Lawn Sign Litigation: What Makes a Statue Content-Based for First Amendment Purposes

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

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

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8 See WSU PODCAST: Why Political Yard Signs Matter, [Website], 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, [Website], 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).


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 388, 605 (5th Cir. 2010) (holding ordinance was constitutionally 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 Empls. Int’l Union, Local 3, 595 F.3d at 588 (holding ordinance was unconstitutionally vague); Solonic, 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).


\(^{21}\) See Moore, supra note 1, at 17-38 (analyzing recent line of precedent narrowing area of unprotected speech).
that the courts have found unpersuasive. It will detail the history of First Amendment litigation and show the development of current content discrimination frameworks. Next, it will discuss the current landscape of content discrimination. Finally, it will provide practitioners with a map of what legal theories will prevail in these cases.

II. HISTORY

The First Amendment guarantees the right of free speech and that the expression of the people will not be abridged by Congress. States are further prohibited from abridging free speech and expression via the Fourteenth Amendment. 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. 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.

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. Before 1972, there was a focus on whether the government had infringed upon the rights of the

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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 abridgment 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).
29 See id. (commenting on purpose of First Amendment and outlining case law).
people. However, the modern trend has been a focus on equality and ensuring that all speech is treated the same. Thus, content neutrality has become the cornerstone of First Amendment analysis.

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

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.” The Supreme Court has examined the issue of how to regulate signs by determining whether a statute analyzes the content of a sign. 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.

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 Chermensky, 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).
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.\textsuperscript{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.”\textsuperscript{42} These types of restrictions violate the constitutional fundamental right to free speech and are presumptively invalid.\textsuperscript{43} These regulations receive strict scrutiny, meaning they must serve a compelling government interest by narrowly tailored means.\textsuperscript{44}

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

For better or for worse, content neutrality has become the
cornerstone of free speech analysis. It has been criticized as lacking nuance, since some government choices involving content are simply unavoidable. Different types of speech can also be difficult to define, and subcategorizing what qualifies as content raises even more questions.

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. First, discrimination based on viewpoint or subject matter is prohibited. 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. Second, there are concerns regarding the components of the underlying speech, such as the “speaker’s choice of words, symbols, and images.” 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. Third, the Supreme Court has considered the effect of speech on the listener. The Supreme Court generally considers laws that regulate based on the effect on the audience content-based and impermissible. Fourth, the speech’s purpose or mode may be subject to

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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 pornography, 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

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\(^{50}\) 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.").

\(^{51}\) See Hill, 530 U.S. at 723 (distinguishing speech purpose discrimination from effect on listener discrimination).

\(^{52}\) See Fee, supra note 52, at 1128 (recounting Court's holding that intercepting information does not discriminate based on viewpoint).

\(^{53}\) See id. at 1129 (discussing Supreme Court's treatment of laws that regulate based on speaker).

\(^{54}\) 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).


\(^{56}\) See id. at 493-96 (outlining controversy).

\(^{57}\) 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. The appellants, companies that owned billboards, contended that it was a violation of their First Amendment rights and would force them out of business. The Court struck down the ordinance. However, the case generated a plurality opinion, a concurring opinion, as well as three separate dissenting opinions.

The plurality first analyzed the distinction made by the statute between commercial and noncommercial speech. 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.

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

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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.\textsuperscript{77}

Concurring in the judgment, Justice Brennan applied the content neutrality framework to the issue.\textsuperscript{78} Rejecting the analysis of commercial and noncommercial speech as a starting point, Brennan’s analysis never reached the issue of the exceptions.\textsuperscript{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.\textsuperscript{80} As an alternative to this analysis, he proposed what he believed was a more appropriate content-neutral analysis.\textsuperscript{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.\textsuperscript{82} Non-government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." \textit{Id.} (quoting Consolidated Edison Co. of N.Y. v. Public Serv. Comm’n of N.Y., 447 U.S. 530, 538 (1980)).

\textsuperscript{77} \textit{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. \textit{Id.}

\textsuperscript{78} \textit{See id.} at 526-27 (“I would apply the tests this Court has developed to analyze content-neutral prohibitions of particular media of communication.”).

\textsuperscript{79} \textit{See id.} at 522 (asserting that this case presented total ban issue).

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

\begin{quote}
This Court noted in \textit{Schad} that “[t]he [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.
\end{quote}

\textit{Id.} at 530 (quoting \textit{Schad}, 452 U.S. at 73).

\textsuperscript{81} \textit{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. \textit{Id.} at 527; \textit{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).

\textsuperscript{82} \textit{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. Commercial speech is afforded slightly less protection, given that it is less important to the values of the First Amendment. Finally, low value speech is not protected by the First Amendment, and it is categorically defined by certain types of speech.

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

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

Low value speech is not protected by the First Amendment. 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.” The Supreme Court held in a recent decision that no new categories of speech may be added.

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. In three cases that focused specifically on low value speech, the Court has limited the government’s power to regulate speech. This narrowing of the government’s power

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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 Chaplinksky 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).


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, 489 (2010) (“Thus, the protection of the First Amendment presumably 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
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

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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. Types of signs could be regulated differently so long as there was no type of content being treated less favorably than another is. 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.

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

B. Reed and the Advancement of Absolutism

This split was resolved in the recent case of Reed v. Town of Gilbert, in which the Supreme Court sided with the absolutist circuits. 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. In practice, the code prevented a church from posting temporary advertising signs. The Court held that statutes must pass a prima facie examination for content-neutrality. Further, the Court held that if a statute fails this test, it is automatically subjected to strict scrutiny. In doing so, the Court rejected the reasoning traditionally relied upon by

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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).
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.\textsuperscript{131} The Court examined and rejected the three arguments of the Ninth Circuit—which was indicative of all practical circuits’ reasoning—point by point.\textsuperscript{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.’”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{135} Once again the Court was unpersuaded, stating that the Ninth Circuit had “conflated two distinct but related limitations that the First Amendment places on government regulation of speech.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{138} The Court also dismissed this reasoning.\textsuperscript{139} The legal error was the assumption that distinctions based on the speaker did not “automatically render the distinction content neutral.”\textsuperscript{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.\textsuperscript{141}

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

\begin{footnotes}
\textsuperscript{131} See \textit{id.} at 2227-30 (recounting and rejecting Court of Appeal’s logic).
\textsuperscript{132} See \textit{id.} at 2227-30 (discussing procedural history).
\textsuperscript{133} \textit{Id.} at 2227-28 (quoting \textit{Reed v. Town of Gilbert, 707 F.3d 1057, 1071-72 (9th Cir. 2013)}).
\textsuperscript{134} See \textit{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. \textit{Id.} The reasoning relied on \textit{Ward v. Rock Against Racism}, which concerns viewpoint discrimination. \textit{See id.} at 2228-29 (discussing precedent); \textit{see also Fee, supra note 52, at 1123} (discussing viewpoint discrimination).
\textsuperscript{135} \textit{Reed}, 135 S. Ct. at 2229.
\textsuperscript{136} \textit{Id.} at 2229-30.
\textsuperscript{137} See \textit{id.} (overturning Ninth Circuit analysis).
\textsuperscript{138} \textit{Id.} at 2230.
\textsuperscript{139} See \textit{id.} at 2230 (stating reasoning was “mistaken on both factual and legal grounds.”).
\textsuperscript{140} \textit{Reed}, 135 S. Ct. at 2230.
\textsuperscript{141} See \textit{id.} at 2231 (reasoning against Ninth Circuit’s “novel theory of an exception from the content-neutrality requirement for event-based laws.”).
\end{footnotes}
turned to whether the town’s reasons were compelling and narrowly tailored in a way that would survive strict scrutiny. The town had presented safety and aesthetics as the justification for the sign code, which the Court coined “hopelessly underinclusive.” The judgment was reversed and remanded.

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

Justice Alito focused on how a sign code could still be effective under the Court’s guidelines. 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. 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.

Justice Breyer’s and Justice Kagan’s concurring opinions voiced concerns with the automatic strict scrutiny trigger put in place by the majority opinion. 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

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

Justice Kagan questioned whether it was necessary to impose an automatic strict scrutiny trigger. Her argument was that the automatic trigger undercuts the purpose of applying strict scrutiny to content-based restrictions. 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. 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. She therefore

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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.”

IV. ANALYSIS

The Supreme Court’s decision in Reed is demonstrative of the hardline stance against non-commercial speech restrictions. Under this absolutist framework, numerous challenges and appeals of previous sign code disputes are likely to arise in the previously practical circuits. 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. However, practitioners can still effectively advocate by strategizing to get a favorable standard of review by focusing on certain aspects of First Amendment precedent.

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. However, content analysis is merely the first step, and the second is formulating an argument based on which level of scrutiny is applied. To litigate effectively, private people and entities will employ different strategies than governments.

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. Because of the holding in Reed, it is abundantly clear that statutes must

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159 Reed, 135 S. Ct. at 2239 (Kagan, J., concurring).
160 See id. at 2224 (majority opinion) (summarizing reasoning and holding).
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.\textsuperscript{168} Therefore, practitioners should have detailed arguments prepared for a prima facie case proving or disproving content neutrality.\textsuperscript{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.\textsuperscript{170} Because any enumerated exceptions constitute looking at content—a common facet of statutes involving signs—courts will apply strict scrutiny.\textsuperscript{171} Any indication that a sign code regulates anything other than time, place, or manner will trigger strict scrutiny.\textsuperscript{172} For example, any law’s treatment of speech that distinguishes between speakers in any way renders a statute content-based.\textsuperscript{173} Furthermore, private individuals can also challenge whether a statute leaves open alternative channels of communication.\textsuperscript{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.\textsuperscript{175} Safety and aesthetics are the interests traditionally relied upon.\textsuperscript{176} Practitioners should ensure that those interests apply, and if not, prepare to argue for other important interests.\textsuperscript{177}

Private parties in a content-neutral case will still have ample opportunity to challenge the validity of a statute.\textsuperscript{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).\textsuperscript{179} A statute that is not narrowly tailored to protect a

\textsuperscript{168} See supra Part III.B (detailing Reed case).

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

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

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

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

\textsuperscript{173} See Fee, supra note 52, at 1129 (banning discrimination based on speaker).


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

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

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

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

\textsuperscript{179} See Ward, 491 U.S. at 798 (reviewing narrowly tailored requirement).
content-neutral government interest will fail under this analysis.\textsuperscript{180}

Practitioners should also be aware that only specific categories of speech will qualify for a lower level of scrutiny.\textsuperscript{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.\textsuperscript{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.\textsuperscript{183}

C. The Effect of Reed

The holding in Reed affirmed the view of the absolutist circuit courts.\textsuperscript{184} Because the absolutist view was the minority view among the circuits, many towns and courts must now adjust to the new rule.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{188} Local governments in formerly practical circuits would be wise to review their sign codes under this new lens of constitutionality in order to

\textsuperscript{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.”).

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

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

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

\textsuperscript{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).

\textsuperscript{185}See discussion supra notes 113, 117 (detailing courts on either side of circuit split).

\textsuperscript{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).

\textsuperscript{187}See id. at 2228 (majority opinion) (emphasizing prima facie case).

\textsuperscript{188}See id. at 2236 (Breyer, J., concurring) (voicing concerns about automatic strict scrutiny trigger).
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. Any categorization that makes even the barest reference to the content of a sign is impermissible. A prima facie case where categorizations are involved will likely sway easily to the private citizen.

A government’s best course of action in the current climate will likely be preventative. To avoid court invalidation, legislators should carefully word statutes to avoid creating categories and exceptions. 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. In these cases, government parties should be prepared to face strict scrutiny. Once a statute receives strict scrutiny, it is nearly impossible to overcome. Safety and aesthetics will not be enough to meet the compelling government interest requirement.

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

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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. This concurrence serves as a guidebook for what kinds of regulations would receive intermediate scrutiny. Regulations must concern only the time, place, or manner of a sign, and leave open alternative channels of communication.

### ii. Automatic Strict Scrutiny Trigger

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

Strict scrutiny may be proper in most cases regarding content discrimination. 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. However, it is not without its drawbacks as a judicial mechanism. It adopts an un-nuanced viewpoint about a nuanced topic. Free speech is a complex and fluid ideal, and one

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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 “[laws] 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. 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.

Something less than an automatic strict scrutiny trigger in content discrimination cases is supported by Supreme Court precedent. 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. Other cases have allowed courts to examine what level of scrutiny was appropriate when bias was not an issue. While the code in Reed needed to be examined under strict scrutiny, the case did not call for a broad automatic strict scrutiny trigger.

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

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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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