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INTRODUCTION

For those of us who do not interpret the first amendment as an absolute prohibition on governmental interference with free expression, the Supreme Court's failure to articulate its underlying values is a source of great difficulty. We are left to search not only for a pattern in the case law, but also for those principles that would identify such a pattern.[1] Such a search necessarily involves suggestions on how the different emerging doctrines about the first amendment may be harmonized.

The Court's treatment of regulations of speech aimed at affecting

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1. This approach is discussed in Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) [hereinafter cited as Redish, *Free Speech*].

behavior has been puzzling.[2] In a series of cases, the Court has considered whether a state may attempt to control behavior by controlling speech. One effect of such regulation is to discourage the participants on one side of the debate. Underlying the state's speech regulation may be a legitimate interest in discouraging harmful or undesirable activity, such as drinking, prostitution, smoking, wasteful energy use or groundless litigation. At issue here, however, is not the legitimacy of that state interest, but instead the availability of speech regulation to achieve that interest, especially when means other than those restricting speech are available. How far the state may go in regulating speech to affect behavior requires an evaluation of the nature of the regulation and the importance of the state interest to be furthered.

The first part of this two-part inquiry—that of the nature of the regulation—focuses on the basis for regulating speech. Apart from discredited attempts to establish the first amendment as an absolute,[3] the discussion centers on whether there should be one type of analysis for all regulations of speech or a variety of analyses keyed to the basis for the regulation, such as the type of speech, speaker, audience and method of regulation. There has been a proliferation of tests, suggested distinctions and bases for regulation.[4]

One frequently relied upon distinction is that of content-based regulation and content-neutral regulation. This distinction is premised on the belief that content-based regulations should be strictly reviewed by examining the compelling state interest that is purportedly narrowly served by the regulation, while content-neutral regulations need merely be reasonable regulations calculated to achieve a nontrivial goal.[5] Thus, to establish the level of scrutiny to which a particular type of regulation

2. *See, e.g.*, Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980); Dunagin v. City of Oxford, 718 F.2d 738 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 3553 (1984); Princess Sea Indus. v. State, 635 P.2d 281 (Nev. 1981), *cert. denied*, 456 U.S. 926 (1982). This article's subject is the regulation of harmful and undesirable speech—speech on which the state has made a substantive value judgment, but which has not been declared unlawful. For an examination of a state's ability to regulate unlawful speech, especially when it is also commercial, see Barnes, *Unlawful Commercial Speech: A Clear and Present Danger*, 1984 B.Y.U. L. REV. 457.

3. A recurring theme in first amendment theory is that speech should be absolutely protected. *See, e.g.*, Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245. But even absolute protection does not prevent speech regulation when it is more than speech. An example of this regulable speech activity is speech that is, in effect, action. As Justice Holmes suggested, the shouting of fire in a crowded theater goes beyond speech and can be regulated. Schenck v. United States, 249 U.S. 47, 52 (1919). More recently, Professor Farber has suggested that commercial speech has two functions: expression and contract formation. *See* Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U.L. REV. 372 (1979). Professor Farber suggets that the contract formation of speech should be regulable, while expressions of a commercial nature should be protected like any other category of speech. *Id.* at 386-90.

4. *See* Bork, *supra* note 3; Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981) [hereinafter cited as Redish, *Content Distinction*]; Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983) [hereinafter cited as Stone, *Content Regulation*].

5. *See* Stone, *Content Regulation*, *supra* note 4, at 190-97.

will be subjected, the regulation should first be categorized according to its basis.

The second part of this inquiry requires the identification, with reasonable certainty, of the interest to be furthered and the determination of whether that interest is legitimate and effectively furthered by the regulation.[6] It is suggested, however, that this portion of the inquiry is inadequate because the issue of whether the interest can be achieved by methods that do not infringe freedom of speech is also important. If the goal can be achieved by methods that do not infringe on freedom of speech, the state must choose one of those other methods. When the state seeks to affect behavior, it should not be allowed to prohibit speech about an undesirable behavior unless the state first declares that behavior unlawful as well as undesirable.

This article argues that the outer limit of the state's power to regulate speech is a function of the existence and strength of the regulation of the underlying activity. When the underlying activity is prohibited, the state should be permitted to regulate speech likely to foster the unlawful activity. Conversely, when it is merely the judgment of the legislature, the executive, the courts or an administrative agency that the activity is harmful or undesirable, albeit lawful, speech regulation intended to discourage that activity should not be permitted. Thus, in a state where liquor sales are prohibited, commercial speech promoting the sale of liquor may be properly prohibited.[7] However, if a legislature decided to curb cigarette smoking by banning all advertising, it would be an impermissible regulation of speech unless the legislature also prohibited cigarette smoking.

To facilitate an understanding of this article's thesis, it will be necessary to review the significant cases and current theories on speech regulation. From these sources, a two-part test for the application of heightened scrutiny to state action will be formulated. In the latter half of this article, this "heightened scrutiny" test will be analyzed to elucidate the reasons for requiring states to address the problems of substantive behavior before permitting them to regulate speech as a means of discouraging undesirable behavior.

I. CONTENT REGULATION

The content of speech has been regulated since the beginning of constitutional history.[8] Despite what many people would like to believe about the framers' intent as to the first amendment,[9] the better view is that first amendment protections were slow to develop. The current protection of speech is more the result of twentieth century beliefs than that of libertarian notions universally accepted throughout the nation's

6. *See infra* notes 226-38 and accompanying text.
7. *See infra* notes 263-77 and accompanying text.
8. L. LEVY, FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 10-44 (1966).
9. *See* Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 954-56, 966-69 (1919).

history.[10]

Although one may legitimately point to the first "clear and present danger" case decided by the Supreme Court as the progenitor of the modern concern for free expression, it was probably more of an affirmation of the ease with which a state may regulate content to further an important interest.[11] One could even begin with the first concise and clear statement by the Court about the need for content neutrality:

> Necessarily, then, under the Equal Protection Clause, not to mention the first amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard .... Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.[12]

Exactly when the modern first amendment doctrine, including the hostility towards content-specific regulations, emerged is a subject of controversy.[13] The "revisionist" view of the first amendment, rejecting a libertarian intent by the framers, was best expressed by Professor Levy's work.[14] Given the political and social setting of the Bill of Rights and the first amendment's virtual dormancy until the twentieth century, it is difficult to refute Professor Levy's view of the first amendment as a statement of political and legal truths of late eighteenth century currency that embodied a less than libertarian view of the freedom of expression.[15]

Contemporary scholars have difficulty examining *Schenck v. United*

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10. *See* Rabban, *The Emergence of the Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1207-13 (1983) [hereinafter cited as Rabban, *Emergence*].

11. *See* Chafee, *supra* note 9, at 966-69.

12. Police Dep't v. Mosley, 408 U.S. 92, 96 (1972) (quoting A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1948)).

13. *Compare* Chafee, *supra* note 9, at 944-47 *with* Rabban, *The First Amendment in its Forgotten Years*, 90 YALE L.J. 514 (1981). Professor Chafee suggests that Justice Holmes' decision in *Schenck* was libertarian and began the modern judicial sensitivity toward free speech protection, while Professor Rabban argues that the "clear and present danger" test of *Schenck* was, at the time, mere gloss on the widely held restrictive view of free expression prevalent at the time. Professor Rabban's view is more appealing, especially in light of the result in *Schenck* and Justice Holmes' role as a dissenter in later cases where he supported a more libertarian view. Professor Rabban also provides an excellent analysis of state and federal decisions as well as scholarly works from the period preceding World War I, showing that deference toward the protection of free speech was the result of an evolutionary process not fairly described as libertarian until many years after the point Professor Chafee suggests. *See* Rabban, *Emergence*, *supra* note 10, at 1208-12.

14. L. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960). For authority on equality of opportunity, the Court turned not to its earlier decisions, but to Alexander Meiklejohn's monograph, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960). *Mosley*, 408 U.S. at 96.

15. *See* L. LEVY, *supra* note 14, at 2-4.

States,[16] the first content regulation case, without leaping to engage the first amendment debate. This reaction is the result of conditioning by exposure to this debate over the past twenty to thirty years. However, arguments based on freedom of expression were not quite as apparent to either the Court or the lawyers who argued *Schenck* and the other Espionage Act cases.[17]

Unfortunately, the better explanations and criticisms of what constitutes content-differential regulation[18] and why it is suspect have come from commentators instead of the Court.[19] Statements, such as those in *Police Department v. Mosley*,[20] which cited a scholar's writings for support,[21] are superficial conclusions without explanation or discussion of the underlying principles. *Mosley* suggests that restrictions on content are intuitively offensive to those who believe that the first amendment creates a protective shell around thought and expression.[22] The clear statement of *Mosley* derives from notions of fundamental equality; a requirement that the government deal evenhandedly with all viewpoints, instead of any overriding or fundamental principle of freedom of expression.[23]

This requirement of equality is, however, inadequate in explaining why content-differential regulations are subject to heightened scrutiny. One need look no further than a recent Supreme Court case to see that complete equality of regulation does not assure a state that its regulation will not be subjected to the stringent "compelling state interest" test. In *Consolidated Edison Co. v. Public Service Commission*,[24] the Commission attempted to prevent in an arguably evenhanded manner all discussion of controversial issues. The Commission argued that the regulation was a neutral time, place and manner restriction because it equally disabled all participants in such discussions. The Court, however, held that the Commission's characterization was an inadequate description of the regulation's basis.[25] The Court noted that although the scope of the regulation was neutral because it applied to all viewpoints,

16. 249 U.S. 47 (1919).

17. *See* Rabban, *Emergence*, *supra* note 10, at 1247-57.

18. This is not to say that I accept the usefulness of the distinction between content-neutral and content-specific regulations. My idea, heavily influenced by Professor Redish, is that the distinction is difficult to make and problematic in application for the same reasons that the time, place, and manner category is not helpful. *See infra* notes 120-48 and accompanying text; *see also* Redish, *Content Distinction*, *supra* note 4, at 128-42. For reasons that will become apparent, the content distinction can easily be abandoned in favor of tests that establish the degree of damage caused to equality and non-distortion, values which underlie the heightened scrutiny applied to content-based regulations.

19. *Compare* Stone, *Content Regulation*, *supra* note 4 *with* Redish, *Content Distinction*, *supra* note 4.

20. 408 U.S. 92 (1972).

21. *Id.* at 96.

22. *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION, 6-20 (1970); Meiklejohn, *supra* note 14, at 19-28; Redish, *Free Speech*, *supra* note 1; Stone, *Content Regulation*, *supra* note 4.

23. *See Mosley*, 408 U.S. at 96.

24. 447 U.S. 530 (1980).

25. *Id.* at 537.

its basis was content-specific because it attempted to delineate those subjects fit for discussion.[26] Because of the absence of a compelling state interest narrowly served by the regulation, the Court refused to allow the Commission to dictate what subjects were fit for discussion.[27] Thus, the Court applied the same level of scrutiny as it would have applied if the Commission had attempted to designate the correct viewpoint on a particular issue.[28]

Professor Stone has sought to justify content distinction without oversimplifying the factors determining whether the regulation is content-differential.[29] Professor Stone has suggested that government regulation may be broadly classified as content-neutral or content-based.[30] The challenge as he sees it is to choose between the clarity of simplification and the bewilderment of a system complex enough to distinguish between ambiguous restrictions that may be either content-neutral or content-based.[31] He is willing to impose the stringent "strict scrutiny" test, even to what he terms "modest viewpoint-based restrictions."[32] These restrictions are triggered by viewpoint, but limit only the time, place and manner of expression of a viewpoint.[33] An example of such a restriction is the ordinance in *Linmark Associates v. Township of Willingboro*,[34] that prohibited the use of "for sale" signs in an attempt to stop the flight of white landowners out of neighborhoods where integration appeared to be taking place.[35] He suggests four possible explanations for applying the stringent content-differential analysis in these modest viewpoint-based restrictions: equality, communicative impact, distortion of the debate and motivation.[36]

Professor Stone does an admirable job of refocusing the question on the underlying bases for regulation, instead of perpetuating the rubrics of content-based and time, place and manner restrictions.[37] His purpose, however, is not to suggest a scheme by which all regulations may be classified to determine what level of scrutiny would be appropriate. Instead, he offers explanations for why content distinctions are particularly suspect and the bases for determining whether an ambiguous regulation raises the same type of concern.[38]

Out of Professor Stone's thorough examination of the origins and theory of the content/neutrality distinction emerges an analytical struc-

26. *See id.* at 535-37.
27. *Id.* at 537-38.
28. *Id.* at 540-43.
29. Stone, *Content Regulation*, *supra* note 4; Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978) [hereinafter cited as Stone, *Subject-Matter Restrictions*].
30. Stone, *Subject-Matter Restrictions*, *supra* note 29, at 81-82.
31. *See* Stone, *Content Regulation*, *supra* note 4, at 251-52.
32. *Id.* at 200-07.
33. *Id.* at 200.
34. 431 U.S. 85 (1977).
35. *Id.* at 87-88.
36. Stone, *Content Regulation*, *supra* note 4, at 201-33.
37. *Id.* at 197-233.
38. *Id.* at 233-51.

ture that does not suggest any particular substantive result. His framework of analysis furnishes but a starting point for this article's analysis of speech regulation. The analysis here diverges from Stone's analytical framework by combining and modifying his four explanations and several bases of regulation into six bases of regulation: (1) content/viewpoint, (2) content/subject matter, (3) identity of speaker, (4) identity of audience, (5) efficacy of speech, and (6) time, place and manner. Each basis will be examined to determine what damage, if any, occurs to those values that are typically injured by content-specific regulations. When damage to such values is found, it will be argued that the regulation should be scrutinized in a similarly stringent manner.

Initially, an illustration of content regulation will provide the focal point for an inquiry into why such a basis for regulation is particularly suspect. After identifying the values damaged by content regulation, similar inquiries for each of the remaining bases of regulation shall be conducted. After all the argumentative elements are in place, the analysis will focus on the question of why speech restrictions intended to curb undesirable conduct should be subject to the "compelling state interest" test.

Suppose the legislature wishes to curb the drinking of liquor. The direct route is to prohibit the sale, possession and consumption of liquor (the prohibition route). If this direct regulation is politically unfeasible, is there an indirect route to the goal? If the legislature is satisfied with fewer drinkers or less liquor being sold, it could launch its own campaign to discourage use (the reformation route). Finally, if the legislature is satisfied with fewer drinkers and less liquor being sold, but is unwilling to spend the money for the reformation route, the legislature can discourage the activity by imposing regulations on the availability of liquor or on the quality and quantity of advertising and other types of speech relating to liquor and drinking (the regulation approach).

In this hypothetical, liquor has been identified as a harmful or undesirable product, the use of which the state would like to suppress by what, in the abstract, would appear to be a legitimate action in the interest of the health and welfare of the general populace. Although the control of liquor sales is paternalistic in character, the Supreme Court has traditionally deferred to state interests associated with such regulation.[39] For purposes of the first amendment, liquor control becomes controversial only when a state chooses a regulatory approach restricting the quality or quantity of speech about liquor sales and consumption.

Although speech regulation relating to liquor sales and consumption is content-based, such is not the case with other types of speech regulation. For example, a legislative prohibition on all advertising on highway billboards is a neutral regulation because it equally affects all

39. *See Dunagin*, 718 F.2d at 743-45.

messages and subjects. Such a regulation, however, would be content-based if it prohibited all promotional advertising of alcoholic beverages.

To understand why content-specific regulations are especially suspect and disfavored, the particular evils associated with these regulations must be examined. Viewpoint-oriented regulations damage several preferred values, such as equality and freedom from distortion in the "marketplace of ideas" (nondistortion).[40] When government regulations affect the substance of the debate, some viewpoint will suffer unequal treatment and the audience will receive a distorted version of the debate. As will be discussed,[41] equality is inadequate as a core principle of first amendment theory. Equality, however, is a useful factor in determining when heightened scrutiny should be applied. The strongest criticism of equality as a useful tool stems from its failure to extend to regulations that evenhandedly restrict all speech. This criticism may be negated through the addition of a nondistortion factor and the limitation that this combination be applied only to identify when heightened scrutiny may be appropriate.

To determine the utility of the factors of equality[42] and nondistortion, they should be applied to content-based restrictions to determine whether they adequately explain the intuitive distaste associated with content-based regulations. If those two factors are explanatory, it remains to be determined whether their use is consistent with those first principles that underlie the first amendment. As will be discussed, the question of whether or not equality and nondistortion are perfect protectors of a particular first principle is at present irrelevant because these factors are not intended as competitive entries in that debate. Rather, they are intended to explain why some restrictions should be subjected to heightened scrutiny regardless of which first principle is adopted. Prior to an analysis of viewpoint restrictions and their differences with the five other suggested bases, a review of the competing first principles is necessary. It should be remembered that the proposed bases are but supplements to first principles; factors to be used only to test for heightened scrutiny in the application of any first principle.

II. COMPETING FIRST PRINCIPLES AND WHY CONTENT REGULATION VIOLATES THEM

In attempting to delineate the limits of free expression, the Court has often neglected to set forth the principles underlying its choice of limitations. Therefore, numerous legal scholars have undertaken the task of explaining the Court's reasoning. Professor Karst has developed an analysis of the first amendment doctrine that uses equality as the cen-

40. *See Mosley*, 408 U.S. at 96.

41. *See infra* notes 43-55 and accompanying text.

42. Equality and neutrality will be used interchangably. What they require is uniformity and evenhandness in the regulation of speech. To restrict speakers of one viewpoint in a manner not suffered by other speakers violates neutrality and treats the speakers as unequal.

tral principle.[43] Establishing equality as the central concern has appeal and is supported by cases such as *Mosley*. Few would quarrel with the assertion that a state should not be allowed to treat speakers differently because of their views. To do so allows the state to foster those views it deems desirable, while discouraging undesirable views. However, there has been no explanation of why this should be the rule, even though it admirably explains many of the Court's decisions.

There are three major competing first amendment models that do more than simply justify the results in prior cases: the "marketplace of ideas" model, the "democratic process" model and the "liberty" (self-realization) model.[44] Each model provides a first principle, which in turn generates rules for application in individual cases. All three models are dependent on either the free competition of ideas or the abilities of speakers and their audience to freely communicate to promote either the democratic process or individual self-realization.[45]

In criticizing Professor Karst's narrowing of first amendment principles on equality, Professor Redish, a proponent of the liberty model, correctly points out that equality would exist in a regulation that prohibited all expression.[46] However, such a regulation, no matter how narrowly conceived, would be highly offensive to first amendment principles. For this reason, concern about equality alone does not explain why content and subject-matter differential regulations are subjected to heightened scrutiny. Although helpful, equality, as now conceived, seems inadequate to serve as a first principle.

In the "marketplace of ideas" model, the first amendment is a positive statement that truth will eventually defeat falsity. Government regulation should be permitted only when substantive evil is so clear and imminent that there is no opportunity for the marketplace to work.[47] Under this view, content regulation distorts the marketplace. Inequality in regulation is seen as undesirable not because of an independent interest in equality, but because inequality distorts the marketplace.

Those who espouse the democratic process value are also concerned about equality. The model is based on the first principle that an enlightened and informed citizenry is needed for the proper functioning of democratic institutions.[48] Therefore, to the extent that free expression does not foster the democratic process, speech may be abridged with impunity.[49] However, within this more narrow scope of free speech, any inequality in governmental regulation of speech damages the first principle because such regulation lessens the probability that the electorate will be sufficiently and accurately informed to act demo-

43. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).
44. Redish, *Content Distinction*, *supra* note 4, at 136.
45. *Id.*
46. *Id.* at 136-37.
47. *See* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).
48. Redish, *Content Distinction*, *supra* note 4, at 193-94.
49. Bork, *supra* note 3, at 20.

cratically.[50] Similarly, any distortion of debate would seem to be inimical to the democratic process because it would not be an accurate reflection of the opinions of the democracy's citizens.

More recently, the "liberty" model has suggested that the first principle is self-realization.[51] The model rejects the democratic process value as too narrow a conception of the first amendment's purpose. The constitution's protection of free expression is characterized as a concern for the maturation and fulfillment of the individual, which is derived in part from the process of decision-making.[52] Although nonpolitical speech that contributes to individual growth is beneficial because a mature and informed polity is desirable,[53] "[t]here is, however, more to self-realization than private self-government."[54]

Under the "liberty" model, the ultimate value of free speech is that it fosters self-realization, which is considered to be the instrumental value of democracy.[55] With this broad value underlying the "liberty" model, any interference through inequality of regulation or distortion of debate inhibits the realization of each individual's potential. Thus, content regulation is inconsistent with the "liberty" model because the dual effects of inequality and distortion of debate inhibit self-realization.

In order to avoid reconsidering the merits of these competing models, this article will attempt to establish why content-differential regulation of speech has been viewed by the Court as inimical to first amendment interests. After identifying the interests damaged by content regulation, the five other bases of regulation will be tested to determine whether regulations bottomed on these other bases damage first amendment interests in the same way. Thus, the archetype of content regulation based upon viewpoint will serve as a pattern for establishing when strict scrutiny should be applied. It will be argued that the equality and nondistortion interests are damaged when the basis of speech regulation is the subject matter, the identity of the speaker, the identity of the audience or the efficacy of the speech, but are not damaged by regulations based on time, place and manner of expression.

It will be unnecessary to choose among competing first principles because the distillation of the interests damaged by content-specific regulations produces the neutrality and nondistortion interests. It seems apparent that damage to these interests is inimical to all three first principles, thereby producing a test that does not require the Court to adopt one of the competing core values before it can coherently and consistently determine whether strict scrutiny should be applied. When the principles of nondistortion or neutrality are violated, strict scrutiny should be the standard.

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50. *Id.* at 26-27.
51. *See* Redish, *Free Speech*, *supra* note 1, at 622-28.
52. *Id.* at 605-07.
53. *See id.* at 630-45.
54. *Id.* at 627.
55. *Id.* at 601-05.

Whichever core value is preferred, government regulation of viewpoint is undesirable and damaging because it damages the political process by distorting debate and preventing the communication of ideas, both of which are necessary for the maintenance of a democratic society.[56] Content-differential regulations damage the "marketplace of ideas" model by distorting debate, creating a false market and artificially dictating the appeal of ideas. Similarly, content regulation is inconsistent with the self-realization value because when viewpoints are dictated, an individual is not free to communicate restricted views. Thus, intellectual maturity and other types of self-realization are not attainable because there is no possibility for expression that generates agreement or criticism and little opportunity for the individual to learn from opinions responding to that individual's views. Therefore, content-specific regulations must be viewed as being particularly odious.[57]

In the following section, the evils present in content regulation that cause it to be unacceptable will be discussed. The discussion will then examine the evils in content-neutral regulations to determine whether such regulations should also be subjected to the "compelling state interest" test, which is applied when a regulation is content-specific.

III. Regulations May Be Categorized by the Basis for the Restriction

Regulation of speech may take many forms, although there are a finite number of bases for these forms. This finite number of bases provides guidelines for determining whether harmful or undesirable speech is content-neutral or content-based. These bases also are essential to a coherent analysis of when content-specific regulation may be justified.

One basis of regulation is the content of the message or the viewpoint it communicates. Another basis for regulation is the subject matter of the message. Both of these bases involve the regulation of content. Other bases may also effectively restrict viewpoint, but do so in a content-neutral manner, such as regulations that restrict particular speakers or restrict access to particular audiences. Further, there are some speech regulations, such as those based on time, place and manner or the efficacy of the communication,[58] that appear to be content-neu-

56. Professor Stone applies some of the explanations to various bases for regulation, such as the identity of the speaker, the identity of the audience, the subject matter and the communicative impact of the speech. Stone, *Content Regulation*, *supra* note 4, at 234-50. By examining these ambiguous bases, Professor Stone shows how they may, in some cases, have a differential effect on content, even when there is no direct relationship to the content. Professor Stone's purpose is to show that there is merit in the content distinction, but that this distinction should not be oversimplified. *Id.* at 251-52.

57. Content regulation is not wholly insupportable. There are times when nothing less than the prevention of a particular type of communication will insure the preservation of a competing and compelling value. The classic example is words that have the effect of physical action. Falsely shouting "fire" in a crowded theatre was the example given by Justice Holmes. *Schenck v. United States*, 249 U.S. 47, 52 (1919). The state should be able to preserve the health and safety of its citizens by outlawing this type of speech, even punishing it with criminal sanctions when it occurs.

58. What I have chosen to call "efficacy of the communication" may be what Professor

tral and can only be classed as content-specific when their interaction with extrinsic facts produces an incidental, yet effective restriction on content.

A. *Content Regulation by Restriction Based on Viewpoint*

The Espionage Act cases address the issue of the regulation of viewpoint. In *Schenck v. United States*,[59] the defendant was convicted of wilfully conspiring to have printed and circulated to draftees a document intended to cause insubordination and the obstruction of the draft process.[60] In upholding Schenck's conviction, the Supreme Court stated that the document would not have been sent had it not been intended to have the effect of influencing inductees to obstruct the draft.[61] Although the Court's characterization of Schenck's rather mild exhortation as "impassioned" is certainly an overstatement, it adds to the strength of the Court's conclusion that Schenck had violated the Espionage Act.[62]

Although Justice Holmes introduced the phrase "clear and present danger" because of the context of the phrase and the factual setting, *Schenck* did not announce a deferential attitude toward first amendment concerns.[63] Schenck's call for obstruction did not specify any time for action,[64] nor had Schenck any way of gauging his audience's reaction and fueling any positive response. In this sense there was no immediate threat, but instead merely an abstract advocacy calling for action at some indeterminate future time. Justice Holmes recognized this weakness in the government's case, but remedied it by supplying the Court's conclusion about the intended effect.[65] By inferring the intended effect, the opinion has much in common with the "bad tendency" test of prior cases and may not fairly be read as deferential toward free expression.[66]

Instead of being a model of clear libertarian thinking, *Schenck* is more fairly viewed as a continuation of long-held beliefs that, although the first amendment did grant substantive rights, important state interests are at least as important as the liberty interest of individuals in free expression. *Schenck* manifests an easy acceptance of the state's interest in perpetuation, especially when threatened in wartime. Thus, circumstance and context are important in determining the protection given freedom of speech.[67]

The mark of a content-based restriction is the failure of the state to remain neutral. This is the first evil inherent in content-based restric-

Stone refers to as the "communicative impact." Stone, *Content Regulation*, *supra* note 4, at 234-39.

59. 249 U.S. 47 (1919).
60. *Id.* at 49.
61. *Id.* at 51.
62. *Id.* at 51-52.
63. *Id. See also* Rabban, *Emergence*, *supra* note 10, at 1259-60.
64. *Schenck*, 249 U.S. at 51.
65. *Id.*
66. *Id.* at 51-52. *See also* Rabban, *Emergence*, *supra* note 10, at 1259-62.
67. *Schenck*, 249 U.S. at 52.

tions. A more recent example of such regulation is the "clear and present danger" case of *Brandenburg v. Ohio*.[68] Brandenburg, the leader of a Ku Klux Klan group, was convicted under Ohio's criminal syndicalism statute of advocating violence or terrorism as a means of accomplishing political reform.[69] Instead of asking whether the threat was clear and present, the Court asked whether the "advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[70]

The first amendment, its scope established by whatever value is chosen, is concerned with the protection of an individual's right to communicate a point of view. There is a fine line between advocacy and incitement. Content-specific or viewpoint-based regulations are particularly offensive[71] because they can be used on both sides of the line to stifle self-realization as well as protect order. Individuals whose intellectual growth depends on the expression of views currently not acceptable to the government may find themselves punished in the name of ordered liberty.

It has been suggested quite reasonably that it is not merely the quantity of communication, but also its lack of distortion that furthers both the "democratic process" and "self-realization" values.[72] The proposition that a democratic society that stifles any one viewpoint damages the system by reducing the probability of informed democratic choices is both intuitively appealing and inherently logical. Although there is no assurance that more information and discussion will result in "better" decisions, it is generally accepted that limiting participation in a debate is certain to reduce the probability of receiving all the information needed to make the "best" choice. Similarly, content regulation limits the probability of self-realization when a part of a person's intellectual growth is dependent upon expressing a prohibited or unpopular viewpoint.

For these reasons and those previously discussed, content-specific regulations of speech are disfavored because of their inequality and distortive effects. Prior to *Schenck* and Professor Chafee's rather loose and optimistic reading of it, there was little basis for a libertarian view of the first amendment. The attempts of constitutional scholars to build a coherent theory of freedom of expression have not been based on fundamental principles established by the framers, but rather on their own

68. 395 U.S. 444 (1969) (per curiam).

69. *Id.* at 444-45.

70. *Id.* at 447. At least one commentator has suggested that this is a new test, but the practical difference between this and "clear and present danger," if any, has yet to be explicated by the Court. *See* Comment, Brandenburg v. Ohio: *A Speech Test for All Seasons?*, 43 U. CHI. L. REV. 151, 187-90 (1975).

71. *See supra* notes 34-37 and accompanying text.

72. As to the self-realization value, Professor Redish has suggested that the marketplace-of-ideas concept is deficient because there is not assurance that truth will win out. Nevertheless, without protection for expression of viewpoints that are unpopular the chance for self-realization is reduced. *See* Redish, *Free Speech*, *supra* note 1, at 616-18 (1982).

opinions, as ad hoc judges, of when the state has gone too far in regulating speech.[73] The "clear and present danger" test was not a practical application of theory. That is why examples of theory or formulations of policy stand out in the reading of first amendment cases, such as in the previously-quoted language of *Mosley*.[74] It is no coincidence that as authority for a libertarian conception of the first amendment, the Court in *Mosley* did not quote prior cases, but instead quoted a legal scholar attempting to set forth a general theory of freedom of expression. This libertarian approach disregards the concern for context and the limitation on freedom of speech found in *Schenck*.[75] *Mosley* replaces these concerns with the assumption that the first amendment is a positive statement that the state shall not interfere except in certain extraordinary situations and that any interference must be evenhanded and unrelated to viewpoint.[76] Thus, what should be sought in examining the other possible bases for speech regulation is a congruence; a symmetry as to deleterious effects that should prompt the same reaction. When regulations affecting time, place and manner damage values inherent in freedom of expression to the same extent as content regulation, the Court should be prepared to treat these regulations as equally suspect, despite traditional judicial and scholarly deference toward them. Conversely, when a regulation focuses on content or viewpoint but is justified by a legitimate state interest as important as that underlying the "clear and present danger" test, speech regulation should be permitted.

B. *Content Regulation by Restrictions Based on Subject Matter*

This classification represents a basis for regulation different from simple viewpoint regulation. Although it is regulation based on the content of speech, it is not necessarily viewpoint sensitive.[77] Professor Stone has suggested that there are two categories of subject-matter restrictions.[78] The first is a restriction directed at broad classes of speech. An example of this first type is the restriction in *Mosley* because it restricted all types of speech other than speech about labor relations.[79] The second type of subject-matter classification is comprised of restrictions directed at a specific issue or a cluster of issues forming only one class of speech.[80] An example of this type of restriction is found in *Lehman v. City of Shaker Heights*[81] in which the city sought to prohibit all paid political advertising in the cars of the city's rapid transit system.[82]

Professor Stone does not reach a conclusion as to how these types

73. *Id.* at 591. Commentators, however, have not adequately considered "first principles." *Id.*
74. *See supra* note 12 and accompanying text.
75. *Compare Mosley*, 408 U.S. at 96 *with Schenck*, 249 U.S. at 51-52.
76. *Mosley*, 408 U.S. at 96.
77. Stone, *Subject-Matter Restrictions*, *supra* note 29, at 83.
78. *Id.* at 109-13.
79. *Mosley*, 408 U.S. at 95.
80. Stone, *Subject-Matter Restrictions*, *supra* note 29, at 112.
81. 418 U.S. 298 (1974).
82. *Id.* at 299-300.

of restrictions should be treated in all cases, but suggests that the second type of restriction be treated in the same manner as a viewpoint regulation for consistency and ease of administration as well as for the promotion of a consistent first amendment doctrine.[83] It is also suggested that the first category of broader-based subject-matter restrictions be treated in the same manner as viewpoint neutral restrictions.[84]

An example of subject-matter regulation is the restriction challenged in *Consolidated Edison Co. v. Public Service Commission*.[85] The Commission refused to permit a public interest group to insert in utility bills a rebuttal to Consolidated Edison's earlier pro-nuclear power insert. The Commission also adopted a regulation barring utility companies from including inserts expressing opinions on controversial issues of public policy.[86]

The Commission candidly defended the regulation as acceptable because it permitted consumers to receive useful information while protecting their "privacy" by prohibiting less useful controversial communication.[87] Because the ban applied to all discussion of controversial issues, the Commission argued that it was a neutral subject-matter regulation instead of a viewpoint sensitive regulation and, therefore, was entitled to judicial deference.[88] These arguments were rejected by the Court because neither justification overcame the first amendment's hostility towards content regulation, which extends not only to restrictions on particular viewpoints but also to prohibitions of all discussion of a topic.[89] This stance by the Court seems remarkably protective and even inconsistent with the other cases in which the Court has upheld regulations limiting public debate of particular subjects.[90] The Court recognized that a flat rule prohibiting subject-matter regulation was inappropriate because of the inadequacy of competing state interests offered to justify such regulations.[91] The Court supported its rejection of a flat prohibition by noting the lesser protection given certain categories

83. Stone, *Subject-Matter Restrictions*, *supra* note 29, at 113-15.

84. *Id.* This is a simplification of Professor Stone's views, but in the remainder of this section his reasoning will be expanded upon as ideas are added. Additional ideas will later be needed to complete the analysis of harmful speech and the proposed standard of review in viewpoint sensitive cases.

85. 447 U.S. 530 (1980).

86. *Id.* at 532-33.

87. *Id.* at 537.

88. *Id.*

89. *Id.* at 537-38.

90. *See, e.g.*, Greer v. Spock, 424 U.S. 828 (1976); Lehman v. Shaker Heights, 418 U.S. 298 (1974).

91. *See Consolidated Edison*, 447 U.S. at 538. It is important that the Court establish with reasonable certainty the state interest being served by the regulation. To fail would permit the state to abridge freedom of speech by positing an interest served by a regulation, but which is only indirectly or inadequately served by the chosen method of regulation. This point may be illustrated by comparing the cases of Lehman v. Shaker Heights, 418 U.S. 298 (1974) and Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981). In *Lehman* the restriction on political advertising in transit system cars was the result of solicitous concern for passengers who, as captives for the duration of the ride, were forced to endure advertising. *Lehman*, 418 U.S. at 303-04, 318 (Brennan, J., dissenting). The city of San

of speech such as obscenity, fighting words and commercial speech.[92]

In rejecting the Commission's claim that Supreme Court precedent supported subject-matter regulation, the Court cited two cases that are not within one of the categories of speech that the Court has declared to have a lower level of protection. Those two cases were *Greer v. Spock*[93] and *Lehman v. Shaker Heights*.[94] The Court distinguished them as cases in which validation of the regulation was dependent upon the government's special interest "in overseeing the use of its property."[95] The Court then returned to the simple proposition that government regulation of the viewpoint or subject matter of speech may be sustained only when the regulation is a precise means of serving a compelling state interest.[96] Thus, the Court concluded that the Commission was unable to show either a compelling state interest or that the regulation was sufficiently narrow.[97]

Although the Court may be comfortable with its distinction between the Commission's regulation and the restriction upheld in *Lehman* and

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Diego in *Metromedia* limited billboard advertising in the interest of aesthetics and highway safety. *Metromedia*, 453 U.S. at 493.

The two results are inconsistent if one discounts the importance of the Court's concern about the creation of a public forum in *Lehman*. No first amendment forum was found to exist by virtue of acceptance of some advertising. *Lehman*, 418 U.S. at 303-304. Because the city acted in a propriety capacity, the transit system was free to make reasonable choices concerning the type of advertisement accepted so long as it did not interfere with the general public's convenience and safety. *Id.* In the absence of this concern about the proprietary nature of the state enterprise and the question of whether a public forum was created, the result is at odds with *Metromedia*. Both regulations limited the opportunities for speech about non-commercial topics. San Diego banned non-commercial billboards, *Metromedia*, 453 U.S. at 493-95, while Shaker Heights banned political advertising, *Lehman*, 418 U.S. at 300.

The plurality opinion of *Metromedia* critically examined the proffered state interests of aesthetics and safety, found them to be legitimate, and recognized that those interests were damaged by the billboards permitted by the regulation. Because of this inference that communicative interest and value surpassed the interests in aesthetics and safety, the state could not legitimately determine acceptability based on content. Once the Court established that the state's interest in safety and aesthetics did not outweigh the individual's interest in communication in all circumstances, it became apparent that prohibition of certain billboards was based on the state's value judgment of the worth of the subject matter, thereby violating first amendment principles. *See Metromedia*, 453 U.S. at 519-21.

In contrast, the plurality in *Lehman* allowed the state to discriminate between advertising despite the concession that the communicative interest of some advertising outweighed the individual's interest in being left alone and unperturbed during the ride. *Lehman*, 418 U.S. at 303-04; *see also id.* at 318-20 (Brennan, J., dissenting).

The result of *Metromedia* is more easily justified than that of *Lehman*. The interest in *Lehman* was established as the protection of the sensibilities and privacy of the public. This should have led to the conclusion that it was impermissible to choose among types of advertising by eliminating some, but not all, because such discrimination would require a substantive evaluation of the worth of the advertising and a balancing of that worth against the interest in not being disturbed. This type of choice is a violation of both the equality and non-distortion principles because the state judges the value of the speech and enters the debate to ensure that its selected value is furthered by prohibiting the communication of disfavored subjects or viewpoints.

92. *Consolidated Edison*, 447 U.S. at 538 n.5.
93. 424 U.S. 828 (1976).
94. 418 U.S. 298 (1974).
95. *Consolidated Edison*, 447 U.S. at 539-40.
96. *Id.* at 540.
97. *Id.* at 540-43.

Greer, such a distinction does not promote a coherent and consistent theory of speech regulation. This is not to say that the restriction can not be justified, only that it should be justified on other principles. Such a justification might proceed along this line. These regulations are fundamentally at odds with the first amendment's concern for free expression because they distort the public debate by preventing communication of a viewpoint or by limiting its effect. They also allow the government to control the debate in an unequal manner by permitting preferred views to be heard while less favored views are selectively restricted. This pattern of inequality and distortion is inconsistent with both the "marketplace of ideas" and "democratic process" values because both these values rely on the availability of equal access to participants in debates about public issues.[98] For those who see the first amendment as furthering self-realization, content-based regulations obstruct the process of intellectual maturation and self-realization. By skewing the debate, these regulations remove an opportunity for self-growth where it is dependent upon expression of unpopular or undesirable topics.

Subject-matter restrictions are less obviously destructive of the equality and nondistortion interests than direct regulation of viewpoints.[99] Although a case may be made that subject-matter restrictions do not distort the debate because they evenhandedly restrict all speech, this ignores its greater effect on dissenters. If the group in power in a democratic society can prevent all debate on issues that may cause a shift in power, that group will likely be able to maintain its power. Although subject-matter restrictions do not present the problem of government distortion by directly hindering the debate, they do indirectly distort the debate by leaving without a forum those who would seek change in the restricted subject area. Granted, those wishing to laud the status quo will also be hindered, yet their substantive view will probably prevail while those who seek change are dissenters without a voice. Thus, these restrictions are protective of the status quo and damage both the "marketplace of ideas" and "democratic process" models. If the government's interest is to maintain the status quo, it may further this interest by using subject-matter restrictions to affect a de facto distortion of the discussion and discriminate against selected viewpoints.

For those who find a self-realization value at the core of the first amendment, the distinction between viewpoint and subject-matter re-

98. Because the democratic process model would limit protection to those issues valuable in making decisions that are part of the democratic process of self-government, the scope of protection for subject matter may arguably be narrower. Bork, *supra* note 3, at 20-21. Within this narrower scope, however, inequality and distortion would be as harmful to the protected process.

99. Professor Stone has written that these types of restrictions appear superficially to be less dangerous and could be reviewed under a test other than the "compelling state interest" test. Although he does not positively state a rule, his preference appears to be that, on close examination, the surface appeal of the argument for a less rigorous test should yield to a consistent and more easily administered across-the-board application of the "compelling state interest" test in all content-based restrictions, including subject-matter regulations. *See* Stone, *Subject-Matter Restrictions*, *supra* note 29, at 108-14.

strictions is unacceptable. Both damage a person's efforts to develop through self-expression. Viewpoint restrictions hinder personal development by preventing a person from expressing a chosen view. Although the effect of subject-matter restrictions on personal development may be less inimical to a person's integrity, such restrictions are far more damaging because they remove all opportunities for discussion in the subject area covered by the prohibition. Trading viewpoint restrictions for subject-matter restrictions is merely the trading of qualitatively invasive restrictions for quantitatively invasive restrictions.[100] It is rather like being told: the good news is we no longer prohibit criticism of governmental policy, the bad news is you are not allowed to discuss it at all.

Application of these principles to the Court's decision in *Consolidated Edison* inexorably leads to the conclusion that the Court was correct in invalidating the Commission's regulation. Subject-matter restrictions such as those in *Consolidated Edison* are sufficiently similar to viewpoint regulations in the amount and quality of damage done to first amendment values that the "compelling state interest" test should be applied by the courts.[101]

Instead of elucidating the underlying value or values of the first amendment, the Court in *Consolidated Edison* established the rule that: "[w]here a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest."[102] What is missing, however, is an explanation of why this is the standard. In the absence of an explanation of the basis for this rule, it is difficult to predict when that rule will be applied. As Justice Stevens pointed out in his concurrence, any student of history or the Court knows that unequivocal rules about content and viewpoint neutrality are, at least, part hyperbole.[103] What is needed from the Court is its reasoning for subjecting this particular subject-matter restriction to the "compelling state interest" test. However, the Court's conclusion may be reached by applying factors that do not require the adoption of a first principle. Although a comparison of the values damaged by content regulation with those values damaged by subject-matter restrictions is an admittedly conservative approach, it has the virtue of adding an analytical tool that is flexible enough to be adapted to a wide variety of principles.

C. *Content Regulation by Restrictions Based on the Efficacy of the Speech*

This article has to this point suggested that two concerns, inequality and distortive impact, explain why viewpoint or content-based restrictions are of particular concern. Professor Stone has divided into four

100. *See* Redish, *Content Distinction*, *supra* note 4, at 130-39.
101. *Consolidated Edison*, 447 U.S. at 540.
102. *Id.*
103. *Id.* at 544-45 (Stevens, J., concurring).

categories the explanations of why content-based restrictions are disfavored: (1) neutrality; (2) communicative impact; (3) distortion of public debate; and, (4) motivation.[104] Of the four, the first three are readily recognizable reformulations or variations of the previously discussed "equality"[105] and "marketplace of ideas" values.

Motivation is a possible separate basis for invalidating speech restrictions, but it seems inseparable from the objective explanatory interests of neutrality and nondistortion. If a regulation affects either of these two interests, it is superfluous and problematic to ask about improper motivation as a separate basis for invalidation. Establishing motivation is difficult. Moreover, it would not be wise to introduce subjective factors such as motivation into a first amendment analysis when objective factors such as those of equality and nondistortion are sufficient to establish the impropriety of a regulation. Therefore, elimination of motivation as a basis for distinguishing between content-based and content-neutral regulations is desirable.

Professor Stone's reason for including communicative impact as an explanation for the content-neutral/content-based distinction is less readily apparent. Professor Stone seems to believe that this explanation has three sub-categories. Communicative impact can be the basis for regulation when speech is regulated because of concern that the speech will be persuasive, prompt an adverse reaction, or affect other activities by having a strong disruptive effect.[106] He concludes that the first justification is the same type of paternalistic interest that is unacceptable when viewpoints are regulated.[107] Similarly, concern about the "communicative impact" of offensive or controversial speech is unjustifiable as a paternalistic interference with what is said in the public debate.[108]

The disruptive impact subcategory covers speech regulation because its message is particularly distracting or disruptive.[109] Professor Stone is tentatively reassured that this also should be treated as an illegitimate basis in many instances because it again rests on paternalistic concerns over offensive content. However, he is not convinced that these restrictions are inherently invalid when they are unrelated to the presumed offensiveness because they may rest on legitimate concerns that are not paternalistic or reactive to intolerance.[110]

Professor Stone does not suggest it, but it seems that the communicative impact explanation can be subsumed by the equality and distortion of debate categories. All regulations that are the result of paternalistic concerns over acceptance are viewpoint differential and

104. Stone, *Content Regulation*, *supra* note 4, at 200-27.

105. Some first amendment scholars have emphasized the importance of equality in the first amendment doctrine. *See* Karst, *supra* note 43. *But see* Redish, *Content Distinction*, *supra* note 4, at 134-39.

106. Stone, *Content Regulation*, *supra* note 4, at 212-16.

107. *Id.* at 212-14.

108. *Id.* at 215-16.

109. *Id.* at 216.

110. *Id.* at 216-17.

are, at the least, distortive of the debate. Those regulations that are concerned with some reaction other than acceptance should properly be treated not as content regulation but as restrictions based on the efficacy of speech because it is the reaction to the speech that prompts the restriction. Although he does not propose that efficacy of speech restrictions be included within the two values of nondistortion and neutrality and treated in the same manner as content-specific restrictions, his analysis is helpful in understanding why this should be the case. A restriction based on acceptance is a paternalistic attempt to distort the debate or may even seek to impose the view favored by the state. It is a restriction that is content-based, but that focuses upon the reaction to the disfavored view instead of upon the viewpoint.[111] If the restriction is based on paternalistic concern for the reaction to offensive speech, it is just as undesirable because of its distortive effect.[112]

Professor Stone suggests that the third type of restriction—regulations of speech having distractive or disruptive qualities that are not prompted by concerns about acceptance or offensiveness—is a "vanishingly small" category.[113] I would agree and go further to suggest that this classification adds little to the analytical scheme because regulations related to the efficacy of this type of speech can be subsumed by either the equality or distortion of debate categories or may reasonably be classified as time, place and manner restrictions unrelated to effect or efficacy.

An example of this atypical restriction would be a city ordinance prohibiting any demonstration or meeting in the vicinity of a school that is reasonably calculated or likely to disrupt the educational activities. This restriction reasonably could be classified as a regulation based on communicative impact. However, doing so places too much emphasis on the manner and extent to which the city has chosen to articulate its goals. If the regulation were changed to a prohibition of all demonstrations within sight or sound of the schools, it would be more traditional in form and also remove distraction as a basis. This type of evenhanded regulation leaves ample opportunities for expression away from schools. It is also nondistortive and therefore should be given greater deference. It is more efficient to group these regulations with those regulations traditionally referred to as time, place and manner restrictions, which are not subject to the heightened scrutiny of the "compelling state interest" test. Continuation of the communicative impact basis is unnecessary so long as no hypothetical is developed that combines the communicative impact basis, violation of one of the two criteria of equality and nondistortion, and lack of paternalistic concern about acceptance or negative reaction.

111. The Court has noted in dictum that the government's fear of acceptance of an idea is not a permissible basis for speech regulation. First National Bank v. Bellotti, 435 U.S. 765, 789-92 (1978).

112. *Id.* *See also* Cohen v. California, 403 U.S. 15, 21 (1971).

113. Stone, *Content Regulation*, *supra* note 4, at 216-17 n.7.

If the efficacy category is divided into negative and positive reactions, most restrictions will be based on concern for acceptance. Such restrictions are paternalistic regulations of positive efficacy; that is the state would like to discourage the speech because it is persuasive. Restrictions based on concern for negative reaction by the audience, such as to offensive speech, are paternalistic regulations of negative reactions or negative efficacy. Negative and positive efficacy subsume any regulations within Professor Stone's communicative impact category that do not easily fit into the content-based categories of viewpoint and subject-matter restrictions. Regulations of this type exhibit the same paternalism as viewpoint and subject-matter restrictions because they lack neutrality and distort the debate. Even when the state is concerned about some reaction other than acceptance, such as when the audience is offended by sexually explicit mailings, paternalism results if the speech is regulated to prevent the reaction. Although the means may be different, the method is as destructive of first amendment values as the direct, but less subtle regulation of disfavored speech. These regulations may reasonably be grouped with the viewpoint and subject-matter bases. Thus, the communicative impact category or efficacy category may reasonably be eliminated.

D. *Content Regulation by Restrictions Based on the Identity of the Speaker*

In *First National Bank v. Bellotti*,[114] the Court confronted the question of "whether the corporate identity of a speaker deprives [the] proposed speech of what otherwise would be its clear entitlement to protection."[115] The answer was not an unqualified "no" because the Court did not hold that corporations and other entities share all the rights of a natural person, but instead held that the regulation was an unconstitutional attempt to restrict protected speech.[116]

Although the restriction in *Bellotti* on contributions and expenditures for the purpose of affecting a popular vote on issues not materially affecting the property or business of the corporation was reviewed under the "compelling state interest" test,[117] it is not clear whether the Court would subject all restrictions based on the identity of the speaker to that test. Although a finding of a legislative purpose giving an advantage to one side of the debate theoretically would make the difference in what test the Court would apply, it is not clear that the Court found such a purpose or relied on such in holding that the "compelling state interest" test applied.[118]

The regulation in *Bellotti* may be viewed as a subject-matter restriction as well as a speaker restriction because the legislation restricted speech not only because of its corporate identity, but also because of the

114. 435 U.S. 765 (1978).
115. *Id.* at 778.
116. *Id.* at 776, 786-92.
117. *Id.* at 767-68, 786-92.
118. *See id.* at 785-86, 785-86 n.22.

subject on which the corporation chose to communicate.[119] Such a characterization raises the question of why this type of restriction should be tested by the most stringent of first amendment tests. Only when one segment of society is being stripped of its first amendment rights is a restriction truly based on identity alone. In all other cases the decision to restrict will be based on either the subject matter or the viewpoint associated with the speaker. Unless there is a personal or group animus on the state's part, the motivation will be one of promotion of a viewpoint or the distortion of debate by limiting discussion on a subject. As in *Bellotti*, the legislature may have an admirable goal such as fostering individual debate and preventing special interests from exercising undue influence,[120] but these altruistic and well-reasoned goals do not justify the circumscription of debate when it results in distortion or lack of neutrality.

Restrictions based on the identity of the speaker should be tested by the previously identified factors. First, such restrictions distort public debate when they exclude a group or class that plays a part in establishing the patterns and policies of American society. Even if all corporate speech activities were restricted, corporate policy-making on economic matters would still give corporations a significant role in shaping society. There appears to be no better reason to permit the restriction of corporate speech than to permit the restriction of speech of any ethnic or racial group.

It also appears that restrictions based on the identity of the speaker create inequalities instead of promoting evenhanded regulation. When a bias or prejudice directed at a particular group is associated with restraints on speech, there exists a clear case of inequality destructive of traditional first amendment values. If such regulation is not based on a desire to hinder a particular group's expression, then the regulation reflects concern for the result that may follow from the group's expression. Such a regulation is then fundamentally a viewpoint or subject-matter regulation that exclusively affects a particular group. Restrictions of this type are as unacceptable as any directly-imposed content-based restriction.

Even when the classification is seemingly benign, as in the corporate speech limitation of *Bellotti*, there are elements of both distortion and inequality. A state should not be allowed to decide that legally created entities such as corporations are not entitled to speak on certain subjects, although such state actions could be justified on the basis of philosophical paradigms or a reasonable interpretation of the intent of the framers. The relevant question here, however, is not whether such action may be justified, but whether such a regulation violates the equality value. Even if such a regulation does not distort the debate, the answer has to be that its disparate and unequal treatment will certainly stifle debate. In addition, although not singling out members of the group

119. *Id.* at 767-68.
120. *See id.* at 788-89.

for regulation, restrictions such as those in *Bellotti* also damage the self-realization value because such restrictions curtail group speech activities that may contribute to the development of group members as individuals.

As Professor Redish has observed, the self-realization value is not mutually exclusive of other first amendment values such as the "democratic process" and the "marketplace of ideas" values.[121] Nor am I suggesting that the values underlying the first amendment be reexamined. The self-realization value suggested by Professor Redish and others adds something that is missing from the equality and marketplace-of-ideas concerns suggested by Professor Stone. If one accepts the self-realization value as a first principle of first amendment theory, then regulations that inhibit that process are suspect. Those that do so directly and forcefully by limiting viewpoint may be more damaging to that first principle than those that indirectly and insubstantially interfere with the self-realization process.

Professor Redish believes that content-neutral regulations may impair free expression and, thereby, undermine individual self-realization to an even greater extent than some content-specific restrictions.[122] This seems to be an accurate conclusion. Compare, for example, a regulation that prohibits Ku Klux Klan members from burning crosses and a regulation prohibiting all speech within one-half mile of any "public" building. Although the latter is clearly content-neutral, it is far more likely to inhibit discussion and self-realization than is the very content-specific, but limited-scope regulation against KKK symbolic speech.

This does not mean that the self-realization model is not useful. In both hypotheticals, the regulation impaired self-realization and, therefore, is suspect. Thus, the self-realization model will make suspect a far larger group of regulations than would an analysis using the equality and nondistortion values, even when those values are used together. Lack of equality and distortion in speech restrictions also damage the self-realization value, but unlike the "marketplace of ideas" and "democratic process" values, which appear undamaged by neutral, nondistortive regulations, it seems that these regulations—traditionally described as time, place and manner restrictions—may be destructive of the self-realization value.[123] Thus, all speech-impairing regulations should be treated in a similar manner even when not content-based;[124] otherwise, distinctions must be made between the types of the impairment and their relative significance.

At this point it is perhaps worthwhile to explain what the self-realization value adds to the analysis of what level of review should be ap-

121. Redish, *Free Speech*, *supra* note 1, at 594.

122. *See* Redish, *Content Distinction*, *supra* note 4, at 129-30.

123. This is the solution proposed by Professor Redish. *See id.* at 142-44. This article adopts a modification of Professor Redish's approach and this modified approach has an important role in the analysis of the limitations on state interest in regulating speech about harmful and undesirable activities.

124. *See id.*

plied. From the discussion of the first five bases for regulation, it should be apparent that any regulation that impinges on free expression will damage the self-realization value. All speech serves the salutary purpose of promoting self-realization even if it is commercial, defamatory or incites unlawful action.[125] This, of course, does not mean that all lawful speech, such as that which incites unlawful action, is absolutely protected.[126]

If all speech can promote self-realization, the question arises as to how to regulate it in a constitutionally permissible manner assuming that the self-realization value is the first principle. Professor Redish has implicitly confronted this problem by suggesting that the first amendment doctrine be modified by excising the "content distinction."[127] Although Professor Redish does not explicitly say that accepting the self-realization value as a first principle militates against continued acceptance of the content distinction, it is apparent that to accept the self-realization model requires the abandonment of equality and governmental neutrality as first principles because some regulations that impinge equally on all speech are nonetheless violative of an individual's interest in expression and self-realization.[128] The example Professor Redish uses is a modification of the fact pattern in *Mosley*. He asks which is more damaging to free speech interests: a prohibition of labor picketing near schools or a prohibition of all picketing anywhere?[129] The obvious answer is that, despite its equality, the second prohibition does greater damage. Professor Redish would avoid content distinction by subjecting all regulations that impinge on free expression to the same analysis.[130] Although it is not directly stated, this appears to be the only reasonable analysis when self-realization is accepted as a first principle because all speech regulations damage this value. Thus, the analysis is reduced to merely a question of the degree of the infringement. Professor Redish does an admirable job of providing for this balancing by suggesting that the final step of the analysis of all speech-impinging regulations should be a balancing of the strength of the state interest in regulation against the speaker's ability to communicate ideas in another way.[131]

However, it seems that the purpose of balancing may be equally well served by the adoption of the dual values of equality and non-distortion. Although Professor Redish is correct in noting that equality alone may allow for greater infringement in some cases, this result may be avoided if the state is required to show that not only is the equality value protected, but that there is also no distortion of the debate. When the state prohibits all debate on a subject or severely restricts the

125. *See* Redish, *Free Speech*, *supra* note 1, at 625-45.
126. *See id.* at 626-27.
127. *See* Redish, *Content Distinction*, *supra* note 4, at 136-43.
128. *See id.* at 134-38.
129. *See id.* 136-37.
130. *See id.* at 143.
131. *See id.*

amount of expression, it will distort the balance of expression and persuasion that would have been reached if the participants were free to seek their own level of involvement. As previously discussed, the most obvious method of distortion—that of limiting debate—favors the status quo.[132]

The Court's application of the "compelling state interest" test in *Bellotti* seems justified because when restrictions are based on the identity of the speaker, it seems that the interest of equality and non-distortion are damaged by identity-based restrictions, at least, to the same degree as they are by content-specific regulations. Having distilled from the current regulation cases the interests that appear to justify the application of the "compelling state interest" test, a basis emerges for rationally and coherently deciding whether identity of speaker regulations should be stringently reviewed.

E. *Content Regulation by Restrictions Based on the Identity of the Audience*

Despite its artificiality and near insignificant use, the category of restrictions based on the identity of the audience has been included for the purpose of exhausting all possible bases of speech regulation. *Greer v. Spock*[133] and *Federal Communications Commission v. Pacifica Foundation*[134] arguably involve this type of restriction because the audience's identity was important in determining how much protection should be given the speech. However, this would be a superficial conclusion because in both cases the Court was primarily concerned with the subject matter of the speech. The decisions turned on whether the state could restrict the speakers as to subject matter (i.e., partisan political speech in *Greer*[135] and offensive, but not obscene speech in *Pacifica*).[136]

Greer involved a Fort Dix regulation that banned speeches and demonstrations of a partisan political nature.[137] Spock and three other candidates for national office sought to campaign and distribute literature on the military reservation and several non-candidates sought reentry to the post to distribute literature after being evicted.[138] Permission to enter for these purposes was denied by the post commander, who relied in part on his obligation to prevent interference with his troops' training schedule and to avoid the appearance of support for a candidate by a commanding officer.[139]

The Court's opinion addressed the power of the government to control use of its property and the specific need of the military to exclude civilians from military installations.[140] After concluding that the

132. *See supra* notes 61-62 and accompanying text.
133. 424 U.S. 828, 831 (1976).
134. 438 U.S. 726, 730-32 (1978).
135. 424 U.S. at 831.
136. 438 U.S. at 742-48.
137. 424 U.S. at 831.
138. *Id.* at 832-33.
139. *Id.* at n.3.
140. *Id.* at 834-38.

regulation was not facially invalid,[141] the Court found that the regulations had been applied objectively and evenhandedly to keep the post wholly free of political activity.[142]

The Court did not discuss what standard of review was applied to the regulation, but there are indications that it was treated as a time, place and manner restriction. Justice Stewart, writing for the majority, noted that the regulation might be invalid if applied "irrationally, invidiously or arbitrarily."[143] Justice Powell, in a concurring opinion, also suggested that the Court's approach was "to inquire 'whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.' "[144] It seems that because the regulation was applied evenhandedly to all partisan speech and other opportunities to reach the same audience were available,[145] the restriction, though viewed as a valid subject-matter restriction, was tested as merely a time, place and manner restriction of the subjects regulated.[146]

Greer demonstrates that in some instances speech restrictions would not be permissible without the determinative influence of the combined factors of audience identity and subject matter. Thus, it would be unacceptable to regulate partisan political activity or advocates of views that threaten the loyalty, discipline or morale of an audience unless that audience were military personnel on a military installation. Nor would it be permissible to restrict all communications to such an audience. It is apparent, therefore, that the factors of audience and subject matter in *Greer* were inextricably linked.

In *Pacifica*, the same confluence of concern for audience and subject matter occurred, which was instrumental in persuading the Court that the Federal Communications Commission restriction was permissible.[147] George Carlin's satirical monologue, "Filthy Words," which the Court held was not obscene, had been characterized by the FCC as patently offensive speech.[148] Because the broadcast contained patently offensive language and was aired in the afternoon when children were likely to be part of the audience, the Court found that the broadcast was indecent.[149] The Court held that the Commission's ability to regulate the broadcast was dependent upon the factual context of the broadcast, including the time of day, content of the program and the medium.[150] Thus, it seems that the particular combination of the factors of subject

141. *Id.* at 838.

142. *Id.* at 839.

143. *Id.* at 840.

144. *Id.* at 843 (Powell, J., concurring) (citing Grayned v. City of Rockford, 408 U.S. 104, 116 (1972)); *see also* Pell v. Procunier, 417 U.S. 817, 822 (1974); Tinker v. Des Moines School Dist., 393 U.S. 503, 509 (1969).

145. *Id.* at 847, 849.

146. *Greer*, 424 U.S. at 834-38, 840, 843.

147. *Pacifica*, 438 U.S. at 738-40, 749-50.

148. *Id.* at 731.

149. *Id.* at 738-41, 750-51.

150. *Id.* at 750.

matter and audience were determinative of the validity of the FCC regulation.

Cases such as *Rowan v. Post Office Department*[151] and *Perry Education Association v. Perry Local Educators' Association*[152] also focus some attention on the audience identity factor as well as on the subject matter of the speech in determining the proper amount of first amendment protection. From these cases it is apparent that audience identity alone is virtually an insignificant basis for regulation.

Regulations based on audience identity should be treated in the same manner as regulations based on speaker identity because they attempt to control all communications to a person or group and, thereby, damage the interests of equality and non-distortion. When, as in the four cases previously discussed, the regulation is based upon the dual elements of subject matter and audience identity, no less stringent a test should be applied than when only one of these two factors is present. Therefore, the "compelling state interest" test should be applied whenever both the audience identity and the subject matter form the bases of the challenged speech regulation.

Self-realization is hindered by audience-based restrictions because they retard the development of both the speaker and the audience. Thus, the self-realization value could be stretched to include the development of the audience as a basis for invalidating a restriction; however, such an extension is probably unwarranted given the restriction's effect on the self-realization of the speakers.

Because self-realization is not determined by any particular level of speech or expressive activity, but is instead achieved by different persons at different levels of involvement and expression, a regulation that even slightly limits opportunities for expression should not, in the absence of a sufficiently important countervailing state interest, be countenanced. Therefore, a limitation on a speaker's access to an audience, such as in *Greer*, should be considered impermissible even though other means of expression are available that may equally further the self-realization value.

F. *Content Regulation by Restrictions Based on the Time, Place, and Manner of the Speech*

This basis for speech regulation differs from the prior five because its focus is not content, audience, speaker or efficacy. Instead, a time, place and manner restriction may indirectly affect all four of these factors, but in its pure form it is neutral and evenhanded. Because time, place and manner restrictions are facially neutral and evenhanded does not, however, mean that they never impinge freedom of expression. For instance, although a restriction that limits all speech activities of a "controversial or political nature" in the downtown of a city to between the

151. 397 U.S. 728 (1970).
152. 460 U.S. 37 (1983).

hours of midnight and two A.M. might be based on the legitimate concern of preventing congestion resulting from speeches and demonstrations during business hours, it would nonetheless violate the first amendment, even though it is evenhanded and viewpoint neutral, because it effectively inhibits all speech. Because it imposes a limitation so burdensome on such speech as to effectively prohibit it, such a regulation would be as damaging to first amendment interests as would a ban on public speaking about matters of controversy.

The potential invalidity of time, place and manner restrictions may be illustrated by using the previously-developed two-part test. Although time, place and manner restrictions are facially neutral, they have a heavily differential effect because without the circulation of views the status quo is advantaged. Furthermore, no criticism can be voiced nor opposition organized without inconvenience. Thus, this type of regulation seems to be both unequal in its effect and promotional of a particular viewpoint.

The content differential effect of time, place and manner restrictions is not a new concern. *Schneider v. State*[153] involved four separate facially neutral municipal ordinances. Three prohibited all distribution of handbills, pamphlets and similar items, while the fourth prohibited all door-to-door canvassing and soliciting done without the prior approval of municipal authorities.[154] All four ordinances were held invalid because they impermissibly burdened freedom of speech and press.[155] Although the Court noted that not all time, place and manner restrictions were impermissible, it held that those that prohibited the traditionally important method of communicating by pamphlets and permitted local authorities discretion in choosing which persons would be permitted to canvas door-to-door were unconstitutional abridgments of free speech.[156]

These two principles—the power to regulate and the protection of free speech—are, in a superficial sense, logically inconsistent. However, by harmonizing the underlying inconsistencies, it is possible to understand not only why time, place and manner restrictions are permissible, but also why they should logically be subjected to a less stringent test of constitutionality. To do so, however, requires a reexamination of the three interests damaged by content regulation.

For time, place and manner restrictions to be valid, they must not be triggered by content. Three of the four ordinances in *Schneider* were neutral in design and operation.[157] The fourth, however, was subject to abuse because municipal authorities were allowed discretion that could be used to suppress particular viewpoints;[158] a police official had the power to determine what literature could be distributed and who could

153. 308 U.S. 147 (1939).
154. *Id.* at 153-57.
155. *Id.* at 160-65.
156. *Id.*
157. *See id.* at 154-57.
158. *Id.* at 157-59, 163-65.

distribute it.[159] This type of restriction is a classic example of a regulation impairing the equality and nondistortion values. When such discretion exists, officials may treat speakers differently on the basis of content, thereby, violating the equality principle. Such discretion also distorts public debate by filtering out communication that public officials deem is "undesirable."

The self-realization value is impaired by restrictions such as those found in *Schneider* because there is both a reduction in the opportunities for expression and a reduction in the expression of specific views and the concomitant specific individual development. Because the three aforementioned values were damaged by the fourth *Schneider* regulation in the same manner as they would have been by content-based restrictions, the regulation was properly invalidated. The municipality was unable to show a "compelling state interest" served by the ordinance nor was it able to show that its restriction did not unnecessarily impinge expression in accomplishing the restriction's goals.[160]

The other three regulations reviewed in *Schneider* were content neutral in both design and application because they simply forbade all speakers from communicating by one method.[161] Therefore, they did not directly violate the equality principle. There was, however, a greater probable effect on speakers who could not afford a means of communicating other than by pamphlet. The Court also noted that pamphlets are "historical weapons in the defense of liberty"[162] and that the availability of other places for the distribution of pamphlets did not compensate for the restriction on distribution in streets and alleys, which the Court held were "natural and proper places" for disseminating opinion and information.[163]

Professor Stone suggests that content-neutral restrictions of this type may have a differential effect on those with unpopular or controversial views and those whose ability to disseminate views is limited by finances or the characteristics of the intended audience.[164] The logic and appeal of Professor Stone's position is illustrated by the following example. An ordinance banning face-to-face discussions and pamphleteering during harvest season at migrant worker camps would be a content-neu-

159. *Id.* at 163.

160. The Court did not analyze the ordinance in terms of the importance of the purpose of the regulation. It stated that regulations of canvassing may be permissible, but that this regulation was an impermissible burden on speech. *Id.* at 163-65. The censorship concern seems to be preeminent in the Court's reasoning. *Id.* at 163-64. There is language indicating that the ordinance was not sufficiently narrow to be a constitutional regulation intended to prevent trespass and fraud. *Id.* at 164. The Court found that there were other methods available to accomplish such goals, noting that

> [i]f it is said that their means are less efficient and convenient than bestowal of police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press.

Id.

161. *Id.* at 154-57, 162.

162. *Id.* at 162.

163. *Id.* at 163.

164. Stone, *Content Regulation*, *supra* note 4, at 218.

tral restriction seriously infringing speech because such workers are difficult to reach for activities such as union organization except when brought together for work. Furthermore, odd hours, the lack of access to televisions and radios by these workers and the higher than average rate of illiteracy may make communication with them during harvest season through mass media difficult. Even if such an audience could be reached by these methods, such communication would be less cost effective and convenient than direct contact, given the audience's size and concentration.

Thus, there may be lurking in these superficially neutral restrictions a disparate effect on certain speakers, audiences and viewpoints. Although the "compelling state interest" test of content-differential regulations should not automatically be imposed, it would be a mistake to dismiss these restrictions as harmless simply because of their superficial neutrality and evenhandedness.

The distortive effect of time, place and manner restrictions is also readily apparent as the following example will illustrate. Suppose that within a state there are two cities each having a nationally respected newspaper that often present opposing points of view and, thereby, provide a bipartisan perspective on most issues. If the state legislature banned all written discussion of "controversial or partisan issues" except as presented in these two newspapers, such a restriction would undoubtably be held to be an unconstitutional abridgment of free speech and press. Although such a prohibition would be an evenhanded restriction of all other speech activities and could be legitimately classed as a time, place and manner restriction because no particular view would be favored, it should certainly be held to be invalid on the ground that such a prohibition was content-specific because it banned all views too controversial or unpopular for the two major newspapers.

Thus, this type of restriction would limit the opportunities available to those with no access to the two major newspapers and would have a distortive effect on any debate of controversial or partisan issues, thereby violating the "marketplace-of-ideas" and "democratic process" values. Furthermore, for those who believe that the first amendment contains the specific value of self-realization, this type of regulation is inimical to that interest. By limiting opportunity for expression and by forcing views through the filter of the paper's editorial process, individual self-realization is dangerously inhibited. To the extent that society allows individuals to make decisions, it should allow individuals the means and information needed to make a responsible choice. When the choice is not removed, but the ability to reasonably make it is inhibited, the "self-realization" and "democratic process" values are damaged.[165]

165. *See* Redish, *Free Speech*, *supra* note 1, at 605-07.

IV. VIEWING TIME, PLACE AND MANNER RESTRICTIONS FROM THE PROPER PERSPECTIVE

First amendment cases have overemphasized the importance of "time, place, or manner restrictions."[166] Some opinions recognize that the repetition of the phrase "time, place or manner" is an insufficient justification for all such restrictions. An example of an in-depth analysis of time, place and manner restrictions by the Court is *Heffron v. International Society for Krishna Consciousness, Inc.*[167] In *Heffron* the Society challenged a rule adopted by the Minnesota State Fair organizers that prohibited sales, solicitations and distribution of merchandise or literature except from licensed booths.[168] The Society sought invalidation of this rule on the ground that it suppressed speech necessary to the practice of Sankirtan, a religious practice requiring members to solicit donations and sell religious literature.[169]

Justice White, writing for the majority, noted that although the Society's activities were fully protected speech activities even though the literature was offered for sale, these activities were "subject to reasonable time, place, and manner restrictions."[170] The Court also argued that the regulation's classification as a time, place and manner restriction was not determinative of its validity because such regulations must also satisfy three distinct requirements: 1) they must be justified without reference to the content of the speech; 2) they must serve a significant governmental interest; and, 3) there must be alternative means to communicate the affected message.[171]

The Court's choice of wording for its content neutrality requirement is interesting for the Court held that "[a] major criterion for a *valid*

166. Consider, for example, the dicta in *Mosley*, 408 U.S. 92, 99 (1972). In striking the Chicago regulation that prohibited labor picketing in the vicinity of a school, the Court wrote: "In this case the ordinance describes impermissible picketing not in terms of time, place, and manner, but in terms of subject matter. The regulation 'thus slip[s] from the neutrality of time, place, and circumstance into a concern about content.' " *Id.* at 99 (footnote omitted) (quoting Kalven, *The Concept of the Public Forum*: Cox v. Louisiana, 1965 SUP. CT. REV. 1, 29). The implication is that restrictions which focus only on time, place and manner and are not keyed to intent are valid exercises of the police power. What is missing from this analysis is an examination of why most time, place and manner restrictions do not unconstitutionally impair free expression. This can be determined only by examining how these time, place and manner restrictions operate without damaging the fundamental first amendment interests that are damaged by content-based restrictions. Instead of classifying the speech, the Court should examine the interest underlying the speech and determine whether this interest is damaged by restrictions falling under the broad rubric of time, place and manner. The answer will not always be that the interest is safe when speech is restricted in such a manner.

167. 452 U.S. 640 (1981).

168. *Id.* at 643-44. The booths were allocated on a nondiscriminatory first-come, first-serve basis. *Id.*

169. *Id.* at 645. The Society did not challenge the rule as a specific violation of its religious freedom and did not seek an exemption from the rule for its practices as the Minnesota Supreme Court seemed to believe appropriate. Instead, the Society concluded that any right it had was the result of the general right of all persons to conduct similar activities at the fairgrounds. *Id.* at 652 n.15.

170. *Id.* at 647.

171. *Id.* at 647-48.

time, place, and manner restriction is that the restriction 'may not be based upon either the content or subject matter of speech.' "[172] Implicit in this criterion is the possibility that time, place and manner restrictions can be invalid. However, the Court fails to explain why these restrictions may be invalid. It seems that invalidity is, in part, a function of being "based upon either the content or subject matter,"[173] because of the link to content and subject-matter restrictions.[174] Similarly, the Court states that a valid restriction must serve a significant state interest and must leave alternative forums for expression of the restricted speech.[175]

Putting aside the requirement of a substantial state interest, the combination of content and subject-matter neutrality and the availability of alternative means of communication is very similar to the previously developed two-part analysis. The combination of the neutrality and availability of alternatives elements provides an analytical method very similar to the analytical method based upon the neutrality and non-distortion elements in which the presence of either element triggers the requirement that the state meet the "compelling state interest" test.

The Commission's regulation in *Consolidated Edison*[176] is an example of a time, place and manner restriction that failed the content neutrality requirement. The Commission had attempted to prohibit all inserts in utility bills that addressed "controversial issues of public policy."[177] Because the Commission's regulation prevented all expressions on controversial issues in the form of bill inserts, it was, in its broadest sense, a time, place and manner restriction. Although there was no attempt to suppress just one side of any debate or any particular viewpoint,[178] the Court had little difficulty in finding the regulation invalid because it limited the choice of subjects for the public debate that may occur within the forum of utility bill inserts.[179] Thus, it is insufficient to merely classify the regulation as a time, place and manner restriction.

Time, place and manner restrictions may unconstitutionally interfere with debate by impermissibly limiting the opportunity to participate. *Schneider*[180] is an early example of this criterion being applied to invalidate what would otherwise be labeled a time, place and manner restriction. Although three of the four ordinances in *Schneider* did not discriminate or offer the opportunity to discriminate between viewpoints or subjects, all four were invalidated. Part of the basis for invalidating the ordinances in *Schneider* was the weak justification for the restrictions;

172. *Id.* at 648 (citing Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 536 (1980) (emphasis added)).

173. *Id.*

174. *See id.* at 648, 649.

175. *Id.* at 649, 654.

176. 447 U.S. 530 (1980).

177. *Id.* at 537.

178. *Id.*

179. *Id.* at 538.

180. *See supra* notes 150-60 and accompanying text.

specifically, the necessity of keeping the streets clean.[181] The traditional role of pamphleteering in a democratic society and the lack of an appropriate substitute for the distribution of pamphlets in public places were also significant factors.[182] Thus, the clear implication of *Schneider* is that when a state takes away an important traditional method of expression for which there is not adequate substitute, the state must show a state interest more substantial than that of clean and orderly streets.[183]

More recently in *Metromedia, Inc. v. City of San Diego*,[184] the Court reviewed an ordinance prohibiting all "off-site" commercial and some non-commercial billboards.[185] The ordinance was held unconstitutional because it effectively removed one method of communication without the availability of alternative channels[186] and distinguished between permissible and impermissible signs on the basis of content.[187] However, it is unclear whether either infirmity alone, especially that of the lack of an alternative forum, would have prompted the Court to invalidate the ordinance. Nevertheless, the availability of alternative modes of communication continues to be an important factor in determining the validity of time, place and manner restrictions.[188]

The divergent results reached in *Heffron*, in which restrictions on peripatetic pamphleteering and soliciting were upheld, and *Metromedia* may, in part, be harmonized by examining the scope and significance of the effect each challenged restriction had on the speaker's ability to communicate the same message by alternative methods. For the Krishna Society in *Heffron*, the Society member's method of communication was Sankirtan[189] and the site for this communication was the Minnesota State Fair.[190] Sankirtan involves two different expressive activities: proselytizing and fund solicitation. The Society's proselytizing involved both oral communication and the distribution of leaflets.[191] Because only the distribution of leaflets was prohibited, the Society members were free to walk about and communicate orally with

181. *Id.* at 162.
182. *Id.* at 162-63.
183. *Id.* at 162. Also appearing in the opinion is an early example of the least restrictive alternative analysis. The Court noted that: "This constitutional protection [of the freedom of speech and press] does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets." *Id.* at 162.
184. 453 U.S. 490 (1981).
185. *Id.* at 493-96.
186. *Id.* at 516.
187. *Id.* at 516-17.
188. This is a superficial enunciation of the nondistortion interest, an interest which is at the core of this article's proposed content analysis. If a government can effectively choke off all discussion, even if it is an evenhanded manner, it may benefit the status quo or some other chosen position. The availability of equally effective, efficient and convenient alternate methods ensures that the debate will not be distorted by the removal or amplification of any voice. *Cf. Consolidated Edison*, 447 U.S. at 530 (The Court rejected as unconstitutional the Commission's "neutral" suppression of all discussion and noted that hostility to content-based restrictions extends to suppressions of an entire topic.).
189. *Heffron*, 452 U.S. at 645.
190. *Id.* at 643-45.
191. *Id.* at 656 (Brennan, J., concurring and dissenting).

fairgoers.[192] The second type of expressive activity, fund solicitation, was prohibited except from assigned booths.[193] Thus, the Society had unrestricted access to fairgoers to communicate its views orally, but was restricted in the distribution of leaflets and solication of funds.

This ban on pamphleteering and soliciting did not extend beyond the fairgrounds. Society members were free to distribute leaflets and solicit funds outside the fairground's gates and in any other public place. Although the exact audience may not have been available in these locations, the restriction did not prohibit the Society's expressive activities in these locations. Furthermore, the Society had the opportunity to engage in both pamphleteering and soliciting from an assigned booth. Although these were restrictions on expression, they were not restrictions which eliminated the medium as an effective method of expression.[194]

In *Metromedia*, advertisers were prohibited from using billboards for virtually any purpose other than on-site commercial advertising. San Diego's ordinance effectively eliminated noncommercial communication by billboard and limited commercial advertising to a fraction of its traditional use.[195] Although the plurality held the limitation on commercial billboards to be a reasonable time, place and manner restriction, it rejected a similar justification for the noncommercial billboard restriction.[196] The virtual prohibition of noncommercial billboards was held invalid because it impermissibly differentiated between billboards on the basis of content.[197] Furthermore, the ordinance failed to leave sufficient alternative means of communicating messages that would have been communicated by noncommercial billboards.[198]

The Court relied on the parties' stipulation that other forms of advertising were insufficient because of inconvenience, expense or inability to reach the same audience.[199] It is unclear whether the ordinance would have ben invalidated on this ground alone had it evenhandedly prohibited all noncommercial billboards, although the plurality does seem to imply that such an ordinance would be suspect.[200]

Heffron and *Metromedia* are excellent examples of how time, place and manner restrictions flirt with invalidity by being so restrictive that they effectively foreclose an important means of communication. In *Heffron*, ample opportunities existed for the Society to communicate its views even by the methods that were restricted within the fairgrounds. In *Metromedia*, however, persons who chose a billboard as the most effective or convenient method of communicating were unable to use their

192. *Id.* at 656-57.
193. *Id.* at 656.
194. *Cf.* Schneider v. State, 308 U.S. 147, 161-62 (1939) (interest in preventing littering insufficient to permit prohibition of pamphleteering).
195. *See Metromedia*, 453 U.S. at 501, 503.
196. *Id.* at 512-13, 515-17.
197. *Id.* at 516.
198. *Id.*
199. *Id.*
200. *Id.* at 515 n.20.

preferred medium. Furthermore, for those persons with a limited budget who wished to reach a large audience over an extended period of time, there may have been no effective alternative to the billboard. For the Society, their preferred communicative method was available in other places as was the alternative of peripatetic proselytizing without soliciting funds or distributing literature. Thus, there was a higher probability that the *Metromedia* ordinance would have had a distortive effect on public debate than would the *Heffron* restriction.

The previously discussed cases illustrate that time, place and manner restrictions are not inherently innocuous. Tagging a challenged restriction with this phrase does little to advance the analysis of a restriction's validity. Because a time, place and manner restriction must be content-neutral and leave open alternative methods of communicating any messages impeded by the restriction to be valid,[201] it may be more helpful to begin the first amendment analysis by focusing on the elements of neutrality and nondistortion—the two interests previously identified as determinative of whether a heightened level of scrutiny should be applied—instead of jumping to determine whether the challenged restriction falls within the time, place and manner rubric.

In instances where neither of these two interests are damaged by an alleged time, place and manner restriction, the restriction should be classified as a "valid" time, place and manner restriction provided that it meets the reasonableness test. However, if either of the interests are damaged, then there should be applied a heightened level of scrutiny.

V. The Limits of State Power in Discouraging Harmful or Undesirable Activity

Neutrality and nondistortion have been identified as two factors that trigger heightened scrutiny. Subject-matter restrictions may damage either or both of these values. Therefore, these restrictions can not be treated as time, place and manner restrictions because they are either content-based or they distort debate by preempting or restricting the discussion of an entire subject. This section will initially distinguish several harmful or undesirable speech cases from the category of time, place and manner restrictions. It will then be suggested that, despite the heightened level of scrutiny that should be applied to these subject-matter restrictions, there are legitimate state interests to be served by them. Finally, it will be proposed that a precondition to the legitimacy of subject-matter restrictions based on a state's interest in preventing harmful or undesirable speech be incorporated into the first amendment analysis.

201. *Metromedia*, 453 U.S. at 516. In addition, such a restriction must serve a legitimate and substantial state interest. This third requirement is important because it establishes the minimum state interest required to justify any restriction on speech. This article examines why certain types of speech can be interfered with only if a high level of state interest, instead of a mere nontrivial state interest, is shown. Therefore, all speech regulations must satisfy this "substantial interest" requirement, but some must satisfy an even greater interest.

A. *Classifying Restrictions on Harmful or Undesirable Speech*

In *Consolidated Edison*[202] the Commission prohibited all inserts discussing controversial issues of public policy.[203] One of the three justifications advanced by the Commission[204] was that the order was a valid time, place and manner restriction.[205] The case is an excellent illustration of why the time, place and manner classification is more rubric than helpful. The Commission asserted that the regulation was merely a limited regulation because it applied only to bill inserts. The Court, however, questioned the basis of the regulation as well as its scope. The Court dismissed the time, place and manner justification as untenable because the regulation was based on the content of the speech.[206]

As previously discussed, the classification of a regulation as a time, place and manner restriction is a prelude to asking questions about three concerns: (1) content neutrality; (2) availability of alternative means of communication; and, (3) the presence of a substantial state interest.[207] In terms of the analysis developed in this article, the Commission's restriction was one for which a compelling state interest need be shown because it was distortive of debate on controversial issues. Because it was an evenhanded prohibition of all discussion of such issues in bill inserts, it did not violate the equality principle. However, because it prohibited all discussion of controversial subjects, it was distortive of debate. As the Court pointed out, to allow the government to select topics for discussion is to allow it to control the debate.[208] Strict scrutiny should be applied when control of this type violates either the equality or non-distortion values.

In *Consolidated Edison*, the Commission also failed to justify the content regulation by showing a sufficiently compelling state interest.[209] Time, place and manner restrictions, which are neutral and nondistortive, must be based on a significant state concern and must provide for adequate alternative means of communication.[210]

When the state decides what is fit for discussion by promoting or prohibiting the discussion of a topic, it has expressed an opinion on the importance of the discussion. This may violate the equality interest in its broadest sense.[211] When the regulation limits not only discussion of

202. 447 U.S. 530 (1980).

203. *Id.* at 537.

204. The Commission argued that, in addition to being a time, place and manner restriction, the prohibition was a valid subject-matter restriction or a narrowly drawn means of serving a compelling state interest. *Id.* at 535.

205. *Id.*

206. *Id.* at 536.

207. *Id.* at 535-36. *See also supra* notes 163-201 and accompanying text.

208. *Consolidated Edison*, 447 U.S. at 538.

209. After failing to justify the regulation as a permissible time, place and manner restriction or an evenhanded "subject-matter" restriction, the Commission argued that there was a compelling state interest in protecting the consumer from information that was not useful; thereby, safeguarding a privacy interest. *Id.* at 537.

210. *Id.* at 535. The dual concerns of equality and lack of distortion color the requirements of content-neutrality and the availability of alternate channels.

211. The regulation in *Consolidated Edison* was this type of paternalistic invasion of the

a subject, but also directly favors one side of the debate, both the equality and nondistortion values are damaged.

Harmful or undesirable speech is that category of speech concerning subjects which the state has determined are of little value and are socially suspect. This is an intentionally broad category; its utility as a category is limited to elucidating the thesis of this article. When the interest sought to be furthered by the state is the prevention of harmful or undesirable conduct, speech promoting such conduct will be categorized as harmful or undesirable speech. Harmful or undesirable conduct is conduct which, although not illegal, the state may regulate or even prohibit in the interest of the health, welfare and morals of the public. Some examples of this type of conduct are drinking and smoking as well as legalized prostitution and gambling. Thus, an example of harmful or undesirable speech would be a commercial advertisement of any of these products or activities.

In a number of cases, the Supreme Court, lower federal courts and some state courts have reviewed the constitutionality of subject-matter regulations that impair free expression. Because of the breadth of cases covered by the category of harmful or undesirable speech, this article will focus on a relatively small group of cases. Excluded from the category of harmful or undesirable speech are expressions that the state deems to be harmful or undesirable in and of itself and that has no connection to harmful or undesirable conduct. An example of this type of speech may be found in *Consolidated Edison*, where speech which was not associated with any harmful or undesirable conduct, was nevertheless regulated because it was deemed by the state to be of little social value.[212]

The remainder of this article will develop an analogy between subject-matter restrictions of the type found in *Consolidated Edison*[213] and those regulating harmful or undesirable speech. From this analogy, it will be argued that the "compelling state interest" test should be applied in cases where harmful and undesirable speech is regulated. It also will be argued that the state typically may not justify such speech restrictions unless it first prohibits the activity deemed to be harmful or undesirable. Failure to prohibit the activity would be conclusive evidence of the lack of a compelling state interest in regulating speech about that activity.

B. *The Limits of State Interest in Regulating Harmful or Undesirable Speech*

In *Dunagin v. City of Oxford*[214] the Court of Appeals for the Fifth Circuit resolved a conflict between two separate Mississippi district

discussion; to promote not one side or the other, but to ban the entire range of topics being discussed. Although not directly relevant to this article's thesis, the case is useful to indicate why prohibitions of an entire subject in their most general and viewpoint-neutral form are damaging to first amendment interests.

212. *Id.* at 537.

213. *Id.* at 536.

214. 718 F.2d 738 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 3553 (1984).

court rulings. The district courts had reached opposite conclusions on the validity of Mississippi's virtual ban on liquor advertising.[215] This severe restriction on liquor advertising cannot be characterized as a time, place and manner restriction because it was activated by the content of the advertising.[216]

Although acknowledging that its discussion of this subject was dictum,[217] the court's opinion about the extent to which a state may control speech concerning lawful, but harmful or undesirable conduct is disturbing:

> While we need not so hold, there may be no First Amendment protection of purely commercial advertising of those products which the state could entirely proscribe. Or, if by virtue of its police power the state may prohibit or severely limit a trade or conduct (e.g., prostitution, hand-guns, explosive devices, marijuana, pipes and paraphernalia designed to be used with illegal drugs), the state may be entitled to allow the trade but restrict the advertising without having to justify the restriction by balancing the state interest against the public interest in the commercial speech.[218]

The Fifth Circuit erred both in holding that Mississippi may validly prohibit liquor advertising in all areas, despite its legal sale in some areas,[219] and also in its dictum concerning the constitutionally-imposed limits of state action to discourage lawful liquor consumption. The court offered no analysis to support its conclusion that a state may choose to prohibit advertising of lawful activities or trades.[220] Instead, the court based its decision on its belief that the four-part test for validity of commercial speech restrictions set forth in *Central Hudson* had been satisfied by the Mississippi liquor advertising regulation.[221] By concluding that the four-part *Central Hudson* test had been satisfied, the court was able to avoid the question of constitutional limitations on state prohibitions of speech concerning a legal activity; a question inherent in the *Central Hudson* test.

The court should have answered two related questions when it applied the *Central Hudson* test: (1) how can an interest be substantial if a state chooses to indirectly promote that interest; and (2) how can a view-

215. *Id.* at 739-40. All off-site advertising was prohibited and the only advertising permitted was a printed and unilluminated sign eight inches or less, stating that the establishment sold package liquors or was a "lounge." *Id.* at 740 n.3.

216. *See supra* notes 202-14 and accompanying text; *see also Consolidated Edison*, 447 U.S. at 537; *Metromedia*, 453 U.S. at 516-17.

217. For two reasons, the Fifth Circuit's discussion of the limits in regulating speech about lawful activity must be viewed with caution. First, the court acknowledged that its discussion of this subject was dictum. *Dunagin*, 718 F.2d at 742. Almost as important was the court's reliance on the special deference provided by the twenty-first amendment to state control over liquor. *Id.* at 743-45. As an element of this special deference to state regulation, the court applied a reverse commerce clause analysis: presumptive validity for the state law and the lack of federal regulatory power. *Id.*

218. *Id.* at 742 (footnote omitted).

219. *See* Barnes, *supra* note 2.

220. *Dunagin*, 718 F.2d 742.

221. *Id.*

point restriction of speech be no more restrictive than necessary in furthering the state interest? Although the court faithfully applied the *Central Hudson* test, it nonetheless reached the wrong result because of its failure to address these two questions, both of which underlie at least one of the four elements of the test. Thus, the court failed to appreciate the significance of the Supreme Court's requirement that speech regulation promote a substantial state interest.[222]

Mississippi's asserted state interest was the discouragement of liquor consumption.[223] Under Mississippi's regulatory scheme, some counties permit liquor sales and consumption, while in counties where the residents have voted to maintain the pre-existing statewide prohibition, such activities are prohibited.[224] Because the advertising restrictions applied to "dry" counties as well as "wet" counties, the court rejected the asserted justification that, because liquor sales and consumption were illegal in almost one half of the state's counties, the restrictions were valid.[225] Nevertheless, the court found that the state's ambivalent attitude towards liquor sales and consumption expressed a substantial state interest in discouraging those activities and further found that liquor advertising encouraged those activities.[226] The court, therefore, concluded that a nontrivial state interest was present sufficient to justify a commercial speech regulation.

There are several problems with the court's analysis of the state interest. First of all, the court describes the state interest as the reduction of consumption. Therefore, a law regulating advertising would seem to be justified only if it could be shown that there is a link between increased advertising and increased sales. One of the district courts did make such a finding.[227] However, two other portions of the opinion characterized the state interest as the control of the artificial stimulation of liquor sales and consumption.[228] These two interests are different and may be furthered in different ways. For instance, if the state interest

222. This is the third part of the four-part test. The full test is:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson, 447 U.S. at 566.

223. *Dunagin*, 718 F.2d at 747. The Mississippi legislature permitted counties and judicial districts to allow liquor sales, but concomitantly reiterated the state's desire to prohibit the sale and consumption of liquor. Only where the local populace voted to permit sale and consumption of liquor would the prohibition be lifted. *Id.* at 740.

224. *Id.*

225. *Id.* at 742-43.

226. *Id.* at 747, 750-51.

227. *Id.* at 747. The trial judge in *Dunagin* upheld the regulation as a legitimate attempt to reduce consumption and, therefore, reduce the problems associated with the increased consumption of alcohol. The judge relied on one expert's opinion and his own common sense for the necessary link between consumption and the substantive evil sought to be abated. *Id.*

228. *Id.* at 747 (state interest section), 751 (effectiveness of the regulation section).

is in preventing the artificial stimulation of consumption, the regulation could have been tailored to prohibit the types of marketing techniques that make liquor consumption attractive. Thus, the court should not have blithely assumed that there was not a more direct and less intrusive means of advancing the state interest than a prohibition on all liquor advertising.

The court exhibited signs of discomfort with its finding of the existence of a state interest and that the regulation directly and narrowly advanced that interest.[229] In an effort to alleviate its discomfort, the court unfortunately expanded its inquiry.[230] The court cited *Central Hudson* and *Metromedia* in support of its proposition that "common sense" is sometimes sufficient to support a legislative judgment, there being no need for "concrete evidence."[231] Superficially, this seems a reasonable proposition, but the "common sense" conclusion of the Mississippi legislature was that advertising increased consumption, not that it artifically stimulated consumption. Furthermore, there is no "common sense" basis for concluding that nothing less than a virtual ban on advertising would prevent the artificial stimulation of liquor consumption. By shifting from one statement of the state interest to another, the court never directly addressed the question of whether a virtual ban on advertising constitutes state regulation more restrictive than was necessary to reduce liquor consumption.[232]

Even if the state interest is reduced consumption, there remains the troublesome issue of how far a state may go to discourage a lawful activity by regulating speech that encourages the activity. Although the court noted that it was unnecessary to address this issue,[233] this determination seems to be based on the court's characterization of the state interest as the control of the artificial stimulation of liquor sales and consumption. If the interest were more broadly stated as reduced consumption, this issue should have been addressed.[234]

Central Hudson may have laid the foundation for the court's errors in *Dunagin*. Its four-part test of commercial speech was the product of the holdings of several commercial speech cases. In the abstract, the *Central Hudson* test is a helpful and accurate reflection of prior holdings. Since *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*,[235] however, the Court has never held that commercial speech could be differentially

229. *See id.* at 748-49 n.8.

230. *See id.* at 747, 751.

231. *Id.* at 750.

232. The court returns to the artificial stimulation concern to say that the ban is no broader than necessary because only promotional advertising is affected. *See id.* at 751. There is no discussion here of whether only certain types of advertising techniques would artificially stimulate consumption. If it is merely a commonsense approach the court is using, would not a ban on only that advertising which sought to communicate the glamorous or attractive side of drinking be just as reasonable?

233. *Id.* at 472.

234. On the importance of establishing with precision the state interest advanced by the regulation, see *supra* note 31 and accompanying text.

235. 425 U.S. 748 (1976).

treated because of the viewpoint expressed. What the Court has held is that commercial speech is protected, but that there are common sense differences between it and other types of protected speech that permit greater regulation of commercial speech.[236]

The Court has permitted the regulation of commercial speech on bases that would be impermissible if other types of speech were involved. The Court's reason for according less protection to commercial speech has not been to allow states to promote any particular viewpoint, but instead to "insur[e] that the stream of commercial information flow[s] clearly as well as freely."[237] *Virginia Pharmacy*, as the progenitor of modern commercial cases, is particularly helpful in revealing what the Court sought to accomplish by extending first amendment protection to commercial speech. Virginia's rationale for prohibiting the advertisement of prescription prices was its concern for continued competition and professionalism among pharmacists.[238] These interests, however, were considered too attentuated from the method chosen to accomplish them. The Court rejected Virginia's contention that suppressing the advertising of prescription prices would directly advance the asserted goals and do so without unduly restricting protected speech.[239] A similar disbelief by the Court in the connection between the asserted interest and the method chosen to further it resulted in the invalidation of attorney advertising restrictions in *Bates v. State Bar of Arizona*.[240]

In *Linmark Association, Inc. v. Township of Willingboro*,[241] the Court invalidated an ordinance that prohibited "for sale" signs. The township tried to distinguish its ordinance from the *Virginia Pharmacy* restriction on the basis of the important goal of preventing panic selling in neighborhoods undergoing racial integration.[242] The Court rejected the contention that such a ban was needed to advance the goal of racially stable neighborhoods.[243] Instead of attacking the problem directly, the township chose to further its goal by reducing information available about the problem; a method the Court found to be unconstitutional.[244] Thus, pursuit of an interest as strong and admirable as racial integration was insufficient to permit the township to choose the highly paternalistic regulatory practice of reducing the amount of information available when there existed other means to remedy the problem.[245]

Linmark, *Bates* and *Virginia Pharmacy* underlie three of the four parts of the *Central Hudson* test. These cases recognize that commercial speech

236. *E.g.*, *Central Hudson*, 447 U.S. at 561-62; Bates v. State Bar of Arizona, 433 U.S. 350, 381 (1977).
237. *Virginia Pharmacy*, 425 U.S. at 772.
238. *Id.* at 766-68.
239. *Id.* at 678-70.
240. 433 U.S. 350, 364-79. Six reasons for the advertising restriction were examined and rejected by the court as insufficient to justify the ban.
241. 431 U.S. 85 (1977).
242. *Id.* at 94.
243. *Id.* at 95-97.
244. *Id.*
245. *Id.* at 97.

may be regulated when necessary to further a substantial state interest. More importantly, however, they are cases in which regulations were invalidated because they did not "directly advance the state interest"[246] or unnecessarily impaired free expression.[247]

From the specific fact patterns and the holdings in the three aforementioned cases, the *Central Hudson* test emerged.[248] However, the important distinction between regulations which in the process of furthering a substantive state goal, tangentially interfere with speech and those that further the goal by direct suppression of speech was lost in the transformation of the holdings of *Linmark*, *Bates* and *Virginia Pharmacy* into a test of general applicability. For example, in *Virginia Pharmacy* the Court invalidated the prohibition against advertising prescription prices because there was no direct link between the goals of promoting competition and professionalism among pharmacists and the inability to advertise.[249] In *Central Hudson*, however, the Court weakened the holdings of all prior commercial speech cases by not discussing the availability to the state of other means to accomplish its substantial state interest in energy conservation. Although the Court reemphasized that speech restrictions must be confined to methods which are the least restrictive, it concentrated its discussion on other, less restrictive ways of regulating speech instead of methods unrelated to speech regulation.[250] Because it generalized from prior holdings, *Central Hudson* produced a test that allows a state to chose a regulatory scheme that focuses on the content of commercial speech as long as the scheme is the least restrictive of the possible speech restrictions.[251] This startling, though subtle, shift permits a state to control not only subject matter, but also the speaker's viewpoint, provided that the regulation is the least restrictive of the speech-restrictive methods of furthering the state's interest.[252]

Although Justice Blackmun concurred in invalidating the regulation, he authored a separate opinion to express, in part, his concern about the Court's apparent willingness to allow a state to deprive its citizens of information in order to influence their behavior.[253] Justice Blackmun noted that:

> Our prior references to the "commonsense differences" between commercial speech and other speech "suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired." . . . We have not suggested that "commonsense differences" between commercial speech and other speech justify relaxed scrutiny of restraints that suppress truthful,

246. This was the case in *Bates* and *Virginia Pharmacy*. *Central Hudson*, 447 U.S. at 564.
247. This was part of the reason the *Linmark* regulation was invalidated. *Linmark*, 431 U.S. at 96-97; Carey v. Population Services International, 431 U.S. 678, 701-02 (1977).
248. *Central Hudson*, 447 U.S. at 564-66.
249. *Virginia Pharmacy*, 425 U.S. at 769-80.
250. *Central Hudson*, 447 U.S. at 569-71.
251. *See id.* at 578-79 (Blackmun, J., concurring).
252. *Id.*
253. *Id.* at 577.

> nondeceptive, noncoercive commercial speech. The differences articulated by the Court . . . justify a more permissive approach to regulation of the manner of commercial speech for the purpose of protecting consumers from deception or coercion . . . . No differences between commercial speech and other protected speech justify suppression of commercial speech in order to influence public conduct through manipulation of the availability of information.[254]

Justice Blackmun's attack on the Court's apparent willingness to uphold a ban on the advertising of inefficient air conditioning units when no less restrictive speech regulation existed to further the state's goal of reducing energy consumption is justified because such a direct viewpoint restriction of commercial speech is unprecedented.[255] Consequently, the Fifth Circuit followed the *Central Hudson* test and nonetheless reached an absolutely incorrect result in *Dunagin*.

There are three levels on which *Dunagin* should be examined for theoretical and practical soundness. The first involves a return to the equality and nondistortion interests to ask whether the restriction is one that should be subjected to strict scrutiny. If the restriction does damage either of these interests and affects commercial speech, the next inquiry is to determine whether the *Central Hudson* test is satisfied. Lastly, it must be asked whether the distinction set forth in *Dunagin* between commercial speech and other types of protected speech is workable: Can commercial speech be reasonably distinguished from non-commercial speech in order to permit the application of otherwise impermissible viewpoint restrictions to commercial speech?

Dunagin is a classic example of a restriction violative of both the equality and nondistortion interests. By severely restricting liquor advertising, Mississippi unabashedly expressed favoritism for one side of the debate on liquor sales and consumption and also furthered its announced policy of reducing liquor consumption.[256] Rather than explicitly require its citizens to stop drinking, the state chose instead to reduce their drinking by making it more difficult to make reasonable economic choices about where to buy liquor and what type to buy. The state chose regulation over prohibition and reformation.

A "compelling state interest" standard of review would have been

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254. *Id.* at 578.

255. One court has accepted this position as articulated by Justice Blackmun. In Michigan Beer & Wine Wholesalers Ass'n v. Attorney General, 370 N.W.2d 328 (Mich. App. 1985), the Michigan Court of Appeals invalidated regulations of the Liquor Control Commission that were intended to discourage the artifical stimulation of liquor consumption. *Id.* at 335-36. The court did an admirable job of wading through the interests advanced by the Commission to conclude that liquor consumption was not likely to be artificially stimulated by price advertisements where brand advertisements are permitted. The court also concluded, without analysis, that police power interests, however important, do not justify speech regulation in the absence of a real and substantial relationship between the personal freedom impinged and the interest to be furthered. Instead of suggesting that there were regulatory measures available that were less restrictive than speech regulation, the court relied on Justice Blackmun's conclusion and the absence of a substantial furtherance of the state's interest by the regulations. *Id.* at 336-37.

256. *Dunagin*, 718 F.2d at 740-42.

applied in *Dunagin*, but for the fact that the speech was commercial.[257] Because commercial advertising was the subject of the restriction, the court was correct in applying the *Central Hudson* test. The test does not require a compelling state interest. A state need only show that its regulation furthers a substantial state interest,[258] directly advances the state interest and is not unnecessarily restrictive of speech.[259]

There is little doubt that an advertising ban would directly serve the state's interest in reducing liquor consumption, regardless of whether the state interest is characterized as the reduction of all liquor consumption or only the reduction of the artificial stimulation of such consumption.[260] Because of the near hypocritical ambivalence that pervades a state regulatory scheme that permits drinking in some areas, but not in others, it is difficult to accept the state's argument that there exists a substantial state interest. Instead of facing the politically difficult and probably impractical choice of continuing the statewide prohibition, the state chose to discourage consumption by requiring local governmental units to vote affirmatively for the legalization of drinking, while concurrently restricting liquor advertising even in those areas where it could legally be sold.

Although courts should generally defer to legislative judgments about the existence of a substantial state interest in matters affecting public health and welfare, in situations where a state may choose between the prohibition of an activity and a regulatory scheme that impairs free expression, courts ought to carefully scrutinize the authenticity of the state's declared substantial interest.

Closely related to the question of the presence of a substantial state interest is the question of how invasive of first amendment interests a regulation may be in furtherance of the state's goals. If a state's interest is in curbing the artificial stimulation of consumption, then there should be an inquiry into whether there are types of liquor advertisements which do not artificially stimulate consumption.[261] Although there was conflicting evidence in *Dunagin* on this issue,[262] the Fifth Circuit did not bother to differentiate between types of advertising on the basis of whether they were likely or unlikely to stimulate artificial

257. *See id.* at 747.

258. *Central Hudson*, 447 U.S. at 566. There is no doubt that the regulation of this type of speech is permissible. *See Dunagin*, 718 F.2d at 743. There certainly exists a substantial state interest in discouraging alcohol consumption. Had the state prohibited the sale and drinking of alcohol, it would have expressed this legitimate concern. The authenticity of its concern, however, is questionable where the state determines that there is a problem involving the sale and drinking of alcohol, but does not take the obvious step of prohibiting the sale and drinking of alcohol.

259. *Central Hudson*, 447 U.S. at 566.

260. The Court does not focus on either interest to the exclusion of the other. Both are legitimate because any reduction would help to relieve the serious problems associated with liquor consumption. *See Dunagin*, 718 F.2d at 747-48.

261. There was evidence at the trial that most advertising did nothing more than affect brand loyalty. *Id.* at 748.

262. *Id.*

consumption.[263]

Because commercial speech provides important information to consumers, it should not be without protection.[264] Although commercial speech is subject to regulation, the Court has held that such regulation must be based on content and not on commercialism.[265] The commercial speech doctrine permits a greater degree of regulation of commercial versus non-commercial speech in order to ensure that states continue to fulfill their traditional role as guardians of the marketplace. In this capacity, a state may regulate commercial speech to the extent necessary to prevent illegality, fraud and deception,[266] but may not paternalistically choose what is and is not worth hearing.[267] When the choice is between free access to information and the suppression of commercial speech, to further a substantial state interest that could be accomplished by means other than suppression the state should permit unrestricted access to information and further its substantial interest by other means.[268]

Because of the serious infringement of the equality and nondistortion values, the ambivalent commitment to a goal evidenced by the failure to directly advance the purported state interest and the availability of methods that do not impair free speech, the *Dunagin* regulation and others like it should fail constitutional muster. This may be obtained by strengthening the fourth part of the *Central Hudson* test as follows: The method chosen to accomplish the goal must be such as would be chosen by a reasonable legislature to accomplish its goal with the least possible damage to first amendment interests. Under this test, if the goal were to reduce liquor consumption, a large tax on liquor, its rationing or a flat prohibition on its consumption would accomplish that goal without infringing first amendment interests.

Under the test established in *Central Hudson* and applied in *Dunagin*, states not only may distinguish between messages on the basis of commercial subject matter, but also may promote their own interests by regulating the viewpoints expressed, suppressing those messages inconsistent with the state interest being promoted. The Fifth Circuit was unperturbed by this possibility because advertisements in the abstract are clearly commercial and the restrictions at issue furthered the substantial state interest of reducing liquor consumption.[269] Courts in general, however, should be concerned with such viewpoint restrictions in cases where it is unclear whether the speech to be restricted is com-

263. The prohibition also included billboards that did nothing more than give an address, the name of the product and a price in black and white print. Just as Justice Harlan had observed in Cohen v. California, 403 U.S. 15, 20 (1971), that it was improbable that there existed any prurient interest in the phrase "Fuck the draft," it is difficult to believe that such a plain announcement would artificially stimulate consumption.

264. *See Virginia Pharmacy*, 425 U.S. at 765.

265. *Id.* at 761-62.

266. *Id.*

267. *Id.* at 770.

268. *Id. See also Central Hudson*, 447 U.S. at 576-78 (Blackmun, J., concurring).

269. *Dunagin*, 718 F.2d at 750-51.

mercial or non-commercial. As the Supreme Court has acknowledged, it is often difficult to differentiate between commercial and non-commercial messages.[270] The problems associated with making this difficult distinction in a manner which does not seriously infringe first amendment values has only recently been seriously addressed.[271] Suffice it to say that any rule that relies on distinguishing commercial speech from other types of protected speech likely will be problematic.[272] For this reason, testing restrictions that damage the equality and nondistortion values by a standard less stringent than the "compelling state interest" test, solely because the speech is commercial, does not promote the development of a more coherent theory of first amendment protection.

A recent Nevada case provides an excellent example of a state regulation that comports with this article's thesis. In *Princess Sea Industries v. State*,[273] a brothel owner and two newspaper publishers challenged a Nevada law prohibiting advertisements for brothels in those areas of the state where brothels are illegal.[274] Thus, the regulation in this case bears similarities to the regulation in *Dunagin*, because prostitution in Nevada, as liquor sales and consumption in Mississippi, is legal only in some areas of the state.[275] The Nevada regulation is distinguishable from the Mississippi regulation, however, in that the advertising of prostitution is prohibited only where the prostitution is itself illegal, thereby leaving brothel owners free to advertise in those counties where prostitution is legal.[276]

Nevada's ambivalence in regulating prostitution is much less problematic than Mississippi's ambivalence in regulating liquor sales and consumption because Nevada prohibited speech promoting prostitution only where such activity was illegal.[277] Thus, where prostitution was an illegal activity, Nevada legitimately exercised its right to prohibit advertising that could promote such unlawful conduct in order to counteract the substantial danger that local prohibitions of prositution would thereby be violated.[278] The Nevada regulation is an example of a commercial speech regulation that does not damage the equality and nondistortion values because it does not attempt to affect public behavior by regulating speech about prostitution in those areas where it is an argua-

270. *Metromedia*, 453 U.S. at 538-39 (Brennan, J., concurring); *Virginia Pharmacy*, 425 U.S. at 764-65. *See generally* Barnes, *supra* note 2; Comment, *Commercial Speech: A Proposed Definition*, 27 How. L. J. 1015 (1984).

271. *See* Barnes, *supra* note 2, at 476-93.

272. *See id.* at 490-93. *But see* Comment, *supra* note 267, at 1027-30.

273. 97 Nev. 534, 635 P.2d 281 (1981), *cert. denied*, 456 U.S. 926 (1982).

274. *Id.* at 282.

275. *Id.* at 284 (Manoukian, J., concurring).

276. *See id.* Prostitution is not permitted in Clark County where Las Vegas and a large portion of Nevada's tourist business is located. *Id.*

277. *Id.* at 284 (Manoukian, J., concurring).

278. *Id.* at 285 (Manoukian, J., concurring). *See also Virginia Pharmacy*, 425 U.S. at 771-72; Barnes, *supra* note 2, at 498-506. Because the advertising of a commercial activity indicates that there is a willing seller who is able to sell and there has been communicated information about an unlawful activity, which requires only an acceptance, such expression presents a "clear and present danger" of a violation of substantive state law prohibiting the advertised activity. Barnes, *supra* note 2, at 498-506.

bly undesirable, but otherwise lawful activity.[279]

CONCLUSION

Underlying the application of the "compelling state interest" test may be a concern for damage to the neutrality and nondistortion interests. When neither of these two factors are present, the less stringent "reasonable regulation" standard of review should be applied. Regulations that focus on the content of speech, such as those that are applicable only to commercial speech, are subject-matter restrictions that damage at least one, and probably both, of the above mentioned interests. Therefore, these regulations can not be justified by simply classifying them as neutral time, place and manner restrictions.

The application of the intermediate "substantial state interest" test to commercial speech has led to the anomalous treatment of regulations that infringe on commercial speech promoting harmful or undesirable, but lawful activities. This article suggests that to accommodate both the state interest in regulating harmful or undesirable speech and the first amendment interest in the protection of expression, the *Central Hudson* test should be modified to require the state to choose the method a reasonable legislature would choose to accomplish the substantive goal without infringing free expression. Thus, the least restrictive alternative requirement would require that a state legislature attempt to *directly* regulate the purported harmful or undesirable activity before it may regulate *speech* about that activity. A state should not be permitted to manipulate behavior to reduce or eliminate harmful or undesirable conduct by reducing information about such conduct when that conduct has not been directly regulated.

279. Speech regulation intended to affect substantive behavior does not require that in all cases there be a prohibition of the underlying conduct. Instead, this type of regulation should invoke the compelling state interest analysis. Thus, if the underlying conduct proposed by the speech is lawful, there must be a compelling state interest directly furthered by the speech regulation and that interest must be impossible to achieve by a means less restrictive of speech. In Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), Ohralik was suspended from the practice of law for face-to-face solicitation of two women, who had been injured in an accident, to be his clients. *Id.* at 467-68. Although the underlying transaction of providing legal services was lawful and the regulation of the solicitation was not aimed at affecting that transaction, the regulation was intended to regulate such commercial transactions to prevent fraud, overreaching, misrepresentation, the debasement of the legal profession, and the instigation of unnecessary litigation. *Id.* at 461. Thus articulated, it is apparent that the regulation of the manner in which an attorney communicates the availability of legal services not only serves these compelling state interests, but is also the least restrictive of those methods that may interfere with speech. For example, punishing the conduct after the fact would not prevent the substantive harm because even in the best of circumstances it would only redress it. Note that in the instant context the evils flow from the communication, not the conduct. This is not the case when the advertising encourages the evil, but is not the evil, such as in the case of the advertising of liquor or prostitution.