

REED v. TOWN OF GILBERT: RELAX, EVERYBODY

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***REED v. TOWN OF GILBERT:* RELAX, EVERYBODY**

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Abstract: In *Reed v. Town of Gilbert*, the U.S. Supreme Court held that a law is content-based if it draws distinctions on its face based on the message an affected speaker conveys. *Reed* rejected previous lower court interpretations of the Court's content discrimination doctrine, which had consistently held that a content-based law was not subject to strict scrutiny if its reference to content was not based on government disapproval of that content. *Reed* has set off a firestorm. The justices who concurred in the judgment warned that the case's rule would cast doubt on a range of government action historically considered to not implicate the First Amendment, from securities regulation to product labeling. Commentators have called *Reed* everything from a "groundbreaker" to a "redefinition" of content discrimination doctrine that will have "profound consequences." The message of this Article is that *Reed*'s critics should, in a word, relax. Close review of those areas in which *Reed*'s critics claim the case will cause the most harm demonstrates that other parts of First Amendment doctrine, all of which survive *Reed*, will limit the case's reach. The case also clarified several murky areas of that doctrine. Additionally, the focus on *Reed* obscures a far more important issue: the fallacy of continuing to use a categorical approach to First Amendment cases that turns entirely on whether or not a given law refers to content and ignores a law's actual effect on speech.

INTRODUCTION

In 2015, in *Reed v. Town of Gilbert*, the U.S. Supreme Court reaffirmed that, for purposes of First Amendment review, a court should deem a speech-restrictive law content-based, and thus presumptively unconstitutional, if the law "'on its face' draws distinctions based on the message a speaker conveys."¹ In doing so, the Court rejected prior interpretations of its cases that had

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¹ *Reed v. Town of Gilbert (Reed III)*, 135 S. Ct. 2218, 2227 (2015) (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563–64 (2011)).

held governments could make facial references to a particular type or category of content in their laws so long as those laws were not referring to that content in order to express disagreement with or disapproval of it.

The Court's opinion in *Reed* thus ratified a "First Amendment Two-Step" with an order of decision should be familiar to administrative law students. Step One is a facial inquiry, and Step Two is a purpose inquiry. At Step One, if a law's text makes any reference to content, then "that is the end of the matter," to import a *Chevron* term, at least with respect to determining whether scrutiny is strict.² If a reviewing court answers Step One in the affirmative, then it may not inquire into Step Two: whether the regulation in question is adopted, as the lower court in *Reed* had held, "because of disagreement with the message it conveys."³ *Reed*'s Step Two, however, does apply to facially content-neutral laws; a reviewing court can also subject those laws to strict scrutiny if the government adopted the law under review because of disagreement with the message expressed by the speech the law infringes upon—or, in the words of the Court, "when the purpose and justification for the [content-neutral] law are content based."⁴ Accordingly, and contrary to how the lower courts previously understood and applied content discrimination doctrine, government purpose in First Amendment law is a one-way ratchet that moves only toward strict scrutiny. Even a benign (or at least non-content-related) purpose cannot save a law that refers to content from the most rigorous constitutional standard of review.

Much wringing of hands and gnashing of teeth followed *Reed*—including, and for starters, by the three justices who concurred in the case. Justice Samuel Alito felt compelled to list no fewer than nine hypothetical sign regulations that he claimed would survive the Court's Step One—some of which quite obviously *did* in fact make facial references to content and would therefore likely fail, or at least have to survive strict scrutiny, under the majority's test.⁵ Justice Stephen Breyer, consistent with his prior opinions in First Amendment cases, called for a more nuanced approach than the "content based = strict scrutiny" formula, pointing to a range of content-based restrictions on speech for which the application of strict scrutiny would not be appropriate,

² *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). In its landmark 1984 case *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court established a two-step procedure for evaluating an agency's interpretation of a statute. *See id.* at 842–43.

³ *Reed v. Town of Gilbert (Reed II)*, 707 F.3d 1057, 1071 (9th Cir. 2011) (citations omitted), *rev'd and remanded*, 135 S. Ct. 2218 (2015).

⁴ *Reed III*, 135 S. Ct. at 2228.

⁵ *Id.* at 2233 (Alito, J., concurring) (referring to rules "distinguishing between on-premises and off-premises signs" or "imposing time restrictions on signs advertising a one-time event").

such as securities regulation and drug-labeling requirements.⁶ Finally, Justice Elena Kagan, who, like Justice Breyer, only concurred in the judgment, sounded the alarm.

In Justice Kagan's view, the majority's First Amendment Two-Step would not only threaten the ability of any government to regulate private signage but also a host of other non-censorial laws that refer to content. The content inquiry, in Justice Kagan's view, should follow its "intended function"—to determine whether a law's reference to expressive subject matter might be attributable to the government's "favor[ing] or disfavor[ing] certain viewpoints."⁷ To Justice Kagan, the majority's adoption of a First Amendment Two-Step that bifurcates consideration of the law's face from its purpose draws too bright a line. It forecloses the possibility that some references to content should not draw strict scrutiny where the government's purposes for doing so are benign. Following Justice Kagan's lead, commentators in the national media characterized *Reed* as a "transform[ation] [of] the First Amendment" that would apply "exceptional skepticism" to "countless laws" that refer to content.⁸ Other legal analysts and academics have similarly characterized *Reed* as a First Amendment game-changer, calling it the "harbinger of the sign code apocalypse,"⁹ and a "groundbreaking" decision,¹⁰ one whose holding reached "more broadly than necessary," which will cause "unintended consequences" in not just signage codes but in a wide range of areas historically considered fair game for governmental regulation.¹¹

⁶ *Id.* at 2234–35 (Breyer, J., concurring); see also *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2243–53 (2015) (Justice Breyer writing for the majority in a First Amendment case, holding that specialty plates were government speech); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 839–58 (2011) (Breyer, J., dissenting).

⁷ *Reed III*, 135 S. Ct. at 2238 (Kagan, J., concurring).

⁸ Adam Liptak, *Court's Free-Speech Expansion Has Far-Reaching Consequences*, N.Y. TIMES (Aug. 17, 2015), http://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html?_r=0 [<https://perma.cc/JYJ2-D8WU>] (including commentary by, *inter alia*, Yale Law School Dean Robert Post).

⁹ Sarah J. Adams-Schoen, *Reed Applied: The Sign Apocalypse or Another Bump in the Road*, ZONING & PLAN. L. REP., July/Aug. 2016, at 4.

¹⁰ Matthew Hector, *Groundbreaking Supreme Court Opinion Dooms Panhandling Law*, ILL. B.J., Oct. 2015, at 12.

¹¹ Richard J. Lazarus, *Back to "Business" at the Supreme Court: The "Administrative Side" of Chief Justice Roberts*, 129 HARV. L. REV. F. 33, 60 n.161 (2015), <http://harvardlawreview.org/2015/11/back-to-business-at-the-supreme-court-the-administrative-side-of-chief-justice-roberts/> [<https://perma.cc/RZ9R-F6ZS>]; see also Anthony D. Lauriello, Note, *Panhandling Regulation After Reed v. Town of Gilbert*, 116 COLUM. L. REV. 1105, 1106 (2016) (stating that *Reed* will "likely . . . have profound consequences on a broad array of subjects" and represents a "coming sea change in how American municipalities regulate their streets") (citation omitted); Urja Mittal, *The "Supreme Board of Sign Review": Reed and Its Aftermath*, 125 YALE L.J. F. 359, 359 (2016), <http://www.yalelawjournal.org/forum/the-supreme-board-of-sign-review-reed-and-its-aftermath> [<https://perma.cc/AR2D-BTV7>]

The message of this Article is that those claiming *Reed* has upended the Court's content inquiry in First Amendment cases and severely limited governments' ability to protect the public in a range of other areas should, in a word, relax. As Part I shows, and as evidenced already by the lower court opinions applying *Reed*'s First Amendment Two-Step, the case and its subsequent applications simply confirm that the burden of defending any law referencing content rests with the government.¹² Nor does *Reed* present any great threat to consumer-protective regulations that have historically been considered valid despite their references to content. In fact, as Part II argues, *Reed*'s reduction of the role that government purpose should play in cases involving content-based laws is a welcome development.¹³ Finally and most importantly, Part III demonstrates that focusing on *Reed* as a radical departure from First Amendment doctrine obscures a more fundamental issue with far greater ramifications for the freedom of expression: the Court's continued use of a rigid distinction between content-based and content-neutral laws when determining the standard of review to be applied to a regulation that infringes upon speech.¹⁴

I. THE *REED* FIRST AMENDMENT: SAME AS THE OLD BOSS

A fuller contemplation of *Reed*'s effects would consider its applications in four primary categories, all alluded to by the case's critics. Section A discusses future signage restrictions cases.¹⁵ Section B examines cases involving pan-handling.¹⁶ Section C explores the statutory regime around intellectual property, which uses a decision-making apparatus that often takes content into account.¹⁷ Section D reviews more generally—and more importantly—cases involving laws such as securities and labeling regulations that compel speech in furtherance of consumer protection-related governmental interests.¹⁸ Finally, Section E looks at *Reed*'s effects on criminal law.¹⁹ Despite the critics' protestations, however, *Reed* has not caused any great harm to governments' law-making discretion in any of these areas.

(noting that *Reed*'s "redefinition of content discrimination" "revolutionize[d]" First Amendment doctrine).

¹² See *infra* notes 15–111 and accompanying text.

¹³ See *infra* notes 112–122 and accompanying text.

¹⁴ See *infra* notes 123–148 and accompanying text.

¹⁵ See *infra* notes 20–48 and accompanying text.

¹⁶ See *infra* notes 49–60 and accompanying text.

¹⁷ See *infra* notes 61–78 and accompanying text.

¹⁸ See *infra* notes 79–96 and accompanying text.

¹⁹ See *infra* notes 97–111 and accompanying text.

A. Signage Restrictions

Notwithstanding Justice Kagan's claims in her *Reed* concurrence that the laws of "[c]ountless cities and towns across America . . . are now in jeopardy,"²⁰ it is difficult to see why applying more rigorous constitutional review to sign ordinances will wreak any great change in First Amendment law. As an initial matter, it is certainly so that post-*Reed*, sign ordinances making reference to content in the same way as the ordinance at issue in *Reed* itself will not survive strict scrutiny. This is so not merely because of the *Reed* decision, but also because of a long line of cases finding that government interests in aesthetics and safety concerns related to signage, such as lost or distracted drivers, are not compelling.²¹ That being said, other parts of First Amendment law, perhaps needless to say all of which survived *Reed*, will preserve municipalities' ability to regulate signage without infringing on speech.

First and foremost, there is the commercial speech doctrine. For so long as the Court continues to distinguish between commercial and noncommercial speech (an open question, to be sure, though the commercial speech doctrine seems safe at least for now²²), *Reed*'s reach will be inherently limited. Courts

²⁰ *Reed III*, 135 S. Ct. at 2236, 2239 (Kagan, J., concurring) (referencing the laws of "thousands of towns").

²¹ See, e.g., *Neighborhood Enters., Inc. v. City of St. Louis*, 644 F.3d 728, 738 (8th Cir. 2011); *Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1569–70 (11th Cir. 1993); *Whitton v. City of Gladstone*, 832 F. Supp. 1329, 1335 (W.D. Mo. 1993) ("Traffic safety and aesthetics are significant interests, but they are not compelling interests, especially given the nature of the First Amendment rights at stake.") (citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507–08 (1981)); *Loftus v. Twp. of Lawrence Park*, 764 F. Supp. 354, 361 (W.D. Pa. 1991) ("[W]e doubt that aesthetics or residential quietude is sufficiently compelling to ever justify a content-based restriction . . . on freedom of expression.").

²² Of the current members of the U.S. Supreme Court, Justices Ruth Bader Ginsburg, Stephen Breyer, and Elena Kagan support a continued distinction in First Amendment law between commercial and noncommercial speech. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 583 (2011) (Breyer, J., dissenting) (In his dissent, which Justices Ginsburg and Kagan joined, Justice Breyer argued: "We have always been careful to distinguish commercial speech from speech at the First Amendment's core." (internal quotation marks omitted) (quoting *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995))); see also *id.* at 588 ("[N]either of these categories—'content-based' nor 'speaker-based'—has ever before justified greater scrutiny when regulatory activity affects commercial speech."); Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1154–55 (2012) (noting that the Supreme Court has not clearly expressed how the First Amendment affects commercial speech). Justice Anthony Kennedy has consistently joined opinions applying the test for commercial speech in *Central Hudson & Electric Corp. v. Public Service Commission*, decided in 1980 by the Court. See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 485 (1996); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993). He also applied *Central Hudson* himself while writing the majority opinion in *Sorrell*, which Chief Justice John Roberts and Justices Samuel Alito and Sonia Sotomayor joined without writing separately. *Sorrell*, 564 U.S. at 583–86. To be sure, as Justice Breyer noted in his *Reed* concurrence, to refer to the commercial speech doctrine only to find that it did not apply to the commercial speech at issue in the present case, as the Court did in *Sorrell*, should hardly be characterized as a full-throated endorsement of the doctrine. Only Justice Clarence Thomas

considering challenges to cities' regulation of business signage post-*Reed* have taken note of the fact that *Reed* left undisturbed the four-part intermediate scrutiny test for commercial speech that the Court adopted in 1980's *Central Hudson Gas & Electric Corp. v. Public Service Commission*.²³ For example, both the Central and Northern Districts of California have found that *Reed* did not prohibit cities from banning offsite commercial billboards on the ground that those prohibitions were governed by *Central Hudson* intermediate scrutiny, not the *Reed* Two-Step.²⁴ The Northern District of Illinois came to the same conclusion with respect to square footage and numerical restrictions on commercial signs.²⁵ Accordingly, the notion that *Reed*-style strict scrutiny will empower businesses to cram billboards and signs into thousands of powerless cities' parks, playgrounds, and scenic vistas, turning every public space and roadway in the United States into the equivalent of the iconic scene from the film *Blade Runner* with the skies "lit by giant corporate logos and video billboards hyping exotic getaways on other planets,"²⁶ is—not to put too fine a point on it—farcical.

To be sure, a minority of billboards or other signs now subject to the *Reed* Two-Step might not contain commercial messages. Current commercial speech doctrine, however, is well equipped to decide whether a particular sign's message is commercial in nature or not.²⁷ Therefore, because the commercial

has consistently argued that the Court should abandon the distinction between commercial and non-commercial speech. See, e.g., *44 Liquormart, Inc.*, 517 U.S. at 522 (Thomas, J., concurring).

²³ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563–66 (1980).

²⁴ *Citizens for Free Speech, LLC v. Cty. of Alameda*, 114 F. Supp. 3d 952, 969, 973 (N.D. Cal. 2015); *Cal. Outdoor Equity Partners v. City of Corona*, No. CV 15-03172, 2015 WL 4163346, at *10 (C.D. Cal. July 9, 2015) ("*Reed* does not concern commercial speech, let alone bans on off-site billboards. . . . *Reed* does not even cite *Central Hudson*, let alone apply it."); see also *Boelter v. Hearst Commc'ns, Inc.*, 15-Civ 3934 (AT), 15 Civ. 9279 (AT), 2016 WL 3369541, at *9–10, *9 n.10 (S.D.N.Y. June 17, 2016) (noting that *Reed* "has not explicitly overturned the decades of jurisprudence holding that commercial speech . . . which, inherently, requires a content-based distinction—warrants less First Amendment protection"); *Contest Promotions, LLC v. City & Cty. of S.F.*, No. 15-cv-00093-SI, 2015 WL 4571564, at *4 (N.D. Cal. July 28, 2015) ("*Reed* does not concern commercial speech, and therefore does not disturb the framework which holds that commercial speech is subject only to intermediate scrutiny as defined by the *Central Hudson* test.>").

²⁵ *Peterson v. Village of Downers Grove*, 150 F. Supp. 3d 910, 927–28 (N.D. Ill. 2015) (stating that because "the majority never specifically addressed commercial speech in *Reed*, . . . lower courts must consider *Central Hudson* and its progeny . . . binding"). Courts have found *Reed* inapplicable to commercial speech in non-signage cases as well. See *Mass. Ass'n of Private Career Sch. v. Healey*, 159 F. Supp. 3d 173, 192–93 (D. Mass. 2016) (discussing regulations applicable to representations by for-profit schools to prospective students that implicated commercial speech).

²⁶ See Fred Kaplan, *A Cult Classic Restored, Again*, N.Y. TIMES (Sept. 30, 2007), <http://www.nytimes.com/2007/09/30/movies/30kapl.html> [<https://perma.cc/N65T-2QU6>]; *BLADE RUNNER* (Warner Bros. Pictures 1982).

²⁷ See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65–67 (1983) (setting out factors that include advertising format, product references, and economic motivation to determine whether certain statements are commercial speech); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978)

speech doctrine seems to have continued vitality, it is also premature to conclude that a signage regulation that distinguishes between commercial and noncommercial signs and establishes different requirements for each kind of sign is necessarily *itself* content-based and thus doomed to strict scrutiny under *Reed*.

The Court's decision in *City of Cincinnati v. Discovery Network, Inc.* in 1993 is not to the contrary.²⁸ Applying *Central Hudson* intermediate scrutiny, the Court held that Cincinnati's ban on what it defined as "commercial newsracks" did not bear a reasonable fit to its asserted interest in preserving the aesthetics of its sidewalks.²⁹ In concluding that the ban on commercial newsracks—i.e., newsracks containing advertising-based publications such as *Auto Trader*, rather than traditional newspapers—were not reasonably tailored to the city's interest, the Court considered that newspaper-dispensing newsracks, of which there were many more in number, were freely allowed.³⁰ To be sure, the Court did go on to conclude that the Cincinnati sign ordinance's distinction between "commercial newsracks" and those dispensing newspapers was content-based.³¹ Because the Court had already held that the regulation was an impermissible restriction on commercial speech, however, its content-discrimination analysis was at best, as the dissenters noted, "duplicative"³² and, at worst, irrelevant. Nor did the *Discovery Network* majority go on to actually *apply* strict scrutiny once it found the ordinance's distinction rendered it content-based. It was *Central Hudson*, not strict scrutiny, that did all of the analytical work in *Discovery Network*.³³ Lower courts that rely on *Discovery Network* to apply strict scrutiny to sign regulations distinguishing between commercial and noncommercial signs are guilty of a sin similar to the one described in *Reed* itself and discussed in greater detail in Part II.³⁴

(stating that speech on public issues is "indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual") (footnote omitted); cf. *Keene Corp. v. Abate*, 608 A.2d 811, 814 (Md. Ct. Spec. App. 1992) (holding that a corporation advertising its views regarding the societal impact of asbestos litigation during an ongoing asbestos case involving the corporation was fully protected by the First Amendment).

²⁸ See *Discovery Network*, 507 U.S. at 425–26.

²⁹ *Id.* at 426–28.

³⁰ *Id.* at 426.

³¹ *Id.* at 429.

³² *Id.* at 445 (Rehnquist, C.J., dissenting).

³³ If commercial billboards might create a greater nuisance in a particular jurisdiction than non-commercial ones because there are many more of the former, that fact alone could be enough to distinguish the ordinance at issue in *Discovery Network*. See, e.g., *RTM Media, L.L.C. v. City of Houston*, 584 F.3d 220, 227 (5th Cir. 2009). Additionally, distinctions between different types of commercial signs—for example, onsite as opposed to offsite—would be subjected to mere *Central Hudson* intermediate scrutiny as well. See *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507–08 (1981).

³⁴ See *supra* notes 112–122 and accompanying text.

It must be conceded that claiming the commercial speech doctrine will remain a meaningful limitation on *Reed* is as much a legal realist argument as a doctrinal one. Democratic appointees to the lower federal courts are more inclined to apply a robust version of commercial speech doctrine than those judges appointed by Republican presidents, and, because President Barack Obama has made those appointments over the past eight years, *Reed*'s reach will be limited. On the other hand, now that it is a Republican president's turn to stock federal court vacancies, *Reed*'s Two-Step could become the very weapon used to blow the commercial speech doctrine away altogether.³⁵ On the question of *Reed*'s eventual direction, therefore, the metaphorical jury may still be out. It is certainly so at present, however, that *current* First Amendment doctrine—not simply the commercial speech doctrine but also the traditional low-value categories of speech derived from the Court's 1942 decision in *Chaplinsky v. New Hampshire* that have long been thought to rest outside of the First Amendment's protection, despite being content-based³⁶—calls for a prediction that despite the case's potentiality, *Reed*'s reach will actually be more limited than its critics maintain. In other words, the limiting principle for *Reed*'s effect on First Amendment doctrine will be First Amendment doctrine itself. That is certainly tautological, but if the Court plans to use *Reed* as a scythe to cut through wide swaths of existing First Amendment law, then we should not underestimate the monumental nature of that task.³⁷

In 2010, in *United States v. Stevens*, the Court noted that the *Chaplinsky* categories of speech that were deemed “outside the scope of the First Amendment” were long established and historical, such that the Court could not add other categories to that list through an “ad hoc calculus of [the] costs and benefits” of that speech.³⁸ That rule of “historical[] unprotect[ion],” to fashion a

³⁵ See Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 179–80 (“Commercial speech advocates have . . . argued that because commercial speech regulation necessarily targets speech because of the topic discussed, namely its commercial content, *Reed* requires strict scrutiny of all commercial speech.”).

³⁶ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (discussing categories of speech of fighting words, obscenity, and libel).

³⁷ Or, in the words of two of *Reed*'s most trenchant critics:

First Amendment doctrine is plural. There is no single structure of First Amendment doctrine. . . . Different kinds of speech embody different constitutional values, and each kind of speech should receive constitutional protections appropriate to the value it embodies. . . . [S]ubject[ing] all speech to a single set of rules can lead only to doctrinal chaos.

Amanda Shanor & Robert Post, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 181–82 (2015), <http://harvardlawreview.org/2015/03/adam-smiths-first-amendment/> [<https://perma.cc/BTZ9-4MXT>].

³⁸ *United States v. Stevens*, 559 U.S. 460, 471–72 (2010).

term from the Court's test in *Stevens*, cuts both ways.³⁹ The same long-standing history and tradition that counsels the Court against finding *new* content-based categories as being outside of the First Amendment also prevents the Court from assessing whether the lack of protection for those *existing* categories should be reconsidered. The wall around the *Chaplinsky* categories keeps new categories of speech out, but it also keeps the existing categories in.⁴⁰

Finally, and to return the focus to signs, in a development that even *Reed* skeptics should welcome, *Reed* seems to be spurring municipalities to remove references to content in their own sign ordinances—hence significantly reducing the likelihood that municipalities might regulate signage or abuse their signing codes to favor or disfavor certain messages. For example, for several years, Norfolk, Virginia had a sign code that exempted from its restrictions governmental flags, noncommercial “works of art,” and the signs of any “religious organization.”⁴¹ While that sign code was in place, Norfolk decided to initiate condemnation proceedings against several landowners, intending to take the property and transfer it to Old Dominion University (“ODU”).⁴² One of the landowners placed a 375-square-foot, highway-facing banner on one of the condemned buildings, arguing that Norfolk was abusing its eminent domain power by initiating the condemnation proceedings.⁴³ After an ODU employee complained about the banner, the city found that the banner violated the size restrictions in the sign code.⁴⁴ Norfolk's actions were affirmed by the district court and the U.S. Court of Appeals for the Fourth Circuit.⁴⁵ Upon the Supreme Court's vacatur of the Fourth Circuit's decision in light of *Reed*, however, Norfolk amended its code to comply with *Reed*'s rule rather than defend it in court under that standard.⁴⁶ If more cities follow Norfolk's lead in removing content references from their sign codes—and indeed there is al-

³⁹ See *id.* at 472.

⁴⁰ For persuasive arguments that the wall around the *Chaplinsky* categories is not impenetrable (if it exists at all) and indeed that the categories themselves are the product of the very type of cost-benefit balancing that the Court rejected in *Stevens*, see Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 387–98 (2009) and Alexander Tsesis, *The Categorical Free Speech Doctrine and Contextualization*, 65 EMORY L.J. 495, 505–17 (2015).

⁴¹ Cent. Radio Co. v. City of Norfolk, 776 F.3d 229, 232 (4th Cir. 2015), *vacated*, 135 S. Ct. 2893 (2015) (mem.) (internal quotation marks omitted).

⁴² *Id.* at 233.

⁴³ *Id.* at 233–34.

⁴⁴ *Id.* at 234.

⁴⁵ *Id.* at 234, 241.

⁴⁶ Cent. Radio Co. v. City of Norfolk, 811 F.3d 625, 628 (4th Cir. 2016).

ready evidence that this is the case⁴⁷—then there will be many fewer content-referencing signage regulations for speakers to challenge. This would ensure that the Supreme Court will not find itself becoming, to use Justice Kagan’s phrase, a “veritable Supreme Board of Sign Review,”⁴⁸ and permitting the Court to focus on controversies that Justice Kagan apparently deems more worthy of its time.

B. Panhandling

Another category of First Amendment cases in which *Reed* has become highly relevant is legal challenges to municipal bans or restrictions on panhandling. Though courts considering panhandling bans have never held that panhandling is not speech,⁴⁹ pre-*Reed*, a few of those bans survived constitutional challenges on the ground that the relevant municipalities did not promulgate the bans because of disagreement with the messages that panhandlers express.⁵⁰ After its decision in *Reed*, however, the Court vacated and remanded the U.S. Court of Appeals for the First Circuit’s decision to uphold such a ban on those grounds,⁵¹ and on a motion for post-*Reed* rehearing, the U.S. Court of Appeals for the Seventh Circuit reversed its own decision to uphold a panhandling ban in Springfield, Illinois.⁵²

A finding that anti-panhandling ordinances are content-based—as three of the courts of appeals have previously held and as more lower courts are likely to hold post-*Reed*—seems like a straightforward application of content discrimination doctrine.⁵³ This is especially so with respect to laws that use content-related categories to treat solicitations differently based on their particular

⁴⁷ See *Geft Outdoor LLC v. Consol. City of Indianapolis & Cty. of Marion*, 1:15-cv-01568-SEB-MJD, 2016 WL 2941329, at *1 (S.D. Ind. May 20, 2016) (stating that Indianapolis amended its sign ordinance “to reflect the Supreme Court’s holding in *Reed*”).

⁴⁸ *Reed III*, 135 S. Ct. at 2239 (Kagan, J., concurring).

⁴⁹ See, e.g., *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 944–45 (9th Cir. 2011).

⁵⁰ See, e.g., *Doucette v. City of Santa Monica*, 955 F. Supp. 1192, 1204–05 (C.D. Cal. 1997).

⁵¹ *Thayer v. City of Worcester*, 755 F.3d 60, 75 (1st Cir. 2014), vacated, 135 S. Ct. 2887 (2015) (mem.).

⁵² *Norton v. City of Springfield*, 806 F.3d 411, 413 (7th Cir. 2015).

⁵³ See *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 560 (4th Cir. 2013), abrogated by *Cent. Radio*, 811 F.3d 625; *Speet v. Schuette*, 726 F.3d 867, 870 (6th Cir. 2013); *Am. Civil Liberties Union of Nev. v. City of Las Vegas*, 466 F.3d 784, 796 (9th Cir. 2006). One circuit court has held to the contrary, in a decision that is now over twenty years old. *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949, 955 (D.C. Cir. 1995). District courts have also been arriving at the same conclusion post-*Reed*. See, e.g., *Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276, 1289–90 (D. Colo. 2015) (observing that any law prohibiting all solicitation speech in a public forum constitutes content discrimination under *Reed*); *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 185–86, 185 n.3 (D. Mass. 2015) (“It appears at this point clear that regulations of solicitation which single out the solicitation of the immediate transfer of funds for charitable purposes are content-based.”).

purpose, such as charitable donations.⁵⁴ Again, this should not doom any such effort to automatic failure. To the extent that cities have identified panhandling as a serious issue requiring a legislative remedy, compelling non-speech-related interests such as pedestrian safety (as opposed to the above-referenced traffic safety interest invoked by governments to support signage restrictions) could be offered in support of such bans.⁵⁵ Under strict scrutiny, the real question would be how much evidence the government must provide in support of the compellingness of that interest. In the case of bans in high-traffic areas like road median strips, one accident involving a panhandler in the city or a similar area would likely suffice.⁵⁶ Alternatively, if the interest supporting a ban is to protect pedestrians from the intimidation and discomfort caused by aggressive begging, narrow tailoring would require a city to limit its restrictions to solicitations of that type. Forcing governments to narrow a statute's reach to only that kind of speech-related conduct that infringes on the asserted interest at issue is exactly what the First Amendment is meant to do.

For example, in the aforementioned First Circuit decision to uphold a ban that was vacated by the Supreme Court, the ban proscribed only "aggressive" begging or panhandling; it even went so far as to define "aggressive" solicitation as "continuing to . . . solicit from a person after the person has given a negative response" or a solicitation that blocked "the safe or free passage of a [person]" or was "likely to cause a reasonable person to fear imminent bodily harm."⁵⁷ A statute's distinction between "aggressive" solicitation and nonaggressive solicitation arguably does not implicate *Reed* at all, provided the definition of "aggressive" is conduct-based rather than speech-based—and even if the statute might use the content of a panhandler's speech to define "aggressive," the public safety of solicited people is just as compelling an interest as the public safety of their solicitors.⁵⁸ Again, as shown already with respect to

⁵⁴ See, e.g., *City of Lakewood v. Willis*, 375 P.3d 1056, 1063 (Wash. 2016) (finding unconstitutional under *Reed* a law that barred solicitation with the purpose of "obtaining 'money or goods as a charity'").

⁵⁵ See *supra* note 21 and accompanying text. By contrast, courts have rejected other interests asserted in support of panhandling bans, such as the promotion of tourism, as insufficiently compelling. See, e.g., *Am. Civil Liberties Union of Idaho, Inc. v. City of Boise*, 998 F. Supp. 2d 908, 917 (D. Idaho 2014); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1581 (S.D. Fla. 1992).

⁵⁶ Unfortunately, even in Worcester itself, such incidents are not at all rare. See Brad Petrishen, *Known Panhandler in Critical Condition After Being Hit by SUV*, TELEGRAM.COM (Feb. 27, 2015), <http://www.telegram.com/article/20150226/NEWS/302269663> [<https://perma.cc/3KU8-U6BV>].

⁵⁷ WORCESTER, MASS., REV. ORDINANCES ch. 9, § 16 (2016); *Thayer*, 755 F.3d at 64; see also *Norton*, 768 F.3d at 720 (Manion, J., dissenting) (discussing *Thayer*).

⁵⁸ Cf. *McLaughlin*, 140 F. Supp. 3d at 186, 191 (finding that a panhandling statute that distinguished between "immediate" solicitations from other kinds was content-based and implicated *Reed*, and further finding that the "aggressive panhandling" provisions of a statute infringed on speech and

signage restrictions, and later in this Article with respect to consumer-protective regulation, the *Reed* Two-Step will cause municipalities seeking to proscribe panhandling to point to identifiable harms and pass narrow laws when infringing on protected speech.

Indeed, one of the post-*Reed* cases in another area demonstrates how strict scrutiny imposes this type of regulatory discipline upon governments using content-based laws. In 2015, in *Cahaly v. Larosa*,⁵⁹ the Fourth Circuit Court of Appeals, applying *Reed*, held that a South Carolina anti-robocall statute that barred automated telephone calls relating to consumer solicitations or political campaigns was content-based. After so finding, the court found that given the State's asserted interest in "protect[ing] residential privacy and tranquility from unwanted and intrusive robocalls," less speech-restrictive measures, such as "time-of-day limitations, mandatory disclosure of the caller's identity, or do-not-call lists" were more narrowly tailored to that interest than an outright ban.⁶⁰ So too with panhandling bans—if the problem a municipality seeks to correct is to keep panhandlers off of median strips in high-traffic areas, or pedestrian intimidation along boardwalks or promenades, only panhandling with the potential to adversely affect those specifically identified interests should be circumscribed. It does the government no great harm to force it to begin the lawmaking process with consideration of less restrictive alternatives instead of blanket bans on speech.

C. Intellectual Property

Section 2 of the Lanham Act bars the Patent and Trademark Office ("PTO") from registering certain trademarks because of their content.⁶¹ Indeed, one would be hard-pressed to find any federal statute that makes more references to content than the Lanham Act.⁶² Some of these references, in particular those precluding the PTO from registering marks likely "to cause confusion, or to cause mistake, or to deceive," or that are "deceptively misdescriptive," have already been held to not violate the First Amendment because of their compliance with the traditional rule that a government can punish speech that is

were content-based but were supported by the compelling interest of protecting individuals from panhandlers' aggressive behavior).

⁵⁹ *Cahaly v. Larosa*, 796 F.3d 399, 402 (4th Cir. 2015).

⁶⁰ *Id.* at 405.

⁶¹ See 15 U.S.C. § 1052(a) (2012).

⁶² See, e.g., Rebecca Tushnet, *The First Amendment Walks into a Bar: Trademark Registration and Free Speech*, 92 NOTRE DAME L. REV. 381, 382 (2017) ("Section 2 is almost nothing but content-based."). See generally Ned Snow, *Free Speech & Disparaging Trademarks*, 57 B.C. L. REV. 1639 (2016) (discussing the relationship between the First Amendment and the content-based restrictions in the Lanham Act).

fraudulent or likely to cause consumer confusion.⁶³ *Reed* should not challenge these conclusions; as discussed in this Part, courts have consistently found consumer protection to be a compelling interest.⁶⁴ Other parts of Section 2 of the Lanham Act, however, may be at much greater risk, especially post-*Reed*. Most directly in the line of fire is Section 2(a)'s bar on registering marks because of their scandalous, immoral, or disparaging nature.

In 2015, in *In re Tam*, the U.S. Court of Appeals for the Federal Circuit, sitting en banc, held that Section 2(a) of the Lanham Act facially violated the First Amendment.⁶⁵ The court first found that per *Reed*, Section 2(a) denies registration of a mark because the content of that mark is disparaging, and that the PTO's test for disparagement focuses on the message that the mark at issue conveys; each of those conclusions make Section 2(a) content-based, and the court therefore held that strict scrutiny was appropriate.⁶⁶ The court went on to find that Section 2(a) also discriminates on the basis of viewpoint, because the denial of a mark on disparagement grounds constitutes "disagreement with the message . . . convey[ed]."⁶⁷ Pouncing on the government's argument that it should not be compelled to give its imprimatur to "vile racial epithets and images" it finds "odious" by registering them, the court declared that Section 2(a) burdens speech based on the government's disapproval of that speech's message.⁶⁸

Putting aside the Federal Circuit's *Tam* majority's curious rejection of trademarks as commercial speech,⁶⁹ the *Tam* approach to First Amendment ques-

⁶³ 15 U.S.C. § 1052 (d)–(e); *Friedman v. Rogers*, 440 U.S. 1, 13, 19 (1979) (explaining that because an optometry practice can deceive the public by use of a trade name, a law prohibiting optometry practices from their use does not violate the First Amendment); see also Tushnet, *supra* note 62, at 407 ("Since false and misleading commercial speech can just be banned, there's little doubt that the government can take the lesser action of refusing to support it" by refusing to register it as a trademark.).

⁶⁴ See, e.g., *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 162–64 (1995) (stating that because customers may identify a particular color as associated with a brand, that color can be trademarked).

⁶⁵ *In re Tam*, 808 F.3d 1321, 1337 (Fed. Cir. 2015), cert. granted sub nom., *Lee v. Tam*, 137 S. Ct. 30 (2016) (mem.). But see *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439 (E.D. Va. 2015).

⁶⁶ *In re Tam*, 808 F.3d at 1335.

⁶⁷ *Id.* at 1335–36 (quoting *Sorrell*, 564 U.S. at 566).

⁶⁸ *Id.* at 1336–37 (citations and internal quotation marks omitted).

⁶⁹ In brief, the *In re Tam* majority argued that the PTO's refusal to register the mark at issue on disparagement grounds meant that the mark was being regulated based on its expressiveness, not its commercial function, and that the mark was thus not commercial speech. *Id.* at 1337–38. Of course, and as the majority acknowledged, if this were so, it would also be true of every PTO application of Section 2(a) to a mark. Such a broad conclusion would be flatly contrary to both the history of the Lanham Act and the hundreds of federal court cases applying it. See, e.g., *Friedman*, 440 U.S. at 11 (stating that trademarks are "a form of commercial speech and nothing more"); *CPC Int'l, Inc. v. Skippy Inc.*, 214 F.3d 456, 461 (4th Cir. 2000) ("The basic objectives of trademark law are to encour-

tions in intellectual property, informed in part by *Reed*, is surely problematic. Protectability in intellectual property is necessarily content-based, in not just trademark but in copyright as well. Applying the *Reed* Two-Step in these cases would therefore lead ineluctably to strict scrutiny. Nevertheless, there is a defensible way to avoid *Reed*—and indeed the First Amendment altogether—in the trademark context. It is possible to save Section 2(a) from constitutional scrutiny by distinguishing a bar on the PTO’s registering of a mark from a content-based ban on speech. In other words, even though the *object of* registration is expression, the *right to* registration is a government benefit.⁷⁰ Following that distinction, the government’s decision whether to grant such a benefit exists independent of, and thus does not implicate, the speaker’s right to that expression. When the PTO denies registration of a trademark, the government in effect is making a decision to not support that speech⁷¹; choosing not to subsidize speech because of its content is distinguishable from punishing it or restraining it *ex ante* because of its content, which are the First Amendment’s true concerns.

Even under the most robust reading of *Reed*, the government’s failure to grant a speaker a monopoly on his or her speech, or otherwise declining to facilitate the speaker’s monetization or amplification of that speech, is not the same as direct suppression of that speech. The government cannot turn any speaker off because of what they say, but it also does not have to turn every

age product differentiation, promote the production of quality goods, and provide consumers with information about the quality of goods”—i.e., commercial in nature.); *see also In re Tam*, 808 F.3d at 1378 (Reyna, J., dissenting) (“The nature of trademarks seeking federal registration for use in interstate commerce, when considered as a whole, is indisputably commercial . . .”). It cannot be so that the government’s purpose for regulating the speech at issue can transform that speech from commercial to noncommercial.

It is surely the case that *some* marks and alleged infringements of those marks touch on speech involving social or political issues. *See, e.g., In re Tam*, 808 F.3d at 1373–74 (Dyk, J., concurring in part and dissenting in part) (noting that the disparagement bar was constitutional on its face, but unconstitutional as applied to the applicant at issue, because his “choice of mark reflect[ed] a clear desire to editorialize on cultural and political subjects”). The overwhelming majority of marks, however, including those potentially subject to the disparagement bar, are connected to nothing more than the “sale, offering for sale, distribution, or advertising” of a good or service. *See* 15 U.S.C. § 1114(1)(a). Accordingly, the commercial speech issue would not be a close question in the overwhelming majority of cases.

⁷⁰ The fact that the PTO’s declining or revoking the registration of a mark does not have any effect on the mark’s use outside of the registration process also shows the likely inapplicability of the unconstitutional conditions doctrine. As the Court has made clear in its most recent elucidation of the doctrine, it only applies if the government’s conditions on a benefit would adversely affect a party’s speech outside of the program administering the benefit. *See Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2328 (2013). Here, as noted, nothing bars a speaker from using a mark that disparages or offends outside of the PTO’s registration system altogether. *Id.* at 2330.

⁷¹ Tushnet, *supra* note 62, at 386.

speaker up regardless of what they say.⁷² If the Federal Circuit in *Tam*'s view of the First Amendment holds,⁷³ then the federal government may well be out of the business of not just registering trademarks and copyrights, but also granting radio and television station licenses,⁷⁴ tax exemptions to nonprofits,⁷⁵ and federal funds used to advocate certain policy initiatives but not others⁷⁶—all of which have been found to raise no constitutional issue. Accordingly, one way to ensure that the *Reed* Two-Step will not pulverize intellectual property law is to affirm that the First Amendment, and thus *Reed*, does not apply to federal trademark registration at all.⁷⁷ Considering that the Supreme Court granted certiorari to *Tam* in September 2016, the issue may be settled one way or the other soon.⁷⁸

⁷² See *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 355, 358 (2009). The Court in 2009 in *Ysursa v. Pocatello Education Association* stated that the First Amendment does not “confer an affirmative right to use government . . . mechanisms for the purpose of . . . expression,” nor does it require the government to “assist others in funding the expression of particular ideas.” *Id.* The Federal Circuit in *In re Tam* cited this passage from *Ysursa*. *In re Tam*, 808 F.3d at 1368 (Dyk, J., concurring in part and dissenting in part). In addition, in *In re Tam*, Judge Alan David Lourie, dissenting, stated:

[T]he refusal of the USPTO to register a trademark is not a denial of an applicant’s right of free speech. The markholder may still generally use the mark as it wishes; without federal registration, it simply lacks access to certain federal statutory enforcement mechanisms for excluding others from confusingly similar uses of the mark.

Id. at 1374–75 (Lourie, J., dissenting).

⁷³ The Supreme Court granted certiorari to *In re Tam* on September 29, 2016 to address the question of whether or not the provision of the Lanham Act that bars the PTO from registering disparaging marks is facially unconstitutional. *Lee*, 137 S. Ct. 30.

⁷⁴ See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388–89 (1969) (stating that the government can constitutionally license broadcasters); see also *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 622 (1994) (stating that the must-carry statute that mandated cable carriage of certain kinds of content is constitutional).

⁷⁵ See *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983).

⁷⁶ See *Rust v. Sullivan*, 500 U.S. 173, 177, 203 (1991). Nor could a government reject a third parties’ proposed advertising for its public transportation system. See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality opinion); *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 91–93 (1st Cir. 2004); *Uptown Pawn & Jewelry, Inc. v. City of Hollywood*, 337 F.3d 1275, 1281 (11th Cir. 2003). A government also could not exclude certain candidates from debates on its television stations. See *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 683 (1998).

⁷⁷ Despite its references to content, a *Reed*-driven upending of copyright law seems even less likely than an upending of trademark law. Courts “routinely refuse to conduct First Amendment review in copyright cases.” Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 CORNELL L. REV. 463, 479–81 (2010) (arguing that copyright law is a de facto categorical exception that is as immune from First Amendment scrutiny as other categorical exceptions including true threats, fighting words, or obscenity).

⁷⁸ See *Lee*, 137 S. Ct. 30.

D. Consumer Protection-Related Regulations Referencing Content

Of course, the observers most concerned with *Reed*'s reach are not concerned primarily with municipalities' ability to regulate signage or panhandling, or even the federal government's trademark registration system. In his concurrence in the *Reed* judgment, Justice Breyer argued that a strict adherence to the majority's distinction between content-based and content-neutral laws would put at risk a range of government regulation of speech in areas historically deemed permissible—even noncontroversial; these areas include securities regulation, prescription drug labeling, and doctor-patient confidentiality.⁷⁹ Similarly, critics argue that the decision “endangered” laws regulating “misleading advertising and professional malpractice,” and the case “requir[ed] a second look at the constitutionality of aspects of federal and state securities laws, the federal Communications Act and many others.”⁸⁰

Justice Breyer's and others' concerns sound in a growing body of academic critique becoming known as First Amendment *Lochnerism*—a phrase first coined, some might find ironically enough, by Chief Justice William Rehnquist⁸¹—which argues that the Roberts Court and some lower courts are using First Amendment claims brought by business petitioners to apply heightened standards of review to consumer-protective regulations in those areas mentioned by Justice Breyer and other critics⁸² as well as other areas, such as online privacy⁸³ and corporate campaign spending.⁸⁴

⁷⁹ *Reed III*, 135 S. Ct. at 2234–35 (Breyer, J., concurring) (citing 15 U.S.C. § 781 (2012) (registration statement disclosure requirements); 42 U.S.C. § 6294 (2012) (consumer product labeling requirements); 21 U.S.C. § 353(b)(4)(A) (2012) (prescription drug labeling requirements); 38 U.S.C. § 7332 (2012) (medical record confidentiality requirements); 26 U.S.C. § 6039F (2012) (foreign gift tax requirements); 14 C.F.R. § 136.7 (2015) (briefing of airplane passengers requirements)).

⁸⁰ Liptak, *supra* note 8 (internal quotation marks omitted) (quoting constitutional lawyer Floyd Abrams).

⁸¹ See *Cent. Hudson*, 447 U.S. at 591 (Rehnquist, C.J., dissenting) (“[B]y labeling economic regulation of business conduct as a restraint on ‘free speech,’ [the Court has] gone far to resurrect the discredited doctrine of cases such as *Lochner* . . .”).

⁸² See, e.g., Julie E. Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119, 1131–32 (2015) (noting that “cases raising First Amendment challenges” cover regulations on “food and drug labeling requirements, disclosure requirements for securities issuers, [and] permissible uses of consumer information”); Ronald A. Fein, Symposium Foreword, *Money, Politics, Corporation and the Constitution*, 30 CONST. COMMENT. 213, 216–17 (2015); Kenneth D. Katkin, *First Amendment Lochnerism? Emerging Constitutional Limitations on Government Regulation of Non-Speech Economic Activity*, 33 N. KY. L. REV. 365, 369–71 (2006); Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2587 n.16 (2008); Tamara R. Piety, *The First Amendment and the Corporate Civil Rights Movement*, 11 J. BUS. & TECH. L. 1, 1 (2016); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 L. & CONTEMP. PROBS. 195, 203 n.41 (2015); Shanor & Post, *supra* note 35, at 179–80. Some commentators place the beginnings of the rise of a corporate First Amendment at an earlier point in the Court's history—in particular, when Justice Lewis Powell joined the Court in the mid-1970s. See John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 250–51,

Whether the First Amendment can, does, or should distinguish between individual and corporate speech; whether the current Court has given the First Amendment a corporatist cast that diverges from prior cases; whether that divergence moves in a direction that is good or bad for the freedom of speech—these are all debates well worth having. *Reed*, however, does not affect those debates in any meaningful way. A close look at a few of the areas of government regulation purported to be threatened by *Reed*'s holding shows that *Reed* has not doomed every consumer welfare-related regulation affecting speech to judicial invalidation. Even post-*Reed*, it remains so that—as the Court has consistently affirmed—the government can still regulate, and even proscribe, harmful commercial activity that involves speech.⁸⁵

As an initial matter, one should read *Reed* not for what it portends but rather for what it actually does: it places the burden of justification for any regulation referencing content on the government.⁸⁶ This is a straightforward and well established proposition.⁸⁷ In the face of claims that *Reed* will serve as a new and nefarious tool in the Court's First Amendment Lochnerism project, however, it bears reemphasis: if a government references content in its laws, it must demonstrate that they survive strict scrutiny. So, the question is how “fatal” strict scrutiny in particular cases involving facially content-based laws actually turns out to be.⁸⁸ Ironically enough, those areas that present the most

262 (2015); Joe Pinsker, *How Corporations Took Over the First Amendment*, ATLANTIC (Apr. 1, 2015), <http://www.theatlantic.com/business/archive/2015/04/how-corporations-took-over-the-first-amendment/389249/> [<https://perma.cc/TH9C-MQCR>]. Even those commentators argue, however, that the shift from cases involving individual speakers to businesses is accelerating under the current Court. See Coates, *supra*, at 263 (discussing corporate personhood under the Court's *Citizens United* and *Hobby Lobby* cases). A small number of free speech scholars, however, have rebutted this line of critique. See Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CALIF. L. REV. (forthcoming 2017) (manuscript at 7–8), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2741139 [<https://perma.cc/EP2Q-9P8S>].

⁸³ See, e.g., Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495, 1508 (2013).

⁸⁴ See, e.g., *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010); *SpeechNOW.org v. Fed. Election Comm'n*, 599 F.3d 686, 692–93 (D.C. Cir. 2010).

⁸⁵ See, e.g., *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

⁸⁶ As the Court said itself in *Reed*, “it is the Town’s burden to demonstrate that the [Sign] Code’s differentiation between temporary directional signs and other types of signs, such as political signs and ideological signs, furthers a compelling governmental interest and is narrowly tailored to that end.” *Reed III*, 135 S. Ct. at 2231.

⁸⁷ See, e.g., *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (“[T]he State bears the burden of justifying its [commercial speech] restrictions.”); *Texas v. Johnson*, 491 U.S. 397, 406–07 (1989) (“It is . . . the governmental interest at stake, that helps to determine whether a restriction on . . . expression is valid.”).

⁸⁸ *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring). Of course, the “strict in theory, but fatal in fact” convention has been proven wrong time and time again, both in the First Amendment context and in other constitutional areas. See, e.g., *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665–66 (2015); *Grutter v. Bollinger*, 539 U.S. 306, 333–34 (2003).

concern with respect to limiting governmental authority are the same areas in which regulations are most likely to survive First Amendment review. This is so because of the compellingness of the government's interest in protecting consumers in those areas as well as the corresponding ease with which the government will be able to demonstrate that compellingness in future cases.

For example, take compelled disclosures in securities law.⁸⁹ Is there actually anything to fear here? Even if the Court were to eventually read the *Reed* Two-Step to overtake not just the commercial speech doctrine generally, but the *compelled* commercial speech doctrine—an overtaking that is not obviously likely, as discussed in this Article⁹⁰—securities-related disclosures imposed on stock offerors by the Securities and Exchange Commission's regulations would not immediately fall to strict scrutiny review because providing timely, accurate, and material information to market participants is unquestionably a compelling governmental interest.⁹¹ In the absence of disclosure requirements, investors, shareholders, and consumers will be deprived of material information concerning companies listing a security for sale that is not reflected in that security's price alone—deprivations that could lead directly to economic losses. The interest here is in permitting the investor, rather than the listing company, to decide which information is material to the decision of whether to invest. This interest is certainly a compelling one deserving of government protection; hundreds of years of common law fraud is based on the same principle.⁹²

So too with country-of-origin labeling mandates imposed by Congress in a range of areas and, in the case of food labeling, the U.S. Department of Agri-

⁸⁹ Compelled disclosures in securities law is one of the traditional areas of regulatory concern that Adam Liptak, the Supreme Court correspondent to the *New York Times*, suggested may be at risk after *Reed*. Liptak, *supra* note 8.

⁹⁰ See *supra* notes 20–27 and accompanying text.

⁹¹ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (holding that even where commercial speech doctrine does not apply, disclosure mandates of “purely factual and uncontroversial information” aimed at preventing consumer deception do not violate First Amendment); see also Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 652 (1990).

⁹² See *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (defining the Securities and Exchange Commission's Rule 14a-9's use of “material,” stating that “an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote”); *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 233 F.3d 981, 992 (7th Cir. 2000) (“The government is not limited only to explicit antifraud measures to prevent its citizens from being defrauded; certain other narrowly tailored measures with a direct relationship to preventing fraud may be used as well.”). Of course, a general desire for “consumer protection” is stated too vaguely to be deemed a compelling interest. *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996) (noting that “consumer curiosity alone is not a strong enough state interest,” and further noting that “[w]here consumer interest alone sufficient, there is no end to the information that states could require manufacturers to disclose about their production methods”). Here, as discussed *infra* with respect to narrow tailoring, a higher level of scrutiny will require the government to articulate its interests in restricting content with a greater degree of specificity.

culture. There, to take just one example, the interests in informing consumers of information relating to potential food-borne illness outbreaks in other countries or regions would be found compelling as well.⁹³ To lift a phrase Justice Antonin Scalia used in a different context, it is exceedingly unlikely that *Reed* will “almost certainly cause more Americans to be killed” from unknowingly eating unlabeled beef made from English and Canadian mad cows.⁹⁴

Of course, the government must also show that such regulations are also narrowly tailored in order to survive strict scrutiny’s other prong; this is the real concern of *Reed*’s critics. As this Article has argued, however, the narrow tailoring requirement will impose a discipline upon the government when it is regulating speech based on its content, and First Amendment advocates should welcome that. In the case of securities and labeling laws, regulators will have to be mindful that only information the nondisclosure of which will likely cause specifically articulated harms to potential investors or consumers will be subject to disclosure requirements—and they will have to generate detailed, specific findings demonstrating the link between its mandates and the harms those mandates are intended to prevent.⁹⁵ Any compelled disclosures that are not so related would cause regulations premised upon fraud protection, health and safety, or truth-in-marketing to be overinclusive and place the constitutionality of those regulations at risk.⁹⁶

In a First Amendment world where the presumption should rest on the side of the speaker, these are undoubtedly good things. A few of the cases applying *Reed* in other areas of the law demonstrate these principles in application.

⁹³ See *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 23 (D.C. Cir. 2014) (en banc) (characterizing the interest at issue as a substantial one under the Court’s compelled commercial speech standard set forth in *Zauderer*).

⁹⁴ *Boumediene v. Bush*, 553 U.S. 723, 828 (2008) (Scalia, J., dissenting).

⁹⁵ This is not to say that *Reed* strict scrutiny for content-based regulations would require the government to wait until *after* such harms are suffered to take actions to prevent them. See *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136, 146 (1994) (holding that a regulator seeking to compel an advertiser’s use of a disclaimer must “point to any harm that is *potentially real*, not purely hypothetical”) (emphasis added). The burden is on the government, however, to show a link between the regulation and its asserted interest under not only strict scrutiny, but also under *Central Hudson* intermediate scrutiny as well. See *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1219 (D.C. Cir. 2012), *overruled by Am. Meat Inst.*, 760 F.3d 18 (finding that the FDA did not provide substantial evidence linking its proposed graphic warning labels for cigarettes to its asserted interest in reducing smoking).

⁹⁶ See *Am. Meat Inst.*, 760 F.3d at 26 (“[T]he disclosure mandated must relate to the good or service offered by the regulated party . . .”).

*E. Other Areas: Content Discrimination Doctrine and
Criminal Law Post-Reed*

In 2016, in *Free Speech Coalition, Inc. v. Attorney General*, the U.S. Court of Appeals for the Third Circuit provided one example of what post-*Reed* content discrimination doctrine might look like in the criminal law context.⁹⁷ Pursuant to enforcing the criminalization of child pornography, in 1988 Congress imposed several recordkeeping requirements on the creators of “visual depictions” of “sexually explicit conduct” regarding the performers in those depictions.⁹⁸ Those records had to list, among other things, each performer’s name, date of birth, and any stage names the performer had used as well as copies of the performer’s identification documents for verification purposes.⁹⁹ The Court of Appeals for the Third Circuit had previously held that the requirements were content-neutral, on the ground that their references to sexually explicit content were due not to “any disagreement with their underlying message but because doing so was the only pragmatic way to enforce [Congress’s] ban on child pornography.”¹⁰⁰ Intermediate scrutiny was thus the correct standard of review, and both the district court and Third Circuit held that that standard was met.¹⁰¹

Post-*Reed*, however, the petitioners in *Free Speech Coalition* won reconsideration of that conclusion and persuaded the Third Circuit that the statute’s references to “visual depictions” of “sexually explicit conduct” made them content-based under *Reed*.¹⁰² The court then remanded to the U.S. District Court for the Eastern District of Pennsylvania so that it could apply strict scrutiny but noted that, in its own view, expressed in dicta in the prior case, the statute might not be able to meet that standard. Because the interest in preventing child pornography was presumed compelling by all parties,¹⁰³ the issue was, and will be on remand, one of narrow tailoring. Though the Third Circuit left that issue to the lower court, it noted that the problem was likely that the statute swept too broadly in requiring age verification of every performer, no matter what the performer’s age, which was probably overinclusive with re-

⁹⁷ See *Free Speech Coal., Inc. v. Att’y Gen. United States (Free Speech Coal. III)*, 825 F.3d 149, 159–64 (3d Cir. 2016).

⁹⁸ 18 U.S.C. § 2257(a) (2012).

⁹⁹ *Id.* at § 2257(b); 28 C.F.R. § 75.2(a)(1) (2015).

¹⁰⁰ *Free Speech Coal., Inc. v. Att’y Gen. of the United States (Free Speech Coal. I)*, 677 F.3d 519, 534 (3d Cir. 2012) (citing *Ward*, 491 U.S. at 791).

¹⁰¹ *Free Speech Coal. I*, 677 F.3d at 524, 529.

¹⁰² *Free Speech Coal. III*, 825 F.3d at 160, 164 (quoting 18 U.S.C. § 2257).

¹⁰³ *Id.* at 164 n.11.

spect to the asserted interest in protecting children from the harms associated with participating in the production of pornography.¹⁰⁴

Likewise, on the state court level, in 2016 in *State v. Bishop*, the North Carolina Supreme Court applied a similar analysis in finding that the state's cyberbullying statute violated the First Amendment.¹⁰⁵ There, the court found that, pursuant to *Reed*, the statute, which criminalized posting "private, personal or sexual information pertaining to a minor," was content-based.¹⁰⁶ It then found that the statute failed strict scrutiny because even though "protecting children from online bullying" was indisputably a compelling governmental interest, the statute was not narrowly tailored because its criminalizing of postings of personal information intended to "annoy" a minor swept far too broadly.¹⁰⁷

This is precisely the kind of judicial inquiry that First Amendment advocates should cheer. Is the government's interest in deterring *child* pornography or *any* pornography? If the former, then why does the statute cover *any* performer? The drafting history supporting the statute noted that despite the direct prohibitions on child pornography, "producers of sexually explicit materials continued to utilize youthful-looking performers."¹⁰⁸ So why does the statute, which requires the content producer to collect and keep the age of *any* performer as well as any prior stage names, compel more speech than is necessary given that expressed concern? So too with the North Carolina cyberbullying statute. It cannot be the case that the state has the power, consistent with the First Amendment, to protect people from "annoyance"—which seems an even less compelling basis for government intervention than offense, which the Supreme Court has rejected as illegitimate.¹⁰⁹

At their core, the tailoring and less-restrictive-means-related questions asked by the Third Circuit and the North Carolina Supreme Court in *Free Speech Coalition* and *Bishop*, respectively, are vagueness and overbreadth-related questions that courts have long asked of criminal laws involving speech as well as conduct.¹¹⁰ Despite the protestations of *Reed*'s critics, the case has not altered the First Amendment calculus in a way that severely restricts governments from passing such laws. It does ensure, however, that the government's power to criminalize speech should be earned, not assumed.

¹⁰⁴ *Id.* at 158 (quoting *Free Speech Coal., Inc., v. Att'y Gen. United States*, 787 F.3d 142, 156 (3d Cir. 2015), *vacated and remanded on reh'g*, 825 F.3d 149 (3d Cir. 2016)).

¹⁰⁵ *State v. Bishop*, 787 S.E.2d 814, 822 (N.C. 2016).

¹⁰⁶ *Id.* at 815 (quoting N.C. GEN. STAT. § 14-458.1(a)(1)(d) (2015)).

¹⁰⁷ *Id.* at 818–22.

¹⁰⁸ *Free Speech Coal. III*, 825 F.3d at 154 (citing U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 618 (1986)).

¹⁰⁹ *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 867 (1997).

¹¹⁰ *See, e.g., People v. Marquan M.*, 19 N.E.3d 480, 487–88 (N.Y. 2014) (invalidating a cyberbullying statute before *Reed* on the same rationale used by the North Carolina Supreme Court in *Bishop*).

In its *Free Speech Coalition* opinion, the Third Circuit noted that a remand for the application of strict scrutiny would not necessarily “doom” the statutes; indeed, the Supreme Court had recently rejected a challenge to Florida’s ban on judicial campaign solicitations, finding the regulation to be “one of the rare cases in which a speech restriction withstands strict scrutiny.”¹¹¹ Because it is assumed that the government interest at issue in *Free Speech Coalition* is compelling, it is the lower courts’ role in such cases to ensure that the government’s powers are aimed at as little speech as possible to further that interest. That is what the First Amendment is all about—whether the affected speaker is a judge or a pornographer.

II. THE REED TWO-STEP ANALYSIS: PROPERLY MINIMIZING THE ROLE OF GOVERNMENTAL PURPOSE

As shown in Part I, the claims that *Reed* will complete the transformation of the First Amendment from a shield to a sword have so far not been borne out by the lower courts applying the case nor by logically extending the case’s rule to different areas of law involving speech. It is certainly true that many—if not most—of those courts that had previously considered “the government’s purpose . . . the controlling consideration” when analyzing whether a law was content-based have had to, and will have to, revise their analysis post-*Reed*.¹¹² Those courts, however, were applying a rule that the Supreme Court itself had never adopted.

The content discrimination rule adopted in the courts of appeal, including the U.S. Court of Appeals for the Ninth Circuit in *Reed* itself,¹¹³ prioritized governmental purpose in the content neutrality inquiry—in particular, whether a law’s reference to content was based on discrimination against or disagreement with that content. Relying on the Court’s 1972 statement in *Police Department of Chicago v. Mosley* that “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its

¹¹¹ *Free Speech Coal. III*, 825 F.3d at 164 (citing *Williams-Yulee*, 135 S. Ct. at 1666) (internal quotation marks omitted).

¹¹² *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 556 (4th Cir. 2013), *abrogated by* *Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625 (4th Cir. 2016) (applying “a pragmatic rather than formalistic approach to evaluating content neutrality” under which a regulation “is only content-based if it distinguishes content ‘with a censorial intent’”) (citation omitted).

¹¹³ *See Reed v. Town of Gilbert (Reed II)*, 707 F.3d 1057, 1069 (9th Cir. 2013) (finding Gilbert’s sign ordinance was content-neutral because its references to different kinds of signs were not based on “illicit motive or bias” concerning those categories of content), *rev’d and remanded*, 135 S. Ct. 2218 (2015); *see also id.* (“[D]istinctions based on the speaker or the event are permissible where there is no discrimination among similar events or speakers.”).

subject matter, or its content,”¹¹⁴ the lower courts had held that a regulation was content-based when its “underlying purpose [in referencing content] . . . is to suppress particular ideas or [to] single[] out particular content for differential treatment.”¹¹⁵ Academic commentaries, including Laurence Tribe’s massively influential constitutional law treatise, adopted this same purpose-focused approach to determining whether a law is content-based.¹¹⁶

The *Reed* majority at the Supreme Court, however, firmly rejected this interpretation of its content regulation cases. As noted above, the Court declared that a government’s motivation for passing a particular law—its mens rea, so to speak—is not relevant if a law refers to content on its face. In rejecting previous interpretations of purpose’s role in analyzing whether a law was content-based, the Court noted that the idea that a benign purpose could save a facially content-based law from strict scrutiny came from the U.S. Supreme Court’s decision in 1989 in *Ward v. Rock Against Racism*, a case involving a facially content-neutral restriction—the only kinds of laws that, according to *Reed*,

¹¹⁴ *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972). This language from *Mosley* has been quoted in all twelve federal courts of appeal, which has led those courts to consider whether a content-based regulation had been adopted because of the government’s “disagreement with the message [that the content] conveys,” in lieu of a “formalistic approach to evaluating content neutrality that looks only to the terms of a regulation.” *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 366, 368 (4th Cir. 2012); *see, e.g., Moss v. U.S. Secret Serv.*, 675 F.3d 1213, 1228 (9th Cir. 2012), *opinion amended and superseded on denial of reh’g*, 711 F.3d 941 (9th Cir. 2013), *rev’d sub nom. Wood v. Moss*, 134 S. Ct. 2056 (2014); *Republican Party of Minn. v. White*, 416 F.3d 738, 762 (8th Cir. 2005); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1259 (11th Cir. 2005); *Comm’n Workers of Am. v. Ector Cty. Hosp. Dist.*, 392 F.3d 733, 756 (5th Cir. 2004), *rev’d on reh’g en banc*, 467 F.3d 427 (5th Cir. 2006); *Christ’s Bride Ministries, Inc. v. Se. Penn. Transp. Auth.*, 148 F.3d 242, 255 (3d Cir. 1998); *Action for Children’s Television v. FCC*, 58 F.3d 654, 677 n.27 (D.C. Cir. 1995); *Auburn Police Union v. Carpenter*, 8 F.3d 886, 898 (1st Cir. 1993); *Cannon v. City & Cty. of Denver*, 998 F.2d 867, 871 (10th Cir. 1993); *Mozzochi v. Borden*, 959 F.2d 1174, 1178 (2d Cir. 1992); *Knox Cty. Local, Nat’l Rural Letter Carriers’ Ass’n v. Nat’l Rural Letter Carriers’ Ass’n*, 720 F.2d 936, 940 (6th Cir. 1984); *Collin v. Smith*, 578 F.2d 1197, 1202 (7th Cir. 1978). Purpose-based analysis caused lower courts to, as the U.S. Court of Appeals for the Fourth Circuit held pre-*Reed*, “not hesitate[] to deem a regulation content-neutral even if it facially differentiates between types of speech,” and to even consider purpose *before* considering a statute’s text—in other words, the exact opposite of the *Reed* Two-Step. *See Cozart*, 680 F.3d at 366.

¹¹⁵ *Reed v. Town of Gilbert (Reed I)*, 587 F.3d 966, 974 (9th Cir. 2009) (quoting *Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009)), *overruled by* 135 S. Ct. 2218 (2015); *see also Norton v. City of Springfield*, 768 F.3d 713, 717 (7th Cir. 2014) (stating that content-based regulations are those which restrict speech either “because of the ideas it conveys” or “because the government disapproves of its message”), *rev’d on reh’g*, 806 F.3d 411 (7th Cir. 2015).

¹¹⁶ LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 794 (2d ed. 1988) (stating that a law is content-based “if on its face a governmental action is targeted at ideas or information that *government seeks to suppress*, or if a governmental action neutral on its face *was motivated by* (i.e., would not have occurred but for) an intent to single out constitutionally protected speech for control or penalty”) (emphasis added and omitted).

trigger an inquiry into governmental purpose at all.¹¹⁷ Further, and more importantly, focusing on whether the governmental purpose of a facially content-based law *at the time of its adoption* was biased or benign toward that content does nothing to restrict who might be called the next bad actor: a governmental official who uses an existing facially content-based law for content-discriminatory purposes.¹¹⁸ The Court has long been concerned with excessive

¹¹⁷ See *Reed v. Town of Gilbert (Reed III)*, 135 S. Ct. 2218, 2227 (2015) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Indeed, the opinion in *Ward* itself deserves most of the blame for the expansion of government purpose analysis in cases involving content-based laws. See 491 U.S. at 791 (“The principal inquiry in determining content neutrality, *in speech cases generally and in time, place, or manner cases in particular*, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.” (emphasis added)). Lower courts’ treatment of that “speech cases generally” bit of dicta as establishing a rule of decision in cases involving content-based laws was arguably consistent with the longstanding rule in many circuits to treat “Supreme Court dicta . . . as prophecy of what the Court might hold.” *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000) (internal quotation marks omitted); see also *Wynne v. Town of Great Falls*, 376 F.3d 292, 298 n.3 (4th Cir. 2004) (noting that Supreme Court dicta are “authoritative”) (quoting *Sierra Club v. EPA*, 322 F.3d 718, 724 (D.C. Cir. 2003)); *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 561 (3d Cir. 2003) (en banc) (stating that although “the Supreme Court’s dicta are not binding,” the court “[does] not view it lightly”); *Bangor Hydro-Elec. Co. v. Fed. Energy Regulatory Comm’n*, 78 F.3d 659, 662 (D.C. Cir. 1996) (stating that “Supreme Court dicta tends to have somewhat greater force” than other dicta). The problem, however, was that the Court *had already held*, consistent with the *Reed* Two-Step and contrary to the *Ward* dicta, that purpose could not play a role in analyzing the constitutionality of laws facially referencing content. See *Reed III*, 135 S. Ct. at 2228 (quoting, *inter alia*, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991)); see also *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 677–79 (1994) (O’Connor, J., concurring in part and dissenting in part) (“[B]enign motivation, we have consistently held, is not enough to avoid the need for strict scrutiny of content-based justifications. . . . [W]e have often struck down statutes as being impermissibly content based even though their primary purpose was indubitably content neutral.”) (citations omitted).

Perhaps, then, the simplest way to think about *Reed* is that Justice Thomas’s opinion cleans up the stray dicta from Justice Kennedy’s *Ward* opinion regarding the application of purpose analysis to content-based laws—dicta that had been picked up on and carried forward with vigor by the lower courts. Justice Scalia had attempted a similar clean-up job in the Court’s 2000 case *Hill v. Colorado*, in which the Court began its content discrimination analysis by quoting *Ward* for the proposition that “the principal inquiry . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.” 530 U.S. 703, 719 (2000) (internal quotation marks omitted) (quoting *Ward*, 491 U.S. at 791). Justice Scalia attacked this assertion, noting that content discrimination analysis based on the government’s “disagreement with the message” conveyed was just one part of the inquiry into whether a particular law was content-based. *Id.* at 746–47 (Scalia, J., dissenting) (citation and internal quotation marks omitted). Justice Scalia’s contention as to *Ward*’s actual reach, however, could not command a majority in that case.

¹¹⁸ To be fair, “the main concern in many cases will not be why the regulation was ‘adopted’; rather, it will be why the regulation was later applied in a given case” R. George Wright, *Content-Neutral and Content-Based Regulations of Speech: A Distinction That Is No Longer Worth the Fuss*, 67 FLA. L. REV. 2081, 2086 (2015). This distinction itself, however, relies on the distinction between facial and as-applied challenges—which *Reed* has rendered irrelevant, at least to the content discrimination doctrine. Under *Reed*, if a law refers to content on its face, it is subject to strict scrutiny, irrespective of that law’s application to a particular speaker.

governmental discretion in the application of existing content-neutral laws, on the ground that such discretion “has the potential for becoming a means of suppressing a particular point of view.”¹¹⁹ It would be odd for the First Amendment to be oblivious to the same concern with respect to facially content-based laws—where the concern about censorially-motivated constructions of such laws by government officials should be at least as great.

Minimizing the role government purpose should play when applying content discrimination doctrine as *Reed* instructs also clarifies an analysis that has become muddled to the point of obscurity. The purpose-based definition of a content-based law that had been adopted by the lower courts unnecessarily conflated the First Amendment’s *content* neutrality requirement with its *viewpoint* neutrality requirement. As the *Reed* majority noted, the Town of Gilbert itself, mirroring how other governments had defended laws referencing content and following the Court of Appeals for the Ninth Circuit’s holding in its favor, argued that its ordinance was content-neutral because it did not “single out” any particular “idea or viewpoint” for “differential treatment.”¹²⁰ Nevertheless, arguing that a particular law is viewpoint-neutral is no defense to the claim that that law is content-based. Courts, commentators, lawyers, and law students have had enough trouble understanding and explaining the distinction between viewpoint neutrality and content neutrality.¹²¹ To the extent that *Reed* helps to draw a clearer demarcation between the two, all should be thankful.

¹¹⁹ *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130–31 (1992) (quoting *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975); *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940)).

¹²⁰ *Reed III*, 135 S. Ct. at 2222–23; *see also* Brief for Respondent at 22–31, *Reed III*, 135 S. Ct. 2218 (2015) (No. 13-502), 2014 WL 6466937, at *22–31 (explaining why the ordinance should not be analyzed under strict scrutiny). The confusion was manifested in the lower court’s opinion in *Reed*, in which the Ninth Circuit had held that “[n]othing in the regulation suggests any intention by Gilbert to suppress certain ideas.” *Reed I*, 587 F.3d at 975.

¹²¹ *See, e.g., McCullen v. Coakley*, 134 S. Ct. 2518, 2531, 2543, 2551 (2014) (court splitting 5–4 on whether regulation in question was content-neutral, content-based, or viewpoint-based); *Norton*, 768 F.3d at 717 (“[I]t is difficult to be confident about how the line between subject-matter (usually allowed) and content-based (usually forbidden) distinctions is drawn.”); Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1353, 1402 (2006) (stating that “the vagaries inherent in characterizing speech regulations as content-based versus content-neutral have resulted in standards for distinguishing between them that are applied in an inconsistent and results-driven manner,” and that the Court’s content-regulation analysis lacks a “principled and logical method”); Jay Alan Sekulow & Erik M. Zimmerman, *Uncertainty Is the Only Certainty: A Five-Category Test to Clarify the Unsure Boundaries Between Content-Based and Content-Neutral Restrictions on Speech*, 65 EMORY L.J. 455, 456 (2015) (“Although the distinctions between . . . content-based and viewpoint-based restrictions on speech remain a critically important aspect of First Amendment doctrine, the lines between these . . . categories remain quite unclear in key respects despite volumes of court decisions and scholarly commentary on the subject.”) (footnote omitted). In seeking to clarify those lines, the expert authors of the leading First Amendment treatise could do no better than this:

Finally, the *Reed* Two-Step’s minimization of the judicial inquiry into governmental purpose brings First Amendment doctrine more in line with the rest of constitutional law. In other areas involving individual rights, the Court has been hesitant to turn its entire determination of a law’s constitutionality on the underlying purpose of that law. In short, purpose is both hard to find and slippery to the catch. As Justice Hugo Black wrote in the equal protection context:

[I]t is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment It is difficult or impossible for any court to determine the “sole” or “dominant” motivation behind the choices of a group of legislators. Furthermore, there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons.¹²²

As Justice Black notes, constitutional law should be concerned with a law’s “facial effects”—i.e., the amount and nature of the constitutionally pro-

A content-based regulation either explicitly or implicitly presumes to regulate speech on the basis of the substance of the message. A viewpoint-based law goes beyond mere content-based discrimination and regulates speech based upon agreement or disagreement with the particular position the speaker wishes to express. Viewpoint discrimination is a subset of content discrimination; all viewpoint discrimination is first content discrimination, but not all content discrimination is viewpoint discrimination.

1 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 3.9 (1994) (footnotes omitted). This circumlocution, blame for which lies not with the treatise’s authors but with the doctrine’s development, calls to mind the classic colloquy:

Abbott: Well, let’s see, we have on the bags, Who’s on first, What’s on second, I Don’t Know is on third . . .

Costello: That’s what I want to find out.

Abbott: I say Who’s on first, What’s on second, I Don’t Know’s on third.

The Abbott and Costello Show (MCA television broadcast May 15, 1953).

¹²² *Palmer v. Thompson*, 403 U.S. 217, 224–25 (1971). With respect to content-neutral restrictions on speech, the Court was initially dubious with respect to purpose as proof of unconstitutionality. See *United States v. O’Brien*, 391 U.S. 367, 383 (1968) (“[U]nder settled principles the purpose of Congress . . . is not a basis for declaring this legislation unconstitutional.”); see also *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 822–23 (1984) (Brennan, J., dissenting) (“[A] reviewing court faces substantial difficulties determining whether the actual objective is related to the suppression of speech [because] [t]he asserted interest in aesthetics may be only a façade for content-based suppression.”). In this sense, both the lower courts’ misapplications of the content discrimination doctrine, which permitted content-based laws to survive if they did not have a discriminatory purpose, and the second step of the *Reed* two-step analysis, which permits a court to find a content-neutral law content-based if its purpose is to suppress content, represent a departure from this prior understanding.

tected activity that the law at issue prohibits, irrespective of its purpose. Considering the issue of effects in the First Amendment context leads to a different conclusion, well beyond the scope of *Reed* and the commentaries it has engendered: the development of content discrimination doctrine has made the effects of particular laws on speakers nearly irrelevant to constitutional analysis. It is this fundamental problem—and not cases at the margins like *Reed*—that has set First Amendment doctrine on the wrong track.

III. THE TRUE PROBLEM: THE CONTENT-BASED V. CONTENT-NEUTRAL APPROACH (OR “PURPOSE: YES, EFFECTS: NO”)

The distinction between content-based and content-neutral laws that *Reed* sought to clarify has earned significant scholarly attention.¹²³ It is also a dichotomy upon which the Supreme Court has come to completely rely. If there is one First Amendment rule that is clearer than any other, it is that the determination that a regulation is content-based or content-neutral will almost always determine if the regulation will be invalidated or upheld.¹²⁴

Which label applies to the speech at issue is a question that *Reed* helpfully clarifies. The effect of the chosen label, however, is a much more constitutionally consequential issue. Unpacking the two-tiered-content approach shows that it directly contributes to the underprotection of speech. There is no principled basis for treating content-neutral restrictions with the leniency that current doctrine provides. It is this fact—not the *Reed* Two-Step—which should concern scholars and advocates of free expression. By giving content-neutral restrictions only the most cursory level of review regardless of those restrictions’ effects on speakers—and with the help of a scholarly community that has not challenged and thus ratified this aspect of free speech doctrine—the First Amendment has lost its way.

As *Reed* recognizes, the governing rule in applying the First Amendment is the distinction between “restrictions that turn on the content of expression” on the one hand, which “are subjected to a strict form of judicial review” and restrictions that are “concerned with matters other than content” on the other, which “receive more limited examination.”¹²⁵ A serious incongruity exists, however, in setting a standard of review for a speech restriction based solely

¹²³ See, e.g., Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 114 (1981); see also *Reed v. Town of Gilbert (Reed III)*, 135 S. Ct. 2218, 2227–32 (2015) (explaining why the regulation is content-based and why strict scrutiny applies).

¹²⁴ See McDonald, *supra* note 121, at 1351; see also 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, 53 (2000) (“[V]irtually every free speech case turns on the application of the distinction between content-based and content-neutral laws.”).

¹²⁵ Redish, *supra* note 123, at 113.

on whether the restriction refers to content. Content-based restrictions are more rigorously reviewed despite the fact that in many, if not most cases, a content-neutral restriction in operation can, and often does, limit far more speech than one that is content-based.

For instance, imagine two hypothetical laws, both passed to deter distracted driving: Law 1 bans bumper stickers on cars, and Law 2 bans only bumper stickers referring to politics. (Perhaps the legislature that adopted Law 2 believed that politically themed bumper stickers were particularly distracting or were more likely than other kinds of more typically benign stickers to send drivers into a road rage, resulting in dangerous violence on the roadways.¹²⁶) Law 1 is content-neutral because it is “justified without reference to the content” of the speech that the law proscribes.¹²⁷ At most, it is aimed at a mode of expression, not expression itself. Law 2, by contrast, is clearly content-based because it imposes a “burden on speakers because of the content of their speech” or its communicative impact.¹²⁸ So, even though Law 1 will unquestionably suppress more speech because it bars bumper stickers that discuss *all* topics, not just politics,¹²⁹ Law 2’s constitutionality will be reviewed under a much less deferential standard of review.

This is so, goes First Amendment theory, because, even if content-based restrictions result in the suppression of less speech, those restrictions have a skewing effect on public discourse, as they deprive the market of ideas of speech to which the government doing the suppressing might be hostile.¹³⁰

¹²⁶ Under the secondary effects doctrine, a regulation that refers to content can nevertheless be deemed content-neutral if the regulation is aimed not at the referred-to content but at the content’s undesirable “secondary effects.” *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–52 (1986). Nevertheless, even under the secondary effects doctrine, “[l]isteners’ reaction to speech is not a content-neutral basis for regulation.” *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992); see also *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (“[T]he emotive impact of speech on its audience is not a ‘secondary effect’ unrelated to the content of the expression itself.” (citations and internal quotation marks omitted)).

¹²⁷ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1994)).

¹²⁸ *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) (citing *Leathers v. Medlock*, 499 U.S. 439, 447 (1991)); see also John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1497 (1975); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47 (1987) (“Content-based restrictions limit communication because of the message it conveys.”).

¹²⁹ See Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 10 (1986) (“[A] limited abridgment of political speech may be less harmful than a more sweeping abridgment of nonpolitical speech.”).

¹³⁰ See, e.g., ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWER OF THE PEOPLE* 27 (1965); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 446–51 (1996); see also Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 197–98 (1983)

(Again, here, note how all the talk of government hostility to certain ideas contributes to the confusion between content discrimination and viewpoint discrimination—indeed, the *entire theory* of content discrimination doctrine is premised upon that confusion.) Content discrimination doctrine *presumes* that governments intend to create this skewing effect in the direction it prefers public debate take; thus the heightened suspicion applied to content-based regulations. In other words, the First Amendment is primarily directed not at government interferences with speech *per se*, but at those interferences that are based on bias against *certain* speech.¹³¹ The animating concern is with government distortion of public debate rather than with the sum total of public debating—that is, the First Amendment “focuses not so much on what is restricted but on the reasons for the restriction.”¹³² Similarly, Jed Rubenfeld, who argues even more forcefully for a purposivist application of the Speech Clause, claims that “[t]he First Amendment is implicated [only] when the government makes communicative harm the basis for liability”—unless “speech [is] the real target” of the government’s action, the First Amendment should not be concerned at all.¹³³ To boil all this down, a law’s reference to content raises a yellow caution flag for the possible presence of a governmental purpose toward that content that may not be benign; hence, applying strict scrutiny to suss out the government’s true purpose, as opposed to its claimed one, is appropriate.

By contrast, this argument continues, content-*neutral* regulations do not intend to skew speech in any particular topical direction and are thus not sus-

(stating that “the first amendment is concerned . . . with the extent to which the law distorts public debate”). It is in this sense that First Amendment doctrine seems to share much with the law of equal protection; concerns with content-based laws are based not so much on “the restrictive effect on communication . . . as the differential treatment of categories of speech.” Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 731 (1979) (footnote omitted); see also *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1680 (2015) (Scalia, J., dissenting) (“Among its other functions, the First Amendment is a kind of Equal Protection Clause for ideas. The state ordinarily may not regulate one message because it harms a government interest yet refuse to regulate other messages that impair the interest in a comparable way.”).

¹³¹ See Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2172 (2015). As Professor Lakier noted:

[Subjecting content-based restrictions to higher scrutiny] is motivated by the belief that allowing the government to restrict speech on the basis of its content threatens both democracy (by allowing the government to repress the speech of those groups it dislikes or who criticize it) and social progress (by allowing the government to remove ideas from competition in the public marketplace).

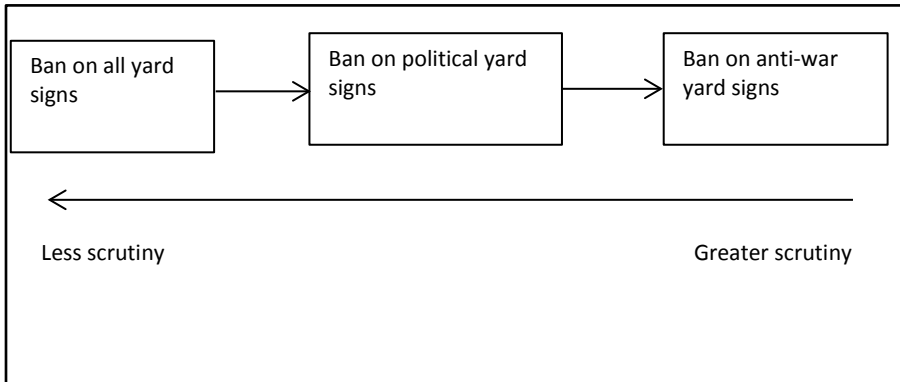
Id.

¹³² FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 68–69 (1982) (citing Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972)).

¹³³ Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767, 777–78 (2001) (emphasis and footnote omitted).

pect. The state's first obligation under the Speech Clause is to treat ideas equally and impartially, and content-neutral restrictions treat ideas equally and impartially, irrespective of the nature or number of ideas that they actually restrict.¹³⁴ Additionally, because a content-neutral regulation treats all ideas equally, the review of that regulation, though (nominally) searching, will accommodate the government interest behind the restriction to a much greater degree.¹³⁵ As Ed Baker notes, "the issue" with respect to content-neutral restrictions "is resource allocation, not censorship."¹³⁶

To demonstrate this incongruity graphically, we can use three other hypothetical laws, this time involving restrictions on the use of yard signs:



The anti-war sign ban represented on the right side of the diagram, because it is viewpoint-based, will receive the most scrutiny by a reviewing court, and is certain to be found invalid.¹³⁷ Moving right-to-left along the diagram, scrutiny of

¹³⁴ See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 776 (1976) (Stewart, J., concurring) (stating that the government's inability to abridge speech because of its content is the "cardinal principle of the First Amendment"); see also *Stone*, *supra* note 130, at 202–04. To take another example, consider *Erznoznik v. City of Jacksonville*, a Supreme Court case decided in 1975. 422 U.S. 205, 214–15 (1975). There, the Court found that Jacksonville could not bar drive-ins from showing films containing nudity that were visible from a public street because the ordinance in question treated such films differently from films not containing that content. *Id.* A blanket restriction on *any* films viewable from the street, however, would likely have been subjected (at most) only to intermediate scrutiny even though the latter restriction would result in far fewer films being shown in Jacksonville. Again, the First Amendment harm is measured not by the total amount of speech suppressed but rather by the unequal treatment of the restricted speech in question.

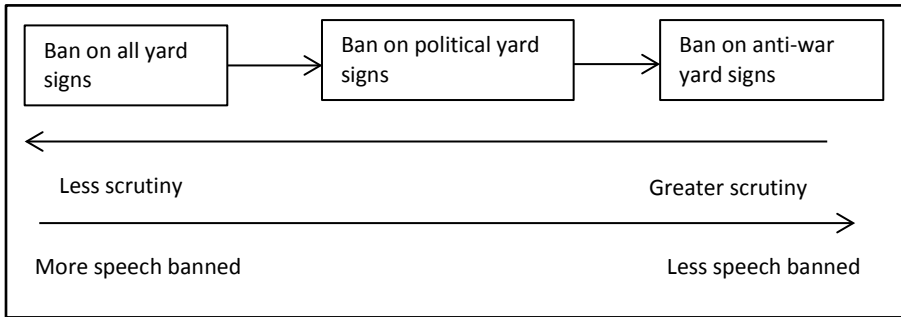
¹³⁵ *Stone*, *supra* note 130, at 192–93.

¹³⁶ C. Edwin Baker, *Unreasonable Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 NW. U.L. REV. 937, 939 (1983).

¹³⁷ See, e.g., *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (concluding that viewpoint-based restrictions on citizens' political speech were *per se* invalid); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 785–86 (1978) (noting that the First Amendment is especially "offended" when the government discriminates on the basis of viewpoint); Farber, *supra*

the middle restriction will remain strict, as that ban's limitation on political content (as well as its failure to differentiate between speech that is for or against a particular political position) renders it content-based. Finally, the total ban on signs shown at the diagram's left would likely be deemed content-neutral and thus subjected to what passes in the speech context for intermediate scrutiny—a level of review that is, as several scholars have shown, “in practice a highly deferential form of review which virtually all laws pass.”¹³⁸

By contrast, it is similarly clear that in terms of the respective laws' effects, the *amount of speech*, as well as the *number of speakers* restricted, drastically decreases as one moves from left-to-right:



As an initial matter, note that the presumption that content-neutral laws burden all speech equally is fundamentally false. So far as all of the theoretical bases underlying the First Amendment are concerned, an anti-war yard sign speaks more than a yard sign that communicates no viewpoint at all. The inversely proportional relationship between the amount of speech suppressed and

note 130, at 729 (“[R]egulatory classifications based on the speaker’s viewpoint are subject to strict scrutiny, and other content-based classifications are subject to . . . milder scrutiny.”).

¹³⁸ Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 237 (2012) (citing *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997)); *Clark*, 468 U.S. at 293; *Members of the City Council of L.A.*, 466 U.S. at 804–05); see also Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921, 925 (1993) (discussing that “[t]he government has always won” cases in which the regulation at issue was deemed content-neutral by a reviewing court); McDonald, *supra* note 121, at 1370 (“In the fourteen cases . . . where the Court has determined or assumed that a speech regulation is content-neutral and has reviewed it under this standard or a close variant, just two of those regulations failed to pass review and only because they involved broad or total bans on the use of popular mediums of expression in places where such restrictions on speech seemed especially inappropriate.” (footnote omitted)); Frederick Schauer, *Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications*, 26 WM. & MARY L. REV. 779, 788 (1985) (stating that in practice, intermediate scrutiny review of speech restrictions “has resembled rational basis review”); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 647 (1991) (noting that the application of content-neutral intermediate scrutiny in *United States v. O’Brien*, 391 U.S. 367 (1968) “presaged the lax and deferential way in which it has been used ever since”) (footnote omitted). *But see McCullen v. Coakley*, 134 S. Ct. 2518, 2541 (2014) (holding that a content-neutral law was not narrowly tailored).

the level of scrutiny applied, however, is irrelevant in the eyes of First Amendment doctrine.¹³⁹ This is so even though the incongruity creates perverse incentives for government. As then-Justice William Rehnquist noted over thirty years ago, “the State would fare better by adopting more restrictive means, a judicial incentive I had thought this Court would hesitate to afford.”¹⁴⁰ Accordingly, where governments are faced with the decision of whether to “tolerate all speech or none at all,” it is unsurprising that they choose the latter course regularly.¹⁴¹ Furthermore, note also under this hypothetical that the effect on the anti-war protester’s expressive rights—the speaker whom the First Amendment is most committed to protect, at least in theory—is actually the same under any of the three bans. Again, however, a regulation’s effects on speech, either on the speaker or his or her intended audience, are not the concern of current free speech doctrine. The government’s presumed purpose, rather than the regulation’s restrictive effect, is the basis for deciding the applicable standard of review and thus the First Amendment issue.

Further, the ample alternative channels analysis—an inquiry as to whether an infringed speaker could have expressed his or her message in another lawful way despite the restriction at issue—is part of the lesser standard of review but not the more rigorous one. Because a content-neutral regulation’s effects are, as a matter of course, deemed by a reviewing court to infringe upon, at most, a means or locus of expression and not the expression’s content, the speaker restricted by such a regulation is presumed to have been free to shift to another means or locus to express the same message. Accordingly, the content of that speaker’s message remains theoretically able to reach its intended listeners and contribute to public debate.¹⁴² For example, a driver who is unable to express his or her political views through a bumper sticker pursuant to hypothetical

¹³⁹ See William E. Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757, 792 (1986) (“[T]he Court’s assessment of a regulation’s burden on expression is tied to its finding that the regulation is facially content neutral with little regard for discriminatory effects.”).

¹⁴⁰ *Carey v. Brown*, 447 U.S. 455, 475 (1980) (Rehnquist, J. dissenting) (emphasis omitted); see also Redish, *supra* note 123, at 137 (stating that “[i]n a perverse sense . . . it appears that the more expression we prohibit, the closer we come to attaining the goal of the equality principle” supporting strict scrutiny for content-based restrictions).

¹⁴¹ John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1113 (2005) (citing *Utah Gospel Mission v. Salt Lake City Corp.*, 316 F. Supp. 2d 1201, 1208–17 (D. Utah 2004), and describing Salt Lake City’s decision to vacate a public easement over a downtown plaza after litigation determined that the easement made the plaza a public forum).

¹⁴² Harold L. Quadres, *Content-Neutral Public Forum Regulations: The Rise of the Aesthetic State Interest, the Fall of Judicial Scrutiny*, 37 HASTINGS L.J. 439, 480 (1986) (“[I]f one could argue that, despite the questioned regulation, a speaker still has numerous alternative means by which to disseminate his message, the degree of first amendment injury may seem insubstantial . . . [because] the speaker can always make use of his alternative access.”).

Law 1 above is free to communicate them in other ways, such as yard signs, blog posts, and the like. This fact alone makes Law 1 likely to survive judicial review under current law.¹⁴³ Nevertheless, the availability of those alternatives—and make no mistake, a reviewing court’s conclusion as to their existence or absence has become *the* dispositive question with respect to the law’s constitutionality¹⁴⁴—is part of First Amendment scrutiny only when the law in question is deemed content-neutral. The driver restricted under the hypothetical content-based Law 2, which bars only political bumper stickers, is similarly limited from expressing political views in the *particular* manner chosen but is similarly as free to express his or her political views through the same alternative channels as the driver who is barred by the general ban on bumper stickers. Yet, the availability of those alternative channels is irrelevant to a reviewing court once Law 2 is deemed content-based.

This distinction is entirely inconsistent with a theory that calls content-based laws into greater question because they might be proxies for a governmental intent to discriminate against the category of content to which a law refers. If government purpose is the actual touchstone for determining a law’s constitutionality, then alternative channels should be just as relevant to the speaker who is infringed by a content-based law as by a content-neutral one. If such channels exist, then the government’s attempt to squelch speech in a certain category of conduct through a content-based restriction has failed—which should lead one to question whether the presumption regarding the government’s intent behind the reference to content was malignant in the first place.¹⁴⁵ If the government’s purported purpose has been frustrated by the availability of the substitute, then the purported purpose may not have been the actual purpose. At which point, the presumption underlying content discrimination doctrine is doing no analytical work at all.

¹⁴³ See generally Enrique Armijo, *The “Ample Alternative Channels” Flaw in First Amendment Doctrine*, 73 WASH. & LEE L. REV. 1657, 1657 (2016) (explaining that “if the regulation leaves open ‘ample alternative channels of communication’ for the restricted speaker’s expression,” the courts will not strike down the law).

¹⁴⁴ See, e.g., Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 790 (noting that in content-neutral cases, “the Court will uphold regulations of speech so long as, in its view, the regulation keeps open for that speaker ample alternative, and effective, channels of communication” (emphasis omitted)); Quadres, *supra* note 142, at 490 (stating that the “alternative access question” is the “touchstone of the whole balancing process” in assessing content-neutral regulations); see also Armijo, *supra* note 143, at 1661 (arguing that a law’s restriction leaving open other means of communication has “dispositive significance in speech cases”).

¹⁴⁵ See Kagan, *supra* note 130, at 446 (a content-based restriction makes “the danger of distortion [of public debate] insignificant” if it affects a “small quantity of speech” and leaves “alternative means to communicate the ‘handicapped’ idea” readily available to speakers).

For example, if, during a particularly taxing basketball season, the campus of the University of North Carolina were to ban burning the university's basketball coach in effigy, the fact that the campus said nothing about other expressions of critique might lead one to conclude that the concern behind the ban was not about squelching dissent but fires on campus.¹⁴⁶ Under current law, however, purpose, whether fulfilled or not, sets out the boundaries for the entire inquiry. Because First Amendment law *presumes* that content-based restrictions are unconstitutional because they have a discriminatory purpose and *presumes* that content-neutral restrictions are benign because they are not aimed at suppressing speech, a particular law's effects on speech are given no weight. This is exactly wrong. The presumed constitutionality of a given law should turn not on what First Amendment doctrine assumes is its purpose but rather on how much or what kind of speech it actually infringes.

Of course, First Amendment doctrine recognizes the principle that harm rather than purpose is the true constitutional evil in all sorts of contexts even if it fails to give it any meaningful value in deciding actual cases. The marketplace of ideas, self-autonomy, and self-governance theories of the First Amendment all relate to the effects of potentially speech-infringing laws: a speech market functions less properly if government deprives that market of expressive ideas; members of society cannot reach their best selves if the law deprives them of the capacity for expression; and without access to relevant information concerning governors and governance, individual and collective political choices are less informed and thus less legitimate. Again, these are all concerns tied to law's effects, not law's purpose. The Supreme Court has used the term "chilling effect" almost one hundred fifty times, mostly in the overbreadth context.¹⁴⁷ So how does it make sense to consider a law's effects on speech prospectively but not retrospectively?

Finally, and coming full circle, consider how a First Amendment doctrine focused more on effects than purpose might better resolve those issues that have drawn the most concern from *Reed's* critics. If a law's effects on speech were the First Amendment's guiding concern, then courts could prioritize consideration of the interests of the infringed speaker over the government's reasons for the infringement. Signage restrictions would or would not survive constitutional scrutiny based not on whether they refer to content, but on whether the claimed interest in those restrictions outweighs the infringed speaker's interest in communicating his or her message through a sign. Pan-

¹⁴⁶ See Armijo, *supra* note 143, at 1726 ("Government arguments that a speaker's message is not limited to the mode of expression that the regulation bars, and that the regulation's harm to speech is thus minimal, are not a part of the decision-making calculus for content-based laws.").

¹⁴⁷ A search of law review articles for use of the term "chilling effect" on Westlaw produced nearly 9700 results.

handling bans could not be saved through the broadening exercise of content-neutral legislative drafting—recall that per the analysis in Part I, a content-neutral law that prohibits standing in the median is much more likely to survive scrutiny than a narrow content-based law that bans panhandling in the median—but instead will stand or fall based on the degree to which the ban at issue interferes with protected speech.¹⁴⁸ Additionally, a stock offeror’s interest in being free from the compulsion to reveal information concerning the object of the stock would fall to the government’s interest in providing information to consumers that would otherwise not be disclosed.

CONCLUSION

Current content discrimination doctrine relies on the law’s references to content—or the lack thereof—as proxies for purpose. Critics of the Supreme Court’s 2015 holding in *Reed v. Town of Gilbert* would prefer to expand the role of governmental purpose in the review of laws infringing on speech to an even greater degree—to the point of making a facial reference to content not just a proxy for censorial intent but a starting point to deciding whether a benign purpose exists that can save the content-based law in question. Just as the First Amendment has achieved speaker agnosticism, however, it should be motive-agnostic as well. By limiting judicial inquiry into governmental purpose to the review of content-neutral laws, *Reed* has ameliorated this problem, not exacerbated it. The less consideration of purpose in First Amendment analysis, the better off speakers will be.

¹⁴⁸ See *Traditionalist Am. Knights of the Ku Klux Klan v. City of Desloge*, No. 4:13-CV-810 NAB, 2016 WL 705128, at *4 (E.D. Mo. Feb. 23, 2016) (an ordinance barring any “person [from] stand[ing] in . . . a [r]oadway for the purpose of distributing anything to the occupant of any vehicle” was content-neutral and constitutional) (quoting DESLOGE, MO, CODE § 220.205 (2013)). *But see* *Cutting v. City of Portland*, 802 F.3d 79, 84–85, 89 (1st Cir. 2015) (finding that even though a ban on standing in any road median in Portland was content-neutral because it “restrict[ed] speech only on the basis of where such speech takes place,” it nevertheless violated the First Amendment because it imposed “serious burdens on speech”).