

The Federal Family Film Enhancement Act assesses an excise tax of 10% on the price of admission to public movie theaters when they show films that contain actual or simulated scenes of human sexual intercourse.

Which of the following is the strongest argument against the constitutionality of this federal act?

- A. The act imposes a prior restraint on the freedom of speech protected by the First Amendment.
- B. The act imposes a tax solely on the basis of the content of speech without adequate justification and, therefore, it is prohibited by the freedom of speech clause of the First Amendment.
- C. The act is not rationally related to any legitimate national interest.
- D. The act violates the equal protection concepts embodied in the due process clause of the Fifth Amendment because it imposes a tax on the price of admission to view certain films and not on the price of admission to view comparable live performances.

## Explanation:

### Speech regulations

Type	Definition	Test
<b>Content-based</b>	<ul style="list-style-type: none"><li>• Facial discrimination</li><li>• Primary purpose targets message, subject, or idea</li></ul>	Strict scrutiny <ul style="list-style-type: none"><li>• Necessary &amp; narrowly tailored to achieve compelling interest</li></ul>
<b>Content-neutral</b>	<ul style="list-style-type: none"><li>• Regulates time, place, or manner of speech</li></ul>	Intermediate scrutiny <ul style="list-style-type: none"><li>• Narrowly tailored to achieve important interest</li><li>• Alternative avenues of communication remain</li></ul>

The First Amendment **free speech clause** protects the right to freely communicate and receive information and ideas. To ensure such protection, **content-based restrictions** on speech are **presumptively unconstitutional** and subject to **strict scrutiny**. This means that the government can only restrict speech based on what is being said (ie, its message or ideas) if it can prove that the restriction is **necessary and narrowly tailored** to achieve a **compelling government interest**—a nearly impossible task.

Here, the act is a content-based restriction on speech because it imposes an excise tax on the price of admission to theaters when they show films that depict human sexual intercourse. And since it is highly unlikely that this act can survive strict scrutiny, the strongest argument against its constitutionality is that it imposes a tax based solely on the content of speech without adequate justification.

**(Choice A)** A prior restraint on speech is a highly disfavored government action that prohibits speech before it even occurs (eg, injunction). But the act here is not a prior restraint on speech because it does not prevent the films from being shown—it merely imposes a tax.

**(Choice C)** If the federal act is *not* rationally related to a legitimate national interest, it cannot pass rational basis scrutiny—let alone strict scrutiny. But this argument would likely fail since laws almost always survive rational basis review.

**(Choice D)** This act may trigger the equal protection concepts embodied in the Fifth Amendment, which apply when the government treats similarly situated people differently. But since the movie theater patrons who must pay this tax are not part of a **protected class**, this is not a strong argument for challenging the act's validity.

### Educational objective:

Content-based restrictions on speech are unconstitutional unless they survive strict scrutiny. This incredibly stringent standard requires the government to prove that the restriction is necessary and narrowly tailored to achieve a compelling government interest.

### **References**

- Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987) (applying strict scrutiny to a tax scheme that exempts certain magazines based on content).

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