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IN FOCUS

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Free Speech: When and Why Content-Based Laws Are Presumptively Unconstitutional

The First Amendment's Free Speech Clause prohibits the government from suppressing or requiring adherence to particular ideas or messages. U.S. CONST. amend. I. The Supreme Court has recognized that laws restricting or compelling speech based on its content have the potential to expel certain ideas or viewpoints from public debate. The Court typically regards such "content-based laws" as "presumptively unconstitutional." Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015). To determine whether a content-based law passes constitutional muster, courts generally apply a legal standard called *strict scrutiny*, under which the government must show that the law is the "least restrictive means" of advancing a "compelling" governmental interest. Sable Commc'ns of Cal. v. FCC, 492 U.S. 115, 126 (1989). The government rarely prevails under strict scrutiny. Accordingly, lawmakers may consider at the early stages of policy discussions or bill drafting whether a contemplated regulation of speech may be content based and whether an exception to strict scrutiny might apply.

This *In Focus* discusses the hallmarks of a content-based law and the limited circumstances in which the Court has recognized a less-demanding standard of review than strict scrutiny for some types of content-based laws. *See generally Content-Based and Content-Neutral Regulation of Speech*, CONSTITUTION ANNOTATED.

Hallmarks of a Content-Based Law

A law that regulates speech can be content based in two ways. A law can discriminate against certain content through its text (i.e., "on its face") or through a discriminatory purpose. Both forms of content discrimination typically trigger strict scrutiny. A law is facially content based if its text applies to speech based on the subject matter, topic, or viewpoint of that speech. In facially content-based laws, the law's application turns on the "substantive message" conveyed by the regulated speech rather than a content-neutral factor such as the speech's location. City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1472 (2022). For example, the Supreme Court ruled that a town's sign ordinance was content based on its face because it restricted "political" signs more than "ideological" ones. *Reed*, 576 U.S. at 159–60. In contrast, the Court held that a city's sign code was facially neutral where that law placed greater restrictions on "off-premises" signs advertising businesses or events at another location than it did on "on-premises" signs. *City of Austin*, 142 S. Ct. at 1473. Even though enforcement in both cases would have required authorities to read the signs' messages—that is, to know their content—the second law singled out signs based on their location rather than subject matter. It was therefore facially neutral.

Lower courts have applied *City of Austin*'s rationale to laws outside the context of sign codes and other location-based laws. For example, in a 2022 decision, the U.S. Court of Appeals for the D.C. Circuit upheld a federal statute, the Digital Millennium Copyright Act (DMCA), as applied to computer code. The DMCA prohibits the distribution of products designed to circumvent encryption and other technology that controls access to a copyrighted work. The court assumed, for purposes of its analysis, that writing computer code is protected speech. The court then held that the DMCA is content neutral because instead of targeting computer code's "expressive content," it targets "the act of circumvention and the provision of circumvention-enabling tools." Green v. DOJ, 54 F.4th 738, 745 (D.C. Cir. 2022). In other words, the statute regulates the code's function, not its substantive message.

While laws restricting speech are sometimes content based, laws that compel a person to communicate a particular message are nearly always content based because they alter the content of that person's speech. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018). Laws such as labeling and disclaimer requirements that require private entities to disclose certain information to the public or the government may be considered to compel speech and are usually content based.

Even if a law is content neutral on its face, it might be considered content based if it reflects a discriminatory purpose—that is, if it "cannot be justified without reference to the content of the regulated speech" or was "adopted by the government because of disagreement with the message" conveyed. *Reed*, 576 U.S. at 164. For example, in 1990, the Supreme Court dismissed a prosecution under a federal statute prohibiting flag burning. The statute did not contain explicit content distinctions, for example, by prohibiting flag burning as a political message but allowing it for other purposes. The Court nonetheless concluded that Congress impermissibly sought to suppress "the communicative impact of flag destruction" in order to preserve "the flag's symbolic value"—a content-based justification for the law. United States v. Eichman, 496 U.S. 310, 317 (1990).

The Court considers viewpoint discrimination to be an "egregious" form of content discrimination. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995). A law discriminates based on viewpoint when it regulates speech based on the particular ideology or opinions expressed or favors one side of a debate over another, as opposed to regulating speech about a general subject matter or topic. There are some limited contexts in which viewpoint-based distinctions are permitted, such as when the government itself is the speaker. Apart from those

situations, viewpoint-based laws carry a particular risk of government suppression of unpopular ideas. Thus, the Court has sometimes declared such laws unconstitutional without undertaking a strict-scrutiny analysis.

In sum, a law that regulates speech based on its subject matter, topic, or viewpoint, or because the government sought to suppress or encourage a particular message, is likely to be considered content based under current First Amendment standards. Most often, content-based laws receive strict scrutiny in a First Amendment challenge, but there are some exceptions, discussed below.

Exceptions to Strict Scrutiny Review

In certain contexts, the Supreme Court has applied a less-demanding standard of review than strict scrutiny to content-based laws. Where a lower standard applies, these tests are context specific and range from rational-basis review to intermediate scrutiny.

Commercial Speech

Commercial speech does "no more than propose a commercial transaction," Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rels., 413 U.S. 376, 385 (1973), or relates "solely to the economic interests of the speaker and its audience." Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980). A product advertisement is a classic example of commercial speech. Commercial speech restrictions typically distinguish between commercial and noncommercial messages and may draw other content-based distinctions based on the type of commercial enterprise at issue. Although such laws are content based, they typically receive *intermediate scrutiny* because the Court has historically viewed commercial speech as having less First Amendment protection than other forms of protected speech such as political or religious speech. Under intermediate scrutiny, the government must show that the law is "narrowly drawn" (not necessarily the least restrictive means) to advance a "substantial" governmental interest. *Central Hudson*, 447 U.S. at 564–65. This test is similar to the standard that applies to content-neutral laws that regulate speech. Regardless of the test applied, however, a law that singles out commercial speakers for disfavored treatment solely because of the commercial nature of their speech is unlikely to withstand First Amendment scrutiny.

While commercial speech restrictions typically receive intermediate scrutiny, a subset of commercial *disclosure* requirements may receive a less-demanding standard of review. At least in the context of commercial advertising, if a disclosure requirement is (1) limited to "purely factual and uncontroversial information," (2) about the product or service offered by the speaker, then a court will likely uphold the requirement so long as it is (3) "reasonably related" to an adequate government interest, such as preventing consumer deception, and (4) not "unjustified or unduly burdensome." Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1985). Courts disagree over whether this *Zauderer* test applies outside of the commercial advertising context to other forms of disclosures. Because disclosure requirements may be considered to compel speech, a disclosure requirement that does not qualify for *Zauderer* review may be subject to intermediate or even strict scrutiny. *See* CRS Report R45700, *Assessing Commercial Disclosure Requirements under the First Amendment*, by Valerie C. Brannon.

Unprotected Speech

The Court has recognized some "historically unprotected" categories of speech that the government may regulate because of their harmful content without violating the First Amendment. United States v. Stevens, 559 U.S. 460, 472 (2010). These include obscenity, true threats, and speech integral to criminal conduct. *See* CRS In Focus IF11072, *The First Amendment: Categories of Speech*, by Victoria L. Killion. However, any further content-based distinctions within these categories will trigger strict scrutiny unless "the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable." R.A.V. v. St. Paul, 505 U.S. 377, 388 (1992). The Court has stated, for example, that the government "can criminalize only those threats of violence that are directed against the President" because "the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President." *Id.*

Special Contexts

Besides commercial speech and the recognized categories of unprotected speech, the Court has permitted some content-based distinctions in a few special contexts. Each of these contexts has its own specific legal standards for evaluating the constitutionality of the speech regulation at issue. These special contexts include

- **schools** (*e.g.*, Morse v. Frederick, 551 U.S. 393 (2007); *see School Free Speech and Government as Educator*, CONSTITUTION ANNOTATED);
- **prisons** (*e.g.*, Beard v. Banks, 548 U.S. 521 (2006); *see Prison Free Speech and Government as Prison Administrator*, CONSTITUTION ANNOTATED);
- **nonpublic forums** (government-controlled property opened for specific or limited purposes) (*e.g.*, Minn. Voters All. v. Mansky, 138 S. Ct. 1876 (2018); *see Public and Nonpublic Forums*, CONSTITUTION ANNOTATED); and
- **government programs** (*e.g.*, Rust v. Sullivan, 500 U.S. 173 (1991); *see Selective Funding Arrangements*, CONSTITUTION ANNOTATED).

Whether a court would apply strict scrutiny in a free-speech challenge to a content-based law thus depends in part on whether the law regulates protected or unprotected speech, and if the former, commercial or noncommercial speech, as well as whether the law concerns a special context that carries its own, more specific legal standards.

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