

THE CONTENT-NEUTRALITY DOCTRINE STILL WORKS

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INTRODUCTION

Although the content-neutrality doctrine was first articulated by the U.S. Supreme Court almost half a century ago in *Police Department of Chicago v. Mosely*¹ and has been invoked by the Court at least twenty-four times in the last decade,² the canon is not without its critics. For years, in fact, numerous scholars have called on the Court to clarify the too-often malleable doctrine.³ In a recent piece in the *Florida Law Review*, however, Indiana University of Law Professor R. George Wright calls for a more drastic approach: that courts should completely abandon content-neutrality. “[T]he clarity, coherence, and practical significance of the distinction between content-neutral and content-based regulations,” he opined, “have eroded beyond the point of recoverability.”⁴

To explain his reasoning, Professor Wright identifies five factors that have, collectively, “eroded a basic assumption underlying much of free speech jurisprudence: that content-based restrictions are uniformly subjected to a more rigorous, exacting, and demanding judicial scrutiny than are content-neutral restrictions.”⁵

The first reason Professor Wright gives to abandon the doctrine is that judges often experience difficulty distinguishing between content-based and content-neutral regulations.⁶ The second factor—and the one that

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1. 408 U.S. 92, 96 (1972).

2. See Seth F. Kreimer, *Good Enough for Government Work: Two Cheers for Content Neutrality*, 16 U. PA. J. CONST. L. 1261, 1265–66 (2014) (noting, even before *McCullen v. Coakley*, 134 S. Ct. 2518, 2541 (2014) and *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2233 (2015), that the “Roberts Court had adverted to content neutrality as a defining element of First Amendment doctrine in no less than twenty-two of the thirty-seven free expression cases it has decided on the merits over the last eight years, and virtually all of the decisions of recognized public consequence. Majority opinions regularly declaim that ‘content-based’ restrictions on speech are presumptively unconstitutional”).

3. See generally Clay Calvert, *Free Speech and Content-Neutrality: Inconsistent Applications of an Increasingly Malleable Doctrine*, 29 MCGEORGE L. REV. 69 (1997); Dan V. Kozlowski, *Content and Viewpoint Discrimination: Malleable Terms Beget Malleable Doctrine*, 13 COMM. L. & POL’Y 131 (2008); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 117–18 (1987) (“The time has come for the Court to take a more structured approach. It should make clear both the lines between content-based and content-neutral review and the three-tiered approach it takes toward content-neutral restrictions on speech.”).

4. R. George Wright, *Content-Neutral and Content-Based Regulations of Speech: A Distinction That Is No Longer Worth the Fuss*, 67 FLA. L. REV. 2081, 2082 (2015).

5. *Id.*

6. See *id.* at 2083–88.

receives the most attention—is that the alternative channels element⁷ of intermediate scrutiny may actually make it more rigorous than strict scrutiny.⁸ The third justification for cutting loose content-neutrality is that drafters of content-based laws are often required to produce empirical data that demonstrate the efficacy between the regulation and the putative government interest.⁹ Fourth, he observes, judges possess too much discretion about the putative availability of more narrowly tailored regulations.¹⁰ Lastly, the degree of government interest—generally categorized as significant, important, substantial or compelling—is sometimes difficult to determine, which may lead to arbitrary outcomes.¹¹

In responding to Professor Wright’s quintet of contentions, this response proceeds as follows: Part I provides context by briefly describing the content-neutrality doctrine and the judicial standards of intermediate and strict scrutiny. Part II analyzes each of Professor Wright’s arguments and suggests that, although they individually are technically accurate, taken together, they lack sufficient justification to jettison content-neutrality. Part III concludes by conceding that although the doctrine is certainly flawed, the most prudent course is to carefully mend it, not cast it into the constitutional dustbin.

I. CONTENT-NEUTRALITY AND STANDARDS OF REVIEW

“The binary distinction between content-neutral and content-based speech regulations,” Professor Wright rightly observes, “is of central importance in First Amendment doctrine.”¹² The rationale behind the content-neutrality doctrine is straightforward, as Virginia Law Professor Leslie Kendrick recently explained:

The two basic ideas behind the content-discrimination principle are that it is usually wrong for the government to regulate speech because of what it is saying and that it is usually acceptable, as a First Amendment matter, for the government to regulate speech for reasons other than what it is saying.¹³

Essentially, the Supreme Court explains, content-neutral laws regulate

7. *See id.* at 2088–96. For a short explanation of the alternative channels requirement in intermediate scrutiny, see *infra* notes 27–28 and accompanying text.

8. Wright, *supra* note 4, at 2088–96.

9. *See id.* at 2096–97.

10. *See id.* at 2098–99. For a brief description of the narrow tailoring requirement within both intermediate and strict scrutiny, see *infra* notes 24–25 and accompanying text.

11. *See id.* at 2099–2101.

12. Wright, *supra* note 4, at 2081.

13. Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 235 (2012).

expression “without reference to the content of the regulated speech.”¹⁴ They are generally called “time, place, and manner”¹⁵ regulations because they are less interested with the *what*, *who* or *why* of expression than they are the *when* (the hour range within which sound-amplification devices may be used)¹⁶, *how* (the decibel level music may be played in a national park)¹⁷ and *where* (the minimum number of feet away from a historical structure a billboard must be situated).¹⁸

The distinction between the two types of regulations, although not necessarily outcome determinative, is a key consideration when gauging the constitutionality of expression-abridging laws. Whereas content-based laws are subjected to strict scrutiny to dissuade governments from censoring speech with which they disagree,¹⁹ content-neutral laws receive only intermediate scrutiny because such regulations are necessary to maintain a well-ordered society.²⁰ One can easily imagine, for instance, the chaos that would ensue if a city government had little control over when and how parades were conducted through its main thoroughfare.²¹

Although strict and intermediate scrutiny both consider government interests and narrow tailoring, there are three primary differences between the standards. First, in strict scrutiny, the stated interest must be compelling,²² yet intermediate scrutiny requires that the need be merely significant.²³ Second, strict scrutiny requires that the regulation curb no more expression than necessary to achieve the interest,²⁴ while under intermediate scrutiny, judges allow more wiggle room in the means-end

14. *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

15. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972) (declaring that “government has no power to restrict such activity because of its message. Our cases make equally clear, however, that reasonable ‘time, place and manner’ regulations may be necessary to further significant governmental interests, and are permitted”).

16. CARPENTERSVILLE, ILL. CODE OF ORDINANCES § 8.16.040(a) (2016).

17. Audio Disturbances, 36 C.F.R. § 2.12(a)(1) (2016).

18. STATESBORO, GA. CODE OF ORDINANCES § 1511(I) (2015).

19. *See Turner Broad. Sys., Inc., v. FCC*, 512 U.S. 622, 641 (1994) (explaining that “[l]aws [that discriminate based on content] pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or to manipulate the public debate through coercion rather than persuasion”).

20. *See Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) (articulating that “[c]ivil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses”).

21. This was, in fact, the exact scenario at issue in *Cox v. New Hampshire*.

22. *See Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011) (explaining that a law passes strict scrutiny if it “is justified by a compelling government interest and is narrowly drawn to serve that interest”).

23. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

24. *See United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000) (observing that “[i]f a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative”).

fit between the government's putative interest and the law that furthers it.²⁵ Third, intermediate scrutiny—at least in the time, place, and manner context²⁶—has a third element that is absent from strict scrutiny analysis: that alternative channels of expression exist.²⁷ This element requires a court to consider whether, if it upholds the regulation in question, the would-be speaker would have another reasonable means of expressing himself.²⁸

II. DOCTRINAL PROBLEMS

Of the five potential problems with the doctrine Professor Wright outlines in his article, he spends most of his energy focusing on the idea that because content-neutral regulations are adjudicated under a tri-pronged standard and content-based laws must only satisfy a two-part test, content-based laws may in fact be scrutinized more heavily.²⁹ The Supreme Court has provided scant rationale for this apparent curiosity, and, at least theoretically, it may indeed contravene the doctrine's entire point: that content-neutral laws be upheld more readily.

Although in theory this jurisprudential anomaly may be cause for concern, little evidence exists that it has caused any actual problems. Professor Wright should be commended for drawing attention to this issue by raising a series of reasonable and realistic hypotheticals in which content-based laws are held to a higher standard than their content-based counterparts.³⁰ Yet he experienced apparent difficulty pinpointing actual instances of injustice or incongruity resulting from an application of the third prong of intermediate scrutiny, as he only cited a single case to

25. *See Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (explaining, somewhat vaguely, that “a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government’s legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so”).

26. More than one iteration of “intermediate scrutiny” exists. *Compare* *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980) (creating one version of the test for use within the commercial speech context), *with* *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (creating a similar test—without the alternative-channels requirement—for application in cases involving symbolic speech).

27. *See* Wright, *supra* note 4, at 2088 (opining that “[i]t seems well settled that content-neutral, but not content-based, restrictions on speech must leave ample alternative channels available for conveying the speaker’s message”).

28. This additional prong of intermediate scrutiny is necessary, University of Chicago Law Professor Geoffrey Stone observed three decades ago, because the “Court’s analysis of content-neutral restrictions is designed primarily to assure that adequate opportunities for free expression remain open and available. This is essential for the preservation of a vital and robust public debate.” Stone, *supra* note 3, at 117.

29. Wright, *supra* note 4, at 2089.

30. *See id.* at 2091–92 (inviting readers to “imagine a prohibition of all battery-powered amplified speech” that is both under- and over-inclusive and to “[i]magine a case of a perfectly tailored regulation” that may not leave alternative channels of communication).

illustrate his point.³¹ Despite Professor Wright's seemingly legitimate concern, the lack of evidence pointing to any real problem suggests that if there is indeed a reason to abandon the content-neutrality doctrine, it would be found among his other four reasons, not because the alternative channels prong is inherently flawed.

Unfortunately, each of the other four reasons suffers from problems stemming from either inherency or solvency—to wit, the specific complications Professor Wright identifies with the doctrine are already being fixed in the status quo or the proposed solutions are unlikely to fix any remaining problems.³² For instance, Professor Wright makes the point that content-based and content-neutral regulations are hard to distinguish.³³ Although he could not have known it at the time, Professor Wright likely composed this piece about the same time that the U.S. Supreme Court decided *Reed v. Town of Gilbert*.³⁴ The Court's decision in *Reed* helped solve some of the ambiguities in delineating between the two types of regulations. The Court declared that if a regulation on its face singles out a particular topic, then it is content-based and subject to strict scrutiny.³⁵ *Reed*, therefore, has likely rendered Professor Wright's

31. The case he cited was *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), a case that considered the constitutionality of an ordinance that placed narrow municipal zoning restrictions on adult businesses. The Court ascertained that the law indeed singled out a certain kind of business for regulation, yet it also determined that, “at least with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to ‘content-neutral’ time, place, and manner regulations.” *Id.* at 49 (citation omitted). However, it can be reasonably argued—as many have—that if there indeed was a problem with the outcome of *Renton*, the reason was the application of the secondary effects doctrine, not the third prong of intermediate scrutiny. *See, e.g.*, Stone, *supra* note 3, at 117 (lamenting that “[o]ne can only hope that this [secondary effects] aspect of *Renton* is soon forgotten”).

32. When considering the adoption of any policy change, the following three elements generally must be met to pass prima facie muster: (1) *harm and significance*, which require that the problem the proposed policy is intended to address is both (a) real and (b) big enough to bother with; (2) *inherency*, which demands that the policy catalyze a state of being that is not already occurring or is likely to occur within the status quo; and (3) *solvency*, which mandates that the policy change actually further some measure of amelioration. Beyond these prima facie hurdles, the proposed policy must not carry with it unduly burdensome (4) *disadvantages*, which means that the plan cannot create more problems than it solves. *See generally* E-mail from Jamey Dumas, Cornell University, jmd9@cornell.edu, to CEDA-L@cornell.edu (Nov. 16, 1993), <http://www.cs.jhu.edu/~jonathan/debate/ceda-l/archive/CEDA-L-Nov-1993/msg00125.html>.

33. Wright, *supra* note 4, at 2083.

34. 135 S. Ct. 2218 (2015).

35. *Id.* at 2232–33.. Although the opinion likely added clarity, some scholars rebuffed the decision, suggesting that it may sweep up many legitimate, yet content-based, regulations in its net. Yale Law Dean Robert Post lamented, for instance, that the decision may “[e]ffectively . . . roll consumer protection back to the 19th century.” Adam Liptak, *Court's Free-Speech Expansion Has Far-Reaching Consequences*, N.Y. TIMES (Aug. 17, 2015), <https://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html>.

contention obsolescent.

Another point Professor Wright makes—and rightly so—is that content-based laws triggering strict scrutiny often require empirical data to illustrate evidence of causation between government interest and government action.³⁶ “Where this additional ‘compelling evidence’ requirement exists,” Professor Wright explains, “the constitutional rigor of the test is, justifiably or unjustifiably, distinctly enhanced without affecting the alternative speech channels dynamic or any other consideration.”³⁷ This reality, however, seems to be of no concern to content-neutrality. The requirement that the state provide evidence of efficacy before it can single out a topic for censorship need not add any confusion to the doctrine. In fact, because it applies to strict scrutiny only, this stipulation would seem to engender an extra degree of clarity between the content-based and content-neutral realms by generating an additional and distinct hurdle for governments to clear before regulating expression based on content.

Another problem Professor Wright mentions is that under both strict and intermediate scrutiny, judges must speculate about the availability of more narrowly tailored regulations.³⁸ If a judge is creative enough to envision a hypothetical law that achieves the same government ends while simultaneously abridging less expression, then he or she will usually strike down the law in question.³⁹ Yet narrow-tailoring is not a content-neutrality matter; it is an inherent consideration to some degree in *any* judicial balancing test—whether it be strict scrutiny, intermediate scrutiny, rational basis,⁴⁰ undue burden⁴¹ or ad hoc balancing.⁴² The

36. See, e.g., *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011) (declaring that a content-based California law proscribing minors from buying violent video games was unconstitutional, and that, to pass scrutiny, there must be a “direct causal link” between the law and the furtherance of a compelling government interest).

37. Wright, *supra* note 4, at 2097.

38. *Id.* at 2098.

39. This approach comports with the strictures of both strict and intermediate scrutiny, both of which require the regulation in question to be narrowly tailored. See *supra* notes 24–25 and accompanying text.

40. The most government friendly of all standards, the rational basis standard only requires that the law under consideration be “rationally related to a legitimate state interest.” *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976).

41. The undue burden standard, which applies to regulations involving abortion rights, is similar in strength to intermediate scrutiny and requires judges to holistically weigh both the benefits and burdens created by the law at issue. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016).

42. The preferred position of Justice Stephen Breyer, ad hoc balancing allows judges to avoid the structure provided by tiers of scrutiny and feel their way through cases, one at a time. See Mark Tushnet, *Justice Breyer and the Partial De-Doctrinalization of Free Speech Law*, 128 HARV. L. REV. 508, 511 (2014) (describing Justice Breyer’s propensity toward a “de-doctrinalization of the First Amendment”).

narrow-tailoring requirement, which Professor Wright dubs “judicial self-indulgence,”⁴³ implicates matters much more fundamental than mere content-neutrality. At bottom, it appears to be a separation of powers question: Who has the final say in rights balancing—the courts or lawmakers?⁴⁴

The final reason for dropping content neutrality is that “finding or not finding a compelling government interest is a surprisingly manipulable enterprise.”⁴⁵ Although this is a legitimate problem,⁴⁶ attempting to solve it by shedding the content-neutrality doctrine is unlikely to work. Whether content-neutrality exists or not, judges will always be asked to ascertain the validity and significance of competing rights and interests. Ultimately, then, this reason for abandoning the doctrine—just like three of the four others—is not solvent. Even if content-neutrality were utterly discarded, then, most of the problems outlined in Professor Wright’s article would probably remain.

III. ALTERNATIVE SOLUTIONS

As Professor Wright correctly observes, content-neutrality is an imperfect doctrine, and categorizing certain speech-abridging regulations can sometimes be difficult. Yet casting the doctrine aside is unlikely to help judges rule more predictably and justly, and potentially less-disruptive options may exist to help add clarity. Some of these include jettisoning the secondary effects concept;⁴⁷ adding the alternative channels prong into strict scrutiny analysis; removing the alternative channels prong from intermediate scrutiny; collapsing the second and third prongs of intermediate scrutiny into an undue-burden-like analysis,

43. Wright, *supra* note 4, at 2098.

44. *See generally* *Marbury v. Madison*, 5 U.S. 137, 180 (1803). Incidentally, the surest way to avoid hypothetical speculation is to introduce additional empirical evidence into the judicial equation; yet as illustrated above, this option may likewise be unpalatable for Professor Wright, who already laments the increased need for lawmakers to scientifically justify regulations. Wright, *supra* note 4, at 2096–97.

45. Wright, *supra* note 4, at 2099.

46. Professor Wright provides an example of the government interest in the protection of eagles to illustrate how elastic this determination can be. *Id.* at 2099. To paraphrase an actual case, found in *United States v. Wilgus*, 638 F.3d 1274, 1285 (10th Cir. 2011), the interest could be considered compelling if the issue were framed as protecting life, but it would be less than compelling if it were described as something to the effect of shielding an individual species of bird from potential habitat reduction. *See* Wright, *supra* note 4, at 2099.

47. *See* Kozlowski, *supra* note 3, at 150–62 (dedicating more than ten pages of analysis to the complications that secondary effects adds to the content-neutrality doctrine); Minch Minchin, *A Doctrine at Risk: Content-Neutrality in a Post-Reed Landscape*, 22 COMM. L. & POL’Y 123, 145 (suggesting that complicating and less-comprehensive doctrines such as secondary effects should be cast aside).

as found in abortion jurisprudence;⁴⁸ and asking whether law enforcement officers need to actually read or listen to the words being said or written to determine whether a law has been broken.⁴⁹

While discussing these potential solutions, it is important to recognize the limited, yet important, function that content-neutrality plays within a larger constitutional context. Roughly a decade prior to her nomination to the U.S. Supreme Court, then-University of Chicago Law Professor Elena Kagan contended that the “distinction between content-based and content-neutral regulations of speech serves as the keystone of First Amendment law.”⁵⁰ Even if she were overstating the matter, it cannot be denied that the doctrine plays a significant role, both at the Supreme Court and below.⁵¹ Riffing off Justice Kagan’s metaphor, University of Pennsylvania Law Professor Seth Kreimer recently argued that “content neutrality is not the totality of a properly functioning system of protection for free expression. A keystone is not a castle; it is not even an arch.”⁵²

The doctrine, therefore, is certainly not a panacea that can solve all the problems stemming from scientific evidence, gratuitous judicial discretion or the tiers-of-scrutiny scheme. It is, however, a stabilizing constant within First Amendment jurisprudence. Removing it would not only upset almost half a century of stare decisis, but it would also leave judges with few practical tools left in their First Amendment toolboxes.

In the current doctrinal configuration, examining the face of an ostensibly speech-abridging regulation is the first step in ascertaining censorial government motive,⁵³ yet it is important to remember that facial analyses do not necessarily determine whether laws are content-neutral. A statute can still be deemed content-based—and therefore subject to strict scrutiny—even if on its face it does not single out a particular topic.⁵⁴ A court can still find a law content-based if it is profoundly obvious that the law-drafters disagreed with a targeted group of

48. Clay Calvert & Minch Minchin, *Can the Undue Burden Standard Add Clarity and Rigor to Intermediate Scrutiny in First Amendment Jurisprudence?: A Proposal Cutting Across Constitutional Domains For Time, Place & Manner Regulations*, OK. L. REV. (forthcoming 2017).

49. This heuristic was suggested by Chief Justice John Roberts in *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014).

50. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 443 (1996).

51. See Kreimer, *supra* note 2, at 1266 (stating that “between 22% and 34% of non-pro se free expression cases [from September 2009 through August 2013] deployed the content neutrality framework”) (emphasis omitted).

52. *Id.* at 1342 (internal quotation marks omitted).

53. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015) (chastising the Ninth Circuit below for skipping “the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face”).

54. See *id.* (explaining that “we have repeatedly considered whether a law is content neutral on its face *before* turning to the law’s justification or purpose,” after which a court may look for non-facial signs of questionable governmental motives).

speakers.⁵⁵ Yet the doctrine works the other way, too, as some laws are deemed content-based even if no government censorship is afoot. As the Supreme Court has made clear, “[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment.”⁵⁶ This flexibility means that the doctrine serves both as a helpful starting point and a useful heuristic for “ferreting out”⁵⁷ bad governmental motives while also encouraging judges to strike down speech-unfriendly laws crafted by well-meaning legislators.

Ultimately, then, maintaining the content-based versus content-neutral distinction conveys all the flexibility-related benefits of *not* having the doctrine while simultaneously preserving a much-needed element of jurisprudential stability and objectivity. Abandoning it, therefore, seems imprudent.

55. See *McCullen v. Coakley*, 134 S. Ct. 2518, 2544 (2014) (featuring Justice Antonin Scalia calling for strict scrutiny to be applied to a Massachusetts abortion-access statute because “[e]very objective indication shows that the provision’s primary purpose is to restrict speech that opposes abortion”) (Scalia, J., concurring). This dicta is especially noteworthy coming from staunch textualist Justice Scalia, who generally decried examining legislative intent.

56. *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Rev.*, 460 U.S. 575, 592 (1983).

57. Kreimer, *supra* note 2, at 1315.