

SPEECH AND DISTRUST: RETHINKING THE CONTENT
APPROACH TO PROTECTING THE FREEDOM OF
EXPRESSION

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ABSTRACT

For over the past three decades, the Court's implementation of the free speech guarantee of the First Amendment has centered on the content approach. The common understanding of that approach is as follows: if a speech regulation is content based, it will be subject to a stringent form of balancing known as "strict scrutiny" and rarely will be upheld; if it is content neutral it will be subject to a more general form of balancing known as "intermediate scrutiny" and may or may not be upheld. The fundamental concern animating the content approach is a general distrust for government speech regulation—the fear that it will attempt to control speech on the basis of its ideological or moralistic agreement or disagreement with the ideas or views being expressed.

This Article challenges commonly held assumptions about the content approach, argues that it should not be the centerpiece of free speech analysis, and proposes a more sensible approach. First, it demonstrates that instead of a system of stringent versus moderate balancing of interests, the content approach has really devolved into a "bicategorical approach" where the initial content characterization of a regulation does all the work: if designated as content based, it is categorically struck down; if content

* Associate Professor of Law, Pepperdine University School of Law. J.D., Northwestern University, Chicago, Illinois (1988). I gratefully acknowledge funding for my work on this Article from a research grant provided by Pepperdine University School of Law. The title of my article is obviously a play on the title of the late Professor John Hart Ely's classic work *DEMOCRACY AND DISTRUST* (1980). However, whereas Professor Ely's thesis was that judicial review of legislative action should be limited absent reasons to distrust the democratic process, my use of the distrust concept is different: that current free speech doctrine as embodied in the content approach is centered on the Court's distrust for government regulation of speech, and that while such concerns are not insubstantial, an inordinate focus on them has created problems in free speech doctrine that require a new approach.

neutral, it is upheld on a virtually categorical basis. Such a framework unreasonably ties the government's hands in dealing with problems created by particular types of expression, and essentially gives the government *carte blanche* to stifle expression by targeting its means rather than its substance. Second, it will demonstrate that most speech regulations reviewed by the Court are content based in the sense that they draw some sort of content distinction on their face. Yet the Court has modernly taken to calling many of these restrictions "content neutral," under two main sets of standards it has adopted to test that neutrality which are applied in an inconsistent and results-driven manner. Within the context of the bicategorical content approach, this means that today many selective content restrictions are being upheld under the deferential level of review accorded to content neutral regulations.

This Article seeks to rectify these problems by proposing a more sensible and "true" categorical balancing approach to assessing speech regulations, where the government's burden of justification is tied not only to a more simplified yet more meaningful assessment of content concerns, but as importantly to the burden a regulation places on expressive rights. Surprisingly, although the latter burden analysis lies at the core of free speech's sister doctrine—the freedom of expressive association—as well as the free expression systems of other liberal democracies, it is largely absent from the current content approach to free speech analysis.