 In keeping with this general view, the Court's conception of illicit motive must apply not only to officials but also to the public acting through them. Just as in equal protection law the government may not discriminate among persons on the basis of majoritarian biases, n51 so too in First Amendment law the government may not so distinguish among messages. The key principle with respect to motive is that the government may not limit speech on grounds of mere disapproval, no matter whose or how widely shared.

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n49 See *Texas v Johnson*, 491 US 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Hustler Magazine, Inc. v Falwell*, 485 US 46, 55 (1988), quoting *FCC v Pacifica Foundation*, 438 US 726, 745-46 (1978) ("The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."). See also Stone, 25 Wm & Mary L Rev at 214-16 (cited in note 15); Sunstein, *Democracy and the Problem of Free Speech* at 155-56 (cited in note 19). The notion of offense is, of course, a tricky one. There is a fine line between offense at the content of ideas, to which I refer, and offense at the means by which those

ideas are expressed. There is also a fine line between mere offense and emotional injury, in that a certain kind and degree of the former (the "offense" felt, for example, by the concentration camp survivors in Skokie) may constitute what society recognizes, or would wish to recognize, as the latter. Finally there is a complex relationship between offense at ideas (or any other sort of hostility toward ideas) and the entire range of harms those ideas cause. See text accompanying notes 60-66.

n50 See cases cited in note 49. See also *Kingsley Pictures Corp v Regents*, 360 US 684, 689 (1959) (stating that the First Amendment's "guarantee is not confined to the expression of ideas that are conventional or shared by a majority"). This view has its ancestry in the Framers' fear of majority factions. As James Madison wrote: "In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents." Letter from James Madison to Thomas Jefferson (Oct 17, 1788), in Robert A. Rutland, et al, eds, 11 *The Papers of James Madison* 298 (Virginia 1977). But see Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *Yale L J* 1131, 1147-52 (1991) (suggesting that the First Amendment protects against government self-dealing, rather than majority tyranny). Amar's narrow understanding of the Amendment suggests, among other things, that no decision made by a properly selected jury--in, for example, a defamation case--would violate free speech principles.

n51 See, for example, *City of Cleburne v Cleburne Living Center, Inc.*, 473 US 432, 448 (1985); *Palmore v Sidoti*, 466 US 429, 433 (1984).

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This principle leaves untouched many reasons to restrict expression; in this Article, I call these reasons "harm-based" and contrast them to the "ideological" reasons I have just discussed. The distinction raises difficult issues, which I address below, but to understand first its essential nature, a return to R.A.V. may prove helpful. Consider some different explanations for the St. Paul ordinance. First, the city may have enacted the statute to express its own or its citizenry's hatred of the ideas of racism, sexism, and so forth. n52 Alternatively, the city could have enacted the statute to prevent harms that it thought the covered speech posed to the community. Perhaps the city feared that the speech would cause some persons to suffer psychic trauma or other emotional harm; or that the speech would spark bloody public riots, because of strong popular resistance to it; n53 or that the speech [\*431] would persuade listeners to engage in acts of race-based violence. The concept of impermissible motive I have described applies to the first of these explanations, but to none of the others. The first violates the principle that the government may not restrict speech on the basis of its own or the majority's view of what ideas are right or wrong, praiseworthy or shameful. The others do not violate this principle because they relate not to the message as message, but to the consequence of its expression; they stem not from ideological hostility, but from a perception of material harm. n54 In short and critically, they relate to harms that the government has a legitimate interest in preventing and obviously could act to prevent if not caused by expression.

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n52 Justice Scalia believed the city intended the law to serve just this function and accordingly savaged the city's motives. Asserting that the city enacted the ordinance to convey the majority's disapproval of an idea, Scalia wrote that "the point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech . . . ." R.A.V., 505 US at 392.

n53 This reason for restricting speech in one sense depends on popular hostility to ideas, which I have deemed an illegitimate reason for speech regulation: were it not for popular hostility, the government would have no fear of riot, and thus would have no reason to restrict the expression. Nonetheless, there is a difference between restricting speech because of public hostility alone and restricting speech because this hostility will lead to bloodshed. In the former case, the government acts only to advance the majority's version of truth; in the latter, the government acts to avert violence, even if it is the majority's desire to impose its will that makes this action necessary.

n54 The Court recently drew this kind of distinction in explicit terms, asking whether "the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate." Turner Broadcasting System, Inc. v FCC, 114 S Ct 2445, 2458 (1994).

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Whenever hostility toward ideas as such (or the other impermissible factors of sympathy or self-interest) has played some part in effecting a restriction on speech, the restriction is irretrievably tainted; what has entered into the action commands its invalidation. n55 In contrast, when such factors have played no role--when the government has restricted ideas only as and when they bear harmful consequences--the government's purposes support sustaining the action. The critical inquiry is whether the government would have imposed the restriction in the absence of impermissible factors, solely on the basis of a neutral and legitimate evaluation of harm. Or to put the question in another way, it is whether the government would have treated (or did treat) identically ideas with which it disagreed, ideas with which it agreed, and ideas to which it was indifferent, to the extent those ideas caused the same harms. n56 This inquiry tests [\*432] whether the government regulated, even in part, on the basis of ideas as ideas, rather than on the basis of material harms.

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n55 For a similar understanding of the consequence of finding an impermissible motive, see Stone, 25 Wm & Mary L Rev at 229-30 (cited in note 15). Note that it should make no difference whether the impermissible motive has played a role on a conscious or unconscious level. If, as I argue, the injury is differential treatment based on prohibited considerations, the injury is not affected by the level of consciousness at which the considerations operated. See Strauss, 56 U Chi L Rev at 960 (cited in note 40).

n56 This test resembles the test proposed by many commentators to determine discriminatory intent in the equal protection context. See, for example, Paul Brest, The Supreme Court, 1975 Term--Foreword: In Defense of the Antidiscrimination Principle, 90 Harv L Rev 1, 6-8 (1976); Ely, 79 Yale L J at 1266-68 (cited in note 40). David Strauss calls this the "reversing the

groups" test because it asks "if the government would have made the same decision even if the races of those affected had been reversed." Strauss, 56 U Chi L Rev at 957 (cited in note 40). Similarly, the test in the First Amendment context might be called the "reversing the ideas" test, because it asks whether the government would have made the same decision if different ideas were affected. Strauss criticizes the test in equal protection law on the ground that it forces courts to make speculative, counterfactual determinations. To the extent the test asks courts to consider the question of "reversal" directly, this criticism is valid; my argument, offered in Section III, is that First Amend- ment doctrine relieves courts of this impossible task by providing rules that capture the gist of this inquiry in a concrete and easily administrable fashion.

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This test is a measure of the neutrality or impartiality that the First Amendment often is said to command. n57 The First Amendment allows distinctions among speech on many bases. What it does not allow is classifications built on hostility or sym- pathy to ideas. The neutrality principle thus mirrors the doctrine of impermissible purpose. The government may classify speech to achieve legitimate governmental objects, such as the prevention of illegality or violence. But the government may not rest a clas- sification, even in part, on the ground that some messages are worthier than others. Differences of this kind with respect to ideas must count as legally irrelevant. To say that "there is an 'equality of status in the field of ideas,' " n58 is to say that the gov- ernment cannot regulate speech for such impermissible reasons.

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n57 See, for example, Carey v Brown, 447 US 455, 462-63 (1980); Police Department of Chicago v Mosley, 408 US 92, 96 (1972).

n58 Mosley, 408 US at 96, quoting Meiklejohn, Political Freedom at 27 (cited in note 15).

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2. A limitation, an objection, and a comparison.

One question about the principle just articulated relates to its scope of operation: does the principle apply only when the government acts in its traditional role as regulator of private speech, or does it also apply (in either pure or diluted form) when the government performs the increasingly important functions of speaker, employer, and educator? In this Article, I discuss the issue of governmental motive only in relation to restrictions on private speech; except for a few words, I leave for another time the question how the understanding of improper motive I have described translates (or does not) into contexts in which the gov- ernment itself performs speech functions. My thumbnail view is that the principle has greater relevance in these contexts than [\*433] might be thought, though less than when the government re- stricts private speech; n59 I also believe that the concept of illicit purpose should apply in these contexts even more strongly than it does, thus narrowing (though not eliminating) the importance for First Amendment analysis of the particular role the govern- ment is playing. But because I cannot defend these views in this Article, the key point here is one of limitation: the concept of

impermissible motive I have described refers to the government in its capacity as regulator of private expression.

-Footnotes-

n59 The law in this area is largely a mess, resisting any coherent understanding. If motive-based theory does not wholly explain the doctrine, neither does any other. See Kagan, 1992 S Ct Rev at 40-45 (cited in note 14).

-End Footnotes-

A second and, for my purposes, more important question concerns the coherence of the distinction I have drawn between motives based on harm and motives based on ideology--a distinction that might be viewed as possessing rhetorical appeal, but collapsing on deep reflection. n60 What is it, after all, to hate a message if not, and other than, to think the message causes injury? Perhaps opposition to speech on what I have termed "ideological" grounds--sheer hostility toward a message--does not exist as a real-world phenomenon. Perhaps such opposition always stems from, and thus reduces to, a conviction that the idea causes harms that the government has a legitimate interest in preventing. n61 If this is so, the distinction I have drawn might be said to rest only on the level of generality chosen to frame the critical question. Query 1: Why did officials restrict the expression? Answer 1: Because they disliked its message. Query 2: Why did the officials dislike its message? Answer 2: Because they believed the message caused material harm of a serious nature. If the distinction I have drawn depends on failing to ask the second question, then it seems a foundation too weak to support First Amendment doctrine.

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n60 I assume that the distinction between motives based on harm and motives based on self-interest is not so mysterious. It seems clear that self-interest can counsel a speech restriction that an evaluation of harm (at least of harm that can be counted as harm) would not.

n61 See Elena Kagan, Regulation of Hate Speech and Pornography After R.A.V., 60 U Chi L Rev 873, 880 (1993).

-End Footnotes-

This challenge is strong and the issue complex, but some examples indicate that the two kinds of motives, though closely interwoven, retain distinct characters. Assume that racist speech--or, to see the point from another perspective, assume that flag-burning--poses dangers: such speech may spark a riot, [\*434] induce a violation of law, or cause emotional injury. Not everyone will measure or respond to these potential harms in the same manner. Persons will differ both in assessing the magnitude (indeed, the existence) of danger and in deciding what amount of danger will justify a restriction. And these divergent judgments about the harm the speech causes and the need to limit it rest in part on what I have said cannot count in the equation: the desire of persons, conscious or not, to suppress ideas that challenge (just because they challenge) and to privilege ideas that ratify (just because they ratify) their own belief systems.



So too we might explain other instances, past and present, of deciding when neutral interests counsel a restriction on speech. Consider the core cases of our free speech tradition, involving the questions whether speech opposing World War I or supporting communism threatened resistance to law or overthrow of the government. n62 Or consider the string of cases in the 1960s raising the issue whether civil rights protests would cause public riots. n63 Or consider this past year's debate as to whether right-wing talk radio provokes crimes of violence. n64

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n62 See, for example, *Schenck v United States*, 249 US 47 (1919) (World War I); *Dennis v United States*, 341 US 494 (1951) (communism).

n63 The Court held unconstitutional in these cases the actions of Southern law enforcement officers in dispersing (shall we say "prematurely") civil rights demonstrations on the ground that they would provoke a riot or other hostile audience response. See *Edwards v South Carolina*, 372 US 229, 237-38 (1963); *Cox v Louisiana*, 379 US 536, 550-51 (1965). Professors Sunstein and Fiss have interpreted these cases to require affirmative police protection of any speaker whose words arouse a threatening response. See Cass R. Sunstein, *Free Speech Now*, 59 U Chi L Rev 255, 273-74 (1992); Fiss, 100 Harv L Rev at 786 (cited in note 19). I think the decisions have a narrower meaning, consistent with the theory I have proposed. The decisions established not a duty to provide police protection for all speakers, but rather a duty to provide as much police protection for speakers whose ideas officials hate as for speakers whose ideas the officials approve.

n64 Ronald Dworkin has suggested another example to make a similar point. He asks why the feminist movement has focused so much attention on pornography when (by his estimation) "popular forms of mass culture--the view of women presented in soap operas and commercials, for example--are much greater obstacles to [ ] equality than the dirty films watched by a small minority." Ronald Dworkin, *Women and Pornography*, NY Rev Books 36 (Oct 21, 1993). He concludes that pornography, though less harmful than these other forms of culture, is more detestable--that the rawness with which it expresses the idea of sexual subordination causes it to be "deeply offensive in itself, whether or not it causes any other injustice or harm." Id. Dworkin, of course, may be wrong about the relative harms caused by these two forms of speech. But his example suggests the potential for purely "ideological" motives to influence regulatory proposals and the estimations of harm on which they are built.

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As examples of this kind suggest, hostility toward speech (or its opposite) may affect the decision to regulate speech, separate from and independent of neutrally conceived harms. n65 Such hostility no doubt may derive from the fact of harm and have no significance of its own. But so too hostility toward ideas may exist apart and freestanding, or even impel the judgment of harm. Most often, perhaps, the two kinds of motives become hopelessly entangled, as one influences the other which in turn influences the first in a kind of endless feedback loop. But the complexity of this relationship--the way the different motives interact with each other, on both a conscious and an unconscious level--should not obscure the role that ideological factors may play. Hostility against speech (or sympathy toward it) may lead the government

or public to overassess (or underassess) the harm speech causes. Likewise, hostility against speech (or sympathy toward it) may lead the government or public to tolerate a lesser (or greater) degree of the harm than it otherwise would. In either case, hostility (or sympathy) is doing some of the work in the decision to impose a limit on speech. The desire to suppress for its own sake--the tendency to count challenge or opposition itself as harm--is impermissibly entering into the calculation. n66

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n65 See also Schauer, Free speech at 82 (cited in note 39) (noting "in people a desire for unanimity, an urge to suppress that with which they may disagree even if there seems no harm to that expression").

n66 The complex relationship between harm and ideology has a familiar analogue in equal protection law. Discrimination on the basis of race, gender, and so forth often has a basis in reason--in accurate generalizations about the different characteristics, behaviors, and needs of members of particular groups. But such discrimination also often has a basis in fear, loathing, and prejudice. Hatred of this kind in part may emerge from actual difference, in part may exist as something independent, in part may construct and influence the perception of difference. The entanglement of hostility and harm-based reasons in First Amendment law is in many ways similar.

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The distinction between harm-based and ideological motives I have offered here differs from a distinction several other commentators have drawn relating to governmental purpose. They have argued that the great divide is between laws based on the communicative effect of speech and those based on other effects--or more narrowly, between laws based on the "persuasive" effect of speech and those based on other effects. When phrased in terms of communicative effect, the argument runs as follows. The government may not restrict speech for any reason having to do with either the messages embedded in the speech or the consequences of those messages; the government may impose restrictions for reasons relating only to aspects of the speech independent of and extraneous to the message, such as the speech's decision level. n67 When phrased, alternatively, in terms of "persuasive" [\*436] effect, the argument has a narrower cast. It now posits that the government may not restrict speech for any reason having to do with either the message itself or the ability of the message to persuade listeners to take some action. n68 So whereas my conception of motive countenances (to use but a few examples) reasons relating to the capacity of speech to cause psychic trauma, trigger a hostile audience response, or persuade an audience to violate a law, the communicative effects theory views all of these reasons as impermissible, and the persuasive effects theory rules out the final reason, though not the two others.

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n67 The concept of communicative effects has received its fullest explication in the work of John Hart Ely and Laurence Tribe. See John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 110-11 (Harvard 1980) (asking whether "the evil the state is seeking to avert . . . arises from something other than a fear of how people will react to what the speaker is saying"); Laurence Tribe, American Constitutional Law section 12-2 at 789- 90 (Foundation 2d ed 1988)

"If the constitutional guarantee is not to be trivialized, it must mean that government cannot justify restrictions on free expression by reference to the adverse consequences of allowing certain ideas or information to enter the realm of discussion and awareness.").

n68 See Scanlon, 1 Phil & Pub Aff at 212-13 (cited in note 39); Strauss, 91 Colum L Rev at 334 (cited in note 39) ("The government may not justify a measure restricting speech by invoking harmful consequences that are caused by the persuasiveness of the speech."). A still narrower version of this theory might posit that the government is forbidden from restricting speech on the ground that it will persuade people to adopt wrong or false opinions (rather than persuade people to take actions causing harm). If phrased in this way, the principle becomes compatible (indeed, is largely synonymous) with my description of impermissible motive.

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These alternative theories are deficient in two respects. First, they conflate motives that I have just argued differ from each other, albeit in a complex, shifting, and elusive manner. Second, and more important for my purposes, they fail as descriptive theories of what constitutes illicit motive in First Amendment law. Courts in fact allow the government to restrict speech for reasons concededly related to its communicative (including persuasive) effects. True, the government usually must meet a heightened standard when it justifies a law on these grounds. n69 But if the motives identified by these theories were impermissible, in the way I use the term, a court would have to invalidate in all circumstances restrictions concededly based on them. A reason that is impermissible cannot count as a reason because it refers to a thing that cannot count as a harm. Reasons related to communicative or persuasive effects are not of this kind: the [\*437] government may count such effects--for example, violations of law arising from advocacy--as cognizable harms and may move to prevent them upon showing a real need to do so. n70 By contrast, what I have termed "ideological" reasons are indeed off-limits. The government may not count a challenge to governmental officials or official opinion as a harm and may not restrict speech to defeat such a challenge, even if the restriction is essential for achieving this purpose. The line between licit and illicit reasons thus lies not where these alternative theories have placed it, but between harm-based and ideological motivations. n71

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n69 The heightened standard actually arises from the content-based terms of a law rather than from its underlying justification. Of course, the distinction between content-based and content-neutral laws may serve as an easily administrable device to test for impermissible motive. See Section III.A. But as I explain in the text, the structure of First Amendment law belies the view that all reasons relating to the communicative or persuasive effects of speech are impermissible.

n70 The prevailing standard, emerging from Brandenburg v Ohio, allows the government "to forbid or proscribe advocacy of the use of force or of law violation . . . where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 US 444, 447 (1969). In cases of standard-fare criminal solicitation, with no political or "public" character, most scholars assume a lesser standard would

apply. See, for example, Kent Greenawalt, *Speech, Crime, and the Uses of Language* 110-26 (Oxford 1989). Such cases thus pose even starker counterevidence for any theory of impermissible motive based on communicative or persuasive effect. So too do cases dealing with speech proposing an illegal commercial transaction, which the government also may regulate freely under the First Amendment. See *id.* at 270-71.

n71 I do not claim that the notion of communicative effect has no operative meaning in the law. As I discuss in Section III, First Amendment doctrine sometimes uses this notion to aid in the search for the true impermissible--that is ideological--motive.

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But if I am correct that the central prohibition of the First Amendment relates to ideological motive, then the practical import of the Amendment would seem nonexistent. Even assuming there is such a thing as a governmental motive in the sense I have used the term, how would a court ever discover the motive that I have said is off-limits? Officials will not admit (often, will not themselves know) that a regulation of speech stems from hostility or self-interest. They will invoke in each case a plausible interest, divorced from ideological disapproval, to restrict the affected expression. Then, perhaps, even a speech-protective court will have to approve the government's action. Or will it? The next Section focuses on this question. It first discusses briefly the difficulty of making a direct inquiry into governmental motive, as well as the very coherence of this project. It then addresses, more fully, the possibility of ascertaining motive through indirect means, by using a set of rules directed to the face of legislation that will demarcate very roughly the set of governmental actions most likely to have arisen from illicit motive. [\*438]

C. Surmounting Problems of Proof

It has become a commonplace among both judges and scholars that the search for legislative intent--indeed, the very notion of legislative intent--raises grave problems. One set of questions relates to whether there is "a" legislative intent to be found. Consider that each legislator possesses a complex mix of hopes, expectations, beliefs, and attitudes. It is not obvious which of these mental states, or combination of them, constitutes her essential intent in voting for legislation. n72 Now consider that a legislature has many, perhaps hundreds of members. It is, if anything, less obvious how to combine different individual intents (assuming those exist) into a composite group purpose. n73

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n72 See Ronald Dworkin, *Law's Empire* 321-33 (Harvard 1986); *Edwards v Aguillard*, 482 US 578, 637 (1987) (Scalia dissenting).

n73 See Dworkin, *Law's Empire* at 320-21 (cited in note 72). The branch of public choice theory growing out of Arrow's impossibility theorem presents an especially strong challenge to the notion that a collective body has an intent. See Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 *Intl Rev L & Econ* 239, 249-50 (1992); Frank H. Easterbrook, *Statutes' Domains*, 50 *U Chi L Rev* 533, 537-39 (1983). For a defense of the notion of legislative intent, see Andrei Marmor, *Interpretation and Legal*

Theory 159-72 (Clarendon 1992).

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A second set of questions assumes there is such a thing as legislative intent, but asks whether we can find it (and, if so, how). This is the aspect of the problem on which the O'Brien Court focused when it declared that "inquiries into congressional motives . . . are a hazardous matter." n74 Often, the Court recognized, evidence of legislative purpose will consist "of what fewer than a handful of Congressmen said about it." n75 But "what motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it . . . ." n76 Indeed, what motivates one legislator to make a speech about a statute is not necessarily what motivates that very legislator to enact it. n77 The evidentiary materials available--floor statements, [\*439] committee reports, and so forth--provide a less than reliable guide to the intent of any individual legislator, let alone to the intent of the collective body.

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n74 391 US at 383.

n75 Id at 384.

n76 Id.

n77 The Court expressed this point in a slightly different way: it worried that legislation "could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." Id. Congress, that is, could respond to the judicial invalidation of a statute on grounds of improper purpose by passing the identical statute with a cleaned-up legislative record. This argument, often termed the "futility" concern, usually is treated as an independent reason--distinct from the difficulty of ascertaining legislative motive--to disdain an inquiry into purpose. See Ely, 79 Yale L J at 1214-15 (cited in note 40) (accepting the argument); Paul Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 S Ct Rev 95, 125-27 (rejecting the argument). The futility concern, however, rests entirely on the problem of ascertainability. If motive could be reliably determined, the Court would not fear futility, for it then could invalidate the reenacted, no less than the original, statute (assuming the motive remained the same). The problem of futility arises only because legislators, at any time, can feign a purpose they do not have.

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The conception of impermissible motive I use in this Article does not fall prey to questions regarding the coherence of the notion of collective intent. The issue of motive, as I have framed it, is one of but-for causation: would the restriction on speech have passed--that is, would the outcome of the legislative process have differed--in the absence of ideological considerations? n78 To answer this question, it is unnecessary to consider the essential intent of any individual, much less of the decision-making body; it is irrelevant whether any such intent exists or can exist as a conceptual matter. The "thing" that a court is attempting to find is only the intrusion of a particular factor in a way that affects the decision-making process. Whatever questions attach to the notion

of collective intent do not place in doubt these but-for causes of governmental action. n79

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n78 Compare Laurence H. Tribe, The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice, 1993 S Ct Rev 1, 33 n 79 ("The motive inquiry in the O'Brien context, for example, need go no deeper than to ask whether the law would have been enacted but for the fact that draft-card burning was being used for protest."); Brest, 1971 S Ct Rev at 119 (cited in note 77) ("It is inappropriate to ask which of several possible objectives was 'sole' or 'dominant' in the decisionmaker's mind: an illicit motive may have been 'subordinate' and yet have determined the outcome of the decision.").

n79 Moreover, conceptual doubts about legislative intent are irrelevant to my project, which is one of understanding the root sources of current doctrine. The Court has not allowed such doubts to prevent it from inquiring into motive--even into "sole," "dominant," or "essential" motive--in a variety of circumstances. For example, in determining the constitutionality of legislative action under the Establishment Clause and Commerce Clause, the Court specifically asks about legislative purpose. See Lemon v Kurtzman, 403 US 602, 612 (1971); Pike v Bruce Church, Inc., 397 US 137, 142 (1970). And as the O'Brien Court itself admitted, courts routinely explore legislative motive in interpreting statutes. 391 US at 383. Even if there is no such thing as legislative intent, the Court often acts as if there is. So long as this is true, objections to the concept of legislative intent do no damage to the claim that some aspect of doctrine, explicitly or implicitly, attempts to discover the intent of the legislature.

-End Footnotes-

But this conception of impermissible motive cannot avoid questions relating to the difficulty of finding the relevant object. True, the Court need not determine the collective sense of a decision-making body or even a single legislator's full state of mind. But the Court must perform a task that might be as hard: determining whether a particular factor played a but-for role in a [\*440] decision-making process. This task, in its most simplified form, involves reckoning how many legislators the impermissible consideration swayed and comparing that number to the margin of victory. n80 What O'Brien said about the hazards of inquiring into motive seems to apply in full to this inquiry. The standard evidence of legislative process provides an insufficient basis to make the requisite head count or even estimate its outcome.

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n80 There are many complications in determining whether ideological factors altered a legislative decision that this simplified statement of the problem ignores. Most notably, this statement overlooks the disproportionate influence that some legislators wield because of, among other things, their agenda-setting ability or their strategic importance on other issues. What if, for example, only one legislator harbored impermissible reasons for favoring a statute (all other legislators having legitimate, harm-based reasons), but she was the person responsible for bringing the statute to a vote? Or what if other legislators acceded to her wishes on the statute (having no strong views of their own) to get her vote on another issue? The critical issue is whether

impermissible reasons altered the outcome of the decision-making process; in both these cases, they did. But in both cases, it will not suffice to ask whether improper motives directly accounted for the votes necessary to enact the statute. The story about how improper motive affected the outcome is more complicated, raising even greater problems of discovery.

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Consider first, to highlight the difficulty of the endeavor, how a court would decide whether improper motive tainted the decision of even one legislator. Few legislators, of course, will admit to a constitutionally illegitimate purpose; the legislator instead will point to some real harm that the speech causes. Such a harm-based pretext usually will be available; cases in which the government tries to curtail speech that cannot plausibly be described as harmful are not common. Further, the legislator herself often will not know whether an illicit reason tainted her consideration of the law at issue, given the complex dynamic between legitimate assessments of harm and illegitimate attitudes toward opinions. To make matters worse, the judge handling the matter will possess her own views of the ideas restricted, which may affect her evaluation of the legislator's motives in the same diffuse and incalculable ways as the legislator's views initially affected her decision. Now consider how these difficulties multiply when a court must face the issues of aggregation involved in determining how illicit motive affected a multimember body. Hence the message of O'Brien: direct inquiry into motives for restricting speech very rarely will prove productive.

But the impracticality of this inquiry need not force courts to abandon the goal of invalidating improperly motivated legislation, if they can find another, more feasible way of pursuing that project. If courts cannot determine motive directly, by exploring [\*441] what went into the legislative process, perhaps they can determine motive obliquely, by looking at what came out of it. Suppose that courts could develop rules relating only to the terms of legislation; suppose further that these rules predictably operated to sort out actions that had impermissible motives from those that did not. By using these rules, courts could invalidate laws supported by improper reasons without ever confronting the problems of proof generated by a direct inquiry into motive. The function of the rules in flushing out impermissibly motivated actions might not be articulated or even understood. The rules would operate in an autonomous manner, removed from explicit consideration or discussion of the question of motive. But the two would remain integrally connected: the concern with motive would determine the scope of the rules, and the rules would give effect to the concern with motive.

So it might be in First Amendment law: perhaps the Supreme Court has constructed a set of rules that allows a judge to ferret out impermissible motives at the same time as it obviates any need to ask about this issue. We might think of these rules as proxies for a direct inquiry into motive or as rules of an evidentiary nature. These rules use objective criteria, focusing on what a law includes and excludes, on what classifications it uses, on how it is written. But in making such inquiries, the rules in fact serve as an arbiter of motive. Through use of these objective tests and rules, some rough sorting out takes place: between laws tainted by ideological motives and those not so blemished.

The roughness of this division should not be understated: these tests of governmental purpose necessarily will be imperfect--simultaneously under- and overinclusive. Still, it makes sense to use the rules, rather than to ask directly about motive, as it often makes sense to use rules rather than to rely on their underlying reasons. If courts cannot reliably (or cannot at all) determine whether the reason for the rules (here, improper motive) exists, then the mistakes made without any rules will exceed the mistakes arising from the rules' structure. n81 The decision to use such rules thus follows from the combination of one fundamental principle and one unfortunate fact. The principle is [\*442] that the First Amendment bans restrictions on speech arising from hostility, sympathy, or self-interest. The fact is that courts cannot enforce this ban directly.

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n81 For general discussion of this rationale for the use of rules, see Frederick Schauer, *The Second-Best First Amendment*, 31 Wm & Mary L Rev 1, 9-12 (1989). Just as rules better enable courts to determine legislative motive, the rules may perform the same function for legislators. Odd as it may seem, it may be easier for legislators to follow rules relating to the terms of a law than to follow a command not to consider illicit factors.

-End Footnotes-

If all this is so, the First Amendment rules of which I am speaking, though seemingly substantive in content, resemble in function such procedural mechanisms as presumptions and shifting burdens of proof. Consider how a different body of law responds to the difficulty of proving motive. Under the labor laws, an employer may not discharge an employee because of union activity. A court deciding whether such an act has occurred will shift the burden of proof on the question of motive to the employer once the employee has made a lesser (prima facie) showing. n82 In so doing, the law in effect establishes a rebuttable presumption: the law presumes improper motive from a set of facts merely suggestive of it unless the employer proves its absence. The rules of First Amendment law work in a similar manner. They too operate, though not overtly, to make a rebuttable determination of improper motive on the basis of some set of facts--for example, a content-based classification--suggestive but not dispositive of it. It is in this sense that I have spoken of these rules as evidentiary in nature: they, no less than such procedural mechanisms as presumptions and shifting burdens, serve to ameliorate troublesome problems of proving motive by giving exceptional weight to certain evidentiary materials.

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n82 See *NLRB v Transportation Management Corp*, 462 US 393, 403 (1983). A similar though less potent procedural mechanism, designed to accomplish the same object, is used in Title VII cases. See *Texas Department of Community Affairs v Burdine*, 450 US 248, 252-53 (1981).

-End Footnotes-

This hypothesis suggests a reinterpretation of O'Brien. No longer should that decision be viewed as a broad-scale stricture against invalidating regulations of speech on the basis of improper motive. That understanding of the case has always conflicted with too much in the Court's rhetoric and

decisions. O'Brien stands for a narrower proposition, relating not to the propriety of inquiring into motive, but to the means by which to conduct this inquiry. To be more precise, O'Brien stated not that motive was irrelevant, but only that it could not be proved by traditional methods. In so doing, the decision left open the option of adopting a different mechanism to discover motive. The Court, as the next Section of this Article shows, has chosen this course in its elaboration of First Amendment doctrine. [\*443]

### III. The Doctrine of Impermissible Motive

Let us accept that the First Amendment prohibits restrictions on speech stemming, even in part, from hostility, sympathy, or self-interest. And let us accept that the difficulty of proving this impermissible motive--resulting, most notably, from the government's ability to invoke pretextual reasons--gives rise to a set of rules able to flush out bad motives without directly asking about them. What would these rules look like?

The first rule would draw a sharp divide between content-based and content-neutral restrictions, with a fuzzier line bisecting the world of content-based restrictions into those based on viewpoint and those on subject matter. The second and third rules would specify exceptions to the first: instances in which a restriction, though content-neutral, demands heightened scrutiny because of suspect origin; instances in which a restriction, though content-based, could receive relaxed scrutiny because apparently safe. And the fourth rule would draw another sharp distinction, this time between actions directly addressed to speech and those affecting speech only incidentally.

These rules--the rules that would be devised to flush out illicit purpose--in fact constitute the foundation stones of First Amendment doctrine. Examining their structure reveals that the search for impermissible motive animates the doctrine, as the doctrine implements the search for motive.

#### A. The Distinction Between Content-Based and Content-Neutral Laws

The distinction between content-based and content-neutral regulations of speech serves as the keystone of First Amendment law. n83 Content-neutral restrictions on speech--restrictions that by their terms limit expression without regard to what is said--usually are subject to a fairly loose balancing test. So, for example, in reviewing a law that bans all billboards within city limits, the Court might consider the strength of the state interests asserted (say, in aesthetics and traffic safety), the availability of alternative means to protect those interests, the extent to which the law limits expression, and the existence of alternative avenues of communication. This analysis may well result in a decision that the law accords with the First Amendment. Content-based restrictions on speech--restrictions that by their terms limit expression on the basis of what is said--usually are subject to far more rigorous scrutiny. This is true even in cases like R.A.V. in which the government concededly could restrict the speech affected through a broader law written in content-neutral language. Formulations of the standard used to review content-based action vary, but the Court most often requires the government to show a compelling interest that could not be attained through less restrictive means. Application of this standard usually leads to a law's invalidation.

n83 The fullest description and analysis of this distinction remains Stone, 25 Wm & Mary L Rev at 189 (cited in note 15).

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Somewhat mitigating the starkness of this scheme, a further, hazier distinction operates within the realm of content-based regulation. Here, the Court often differentiates between view- point-based restrictions and all other content-based restrictions, including, most notably, restrictions based on subject matter. n84 So, for example, the Court would treat differently a law prohibiting the use of billboards for all political advertisements and a law prohibiting the use of billboards for political advertisements supporting Democrats. The former might meet constitutional standards; the latter would never succeed in doing so. It is not so much that the Court formally uses two different standards for subject matter and viewpoint regulation; in most contexts, a strict scrutiny standard applies to content-based action of all kinds. n85 But the Court, when reviewing subject-matter restrictions, either may apply a purportedly strict standard less than strictly or may disdain to recognize the law as content based at all. n86 By contrast, the Court almost always rigorously reviews and then invalidates regulations based on viewpoint.

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n84 See generally Geoffrey R. Stone, Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions, 46 U Chi L Rev 81 (1978).

n85 In some rare contexts--most notably, in nonpublic forums--the Court explicitly adopts different standards for subject-matter and viewpoint regulation. See Kagan, 1992 S Ct Rev at 42-43 (cited in note 14).



n86 For a case in which the Court applied a toothless version of strict scrutiny, see *Burson v Freeman*, 504 US 191, 198-211 (1992). For a case in which the Court pretended that a subject-matter restriction was content neutral, see *Rowan v United States Post Office Department*, 397 US 728, 737-38 (1970). Of course, in many subject-matter cases, the Court applies a strict scrutiny standard with all the rigor its name implies. See, for example, *Police Department of Chicago v Mosley*, 408 US 92, 98-102 (1972).

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This scheme makes no sense under the speaker-based model of the First Amendment. n87 Recall that this model treats as critical the sum total of expressive opportunities; the more a law [\*445] curtails the ability to speak, the greater its constitutional difficulty. Yet a content-neutral law, no less than a content-based law, can lessen the ability to speak; indeed, a content-neutral law can do so more dramatically. To use my earlier example, a general ban on billboards will reduce speech more than a ban on billboards for political advertisements, which in turn will reduce speech more than a ban on billboards disabling only Democrats. Yet under current law, the Court will subject the first of these ordinances to the most relaxed form of review and the last to the strictest. Consider in the same vein the cases of *Police Department of Chicago v Mosley* n88 and *Grayned v City of Rockford*. n89 In the

latter, the Court upheld a content-neutral ban on speech in the vicinity of a school; in the former, the Court invalidated a similar ban on the ground that it exempted speech about labor disputes from its general prohibition. Finally, recall the Court's view in R.A.V. that although a ban on all fighting words would have passed muster, with the category of fighting words treated as content neutral, n90 a ban on fighting words limited to a certain subject--worse, to a certain viewpoint--violated constitutional norms. Each of these examples shows that a concern with the extent of expressive opportunities cannot explain the most critical aspect of First Amendment doctrine.

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n87 See Redish, 34 Stan L Rev at 128-39 (cited in note 34) (criticizing the distinction on this ground); Stone, 25 Wm & Mary L Rev at 197 (cited in note 15) (acknowledging the point, but approving the distinction).

n88 408 US 92 (1972).

n89 408 US 104 (1972).

n90 The Court analogized the regulation of fighting words to the regulation of sound trucks, which of course is content neutral. The Court explained: "For purposes of [the First] Amendment, the unprotected features of fighting words are, despite their verbal character, essentially a 'nonspeech' element of communication." R.A.V., 505 US at 386. I discuss later the reasons for treating the category of fighting words as neutral with respect to the content of speech. See text accompanying note 182.

-End Footnotes-

Perhaps, however, a concern with the quality of the speech market--the concern of the audience-based model--may explain the distinction between content-based and content-neutral regulation. n91 The argument, anticipated in my discussion of R.A.V., relies on the "distorting" effect of content-based, and especially viewpoint-based, regulation. The edict "no billboards" on its face handicaps equally all ideas. The edict "no ads for Democrats on billboards," by contrast, disadvantages certain ideas to the benefit of others. Finally, the edict "no political ads on billboards" falls in between these extremes. Bans of this kind at the least disfavor one subject of discussion compared with others. And they often (at any rate, more often than content-neutral restrictions) operate to skew debate among competing ideas on a single subject: consider, for example, if in 1970 the government had banned discussion of the Vietnam War. Perhaps, then, current doctrine responds to the different ways in which viewpoint-based, subject-matter-based, and content-neutral laws distort public discourse, and thereby (in Meiklejohn's phrase) mutilate the community's thinking process.

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n91 For such an argument, see Stone, 25 Wm & Mary L Rev at 217-27 (cited in note 15); Sunstein, Democracy and the Problem of Free Speech at 170 (cited in note 19).

-End Footnotes-

Even assuming, however, that a law disparately affecting ideas necessarily skews the speech market--an assumption I contest shortly--this justification of the divide between content-based and content-neutral regulation suffers from two related weaknesses. n92 First, a doctrinal structure based on the problem of distortion seemingly would subject to heightened scrutiny whatever content-neutral rules fall much more heavily on one idea than others. Suppose, for example, that only Democrats, and not Republicans, use billboards to advertise; then, the skewing effect of a general ban on billboards would match the skewing effect of a law specifically barring Democrats from this forum. To put the point more generally, content-neutral laws often have content-based effects--and sometimes these are quite dramatic. A jurisprudence concerned with distortion should treat these cases with the utmost seriousness. But current doctrine all but ignores the distorting effects of content-neutral law. n93

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n92 I consider below whether a model focusing on motive also suffers from these weaknesses and conclude that it does not--or, at least, that it does not do so to the same extent. See text accompanying note 104.

n93 For discussion of the cases, see Stone, 25 Wm & Mary L Rev at 218-22 (cited in note 15). For an argument that content-neutral laws with significant content-based effects ought to be treated as if facially content-based because of the extent to which these laws distort debate, see Susan H. Williams, Content Discrimination and the First Amendment, 139 U Pa L Rev 615, 655-63 (1991).

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Second and conversely, a body of doctrine based on the problem of distortion apparently would subject to relaxed review any content-based laws that have only a modest tilting effect. Consider again our viewpoint-based billboard regulation; if neither Democrats nor Republicans use billboards, disallowing such use for one party only will not skew public discourse. Or recall again R.A.V. where the ban on racist fighting words could not seriously have distorted the deliberative process. In such cases, the small quantity of speech affected, combined with the ready availability of alternative means to communicate the "handicapped" idea, makes the danger of distortion insignificant. Yet First Amendment doctrine distinguishes not at all between content-based [\*447] laws of this kind and content-based laws that wholly excise ideas from public discourse. n94

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n94 For discussion of the case law, see Stone, 25 Wm & Mary L Rev at 200-01 (cited in note 15).

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One explanation of these oddities refers to the difficulty of deciding when a regulation has a skewing effect that is sufficiently large or small to alter the usual standard of review. n95 Any such decision necessarily will involve difficult questions relating to what speakers use what forms of speech, as well as to how effectively different forms of speech (both the form restricted and its alternatives) communicate a desired message. Perhaps, given these difficulties, the distinction between content-based and content-neutral

regulation functions as an imprecise (both over- and underinclusive) but still sensible mechanism for sorting out consequential from inconsequential skewing effects, in accord with the dictates of the audience-based model.

-Footnotes-

n95 See id at 224-27.

-End Footnotes-

This explanation, however, is unconvincing. True, there would be hard cases if courts evaluated skewing effects--cases involving tricky issues of measurement and line drawing. But such problems seem no more common or intractable in this adjudicative context than in many others, where no one thinks they preclude evaluative efforts. There also would be many simple cases as measured by an effects-based ruler--cases in which courts confidently could say either that a content-based law would have minor skewing effects or that a content-neutral law would cause major distortion. Recall again R.A.V., where the ordinance would have had utterly insignificant skewing effects. Were courts primarily concerned with distortion they would at least modify the strict distinction between content-based and content-neutral laws to respond to the host of cases in which they could directly evaluate skewing effects.

Indeed, to the extent this conclusion is wrong, it is so because of a fear of improper motive. Suppose, that is, there is some special reason to resist case-by-case line drawing with respect to the skewing effects of a speech restriction. What would this reason be? It likely would relate to the fear that a judge's own biases toward the speech affected would taint her decision as to whether the restriction had a severe or narrow skewing effect. n96 But if this is the reason for preventing judges from making [\*448] ing case-specific determinations as to distortion, then the doctrine arises from considerations of motive at least to this extent: that fear of illicit motive constrains and structures the inquiry as to effects. And if this is so, then it is at least true that the doctrine attempts not to create a distortion-free universe, but only to accomplish as much as can be accomplished in this direction consistent with an omnipresent fear of improper motive.

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n96 See id at 225 (Judges "may be influenced by . . . biases that may undermine their ability to evaluate accurately and impartially the extent to which particular . . . restrictions actually impair the communication of specific, often disfavored, messages."); Ely, Democracy and Distrust at 112 (cited in note 67) (Such evaluations "inevitably become involved with the ideological predispositions of those doing the evaluating.").

-End Footnotes-

But much more than this can be said. The discussion so far has assumed that the disparate impact of a law on ideas will distort the speech market. If that assumption is false, then the distinction between content-based and content-neutral laws--even if the most sensible way of determining whether a law disparately affects ideas--would not further the interest in balanced discourse.

In fact, this assumption is hard to defend, for as a conceptual matter, the disparate impact of a law on a set of ideas might lead to balance as easily as to distortion. n97 Remember that each regulation affecting speech acts against a backdrop of countless other regulations affecting speech, sometimes directly, sometimes incidentally. Among these are rules of property and contract, which provide some speakers with access to the most effective means of expression and consign other speakers to the least so. All these regulations, operating together, give shape and content to the realm of discourse, and given the nature of these rules --specifically, the ways they effect inequalities of wealth and access--the speech environment they create stands little chance of nearing the ideal condition. Distortion, skew, tilt--whatever one calls lapses from the ideal--will occur all over. In such a setting, any law with a disparate impact on ideas may succeed in balancing, no less than skewing, the speech market; conversely, any law affecting ideas equally may perpetuate a skewed, no less than a balanced, speech environment. As a logical matter, such laws will do the one thing no less than the other.

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n97 See text accompanying notes 19-20. For fuller discussion, see Owen M. Fiss, Free Speech and Social Structure, 71 Iowa L Rev 1405, 1410-13 (1986); Sunstein, Democracy and the Problem of Free Speech at 177-80 (cited in note 19).

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The distinction between content-based and content-neutral regulation thus cannot rest on a pure audience-based approach to the First Amendment. It is true that this distinction reflects the likelihood that a law will change the prevailing structure of public comment. But if that structure itself departs from the ideal--if, in Meiklejohn's words, the existing distribution of views itself "mutilates" the "thinking process of the community" n98 --then the presumption against content-based law may not serve to protect this process. In such a world (which is our world), a content distinction has no necessary tendency to impede the goals of the audience-based model.

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n98 Meiklejohn, Political Freedom at 27 (cited in note 15) (emphasis omitted).

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Indeed, this model of the First Amendment might well command (not merely tolerate) the use of content discrimination in some circumstances. As one proponent of the view has urged, "governmental action . . . based on content . . . might be needed to protect our freedom" by ensuring that "public debate is enriched and our capacity for collective self-determination enhanced." n99 No proposal could be further from current doctrine; the use of the audience-based model seems to counsel discarding the keystone of the law for its opposite.

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n99 Fiss, 71 Iowa L Rev at 1415 (cited in note 97). See also Sunstein, 59 U Chi L Rev at 290-91 (cited in note 63) ("Efforts to restructure the

marketplace [of ideas] might even be seen as the discharge of the legislature's constitutional duty, a duty that courts are reluctant, for good institutional reasons, fully to enforce.\*).

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Few courts or commentators would view with equanimity a reform of this kind; indeed, even proponents of the audience-based model might favor the Court's decision to use as its benchmark the actual, rather than the perfect, distribution of viewpoints. The stated reason might run something as follows: no matter how unhealthy the existing speech market, governmental action directed at the content of speech would cause in most cases further harm. But given all I have said, how is it possible to defend this assertion? The answer to this question will suggest the deepest wellspring of First Amendment doctrine--the concern that drives and indeed defines all others.

One explanation for our choice of benchmark refers to the difficulty--even the incoherence--of defining the ideal realm of discourse. n100 We do not have a full picture of what a well functioning marketplace of ideas would look like. Who would say what in such a system? At what point would an idea become over- or underrepresented? Perhaps we can provide no account of the optimal mix of expression. And if we cannot describe the ideal, perhaps we also cannot decide whether an action would bring us closer to, or take us further from, this state of perfec- [\*450] tion. The government, on this view, could not tell whether its decisions respecting ideas would ameliorate or exacerbate distor- tion. Hence derives the command to leave things alone.

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n100 For fuller discussion of these issues, see Strauss, 91 Colum L Rev at 349 (cited in note 39); Strauss, 1993 U Chi Legal F at 202-10 (cited in note 20).

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But this account of the presumption against content-based regulation of speech suffers from two notable defects. First, the folly of attempting to evaluate these matters can be overstated. Even without a fully fleshed out conception of the ideal, observers sometimes will be able to make sensible claims about what prob- lems of distortion exist and how to fix them. For example, it is not incoherent (it may even be correct) to suggest that campaign finance restrictions would improve the speech market. Of course not everyone will agree on these matters, but not everyone agrees on any matter respecting the desirability of governmental action. The key point is that it will not always (even if it will often) be impossible to reach a cogent, well supported decision on the ef- fects of regulation on the existing speech market.

Second, and more important, the presumption against con- tent-based action cannot arise from an inability to evaluate skew- ing effects, even assuming this inability existed. Recall that all governmental action, whether or not directed toward the content of speech, has effects on the speech market. If we command the government to forego content-based regulation, on the ground that we cannot evaluate its effects, we do not command the gov- ernment "to leave things alone"; we instead command the govern- ment to let stand the effects of content-neutral action, which we also cannot evaluate. The theory at issue

here provides no reason for preferring the one set of effects to the other. Thus, the difficulty of evaluating distortion, taken alone, cannot justify the distinction between content-based and content-neutral regulation; it could as well explain a presumption against the one as against the other--or against both, or against neither.

A better explanation for measuring distortion by reference to the ex ante distribution of views--for assuming that content-based action will skew public debate--relates to fear of impermissible governmental motive. We presume that content-based regulation will exacerbate rather than minimize existing bias because we believe that such regulation is disproportionately linked to suspect motives. Suppose, that is, that the content-based nature of an action provides a special reason to distrust the government's motives; this distrust then provides a reason to conclude, without further evidence, that the action's effects are untoward. On this account--the only one that makes sense--the [\*451] view that content-based regulation skews debate reduces to the view that content-based regulation emerges from illicit motives.

The goal of the doctrine, then, must be to identify a set of improper motives, which themselves may give rise to untoward consequences--not to identify a set of untoward consequences defined independent of improper motives. Purpose is the crux of the matter--whether, as suggested above, the concern with purpose ultimately has something to do with consequences, or whether, as discussed in Section IV, the concern has other, nonconsequential sources. The critical question is thus whether the distinction between content-based and content-neutral action--more specifically, the distinction among viewpoint-based, other content-based, and content-neutral action--facilitates the effort to flush out improper purposes.

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n101 Otherwise put, the concept of skewing effects in the law of the First Amendment means only whatever effects arise from actions based on illicit motive.

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The distinction in fact serves just this function: it separates out, roughly but readily, actions with varying probabilities of arising from illicit motives. Consider again our billboard laws. Ideological reasons are unlikely to taint the content-neutral statute, which prohibits billboards of any content. Because the statute applies to all ideas, a legislator's decision to support it probably will not rest on hostility or sympathy to particular messages. (Such circumstances are equally unlikely to taint a court's decision to uphold the statute.) By contrast, improper purpose probably will infect the viewpoint-based statute, which prohibits the use of billboards to endorse candidates of a single party. Here, a legislator's view as to the merits of particular ideas--the idea restricted and its competitors--will intrude, whether consciously or not, on the decision whether the harms caused by the speech justify the regulation. (Likewise, a court probably will incorporate impermissible considerations in ruling on the statute.) A concern with governmental purpose--unlike a concern with effects on speaker or audience--thus explains the division between restrictions applying to all viewpoints and restrictions applying only to one.

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n102 See Stone, 25 Wm & Mary L Rev at 230-33 (cited in note 15).

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So too the concern with purpose explains the intermediate treatment given to subject-matter restrictions. Hostility or sympathy toward ideas is less likely to taint a subject-matter restriction than a viewpoint restriction precisely because the former, by its terms, applies to a range of ideas. But a subject-matter re- [\*452] striction poses a greater risk of improper purpose than the usual content-neutral law. Consider again a ban on political speech in a given forum (in my running hypothetical, on billboards). Though neutral reasons may support such a ban, n103 there is heightened danger that the government is acting in part for illicit reasons--because, say, officials know that a disfavored political group disproportionately uses this mode of communication. Such a purpose could infect as well the law banning all billboards, but as the law applies to an ever greater range of ideas, the probability of taint decreases.

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n103 The government offered such legitimate justifications in Greer v Spock, 424 US 828 (1976), and Lehman v City of Shaker Heights, 418 US 298 (1974), which involved bans on political speech on an army base and in a mass transit system's advertising space. The government in the former case invoked the interest in keeping the military removed, in both appearance and reality, from partisan causes. Greer, 424 US at 839. The government in the latter case pointed to administrative problems involved in allocating limited space to political candidates. Lehman, 418 US at 304. Both of these motives, in the scheme of this Article, are perfectly permissible.

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Finally, the focus on purpose explains why First Amendment doctrine ignores the severe skewing effects of some content-neutral laws and the slight skewing effects of some viewpoint-based laws. It is true that such effects may offer evidence relating to motive; presumably the greater the skewing effect, the greater the chance that illicit considerations have intruded. But in most cases a law's terms more reliably indicate illicit motive than its effects and thus should control the legal analysis. n104 A content-neutral law, even when it has severe skewing effects, poses only a minor risk of improper motive because the law creates such effects along so many dimensions. The diffuseness of the law outweighs the severity of its impact on any particular idea as evidence of motive. Conversely, a content-based law, even when it has insignificant skewing effects, presents a substantial risk of impermissible motive because the effects occur in so narrow an area. The focused nature of the law outweighs the mildness of its impact on an idea as evidence of motive. This is why courts would treat differently our three billboard laws even if, as could be true, the laws similarly affected the distribution of political views. The terms of the laws indicate, even if the effects of the laws do not, disparate risks of improper motive.

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n104 I here put to one side the concern that bias will infect the measurement of a law's skewing effects. These concerns only strengthen the conclusion that the face of a law indicates more reliably than the effects of the law what purposes underlie it.

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The distinctions among viewpoint-based laws, other content-based laws, and content-neutral laws thus create a set of presumptive conclusions about when improper motive has tainted a restriction on speech. These distinctions will suggest some "wrong" results, for some viewpoint-based laws arise solely from legitimate reasons and some content-neutral laws arise partly from their opposite. We tolerate the imprecision because the alternative--a direct inquiry into motive--will produce even more frequent errors. If the facial markers we use are not perfect, they are better than what they replace.

We also attempt to mitigate the imprecision by making the outcomes suggested by these facial distinctions presumptive only and requiring courts to consider evidence to the contrary. But this evidence of motive again takes an indirect form: it resides at this stage in the substantiality of the asserted legitimate interest for the restriction and the closeness of the fit between that interest and the terms of the law.

So, for example, the strict scrutiny standard--indeed, each component of it--is best understood as an evidentiary device that allows the government to disprove the implication of improper motive arising from the content-based terms of a law. n105 This is true first of the compelling interest requirement: the stronger the state interest asserted, the more likely it is that the government would act to achieve that interest in the absence of antipathy toward the speech affected. Similar reasoning applies to the demand for close tailoring. If a restriction applies to more speech than necessary to achieve the interest asserted, the suspicion deepens that the government is attempting to quash ideas as ideas rather than to promote a legitimate interest. And if a restriction applies to less speech than implicates the asserted interest, so too the concern grows that the interest asserted is a pretext. n106 But if a restriction fits along both dimensions--if it applies to all and also to only the speech that threatens the asserted interest--then there is an assurance that the government has acted for proper reasons. In this way, the strict scrutiny test operates as a measure of governmental motive. The showing that the government must make under that standard does not serve, as on a scale, to outweigh impermissible motive or counter its harms. The showing instead serves an evidentiary function: to disprove (again, of necessity indirectly) the inference of bad motive that arises from the content-based face of a law. n107

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n105 John Hart Ely has made a similar argument on the use of strict scrutiny in equal protection law. See Ely, *Democracy and Distrust* at 145-48 (cited in note 67). There, a compelling interest and a close fit between means and end negate the presumption of illicit motive arising from use of a suspect classification such as race. In the First Amendment context, matters are the same, except that the suspect classification is content.

n106 In effect, the content-based nature of the law has raised suspicions so great that the usual defense of taking "one step at a time," see *Williamson v*

Lee Optical Co., 348 US 483, 489 (1955), is unacceptable. We view the underinclusive action not as a first step toward achieving a legitimate end, but as confirmation of an illegitimate purpose. See, for example, Erznoznik v City of Jacksonville, 422 US 205, 214-15 (1975) (holding that an ordinance prohibiting nudity in drive-in movie theaters could not be justified as a traffic regulation because "a wide variety of other scenes in the customary screen diet . . . would be no less distracting").

n107 Justice Kennedy has expressed a similar view of the function of the strict scrutiny standard in First Amendment law. He has written that "the compelling interest test . . . determines the accuracy of the justification the State gives for its law." Free-man, 504 US at 213 (Kennedy concurring). I take this to be another way of saying that the strict scrutiny standard is a tool for discovering the government's real motive.

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A similar mechanism, though operating in reverse, is necessary to assess the constitutionality of content-neutral laws. So long as a content-neutral law has differential effects on particular ideas--even assuming those effects are widely dispersed--it may bear the taint of improper motive. Officials may care so much about suppressing a particular idea affected by a content-neutral law as to disregard or tolerate the law's other consequences. Or, in a slightly different vein, officials may desire a broad-scale entrenchment of status quo positions and enact a law restricting all expression in a certain sphere in order to achieve this object. n108 Such a restriction, in addition to benefiting ideas already accepted, allows the government to emerge as the dominant speaker in the sphere, able to control opinion through speaking itself rather than through regulating the speech of private parties. For these reasons, the presumption that content-neutral laws are untainted by impermissible motive must remain just that--a presumption subject to rebuttal.

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n108 Subject-matter restrictions accomplish a narrower de facto favoring of status quo positions: for example, a law prohibiting all discussion of the government's foreign policy will favor whatever views on that policy are currently dominant. In such a case, the danger of impermissible motive is significant because of the restricted scope of the law (and of the consequent skewing effect). Content-neutral laws, which favor status quo positions generally, pose a lesser, but still cognizable, danger.

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The relatively deferential standard governing the constitutionality of content-neutral laws serves this kind of evidentiary function. Just as passing strict scrutiny demonstrates that a content-based law has a legitimate purpose, thus rebutting a presumption of impropriety, so flunking this looser standard demonstrates that a content-neutral law has an illegitimate basis, thus rebutting the opposite presumption. The way this occurs should by now be clear. The less significant the legitimate interest supporting the law, the greater the reason to distrust the government's action. Similarly, the looser the fit between the interest asserted and the contours of the law, the greater the cause for suspicion. At a certain point--when the asserted interest is insubstantial or when it does not fit the scope of the challenged

regulation--the usual presumption of proper purpose topples; there is reason, then, to think that the law, though content neutral, has been tainted by impermissible purpose. n109

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n109 The Court's "public forum" doctrine can be seen as establishing a kind of backstop to this relatively easy test for illicit motive. Even if a content-neutral law tainted with improper motive manages to pass this test, the public forum doctrine may prevent the law from operating in certain places. Thus, public forums serve as a kind of safe harbor for speech, providing in certain areas an extra level of protection. Of course, public forum doctrine also functions to ensure a minimum level of opportunities for expression, in line with the speaker-based model of the First Amendment. Viewed from this perspective, public forum doctrine insulates a zone of speech against even properly motivated governmental action; only outside that restricted zone does the question become one of motive.

-End Footnotes-

I do not mean to say that review of content-neutral regulations serves only, or even primarily, as a mechanism to discover bad motive. The review of content-neutral laws also functions to ensure adequate expressive opportunities, in keeping with what I have called the speaker-based perspective. If expressive activity has special value to individuals, then the government should have to justify in a special way, by offering unusually weighty countervailing interests, any restriction on expression. n110 In this way, one of the effects-based models supplements the purpose-based model in explaining the standard of review for content-neutral legislation. n111

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n110 This rationale explains the tendency of the Court, in practice, to review content-neutral regulations more strictly when they have a severe effect on expressive opportunities and less strictly when they have a modest effect. See Geoffrey R. Stone, Content-Neutral Restrictions, 54 U Chi L Rev 46, 58-59 (1987). Under the speaker-based theory, as the effect of a law on expressive opportunities increases, so too should the government's burden of justification. A motive-based theory might add a further reason for varying the standard of review in this way. As the impairment of expressive opportunities increases relative to the importance of the asserted governmental interest, so too does the suspicion grow that the government is acting for illegitimate reasons.

n111 The audience-based model of the First Amendment explains less well than its competitors the standard of review applied to content-neutral legislation. If "what is essential is not that everyone shall speak, but that everything worth saying shall be said," Meiklejohn, Political Freedom at 26 (cited in note 15), then some content-neutral restrictions on speech (like some content-based restrictions) will count not as harms, but as positive goods. The "traditional American town meeting," id at 24, which Meiklejohn used as the model of public debate, indeed depends on rules of order. Some content-neutral laws, of course, may restrict speech so broadly as to disserve the interests of the audience. But the audience-based theory, taken alone, cannot explain the practice of subjecting not only these but all content-neutral laws to special scrutiny. For that result to follow, it is necessary to refer either to the interests of

potential speakers or to the possibility of improper purpose on the part of legislators or judges.

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But only the purpose-based model can explain the difference in the levels of review applicable to content-based and content-neutral laws. In justifying this distinction, the speaker-based model provides no assistance. The audience-based model becomes useful only to the extent that it reduces to a motive inquiry, concerned not with skewing effects per se, but only with such effects as arise from, and are defined by, illicit purpose. It is the quest for purpose that drives the doctrine--that explains the divergent treatment given to content-based and content-neutral laws. So too that quest explains the creation of exceptions to this doctrinal division: instances in which the courts treat facially content-neutral laws as content based or facially content-based laws as content neutral. The next two Sections deal with these exceptions and the role of motive analysis in explaining them.

B. "Suspect" Content-Neutral Laws

Although most content-neutral laws pose small danger of stemming from improper purpose, some such laws present greater risk. Three kinds of content-neutral laws, in particular, raise the same specter of improper purpose as the typical content-based governmental action. This suspect trio of facially content-neutral laws consists of (1) laws conferring standardless discretion on administrative officials; (2) laws turning on the communicative effect of speech; and (3) laws attempting to "equalize" the speech market. Because these laws, though content neutral, sound the alarm of illicit purpose, First Amendment doctrine treats them just as it does content-based actions. Here too, the standard applied operates as a presumption of improper motive, adopted in response to difficulties of proof.

1. Laws conferring discretion.

Consider this law: "It shall be unlawful for any person to maintain and operate . . . any radio device, mechanical device, or loud speaker . . . which is so placed and operated that the sounds coming therefrom can be heard to the annoyance or inconvenience of travelers upon any street . . . [except if ] the same be done under permission obtained from the Chief of Police." n112

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n112 Saia v New York, 334 US 558, 558-59 n 1 (1948).

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In Saia v New York, the Court held this ordinance unconstitutional on its face because it prescribed "no standards . . . for [\*457] the exercise of [the police chief 's] discretion." n113 The Court likewise has invalidated laws broadly empowering officials to grant (or deny) permission to distribute leaflets, hold parades, or erect newsracks on public property--all, again, on the ground that the laws failed to cabin appropriately administrative discretion. n114 In none of these cases did the Court wait to find that the

admin- istrator actually had abused her discretion. In several of the cases, the administrator had no opportunity to engage in abuse because the speaker never applied for the requisite license. n115 In most of the cases, the administrator might well have succeed- ed in denying the license (assuming the speaker had applied) under a properly drafted statute. The constitutional problem in the cases thus arose not from any administrative decision re- stricting speech, but from the wide authority that the statute gave to administrators to restrict speech, both then and in the future. n116 Otherwise put, the rule established in these cases responded not to any actual abuse of governmental authority, but only to the potential for abusive conduct.

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n113 334 US 558, 560 (1948).

n114 See *Lovell v City of Griffin*, 303 US 444, 450-51 (1938) (leaflets); *Shuttlesworth v City of Birmingham*, 394 US 147, 150-51 (1969) (parades); *City of Lakewood v Plain Dealer Publishing Co.*, 486 US 750, 769-70 (1988) (newsracks).

n115 See *Lovell*, 303 US at 448; *Lakewood*, 486 US at 754.

n116 As the Court stated in *Freedman v Maryland*, "in the area of freedom of expres- sion . . . one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license." 380 US 51, 56 (1965).

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What could account for a rule of this sort? The best explana- tion, stated briefly for now, goes as follows. A law conferring standardless discretion effectively delegates to administrators the power to make decisions about speech on the basis of content. Such administrative decisions raise the same constitutional con- cern as do content-based laws: the danger of improper motive. Because courts cannot discover improper purpose directly, they use as a proxy the presumption against content-based distinc- tions. But likewise, because courts cannot easily determine, in the context of administrative action, when a content-based deci- sion has occurred, they here add a further prophylactic rule, designed both to prevent and to detect content-based administra- tion. The fundamental purpose of this rule barring standardless discretion thus resides in its capacity to assist in the campaign against impermissible motive. n117

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n117 A similar argument explains at least in part the First Amendment's vagueness doctrine. Vague laws delegate to administering officials a kind of standardless discretion- ary authority--here, to interpret and apply unclear language. Such discretion raises much the same concerns of improper motive as I discuss in the text.

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To amplify this understanding of the rule, it is best to begin by rejecting the alternatives. The speaker-based model cannot explain the rule against standardless licensing schemes because such schemes do not necessarily curtail more speech than other, less constitutionally suspect modes of restricting expression. To see this point, contrast Saia to Kovacs v Cooper, n118 decided seven months later. In Kovacs, the Court upheld an ordinance banning the use "upon the public streets" of any "sound truck, loud speaker, or sound amplifier." n119 The amount of speech that this ordinance limited must have exceeded the amount that the law in Saia curtailed; the latter, after all, allowed exemptions from the ban. The constitutional difficulty in Saia thus could not have stemmed from the extent of the restriction. The same is true of all standardless licensing schemes, which may restrict less, as well as more, speech than a cabined licensing system or a flat prohibition. n120 Nothing in the nature of standardless licensing indicates the amount of speech either actually or potentially restricted. If this is true, nothing in the nature of standardless licensing makes it peculiarly problematic from the standpoint of maximizing communicative outlets.

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n118 336 US 77 (1949).

n119 Id at 78.

n120 Another example comes from Lakewood, where the Court invalidated an ordinance regulating the placement of newspaper vending machines for failure to limit properly the relevant official's discretion. 486 US at 750. All Justices assumed for purposes of the case that the city could have chosen to ban all such vending machines. Id at 762 n 7; id at 773 (White dissenting). The objection to the licensing scheme thus could not have turned on the extent to which it curtailed expressive opportunities.

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Similarly, the audience-based model fails to explain the rule against standardless licensing schemes. Standardless licensing, as I will show, may well encourage content-based decisions, which punish and deter certain ideas as compared to others. n121 [\*459] Hence, the claim might go, standardless licensing, in Meiklejohn's phrase, mutilates the community's thinking process. But I have reviewed this claim before and found it wanting, except to the extent that it reduces to a concern with improper purpose. n122 As a conceptual matter, content-based actions as well may improve as mutilate the community's thinking process. So too, then, with the standardless licensing schemes that facilitate such actions. If there is reason to think that as a practical (rather than a conceptual) matter standardless licensing more often will distort than improve public debate, that reason relates to the fear of illicit motive on the part of licensing officials. n123 The real question, then, concerns governmental motive; it is whether a rule against standardless licensing will identify and reduce the incidence of improperly motivated administrative decisions.

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n121 The Court, in explaining why it recognizes facial challenges to standardless licensing schemes, often focuses on the way such schemes deter

or "chill" certain ideas. As the Court said in Lakewood:

The licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused. . . . It is not difficult to visualize a newspaper . . . feeling significant pressure to endorse the incumbent mayor . . . to receive a favorable and speedy disposition on its permit application.

486 US at 757-58.

n122 See text accompanying notes 96-101.

n123 The Court's repeated invocation of chilling effects in this context, see note 121, thus derives from the fear of improper motive. Standardless licensing schemes chill certain ideas and not others, as each speaker considers what speech will advance and what speech will hinder her attempt to obtain a license. The reason to assume that the resulting disparate impact necessarily will have adverse effects on public discourse relates to the danger that officials will allow inappropriate factors--hostility, sympathy, or self-interest--to taint their decisions.

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The rule against standardless licensing indeed serves this function of flushing out bad motive by establishing a safeguard against administrative action based on the content of expression. I have discussed already how and why impermissible motive more often taints content-based than content-neutral decisions. n124 This taint may affect administrative actions based on content no less than their legislative counterparts. Enforcing a prohibition on improperly motivated action thus would counsel adopting a presumption against any administrative decision based on the content of speech, which indeed the Court has done. But even more is needed to enforce the stricture against improper motive, for content-based administrative action (unlike content-based legislative action) is itself hard to identify. Suppose an official denies a license to a speaker under a statute specifying no standards; in the absence of an admission, a court cannot easily determine whether the official based her decision on the content of the speech (let alone whether she allowed impermissible motive to infect the decision). n125 To enforce the prohibition on content-based action--which is itself a proxy for a finding of impermissible purpose--the Court needs yet a further prophylactic rule, commanding facial invalidation of all statutes providing for standardless licensing.

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n124 See text accompanying notes 102-04.

n125 As the Court noted in Saia: "In this case a permit is denied because some persons were said to have found the sound annoying. In the next one a permit may be denied because some people find the ideas annoying. Annoyance at

ideas can be cloaked in annoyance at sound." 334 US at 562.

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Such a rule decreases the danger of content-based licensing decisions, which in turn decreases the danger of improperly motivated licensing decisions, in two related ways. n126 First, by requiring that a licensing scheme contain specific, content-neutral standards, the rule directly promotes administrative decision making in accordance with those, and only those, criteria. Although licensing officials may take into account the content of speech even in the face of formal constraints, they are less likely to consider content if the authorizing statute spells out neutral criteria than if it is silent on the grounds for action. Second, the requirement of specific standards facilitates judicial review of the bases of licensing decisions. Although standards hardly ensure that courts will detect licensing decisions grounded in content, they at least provide, as the Court has noted, "guideposts" to aid the inquiry "whether the licensor is discriminating against disfavored speech"; n127 without such standards to serve as a measuring stick, "the difficulty of effectively detecting, reviewing, and correcting content-based censorship 'as applied' " must increase. n128 Standards thus help to prevent and detect content distinctions and, even more critically, the impermissible motives that likely underlie them.

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n126 See David A. Strauss, The Ubiquity of Prophylactic Rules, 55 U Chi L Rev 190, 196 (1988).

n127 Lakewood, 486 US at 758.

n128 Id at 759. At a later point, the Court recognized that the ultimate question was not whether the administrative action was based on content, but whether it was supported by an illegitimate motive. The Court stated that "without standards to bound the licensor, speakers denied a license will have no way of proving that the decision was unconstitutionally motivated, and, faced with that prospect, they will be pressured to conform their speech to the licensor's unreviewable preference." Id at 760. Note here how the issue of chill is related to the issue of motive. See notes 121, 123.

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Simply put, the rule against standardless licensing statutes has emerged to prevent a legislature from displacing to administrators the power to make decisions regarding speech on the basis of a criterion--the content of expression--likely to involve impermissible motive. n129 The next rule I consider is similar, for [\*461] it too demands strict scrutiny of a content-neutral law that effectively delegates authority to others to make content-based decisions, raising concerns of improper motive--although here the delegates are not so much administrative officials as members of the public.

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n129 These statutes also may contain a hint of illicit legislative motive. Legislators, after all, know the dangers of conferring unfettered discretion

on administrators, and such discretion is not usually necessary to accomplish legitimate ends. Perhaps, then, a grant of standardless discretion indicates a legislative desire for administrators to engage in ideological censorship, which itself counts as improper motive.

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2. Laws turning on communicative effect.

Some laws are content neutral on their face, but turn in operation on "communicative effect"--that is, on the way an audience responds to the content of expression. n130 A common example is a breach-of-the-peace statute, as applied to persons engaged in expressive activity. n131 In the typical case, a speaker expresses certain ideas, an audience makes known its displeasure, and police officers, fearful of public disturbance, arrest the speaker. The statute under which the arrest occurs makes no reference to the content of speech; it applies to whatever speech provokes, or tends to provoke, a hostile reaction. Yet the courts act as if the statute referred in express terms to the ideas that prompted the response, upholding the conviction only on a showing of necessity. n132 The courts effectively overlook the facial neutrality of the law and focus instead on what sparks its application--the reaction of an audience to a message.

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n130 For discussion of the notion of communicative effect, see Ely, Democracy and Distrust at 111-15 (cited in note 67). For discussion of the law's treatment of content-neutral laws turning on communicative effect, on which my analysis is partly based, see Stone, 25 Wm & Mary L Rev at 234-39 (cited in note 15).

n131 See Gregory v City of Chicago, 394 US 111 (1969); Cox v Louisiana, 379 US 536 (1965). See also Edwards v South Carolina, 372 US 229 (1963) (common law breach of peace); Cantwell v Connecticut, 310 US 296 (1940) (same).

n132 See cases cited in note 131. In the hostile audience context, courts most often phrase the standard of review in terms of "clear and present danger," but the standard differs not at all from that used to review content-based statutes.

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At first glance, these cases seem mysterious under a motive-based theory, for breach-of-the-peace laws appear to raise few concerns of improper purpose on the part of the legislature. A desire to prevent violence counts as a legitimate, nonideological reason for restricting speech under the conception of improper motive used in this Article. Further, the risk seems small of hostility or self-interest creeping into the decision making process. If a statute were to prohibit specific ideas, on the ground that they provoked violence, we indeed would fear that dislike of those ideas influenced the legislature's decision. But a breach-of- [\*462] the-peace statute, or other similar law, preselects no particular ideas as posing a danger, instead applying to whatever speech, in the actual event, threatens violence. (Indeed, such a law may apply not only to speech, but also to conduct posing a risk of disorder; such breadth usually decreases further the chance of illicit purpose. n133 ) Thus, if the focus is on legislators' motives alone, the hostile audience cases seem wrongly decided.

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n133 See Section III.D.

-End Footnotes-

This conclusion, however, might come too fast, even if the focus remains on legislative motives. Legislators, after all, may well know what ideas will provoke a hostile response; at the least, legislators can guess that the ideas most likely to do so will be those most generally seen as controversial or offensive. Similarly, legislators may well know what ideas potentially falling within the statute most often will capture the notice of law enforcement officials. This broad sense of how the law will operate may taint any legislator's consideration of the law, whether she shares or disputes the views of the public and officials. Of course, a legislator also may anticipate the effects of other content-neutral laws, but these effects usually will be so numerous, disparate, and crosscutting as to minimize their potential to corrupt her decision. The case may be different as to a law that operates only against ideas that raise the ire of the public.

An even greater concern involves the motives of law enforcement officials. Hostile audience laws raise, though to a lesser degree, the same broad problem as standardless licensing schemes: the capacity of officials, under such laws, to take action based on their views of ideas. These laws, of course, do not authorize action on this basis. Further, enforcement officials may import into the administration of any restriction on speech such ideological considerations. But a bit of history suggests that hostile audience laws are especially prone to this abuse, as in case after case, decade after decade, police officers have responded hastily, to say the least, to the risk of disorder caused by disfavored speech. n134 Nor is this history very surprising, given the vague standards contained in most breach-of-the-peace statutes, which make such laws more than usually subject to discriminatory enforcement. n135 The facility with which improper motive may [\*463] taint--and the frequency with which it has tainted--the enforcement of hostile audience statutes thus provides another reason for treating such statutes with suspicion.

-Footnotes-

n134 See Gregory, 394 US at 111 (civil rights protest); Cox, 379 US at 536 (same); Edwards, 372 US at 229 (same); Feiner v New York, 340 US 315 (1951) (speech endorsing racial equality and criticizing public officials); Chaplinsky v New Hampshire, 315 US 568 (1942) (speech attacking religion and government); Cohen v California, 403 US 15 (1971) (speech attacking the draft).

n135 For example, the statute in Cohen prohibited any person from "maliciously and willfully disturbing the peace or quiet of any neighborhood or person . . . by . . . offensive conduct." 403 US at 16. Similarly, the statute in Gregory made it unlawful for any person to make "any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace." 394 US at 116 (Black concurring). See note 117 on the relationship between vagueness and improper motive.

-End Footnotes-

Most important, a hostile audience law, as applied, may constitute an improper delegation of authority to the public to suppress messages it disfavors. Consider how such a law operates in practice. A public disturbance of some kind triggers the restriction, but the content of the speech usually triggers the disturbance, and ideological considerations usually enter into the public's response to the speech's content. The constitutional difficulty grows out of this nexus between the government's action and the majority's viewpoint. First Amendment doctrine treats identically regulation stemming from incumbent officials' hostility toward ideas and regulation stemming from (or deferring to) the analogous attitudes of the majority. n136 As the government cannot itself censor citizens for ideological reasons, so too it cannot authorize one group of citizens to censor another. n137 This principle leaves the government free to restrict speech provoking a hostile response when necessary to prevent violence, but bars the government from restricting such speech in reflection of or deference to majoritarian bias. Stringent scrutiny of each application of a hostile audience law separates the one kind of action from the other; it ensures that the government has not simply empowered the public to restrict speech on the basis of content, with all the likelihood of ideological censorship such a restriction implies. n138

-Footnotes-

n136 See text accompanying notes 49-51.

n137 See Geoffrey R. Stone, Reflections on the First Amendment: The Evolution of the American Jurisprudence of Free Expression, 131 Proc Am Phil Soc'y 251, 258 (1987).

n138 The fighting words doctrine constitutes an exception to the principle that statutes turning on communicative impact, though facially content neutral, receive heightened scrutiny because they delegate to the public the ability to restrict speech based on content. I consider in Section III.C.1 why fighting words laws receive minimal scrutiny.

-End Footnotes-

The key to the analysis of this Section is first, the functional equivalence between statutes referring to content and statutes turning on communicative impact and second, the relation between content discrimination and impermissible motive. The first point is that laws turning on communicative impact (much like laws establishing standardless licensing schemes), though content neutral on their face, allow content-based actions in application, whether by enforcement officials or the public. The second point is that content-based action--whether on the face of a law or as it applies--raises the fear of improper motive. I now turn to one last case in which that fear comes into play, notwithstanding a statute's facial neutrality.