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LAWN SIGN LITIGATION: WHAT MAKES A STATUTE CONTENT-BASED FOR FIRST AMENDMENT PURPOSES?

I. INTRODUCTION

Although based on a seemingly simple concept, free speech has produced a complex and constantly changing set of tests and rules.¹ The First Amendment gives the government a broad and vague mandate to not restrict free speech, but does not account for speech that the government must regulate.² Local governments have an important interest in maintaining the safety and aesthetics of outdoor areas, including the appearance of signs in publicly visible places.³ Individuals and organizations have the constitutional right to express themselves, including placing signs in the public view.⁴ In order to balance these interests, the Supreme Court has held that the government “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”⁵ The shorthand for these types of statutes is “content-based.”⁶

The First Amendment holds a place of particular prominence in the

¹ See John D. Moore, *The Closed and Shrinking Frontier of Unprotected Speech*, 36 WHITTIER L. REV. 1, 4 (2014) (stating that “[t]he Supreme Court’s free speech jurisprudence is notoriously complex and contradictory.”). Moore also notes the language other scholars have used to describe the doctrine, including a “bizarre mess” and a “complex array of rules, which some consider more suitable for a tax code than a statement of constitutional principle.” *Id.*

² See Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1357-59 (2006) (criticizing modern interpretation of First Amendment); Erwin Chemerinsky, *The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLEV. ST. L. REV. 199, 204-07 (1994) (analyzing situations where government is inevitably forced to regulate speech based on content).

³ See *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) (finding that safety and aesthetics are important government goals); see also *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981) (reaffirming that safety and aesthetics are substantial government goals).

⁴ See *Metromedia, Inc.*, 453 U.S. at 501 (describing outdoor signs as important medium of expression); Jason R. Burt, *Speech Interests Inherent in the Location of Billboards and Signs: A Method for Unweaving the Tangled Web of Metromedia, Inc. v. City of San Diego*, 2006 B.Y.U. L. REV. 473, 492-93 (2006) (detailing importance of outdoor signs).

⁵ *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

⁶ See Chemerinsky, *supra* note 2, at 201-02 (summarizing history of content-based categorization in Supreme Court case law).

home, which is a specially recognized area for speech.⁷ Common forms of speech within the purview of the home are political lawn signs.⁸ Local governments have a significant interest in regulating these lawn signs for the purpose of safety and aesthetics in the community.⁹ However, these ordinances must not unduly regulate content in order to remain constitutionally valid.¹⁰ The Supreme Court categorizes statutes as either content-based or content-neutral.¹¹ The question of how this distinction is made is a contested matter.¹²

Until June of 2015, a split existed among the circuits about what

⁷ See *City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring) (noting discrimination against content of speech by private citizens on private property is "presumptively impermissible").

⁸ See *WSU PODCAST: Why Political Yard Signs Matter*, WICHITA ST.U., Oct. 13, 2008, <http://www.wichita.edu/thisis/stories/story.asp?si=423> ("Political yard signs provide name recognition and more, according to Kahn."). Lawn signs are a staple of American political campaigns, providing name recognition for the candidate and an estimated 6-10 votes per sign. *Id.* It is uncommon for campaigns to go without them, and even nonpartisan messages have been shown to increase voter turnout. See Sean Quinn, *BREAKING: Obama Campaign Organizers Trying to Win Election Instead of Get You Yard Sign*, FIVETHIRTYEIGHT, Sept. 21, 2008, <http://fivethirtyeight.com/features/breaking-obama-campaign-organizers/> (opining that outrage surrounding Obama's decision to forgo lawn signs in certain areas was misplaced); *How Powerful Is a Political Yard Sign?*, NATIONAL PUBLIC RADIO, Mar. 10, 2012, <http://www.npr.org/2012/03/10/148351027/how-powerful-is-a-political-yard-sign> (discussing study from Fordham University about effectiveness of nonpartisan yard signs).

⁹ See *Metromedia, Inc.*, 453 U.S. at 507-08 ("... traffic safety and the appearance of the city -- are substantial governmental goals.").

¹⁰ See, e.g., *Hill v. Colorado*, 530 U.S. 703, 723 (2000) ("Regulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation."); *Turner Broad. Sys. Inc. v. F.C.C.*, 512 U.S. 622, 641-43 (1994) (For these reasons, the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals."); *Mosley*, 408 U.S. at 95 (limiting depth to which government may look at content in order to regulate speech).

¹¹ See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (establishing when government may impose content-based regulations); *United States v. Grace*, 461 U.S. 171, 177 (1983) (dictating when government may impose content-neutral regulations).

¹² Compare *Neighborhood Enters. Inc. v. City of St. Louis*, 644 F.3d 728, 731 (8th Cir. 2011) (concluding zoning code failed strict scrutiny), *Service Emps. Int'l Union, Local 5 v. City of Houston*, 595 F.3d 588, 605 (5th Cir. 2010) (holding ordinance was unconstitutionally vague), and *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005) (finding barest examination of content unconstitutional), with *Brown v. Town of Cary*, 706 F.3d 294, 297 (4th Cir. 2013) (permitting residential signs to be subject to reasonable restrictions), *American Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 587 (7th Cir. 2012) (holding eavesdropping statute restricted speech more than necessary), *Melrose, Inc. v. City of Pittsburgh*, 613 F.3d 380, 383 (3d Cir. 2010) (allowing "content sensitive" analysis), *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 612 (6th Cir. 2009) (deciding constitutionality of ordinances on subject matter basis), and *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1085 (9th Cir. 2006) (allowing distinctions to be made based on subject matter).

rule to apply when determining whether an ordinance was content-based.¹³ The “absolutist” circuits took a strict view, holding that any statute which on its face looked to content was impermissible under the First Amendment.¹⁴ The “practical” circuits took a more relaxed approach, holding that differentiations based on content were not barred so long as one type of content was not treated less favorably than another.¹⁵ In the case of *Reed v. Town of Gilbert*,¹⁶ the Supreme Court definitively sided with the absolutist circuits in a unanimous decision.¹⁷ Specifically, the Court held that any look at the communicative content of a sign was impermissible and would automatically trigger strict scrutiny.¹⁸

Given that the absolutist view was the minority among the circuits, disputes over sign codes in several circuits are now ripe for appellate review.¹⁹ Due to the automatic strict scrutiny trigger, any town faced with this type of appeal will more than likely lose.²⁰ Additionally, the holding could have wider implications for the interpretation of the First Amendment in other speech contexts, following the current trend of the Roberts Court limiting the power of the government in this area.²¹

This note seeks to provide guidance to practitioners who are bringing or appealing similar causes of action under the different theories by highlighting strategies that have prevailed and warning against those

¹³ See *Wagner v. City of Garfield Heights*, 577 F. App’x 488, 494-95 (6th Cir. 2014) (discussing circuit split on content-based ordinances), *vacated*, 135 S. Ct. 2888 (2015).

¹⁴ See, e.g., *Neighborhood Enters. Inc.*, 644 F.3d at 728 (concluding zoning code failed strict scrutiny); *Service Emps. Int’l Union, Local 5*, 595 F.3d at 588 (holding ordinance was unconstitutionally vague); *Solantic, LLC*, 410 F.3d at 1250 (finding barest examination of content unconstitutional).

¹⁵ See, e.g., *Brown*, 706 F.3d at 294 (permitting residential signs to be subject to reasonable restrictions); *Alvarez*, 679 F.3d at 583 (holding eavesdropping statute restricted speech more than necessary); *Melrose, Inc.*, 613 F.3d at 380-83 (holding zoning ordinance limiting advertisements to identification signs with advertising aspects in certain areas content-neutral); *H.D.V.-Greektown, LLC*, 568 F.3d at 609 (deciding constitutionality of ordinances on subject matter basis); *G.K. Ltd. Travel*, 436 F.3d at 1064 (allowing distinctions to be made based on subject matter).

¹⁶ 135 S. Ct. 2218 (2015).

¹⁷ See *id.* at 2232 (naming specifically their approach as “absolutist”).

¹⁸ See *id.* at 2227 (stating if ordinance is content-based on its face, strict scrutiny applies).

¹⁹ See generally *Thayer v. City of Worcester*, 135 S. Ct. 2887 (2015) (mem.); *Cent. Radio Co. v. City of Norfolk*, 135 S. Ct. 2893 (2015) (mem.); *Wagner v. City of Garfield Heights*, 135 S. Ct. 2888 (2015) (mem.) (vacating and remanding cases for review in light of *Reed*). These cases arose in the First, Fourth, and Sixth Circuits, respectively.

²⁰ See *Reed*, 135 S. Ct. at 2236-37 (Kagan, J., concurring) (detailing consequences of using automatic strict scrutiny trigger).

²¹ See *Moore*, *supra* note 1, at 17-38 (analyzing recent line of precedent narrowing area of unprotected speech).

that the courts have found unpersuasive.²² It will detail the history of First Amendment litigation and show the development of current content discrimination frameworks.²³ Next, it will discuss the current landscape of content discrimination.²⁴ Finally, it will provide practitioners with a map of what legal theories will prevail in these cases.²⁵

II. HISTORY

The First Amendment guarantees the right of free speech and that the expression of the people will not be abridged by Congress.²⁶ States are further prohibited from abridging free speech and expression via the Fourteenth Amendment.²⁷ Permissible restrictions on speech are determined by looking at content neutrality, meaning that a court determines whether a statute looks at the substance of speech to regulate it.²⁸ This process is described in a complicated and often contradictory line of precedent, tied into what the Supreme Court of the time has determined to be the core purpose of the First Amendment.²⁹

A. The Purpose of the First Amendment

In the past 40 years, there has been a shift in the Supreme Court's view of the purpose of the First Amendment.³⁰ Before 1972, there was a focus on whether the government had infringed upon the rights of the

²² See *infra* Part IV.

²³ See *infra* Part II.

²⁴ See *infra* Part III (discussing facts about current discrimination).

²⁵ See *infra* Part IV.

²⁶ See U.S. CONST. amend. I. ("Congress shall make no law . . . abridging the freedom of speech . . .").

²⁷ See *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244 (1936) ("[F]reedom of speech and of the press are rights of the same fundamental character, safeguarded by the due process of law clause of the Fourteenth Amendment against abridgement by state legislation . . ."); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) ("For present purposes we may and do assume that freedom of speech and of the press -- which are protected by the First Amendment from abridgment by Congress -- are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."); see also U.S. CONST. amend. XIV, § 1 (preventing State from depriving citizens of equal protection of laws).

²⁸ See Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 51-56 (2000) (describing history of content neutrality analysis).

²⁹ See *id.* (commenting on purpose of First Amendment and outlining case law).

³⁰ See Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 21-22 (1975) (discussing paradigm shift in Supreme Court interpretation of First Amendment).

people.³¹ However, the modern trend has been a focus on equality and ensuring that all speech is treated the same.³² Thus, content neutrality has become the cornerstone of First Amendment analysis.³³

First Amendment issues—and by proxy content neutrality—implicate a fundamental right that receives strict scrutiny.³⁴ The Supreme Court has articulated two different purposes for applying strict scrutiny.³⁵ First, applying strict scrutiny intends “to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.”³⁶ Second, strict scrutiny prevents the government from regulating speech “based on hostility—or favoritism—towards the underlying message expressed.”³⁷

B. The First Amendment Framework and Content Analysis

The State is expressly prohibited from “completely suppress[ing] the dissemination of truthful information about an entirely lawful activity merely because it is fearful of that information’s effect upon its disseminators and its recipients.”³⁸ The Supreme Court has examined the issue of how to regulate signs by determining whether a statute analyzes the content of a sign.³⁹ Content analysis for First Amendment purposes begins by determining whether a statute is content-based or content-neutral in order to determine the properly level of scrutiny it should receive.⁴⁰

Content-based restrictions look at the subject matter of the sign and

³¹ See *id.* at 26-27 (describing shift away from liberty principles).

³² See *id.* at 26-27, 29-35 (recounting rise of equality principles).

³³ See *Chemerinsky*, *supra* note 28, at 51-56 (tracking case law utilizing content neutrality).

³⁴ See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 n.3 (1976) (enumerating cases where strict scrutiny applied to implication of fundamental rights).

³⁵ See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2237 (2015) (Kagan, J., concurring) (discussing precedent related to content analysis).

³⁶ *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (quoting *F.C.C. v. League of Women Voters of Ca.*, 468 U.S. 364, 377 (1984)) (relying on the purpose of the First Amendment).

³⁷ *R.A.V. v. St. Paul*, 505 U.S. 377, 386 (1992).

³⁸ *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505 (1981) (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770-73).

³⁹ See, e.g., *City of Ladue v. Gilleo*, 512 U.S. 43, 53 (1994) (noting discrimination against content of speech by private citizens on private property is “presumptively impermissible”); *Taxpayers for Vincent*, 466 U.S. 789, 805-06 (1984); *Metromedia, Inc.*, 453 U.S. at 490 (finding that safety and aesthetics are important government goals); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 98 (1977) (addressing question of restricting signs); see also *Burt*, *supra* note 4, at 492-505 (summarizing relevant Supreme Court cases).

⁴⁰ See *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 99-100 (1972) (striking down statute that prevented non-labor related picketing for being content-based); see also *Burt*, *supra* note 4, at 478 (indicating *Mosley* held that content analysis is first step).

discriminate based on it.⁴¹ Put another way, content-based statutes are ones that “distinguish[] favored speech from disfavored speech on the basis of the ideas or views expressed.”⁴² These types of restrictions violate the constitutional fundamental right to free speech and are presumptively invalid.⁴³ These regulations receive strict scrutiny, meaning they must serve a compelling government interest by narrowly tailored means.⁴⁴

Content-neutral restrictions manage only the time, place, and manner of a sign, thereby never reaching the issue of actual content.⁴⁵ These regulations receive intermediate scrutiny, meaning they must serve an important government interest by rationally related means.⁴⁶ The important government interest must not be related to the speech contained in the sign.⁴⁷ An example of a qualifying interest under this formula is aesthetics and public safety.⁴⁸ Content-neutral regulations must allow ample room for alternative means of communication should speech be in some way restricted.⁴⁹

For better or for worse, content neutrality has become the

⁴¹ See R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333, 337 (2006) (“[W]hether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based.”).

⁴² *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 643 (1989).

⁴³ See *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) (“Content-based regulations are presumptively invalid.”).

⁴⁴ See *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981) (citing *Carey v. Brown*, 447 U.S. 455, 461, 464-65 (1980)) (affirming content-based restrictions should receive strict scrutiny); see also Wright, *supra* note 41, at 363-64 (reviewing history of strict scrutiny in relation to content-based regulations).

⁴⁵ See *United States v. Grace*, 461 U.S. 171, 177 (1983) (allowing restrictions that only regulate times, places, and manners of speech in public forums).

⁴⁶ See *id.* (describing narrowly tailored requirement).

⁴⁷ See *Hill v. Colorado*, 530 U.S. 703, 723 (2000) (rejecting restrictions made because of subject matter expressed); *Turner Broad. Sys.*, 512 U.S. at 641-43 (stating that subject matter and viewpoint are impermissible criteria for discrimination); *Mosley*, 408 U.S. at 95 (overturning statute based on viewpoint expressed alone).

⁴⁸ See *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) (finding that safety and aesthetics are important government goals); *Metromedia, Inc.*, 453 U.S. at 507-08 (reaffirming safety and aesthetics are substantial government goals). It should be noted that “[c]ourts refer to the kinds of interests that intermediate scrutiny sanctions as ‘important,’ ‘significant,’ ‘substantial,’ and ‘legitimate.’” *Wagner v. City of Garfield Heights*, 577 F. App’x 488, 498 n.9 (6th Cir. 2014). However, “compelling” is a legal term of art used only to refer to strict scrutiny. *Id.*

⁴⁹ See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986) (enunciating rule that alternative channels must remain open); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976) (holding restrictions justified in part if “they . . . leave open ample alternative channels for communication”).

cornerstone of free speech analysis.⁵⁰ It has been criticized as lacking nuance, since some government choices involving content are simply unavoidable.⁵¹ Different types of speech can also be difficult to define, and subcategorizing what qualifies as content raises even more questions.⁵²

Despite the difficulties defining different kinds of speech, there are six different elements of speech that the Supreme Court has taken into account when analyzing speech discrimination.⁵³ First, discrimination based on viewpoint or subject matter is prohibited.⁵⁴ This occurs when speech is prohibited merely because of what the speech is about, and the Supreme Court has consistently applied strict scrutiny to this classification.⁵⁵ Second, there are concerns regarding the components of the underlying speech, such as the “speaker’s choice of words, symbols, and images.”⁵⁶ However, these do not enjoy the automatic strict scrutiny that viewpoint discrimination does, and format may maybe subject to a less stringent level of scrutiny.⁵⁷ Third, the Supreme Court has considered the effect of speech on the listener.⁵⁸ The Supreme Court generally considers laws that regulate based on the effect on the audience content-based and impermissible.⁵⁹ Fourth, the speech’s purpose or mode may be subject to

⁵⁰ See Chemerinsky, *supra* note 28, at 49 (calling content neutrality increasingly “the central inquiry” in free speech cases).

⁵¹ See Chemerinsky, *supra* note 2, at 205 (pointing out impossibility of total government neutrality); see also McDonald, *supra* note 2, at 1355-60 (criticizing overly broad holding of *Mosley* as root of problems in current jurisprudence).

⁵² See John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1122 (2005) (summarizing difficulties of legally defining “content-based regulation”). Fee poses two questions at the center of First Amendment analysis: “First, what aspects of speech are included within the meaning of ‘content’? Second, in what manner (motive or effect) is the government forbidden to discriminate?” *Id.*

⁵³ See *id.* at 1123-30 (discussing six elements of speech).

⁵⁴ See *id.* at 1123 (rejecting viewpoint and subject matter as legitimate grounds for excluding speech); see also *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“The principal inquiry in determining content neutrality . . . whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”).

⁵⁵ See Fee, *supra* note 52, at 1123 (establishing this form of discrimination as consistently unconstitutional).

⁵⁶ See *id.* at 1124 (“Consequently, the government engages in content-based discrimination when it undertakes to punish the use of profanity, to prohibit nudity at outdoor movie theatres, or to restrict sexual content on the internet.”).

⁵⁷ See *id.* at 1124-25 (explaining that components of speech receive lower standard of review). Fee also notes that because of this somewhat lax approach to these parts of speech, questions have arisen concerning the breadth of its application. *Id.* at 1125.

⁵⁸ See *id.* at 1125 (recounting Court’s reaction to ordinances based on listener’s reaction).

⁵⁹ See *id.* at 1125-26 (noting these laws as generally invalid); see also *Hustler Magazine, Inc.*

regulation.⁶⁰ This is distinguished from the previous category by focusing on “simply establish[ing] a minor place restriction on an extremely broad category of communications with unwilling listeners.”⁶¹ Fifth, laws concerning the source of the information have been found to be content-neutral.⁶² Sixth and finally, the Court has considered laws that discriminate based on the speaker.⁶³ This component has seen mixed results from the Court, which sometimes defers to the individual or corporation and others times to the government actor.⁶⁴

C. The Pathway to the Current Content Discrimination Framework

i. The Effect of *Metromedia, Inc.*

Much of the confusion around content neutrality appears to stem from disparate interpretations of the Supreme Court decision in *Metromedia, Inc. v. City of San Diego*.⁶⁵ The controversy was whether a San Diego ordinance that functionally banned billboards as a method of advertising was constitutional.⁶⁶ Although most outdoor displays were prohibited, the statute provided exceptions for twelve articulated categories and onsite signs.⁶⁷ The City argued that the ordinance had been enacted to

v. Falwell, 485 U.S. 46, 57 (1988) (holding offensive speech was not subject to tort action for intentional infliction of emotional distress).

⁶⁰ See Fee, *supra* note 52, at 1127-28 (finding acceptable classification based on purpose of speech); see also *Hill v. Colorado*, 530 U.S. 703, 707 (2000) (“[U]nlawful within the regulated areas for any person to ‘knowingly approach’ within eight feet of another person, without that person’s consent, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person.”).

⁶¹ See *Hill*, 530 U.S. at 723 (distinguishing speech purpose discrimination from effect on listener discrimination).

⁶² See Fee, *supra* note 52, at 1128 (recounting Court’s holding that intercepting information does not discriminate based on viewpoint).

⁶³ See *id.* at 1129 (discussing Supreme Court’s treatment of laws that regulate based on speaker).

⁶⁴ Compare *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 828 (1995) (“In the realm of private speech or expression, government regulation may not favor one speaker over another.”), with *Turner Broad. Sys. Inc. v. F.C.C.*, 512 U.S. 622, 657-59 (1994) (“[S]peaker-based laws demand strict scrutiny when they reflect the Government’s preference for the substance of what the favored speakers have to say . . .”). Such conflicting results preclude a consistent application of a speaker based discrimination approach. See Fee, *supra* note 52, at 1130 (indicating lack of consistency in Court’s application).

⁶⁵ 453 U.S. 490 (1981).

⁶⁶ See *id.* at 493-96 (outlining controversy).

⁶⁷ *Id.* at 494. Onsite signs included those for identification of the place and to advertise only goods that were made on location or services rendered therein. *Id.* The twelve excepted categories were as follows:

eliminate hazards from distracting signs and to advance city aesthetics.⁶⁸ The appellants, companies that owned billboards, contended that it was a violation of their First Amendment rights and would force them out of business.⁶⁹ The Court struck down the ordinance.⁷⁰ However, the case generated a plurality opinion, a concurring opinion, as well as three separate dissenting opinions.⁷¹

The plurality first analyzed the distinction made by the statute between commercial and noncommercial speech.⁷² Noting that commercial speech was in general less rigorously protected under the First Amendment than noncommercial speech, the Court held that the part of the San Diego statute pertaining to commercial speech was permissible.⁷³

The plurality focused on the exceptions to the ordinance and delved deeper into the analysis of how noncommercial speech was handled under the statute.⁷⁴ It divided up noncommercial speech into different types, some prohibited and others not.⁷⁵ Considering the direct connection between the actual content of the speech and what the statute prevents, it was content-based and unconstitutional.⁷⁶ The Court noted that it was more

[G]overnment signs; signs located at public bus stops; signs manufactured, transported, or stored within the city, if not used for advertising purposes; commemorative historical plaques; religious symbols; signs within shopping malls; for sale and for lease signs; signs on public and commercial vehicles; signs depicting time, temperature, and news; approved temporary, off-premises, subdivision directional signs; and “[temporary] political campaign signs.”

Id. at 494-95.

⁶⁸ *See id.* at 493-94 (providing exceptions to ordinance by statute).

⁶⁹ *See id.* at 496-97 (discussing parties and procedural history).

⁷⁰ *See Metromedia, Inc.*, 453 U.S. at 521 (finding ordinance unconstitutional on face).

⁷¹ *Id.* at 493, 521, 540, 555, 569. For a concise breakdown of the postures of all of these opinions, *see* Burt, *supra* note 4, at 494-98 (summarizing relevant Supreme Court cases).

⁷² *See Metromedia, Inc.*, 453 U.S. at 503-06 (explaining difference in standards for commercial and noncommercial communications).

⁷³ *See id.* at 504-05, 507 (disagreeing with appellant’s contention that San Diego fails four part test). In order to make this determination, the Court used the established four-part test from *Central Hudson Gas & Elec. Corp. v. Public Service Comm’n*. *See id.* at 507 (citing 447 U.S. 557 (1980)) (explaining four part test).

⁷⁴ *See id.* at 514-15 (looking at exceptions in statute).

⁷⁵ *See id.* The Court turned to the controlling cases around noncommercial speech, and stated that it was impermissible to categorize noncommercial speech in the same way as commercial speech. *See id.* (“Although the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests.” (citing *Carey v. Brown*, 447 U.S. 455, 462 (1980))).

⁷⁶ *See id.* at 514-15 (averring statute’s unconstitutionality where types of speech were treated differently). Invoking language from previous case law, the Court reasons “[t]o allow a

than a regulation of time, place, and manner, so the city had overreached the permissible bounds of its legitimate interest in safety and aesthetics.⁷⁷

Concurring in the judgment, Justice Brennan applied the content neutrality framework to the issue.⁷⁸ Rejecting the analysis of commercial and noncommercial speech as a starting point, Brennan's analysis never reached the issue of the exceptions.⁷⁹ Instead, he argued that the city failed to show that their interest was sufficiently substantial to make an overall ban on certain kinds of speech legitimate.⁸⁰ As an alternative to this analysis, he proposed what he believed was a more appropriate content-neutral analysis.⁸¹

D. Tiered Protection: Non-commercial Speech, Commercial Speech, and Low Value Speech

While the First Amendment places a broad protection on speech as a general concept, certain types of speech are valued above others.⁸² Non-

government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Id.* (quoting *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 538 (1980)).

⁷⁷ See *Metromedia, Inc.*, 453 U.S. at 515-16. The Court noted that the ordinance failed on two counts: first, "[s]igns that are banned are banned everywhere and at all times[.]" and second, there were no alternative channels available because both parties had stated there were not. *Id.*

⁷⁸ See *id.* at 526-27 ("I would apply the tests this Court has developed to analyze content-neutral prohibitions of particular media of communication.").

⁷⁹ See *id.* at 522 (asserting that this case presented total ban issue).

⁸⁰ *Id.* at 528. Justice Brennan analogized the case to *Schad v. Mount Ephraim*, 452 U.S. 61, 73 (1981):

This Court noted in *Schad* that "[the] [city] has presented no evidence, and it is not immediately apparent as a matter of experience, that live entertainment poses problems . . . more significant than those associated with various permitted uses; nor does it appear that the [city] has arrived at a defensible conclusion that unusual problems are presented by live entertainment." Substitute the word "billboards" for the words "live entertainment," and that sentence would equally apply to this case.

Id. at 530 (quoting *Schad*, 452 U.S. at 73).

⁸¹ See *Metromedia, Inc.*, 453 U.S. at 526-27 (Brennan, J., concurring) (rejecting majority's reliance on exceptions to ban to invalidate ordinance). Brennan's proposed analysis relied on a series of previous Supreme Court cases concerning total bans on certain media, consistently finding that less-restrictive means of regulation were available to avoid infringement upon a First Amendment right. *Id.* at 527; see *Schad*, 452 U.S. at 70 (stating less intrusive means available than ban to serve government interest of regulating live entertainment); *Martin v. City of Struthers*, 319 U.S. 141, 149 (1943) (rejecting municipal ordinance banning door-to-door solicitation); *Schneider v. State*, 308 U.S. 147, 165 (1939) (invalidating ban on distributing handbills).

⁸² See Moore, *supra* note 1, at 18 (stating some speech is so low "as to be unworthy of First

commercial speech is the least regulated given that it typically involves private speech and expression.⁸³ Commercial speech is afforded slightly less protection, given that it is less important to the values of the First Amendment.⁸⁴ Finally, low value speech is not protected by the First Amendment, and it is categorically defined by certain types of speech.⁸⁵

Non-commercial speech is the realm traditionally protected by the First Amendment.⁸⁶ It is an expansive category, and protects most private speech.⁸⁷ Regulations on this type of speech are strictly prohibited from looking to content.⁸⁸ Content based regulations are subject to strict scrutiny.⁸⁹ If a regulation is found to be content neutral, it is subject to intermediate scrutiny.⁹⁰

Commercial speech is relatively new to First Amendment protection.⁹¹ Until 1976, protecting commercial speech was not considered integral to upholding the First Amendment's guarantee of free speech.⁹² However, commercial speech is now a lesser protected class of speech, and the Supreme Court distinguishes between it and noncommercial speech.⁹³ To determine whether commercial speech is permissible, the Court created a four-part test in *Central Hudson Gas & Electric Corp. v. Public Service*

Amendment protection.”).

⁸³ See *Metromedia, Inc.*, 453 U.S. at 514-15 (distinguishing commercial speech from noncommercial speech, and valuing noncommercial speech more highly).

⁸⁴ See *id.* at 506 (citing *Ohrlik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)) (indicating commercial speech is less essential to core purpose of First Amendment).

⁸⁵ See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (categorizing unprotected speech as that which do not aid “any exposition of ideas”).

⁸⁶ See *Metromedia, Inc.*, 453 U.S. at 513 (“[O]ur recent commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech.”).

⁸⁷ See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769 (2004) (stating that most speech is protected).

⁸⁸ See *Fee*, *supra* note 52, at 1123-30 (detailing aspects of speech that cannot be discriminated against).

⁸⁹ See sources cited *supra* notes 41-44 and accompanying text (describing content-based restrictions and appropriate level of scrutiny).

⁹⁰ See sources cited *supra* notes 45-49 and accompanying text (giving information about content-neutral restrictions and appropriate level of scrutiny).

⁹¹ See *Burt*, *supra* note 4, at 485-87 (reviewing history of commercial speech in context of First Amendment).

⁹² See *Metromedia, Inc. v. City of San Diego*, 452 U.S. 490, 505 (1981) (telling history of unprotected commercial speech); see also *Burt*, *supra* note 4, at 486-87 (describing historical precedent of unprotected commercial speech).

⁹³ See *Virginia State Bd. of Phar. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770-73 (1976) (holding commercial speech protected under First Amendment).

Commission.⁹⁴ The test requires that: (1) the commercial speech must concern a lawful activity and must not be misleading; (2) the restriction promotes a substantial government interest; (3) the restriction advances that substantial interest; and (4) the restriction is narrowly tailored to achieve that interest.⁹⁵ This test differs from protection of non-commercial speech by not quite reaching strict scrutiny and requiring an initial examination of the content of speech to determine its lawfulness.⁹⁶

Low value speech is not protected by the First Amendment.⁹⁷ The categories are specifically defined as “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”⁹⁸ The Supreme Court held in a recent decision that no new categories of speech may be added.⁹⁹

E. The Roberts Court and the First Amendment

In the past five years, the Roberts Court has substantially shifted the framework of First Amendment analysis.¹⁰⁰ In three cases that focused specifically on low value speech, the Court has limited the government’s power to regulate speech.¹⁰¹ This narrowing of the government’s power

⁹⁴ 447 U.S. 557, 563-66 (1980) (implementing new test in order to balance First Amendment rights and state’s interests).

⁹⁵ See *id.* (describing test); *Metromedia*, 452 U.S. at 507 (expanding on *Central Hudson* test).

⁹⁶ See *Central Hudson*, 447 U.S. at 563-66 (including element of content based examination in test).

⁹⁷ See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 570-72 (1942) (explaining low value speech is not traditional area First Amendment sought to protect).

⁹⁸ See *id.* at 571-72 (defining low value speech).

⁹⁹ See *United States v. Stevens*, 559 U.S. 460, 470 (2010) (calling “free-floating test” for First Amendment categories “startling and dangerous”); Toni M. Massaro, *Tread on Me!*, 17 U. PA. J. CONST. L. 365, 398-401 (2014) (discussing implications of adding no new exceptions for low value speech).

¹⁰⁰ See Moore, *supra* note 1, at 18 (shifting to no balancing test implied by language of protections).

¹⁰¹ See e.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (giving protection to low value speech); *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2736-42 (2011) (holding video games are a protected form of speech under the First Amendment); *United States v. Stevens*, 559 U.S. 460, 480 (2010) (“Thus, the protection of the First Amendment presumptively extends to many forms of speech that do not qualify for the serious-value exception of § 48(b), but nonetheless fall within the broad reach of § 48(c)”). In *Stevens*, the Supreme Court overturned a Federal law that criminalized the “commercial creation, sale, or possession of animal cruelty.” See Moore, *supra* note 1, at 18 (citing *Stevens*, 559 U.S. at 460) (stating some speech is so low “as to be unworthy of First Amendment protection.”); see also 18 U.S.C. § 48 (noting statute used in decision). The law was apparently in response to the rising interstate market for “crush videos,” or videos of small animals being slowly crushed to death, often by women in either

signals a broader strengthening of First Amendment protections.¹⁰²

The Roberts Court has rejected the notion that categories of low value speech may be easily expanded, holding that the government may not decide when speech is valuable.¹⁰³ Even the existing categories will not be expanded from their traditional definitions.¹⁰⁴ In order for a category to be added or expanded, the Roberts Court has implemented a “persuasive evidence” test.¹⁰⁵ While the derivative case law is focused on low value speech, these holdings are indicative of broader framework of First Amendment analysis that the Roberts Court implements.¹⁰⁶ Under this theory of narrow government powers in restricting speech, the Roberts Court resolved a split among the circuit courts concerning First Amendment interpretation.¹⁰⁷

III. FACTS

Before June of 2015, there was a split among the U.S. Circuit Courts of Appeal about how to determine whether a sign statute was content-based under the First Amendment.¹⁰⁸ Two competing theories existed: the “absolutist” circuits and the “practical” circuits.¹⁰⁹

stilettos or bare feet. See Moore, *supra* note 1, at 18-19. In *Brown*, the Court overturned a California law that prohibited the sale or rental of violent video games to minors. See *id.* at 24 (explaining video games are a protected form of speech under the First Amendment). In *Alvarez*, the Court overturned a Federal law that criminalized lying about receiving military honors. See *id.* at 29-30 (giving protection to low value speech). The case specifically dealt with a defendant who had lied about receiving the Congressional Medal of Honor. *Id.* at 24.

¹⁰² See Massaro, *supra* note 99, at 369-70 (indicating that areas of protected speech are expanding).

¹⁰³ See sources cited *supra* notes 100-02 and accompanying text (recounting precedent on low value speech).

¹⁰⁴ See cases cited *supra* note 101 and accompanying text (giving Roberts Court’s view of low value speech exclusions).

¹⁰⁵ See *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 792 (2011) (“But without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the ‘judgment [of] the American people,’ embodied in the First Amendment, ‘that the benefits of its restrictions on the Government outweigh the costs.’” (quoting *United States v. Stevens*, 559 U.S. 460, 470 (2010))).

¹⁰⁶ See sources cited *supra* notes 100-102 and accompanying text (indicating narrow government powers in low value speech analysis).

¹⁰⁷ See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2224 (2015) (holding sign code “impose[d] more stringent restrictions” than permissible); see also *infra* Part III (describing circuit split and eventual resolution).

¹⁰⁸ See cases cited *supra* note 12 (comparing cases discussing subject matter based distinctions).

¹⁰⁹ See *Wagner v. City of Garfield Heights*, 577 F. App’x 488, 493-95 (6th Cir. 2014), *vacated*, 135 S. Ct. 2888 (2015) (describing circuit split).

A. The Split: A Tale of Two Theories

The Fifth, Eighth, and Eleventh circuits were the absolutist circuits.¹¹⁰ In these circuits, any look at content, no matter how cursory, failed the *prima facie* test for content neutrality.¹¹¹ Laying out a list of exceptions to an ordinance—such as allowing religious signs where other signs are not—can be enough to make a statute content-based because it references the subject matter of the speech.¹¹² This was the minority view among the split.¹¹³

Private individuals were more likely to be successful in these circuits.¹¹⁴ Because these courts were more likely to find a statute was content-based, governments had a high burden to overcome with strict scrutiny.¹¹⁵ The sign codes, or portions thereof, were held unconstitutional.¹¹⁶

The Third, Fourth, Sixth, Seventh, and Ninth circuits were the practical circuits.¹¹⁷ The courts using this theory took a more relaxed view

¹¹⁰ See, e.g., *Neighborhood Enters. Inc. v. City of St. Louis*, 644 F.3d 728, 738-39 (8th Cir. 2011) (concluding zoning code failed strict scrutiny); *Service Emps. Int'l Union, Local 5 v. City of Houston*, 595 F.3d 588, 595-05 (5th Cir. 2010) (holding ordinance was unconstitutionally vague); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1274 (11th Cir. 2005) (highlighting absolutist analysis).

¹¹¹ See cases cited *supra* note 110 (outlining cases where any look to content failed the *prima facie* test).

¹¹² See *Solantic*, 410 F.3d at 1258 (holding that exemptions based on content are discriminatory).

¹¹³ See cases cited *supra* note 12 (comparing two sides of circuit split). Three circuits made up the absolutist circuits while there were five that subscribed to practical analysis. See cases cited *supra* note 12 (comparing two sides of circuit split).

¹¹⁴ See *Neighborhood Enters. Inc.*, 644 F.3d at 736 (describing holding of the case); *Service Emps. Int'l Union, Local 5 v. City of Houston*, 595 F.3d 588, 605 (5th Cir. 2010); *Solantic*, 410 F.3d at 1274 (holding for plaintiffs because of content-based code that failed strict scrutiny or impermissible vagueness).

¹¹⁵ See *Neighborhood Enters. Inc.*, 644 F.3d at 737-38 (“[E]ven when a government supplies a content-neutral justification for the regulation, that justification is not given controlling weight without further inquiry.” (quoting *Whitton v. City of Gladstone*, 54 F.3d 1400, 1408 (1995))); cases cited *supra* note 110 (applying strict scrutiny to content-based statutes).

¹¹⁶ See cases cited *supra* note 110 (giving cases where codes were found unconstitutional).

¹¹⁷ See, e.g., *Brown v. Town of Cary*, 706 F.3d 294, 297 (4th Cir. 2013) (holding town ordinance content-neutral where regulation justified for reasons independent of content); *American Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 587 (7th Cir. 2012) (holding eavesdropping statute content neutral); *Melrose, Inc. v. City of Pittsburgh*, 613 F.3d 380, 383 (3d Cir. 2010) (holding zoning ordinance limiting advertisements to identification signs with advertising aspects in certain areas content-neutral); *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 612 (6th Cir. 2009) (holding city ordinance imposing different height requirements on various types of advertisement signs content-neutral); *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1076-78 (9th Cir. 2006) (holding city ordinance exempting certain entities from permit process content-neutral, where provisions based on speaker).

of what made a statute content-based.¹¹⁸ Types of signs could be regulated differently so long as there was no type of content being treated less favorably than another is.¹¹⁹ Since, in their view, exceptions did invalidate a statute on its face, the analysis more often moved into whether an ordinance regulated time, place, and manner and whether there were sufficient alternative channels for communication.¹²⁰

Governments had more success in practical circuits.¹²¹ Sign codes were more often upheld because they received intermediate scrutiny.¹²² Government parties then would point to safety and aesthetics as the important interests, which would meet their burden.¹²³ Private individuals were often left without remedy.¹²⁴

B. Reed and the Advancement of Absolutism

This split was resolved in the recent case of *Reed v. Town of Gilbert*,¹²⁵ in which the Supreme Court sided with the absolutist circuits.¹²⁶ The case arose from a Ninth Circuit decision that upheld a town sign code that categorized types of signs into three categories: ideological signs, political signs, and temporary directional signs relating to a qualifying event.¹²⁷ In practice, the code prevented a church from posting temporary advertising signs.¹²⁸ The Court held that statutes must pass a *prima facie* examination for content-neutrality.¹²⁹ Further, the Court held that if a statute fails this test, it is automatically subjected to strict scrutiny.¹³⁰ In doing so, the Court rejected the reasoning traditionally relied upon by

¹¹⁸ See cases cited *supra* note 117 (detailing cases applying a practical analysis to content neutrality).

¹¹⁹ See cases cited *supra* note 117 (giving cases where statutes were more likely to be found content neutral).

¹²⁰ See cases cited *supra* note 117 (analyzing cases under intermediate scrutiny).

¹²¹ See cases cited *supra* note 117 (showing governments were more often successful).

¹²² See cases cited *supra* note 117 (upholding statutes under intermediate scrutiny).

¹²³ See cases cited *supra* note 117 (recognizing safety and aesthetics as important government interests).

¹²⁴ See cases cited *supra* note 117 (demonstrating that private parties were unsuccessful under this analysis).

¹²⁵ 135 S. Ct. 2218 (2015).

¹²⁶ See *id.* at 2232 (referring specifically to theory it adopted as “absolutist”).

¹²⁷ See *id.* at 2224–25 (describing categories in side code).

¹²⁸ See *id.* at 2225–26 (recounting facts and procedural history).

¹²⁹ See *id.* at 2228 (“But this analysis skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face.”).

¹³⁰ See *Reed*, 135 S. Ct. (“A law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech.” (citation omitted)).

practical circuits.¹³¹

The Court examined and rejected the three arguments of the Ninth Circuit—which was indicative of all practical circuits’ reasoning—point by point.¹³² First, the Ninth Circuit contended “that the Sign Code was content neutral because the Town ‘did not adopt its regulation of speech [based on] disagree[ment] with the message conveyed,’ and its justifications for regulating temporary directional signs were ‘unrelated to the content of the sign.’”¹³³ The Court disagreed with this reasoning, stating that the first step of any content analysis was to make determination of neutrality—the statute needed to be neutral on its face.¹³⁴ Second, the Ninth Circuit argued that the sign code was content neutral because it did not “mention any idea of viewpoint, let alone single one out for differential treatment.”¹³⁵ Once again the Court was unpersuaded, stating that the Ninth Circuit had “conflate[d] two distinct but related limitations that the First Amendment places on government regulation of speech.”¹³⁶ While viewpoint discrimination was a serious issue, it did not mean treating certain kinds of speech differently did not prevent that kind of speech.¹³⁷ Third, the Ninth Circuit claimed that the distinctions in the sign code based on “the content-neutral elements of who is speaking through the sign and whether and when an event is occurring.”¹³⁸ The Court also dismissed this reasoning.¹³⁹ The legal error was the assumption that distinctions based on the speaker did not “automatically render the distinction content neutral.”¹⁴⁰ The factual error was in the assumption that the occurrence of an event meant that the government was not looking at the content of the sign.¹⁴¹

After determining that the sign code was content-based, the Court

¹³¹ See *id.* at 2227-30 (recounting and rejecting Court of Appeal’s logic).

¹³² See *id.* at 2227-30 (discussing procedural history).

¹³³ *Id.* at 2227-28 (quoting *Reed v. Town of Gilbert*, 707 F.3d 1057, 1071-72 (9th Cir. 2013)).

¹³⁴ See *id.* at 2228 (“But this analysis skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face.”). The Ninth Circuit improperly looked at the motive behind the sign code, which does not weigh into content analysis. *Id.* The reasoning relied on *Ward v. Rock Against Racism*, which concerns viewpoint discrimination. See *id.* at 2228-29 (discussing precedent); see also Fee, *supra* note 52, at 1123 (discussing viewpoint discrimination).

¹³⁵ *Reed*, 135 S. Ct. at 2229.

¹³⁶ *Id.* at 2229-30.

¹³⁷ See *id.* (overturning Ninth Circuit analysis).

¹³⁸ *Id.* at 2230.

¹³⁹ See *id.* at 2230 (stating reasoning was “mistaken on both factual and legal grounds.”).

¹⁴⁰ *Reed*, 135 S. Ct. at 2230.

¹⁴¹ See *id.* at 2231 (reasoning against Ninth Circuit’s “novel theory of an exception from the content-neutrality requirement for event-based laws.”).

turned to whether the town's reasons were compelling and narrowly tailored in a way that would survive strict scrutiny.¹⁴² The town had presented safety and aesthetics as the justification for the sign code, which the Court coined "hopelessly underinclusive."¹⁴³ The judgment was reversed and remanded.¹⁴⁴

Although the decision was unanimous, three justices wrote concurring opinions.¹⁴⁵ Justice Alito focused on providing local governments with examples of how to author sign codes that would be content neutral.¹⁴⁶ Justice Breyer and Justice Kagan each wrote separately to express their concern with the automatic strict scrutiny trigger included in the majority opinion.¹⁴⁷

Justice Alito focused on how a sign code could still be effective under the Court's guidelines.¹⁴⁸ He detailed several examples of how a sign code could be content neutral, all of which fell into the broader categories of time, place, and manner.¹⁴⁹ Justice Alito's opinion approved of the automatic strict scrutiny trigger by indicating that the majority's opinion was not overly restrictive of how local governments could write sign codes.¹⁵⁰

Justice Breyer's and Justice Kagan's concurring opinions voiced concerns with the automatic strict scrutiny trigger put in place by the majority opinion.¹⁵¹ Justice Breyer stated that "the category 'content discrimination' is better considered in many contexts, including here, as a rule of thumb, rather than as an automatic 'strict scrutiny' trigger, leading

¹⁴² See *id.* at 2232 (finding that sign code failed strict scrutiny).

¹⁴³ *Id.* at 2231.

¹⁴⁴ See *id.* at 2233 (describing holding of the case).

¹⁴⁵ See *Reed*, 135 S. Ct. at 2233, 2234, 2236 (concurring opinions of Justices Alito, Breyer, and Kagan respectively).

¹⁴⁶ See *id.* at 2233 (Alito, J., concurring) (providing examples of regulations that would be considered content-neutral). Justices Kennedy and Sotomayor joined in this concurrence. *Id.*

¹⁴⁷ See *id.* at 2236 (Kagan, J., concurring) (expressing concern that a finding of content based automatically triggers strict scrutiny). Justices Breyer and Ginsburg joined in Justice Kagan's concurring opinion. *Id.*

¹⁴⁸ See *id.* at 2233-34 (Alito, J., concurring) (explaining how sign code could be constitutional under decision).

¹⁴⁹ See *id.* at 2233 (enumerating examples of content-neutral regulations). Justice Alito's examples included "[r]ules distinguishing between lighted and unlighted signs, . . . on-premises and off-premises signs, . . . [and] imposing time restrictions on signs advertising a one-time event." *Id.*

¹⁵⁰ See *Reed*, 135 S. Ct. at 2233-34 ("Properly understood, today's decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives.").

¹⁵¹ See *id.* at 2234, 2236 (Breyer & Kagan, JJ., concurring respectively) (discussing concerns with strict scrutiny approach).

to almost certain legal condemnation.”¹⁵² The government must necessarily regulate content-based speech from time to time, and automatically subjecting it to strict scrutiny was not justifiable.¹⁵³ Accordingly, Justice Breyer would have only used content discrimination as a strong weight in favor of unconstitutionality rather than an automatic strict scrutiny trigger.¹⁵⁴

Justice Kagan questioned whether it was necessary to impose an automatic strict scrutiny trigger.¹⁵⁵ Her argument was that the automatic trigger undercuts the purpose of applying strict scrutiny to content-based restrictions.¹⁵⁶ The two purposes that were not served were (1) to maintain an open marketplace of ideas; and (2) to ensure the government does not favor one kind of speech over another.¹⁵⁷ Indeed, Justice Kagan points to other previous cases involving facially content-based regulations, to which the Supreme Court declined to apply strict scrutiny because there was no indication of bias, or preference for one viewpoint.¹⁵⁸ She therefore

¹⁵² *Id.* at 2234 (Breyer, J., concurring).

¹⁵³ *See id.* at 2234-35 (Breyer, J., concurring) (stating “virtually all government activities involve speech”). Justice Breyer provides several examples of federal statutes that regulate speech based on content, such as securities, prescription drug labels, and income tax statements. *Id.* at 2235.

¹⁵⁴ *See id.* at 2234-35 (Breyer, J., concurring) (noting strict scrutiny may make sense).

But content discrimination, while helping courts to identify unconstitutional suppression of expression, cannot and should not *always* trigger strict scrutiny The better approach is to generally treat content discrimination as a strong reason weighing against the constitutionality of a rule where a traditional public forum, or where viewpoint discrimination, is threatened, but elsewhere treat it as a rule of thumb, finding it a helpful, but not determinative legal tool, in an appropriate case, to determine the strength of a justification.

Id. at 2234-35 (emphasis in original).

¹⁵⁵ *See Reed*, 135 S. Ct. at 2237 (Kagan, J., concurring) (“Although the majority insists that applying strict scrutiny to all such ordinances is ‘essential’ to protecting First Amendment freedoms, I find it challenging to understand why that is so.”) (citation omitted).

¹⁵⁶ *See id.* at 2237 (Kagan, J., concurring) (“subject-matter exemptions included in many sign ordinances do not implicate [First Amendment] concerns.”).

¹⁵⁷ *See id.* (describing underlying purpose of applying strict scrutiny when banning content-based restrictions).

¹⁵⁸ *See id.* at 2238-39 (reviewing previous Supreme Court case law on content-based restrictions). *See generally* *Davenport v. Washington Educ. Ass’n*, 551 U.S. 177, 188 (2007) (acknowledging “content-based regulations of speech are presumptively invalid.”); *City of Ladue v. Gilleo*, 512 U.S. 43, 46-47, 53 (1994) (“[T]he exemptions from Ladue’s ordinance demonstrate that Ladue . . . has not imposed a flat ban on signs because it has determined that at least some of them are too vital to be banned.”); *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 814-15 (1984) (“Given our analysis of the legitimate interest served by the ordinance, its viewpoint neutrality, and the availability of alternative channels of communication, the ordinance is certainly constitutional as applied to appellees under this

concluded that, in the present case, there was no need to “decide the level-of-scrutiny question because the law’s breadth made it unconstitutional under any standard.”¹⁵⁹

IV. ANALYSIS

The Supreme Court’s decision in *Reed* is demonstrative of the hardline stance against non-commercial speech restrictions.¹⁶⁰ Under this absolutist framework, numerous challenges and appeals of previous sign code disputes are likely to arise in the previously practical circuits.¹⁶¹ Furthermore, questions arise over the prudence of an automatic strict scrutiny trigger, which is a blunt instrument in a fluid and often changing area of the law.¹⁶² However, practitioners can still effectively advocate by strategizing to get a favorable standard of review by focusing on certain aspects of First Amendment precedent.¹⁶³

A. Litigation Strategies

Any litigation involving a crossroad between First Amendment speech and the right of the government to regulate it will need a strong argument either way for content analysis.¹⁶⁴ However, content analysis is merely the first step, and the second is formulating an argument based on which level of scrutiny is applied.¹⁶⁵ To litigate effectively, private people and entities will employ different strategies than governments.¹⁶⁶

B. Content Analysis and Level of Scrutiny

Whether a statute is content-based or content-neutral will be the first, and arguably most important, point in these kinds of cases.¹⁶⁷ Because of the holding in *Reed*, it is abundantly clear that statutes must

standard.”).

¹⁵⁹ *Reed*, 135 S. Ct. at 2239 (Kagan, J., concurring).

¹⁶⁰ *See id.* at 2224 (majority opinion) (summarizing reasoning and holding).

¹⁶¹ *See generally id.* at 2236-39 (Kagan, J., concurring) (raising concerns over automatic strict scrutiny trigger).

¹⁶² *See generally id.* (Kagan, J., concurring) (raising concerns over automatic strict scrutiny trigger).

¹⁶³ *See infra* Part IV.A (giving guiding principles for litigation under absolutist framework).

¹⁶⁴ *See* Chemerinsky, *supra* note 28, at 49 (noting content analysis as primary question).

¹⁶⁵ *See id.* at 55 (describing content analysis as first step to determining level of scrutiny).

¹⁶⁶ *See infra* Part IV.A.i (discussing content analysis and what level of scrutiny will apply).

¹⁶⁷ *See supra* Part II.B (examining content analysis and First Amendment).

survive a *prima facie* examination of content neutrality or be subjected to strict scrutiny.¹⁶⁸ Therefore, practitioners should have detailed arguments prepared for a *prima facie* case proving or disproving content neutrality.¹⁶⁹

Private individuals and corporations challenging sign codes or similar ordinances will fare better under the current absolutist approach when arguing for a content-based finding.¹⁷⁰ Because any enumerated exceptions constitute looking at content—a common facet of statutes involving signs—courts will apply strict scrutiny.¹⁷¹ Any indication that a sign code regulates anything other than time, place, or manner will trigger strict scrutiny.¹⁷² For example, any law's treatment of speech that distinguishes between speakers in any way renders a statute content-based.¹⁷³ Furthermore, private individuals can also challenge whether a statute leaves open alternative channels of communication.¹⁷⁴

Even in a case where a statute receives intermediate scrutiny, government parties should still be prepared to argue that it promotes important government interests.¹⁷⁵ Safety and aesthetics are the interests traditionally relied upon.¹⁷⁶ Practitioners should ensure that those interests apply, and if not, prepare to argue for other important interests.¹⁷⁷

Private parties in a content-neutral case will still have ample opportunity to challenge the validity of a statute.¹⁷⁸ In these cases, it may be beneficial to argue that the statute is over-inclusive as far as preserving the government interest (perhaps, state the government interest precisely within this sentence).¹⁷⁹ A statute that is not narrowly tailored to protect a

¹⁶⁸ See *supra* Part III.B (detailing *Reed* case).

¹⁶⁹ See *Reed*, 135 S. Ct. at 2227 (majority opinion) (affirming that content neutrality is determined by facially examining statute).

¹⁷⁰ See sources cited *supra* notes 40-43 and accompanying text (exploring absolutist approach in which private citizens fare better).

¹⁷¹ See sources cited *supra* notes 40-43 and accompanying text (exploring absolutist approach in which private citizens fare better).

¹⁷² See *Reed*, 135 S. Ct. at 2228 (stating first step of content analysis is determining whether statute is content-based on its face).

¹⁷³ See *Fee*, *supra* note 52, at 1129 (banning discrimination based on speaker).

¹⁷⁴ See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (requiring alternative methods of communication remain open).

¹⁷⁵ See cases cited *supra* notes 45-47 and accompanying text (stating important government interests and giving requirements for intermediate scrutiny).

¹⁷⁶ See cases cited *supra* note 3 and accompanying text (naming safety and aesthetics as traditionally important government interests).

¹⁷⁷ See *Ward*, 491 U.S. at 800-01 (showing regulations as to sound are another important government interest).

¹⁷⁸ See cases cited *supra* notes 45-49 and accompanying text (describing content-neutral statutes and their requirements).

¹⁷⁹ See *Ward*, 491 U.S. at 798 (reviewing narrowly tailored requirement).

content-neutral government interest will fail under this analysis.¹⁸⁰

Practitioners should also be aware that only specific categories of speech will qualify for a lower level of scrutiny.¹⁸¹ Areas of speech that common sense may indicate as low value will not be treated as such unless there is a tradition of protecting that speech less.¹⁸² Outside of these narrow exceptions, this allows practitioners to treat most First Amendment content discrimination cases as equal without having to make value judgments about the contents of speech.¹⁸³

C. The Effect of Reed

The holding in *Reed* affirmed the view of the absolutist circuit courts.¹⁸⁴ Because the absolutist view was the minority view among the circuits, many towns and courts must now adjust to the new rule.¹⁸⁵ In addition, governments and courts must prepare to deal with an automatic strict scrutiny trigger that may inhibit their interests and exercise of common sense.¹⁸⁶

i. Sign Code Challenges and Appellate Review

Courts and legal practitioners should be prepared for arguments surrounding the prima facie case concerning local signs codes.¹⁸⁷ Because of the automatic strict scrutiny trigger, a prima facie finding of content-based discrimination will almost certainly not be fatal to a government's case.¹⁸⁸ Local governments in formerly practical circuits would be wise to review their sign codes under this new lens of constitutionality in order to

¹⁸⁰ See *id.* at 798-99 (“[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.”).

¹⁸¹ See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (specifying categories that qualify as low value speech).

¹⁸² See *supra* Part II.C.iii (examining Roberts Court’s reluctance to add new categories of low value speech).

¹⁸³ See sources cited *supra* notes 1, 99, 101 and accompanying text (discussing precedent excluding new categories of low value speech).

¹⁸⁴ See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2232-33 (holding that absolutist rule would not limit town’s ability to make sign codes).

¹⁸⁵ See discussion *supra* notes 113, 117 (detailing courts on either side of circuit split).

¹⁸⁶ See *Reed*, 135 S. Ct. at 2239 (Kagan, J., concurring) (noting in past Supreme Court did not decide level of scrutiny on lack of necessity).

¹⁸⁷ See *id.* at 2228 (majority opinion) (emphasizing prima facie case).

¹⁸⁸ See *id.* at 2236 (Breyer, J., concurring) (voicing concerns about automatic strict scrutiny trigger).

avoid litigation.¹⁸⁹

Practitioners working on appeals for private citizens should look at the counterarguments available to local governments that concern the time, place, and manner of a sign.¹⁹⁰ Any categorization that makes even the barest reference to the content of a sign is impermissible.¹⁹¹ A *prima facie* case where categorizations are involved will likely sway easily to the private citizen.¹⁹²

A government's best course of action in the current climate will likely be preventative.¹⁹³ To avoid court invalidation, legislators should carefully word statutes to avoid creating categories and exceptions.¹⁹⁴ However, in ordinances that do include exceptions, courts will be unlikely to find that they manage only the time, place, and manner of the speech, making them content-based.¹⁹⁵ In these cases, government parties should be prepared to face strict scrutiny.¹⁹⁶ Once a statute receives strict scrutiny, it is nearly impossible to overcome.¹⁹⁷ Safety and aesthetics will not be enough to meet the compelling government interest requirement.¹⁹⁸

However, in a statute regulating speech that does not have exceptions, a government could make the argument for content neutrality.¹⁹⁹ In his concurrence in *Reed*, Justice Alito provided several

¹⁸⁹ See *id.* (Kagan, J., concurring) (detailing types of restrictions in jeopardy under majority decision).

¹⁹⁰ See cases cited *supra* notes 45-49 and accompanying text (describing requirements of content neutral statute).

¹⁹¹ See *Reed*, 135 S. Ct. at 2228 (majority opinion) (allowing time, place, and manner restrictions).

¹⁹² See *id.* (discussing application of content neutral cases).

¹⁹³ See *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 514-15 (1981) (banning governments from categorizing favorable and unfavorable speech). Following the guidelines from the plurality in *Metromedia, Inc.* and other cases following its lead, legislators will be able to avoid pitfalls in their statutory construction. See *id.* (explaining San Diego's next steps for billboards displaying noncommercial messages).

¹⁹⁴ See *id.* (explaining San Diego's next steps for billboards displaying noncommercial messages); see also cases cited *supra* note 110 (giving cases where codes were found unconstitutional).

¹⁹⁵ See cases cited *supra* notes 42-44 (demonstrating likelihood of courts to apply strict scrutiny).

¹⁹⁶ See cases cited *supra* notes 42-44 (demonstrating likelihood of courts to apply strict scrutiny).

¹⁹⁷ See cases cited *supra* notes 42-44 (demonstrating likelihood of courts to apply strict scrutiny was applied to First Amendment issues).

¹⁹⁸ See *Reed*, 135 S. Ct. at 2231-32 (rejecting sign code under strict scrutiny using safety and aesthetics); *Metromedia, Inc.*, 453 U.S. at 507-08 (stating that safety and aesthetics are substantial governmental goals).

¹⁹⁹ See *Reed*, 135 S. Ct. at 2233 (Alito, J., concurring) (guiding governments to statutes that will be considered content neutral).

examples of regulations that would not be content-based.²⁰⁰ This concurrence serves as a guidebook for what kinds of regulations would receive intermediate scrutiny.²⁰¹ Regulations must concern only the time, place, or manner of a sign, and leave open alternative channels of communication.²⁰²

ii. Automatic Strict Scrutiny Trigger

The automatic strict scrutiny trigger lacks a common sense judicial safety valve.²⁰³ Many of the government's duties involve speech and the regulation thereof.²⁰⁴ Signs are required for health and safety, as well as aesthetics.²⁰⁵ From local governments to Federal agencies, the state often regulates speech on signs based on their content.²⁰⁶ Judges now have no mechanism to differentiate these kinds of speech from any other kind of non-commercial speech.²⁰⁷

Strict scrutiny may be proper in most cases regarding content discrimination.²⁰⁸ Applying it reaffirms the idea that the government may not choose what speech is valuable based on its content, an idea well protected by the First Amendment.²⁰⁹ However, it is not without its drawbacks as a judicial mechanism.²¹⁰ It adopts an un-nuanced viewpoint about a nuanced topic.²¹¹ Free speech is a complex and fluid ideal, and one

²⁰⁰ See *id.* (guiding governments to statutes that will be considered content neutral). Some of these rules included regulating the size of signs, regulating the locations where signs are placed, and distinguishing the placement of signs between commercial and residential property. *Id.*

²⁰¹ See *id.* (explaining when intermediate scrutiny will apply).

²⁰² See cases cited *supra* notes 45, 47-49 and accompanying text (outlining requirements for content neutrality in statutes).

²⁰³ See *Reed*, 135 S. Ct. at 2236-37 (Kagan, J., concurring) (detailing circumstances under which courts will have to invalidate reasonable statutes).

²⁰⁴ See *id.* at 2234-35 (Breyer, J., concurring) (listing statutes that require content-based regulation pertaining to governmental protections).

²⁰⁵ See *id.* (providing examples of government regulated speech “where a strong presumption against constitutionality has no place”).

²⁰⁶ See *id.* at 2235 (pointing out that both federal and state statutes regulate speech).

²⁰⁷ See *id.* at 2235-36 (pointing out that both federal and state statutes regulate speech).

²⁰⁸ See *Reed*, 135 S. Ct. at 2234 (Breyer, J., concurring) (listing statutes that require content-based regulation pertaining to governmental protections).

²⁰⁹ See *id.* at 2227 (majority opinion). The Court stated that “laws that cannot be ‘justified without reference to the content of regulated speech,’ or that were adopted by the government ‘because of disagreement with the message [the speech] conveys,’” and “[l]aws] that are content based on their face, must also satisfy strict scrutiny.” *Id.* (internal citations omitted).

²¹⁰ See *id.* at 2234-39 (Breyer & Kagan, JJ., concurring) (handing down concurring opinions focusing on automatic trigger).

²¹¹ See *id.* (asserting need for flexibility in content discrimination analysis).

that rarely arises in a binary fashion.²¹² Videos depicting animal torture are treated with the same reverence as the ability to speak out against the government, all under the umbrella of the First Amendment.²¹³

Something less than an automatic strict scrutiny trigger in content discrimination cases is supported by Supreme Court precedent.²¹⁴ As Justice Kagan detailed in her concurring opinion, it was not necessary to reach the level-of-scrutiny question in *Reed* nor was it necessary to make the strict scrutiny trigger automatic.²¹⁵ Other cases have allowed courts to examine what level of scrutiny was appropriate when bias was not an issue.²¹⁶ While the code in *Reed* needed to be examined under strict scrutiny, the case did not call for a broad automatic strict scrutiny trigger.²¹⁷

V. CONCLUSION

First Amendment case law walks a fine line between the rights of the individual and the need for the government to regulate. Should a rule be too strict, it prevents the government from performing its necessary functions. However, if a rule is too lenient, governments would be allowed to infringe on the fundamental rights of the individual.

Although expressed in a unanimous decision, the holding in *Reed* has generated certain reservations. Whether an automatic strict scrutiny trigger was prudent will become clearer in time. Additionally, the implications that this laissez faire reading of the First Amendment will have on other types of speech is yet to be seen. Following the current trend in the Roberts Court, it seems unlikely that a restriction on speech without historic roots will be upheld.

When navigating the framework of First Amendment analysis, litigators must pay careful heed to many exceptions and distinctions. Emerging as one of the most complex of these distinctions is the difference

²¹² See *supra* Part II.B (expounding on complex relationship between First Amendment and content analysis).

²¹³ See sources cited *supra* note 101 and accompanying text (discussing cases that narrow definition of low value speech).

²¹⁴ See *Reed*, 135 S. Ct. at 2238-39 (Kagan, J., concurring) (positing alternative to automatic strict scrutiny trigger).

²¹⁵ *Id.* at 2239.

²¹⁶ See *id.* at 2238-39 (detailing Supreme Court precedent regarding bias as a relevant factor).

²¹⁷ See *id.* at 2239 (“The absence of any sensible basis for these other distinctions dooms the Town’s ordinance under even the intermediate scrutiny that the Court typically applies to ‘time, place, or manner’ speech regulations. Accordingly, there is no need to decide in this case whether strict scrutiny applies to every sign ordinance in every town across this country containing a subject-matter exemption.”).

between content-based and content-neutral regulations. Clouded by conflicted precedent and obscure language, the traps of content analysis are treacherous even for the most experienced litigator. Litigators taking on these cases must be prepared to formulate strategies based on whether they will face strict or intermediate scrutiny. Being aware of the current absolutist climate in the area of content discrimination is the first step to successfully litigating these First Amendment cases.

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