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Uncertainty Is the Only Certainty: A Five-Category Test to Clarify the Unsure Boundaries Between Content-Based and Content-Neutral Restrictions on Speech

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

Jay Alan Sekulow[*]
Erik M. Zimmerman[**]

ABSTRACT

The lines between content-neutral, content-based, and viewpoint-based restrictions on speech remain unclear in key respects despite the critical importance that these characterizations hold within First Amendment jurisprudence. This Article will analyze the law concerning the boundaries between these categories of laws with respect to speech activities in public and limited forums. The Article argues that the following five categories of laws are inherently suspect under the Free Speech Clause and should be treated as such:

1. The government's actual purpose is to suppress speech based on its content or viewpoint, or to impose subjective editorial control over content or viewpoint.

2. The government interest that the law is intended to further relates to an aspect of the direct or emotive communicative impact of regulated expression, rather than the manner of its delivery.

3. The law, on its face, treats speakers differently due to the content or viewpoint of their message, or excludes from its coverage speech or conduct relating to different subject matters or viewpoints that pose similar threats to the government's asserted interests.

4. The actual or inevitable effect of the law is to prevent speakers espousing certain messages from effectively reaching their intended audience,

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[*] Chief Counsel, American Center for Law and Justice, Washington, D.C.; B.A., Mercer University; J.D., Mercer Law School; Ph.D., Regent University.

[**] Senior Litigation Counsel, American Center for Law and Justice, Ann Arbor, Michigan; B.A., Niagara University; J.D., Regent University School of Law.

such as by targeting a particular location or manner of expression that is closely tied to one subject matter or viewpoint.

5. The law lends itself to use for content- or viewpoint-discriminatory purposes, or there is a realistic possibility that official suppression is afoot.

Formal recognition by the Court that laws of this nature should be subject to strict scrutiny would bring much needed clarity to this area of law and would help to ensure that freedom of speech receives the robust protection that it deserves, while affording the government ample room to enact reasonable, narrowly tailored laws that address legitimate concerns.

INTRODUCTION

Although the distinctions between content-neutral, content-based, and viewpoint-based restrictions on speech remain a critically important aspect of First Amendment doctrine, the lines between these three categories remain quite unclear in key respects despite volumes of court decisions and scholarly commentary on the subject.[1] In many instances, opponents of a law that affects the exercise of free speech can plausibly characterize it as content- or viewpoint-based, relying upon certain Supreme Court decisions, while supporters of the same law can plausibly characterize it as content- and viewpoint-neutral, relying upon other aspects of those same decisions, different decisions, or both.

For example, in various, and often conflicting, free speech decisions over the past several decades, the Court has (1) declined to examine the government's motive, (2) held laws to be content-based despite the assertion of a neutral government purpose, and (3) stated that the government's purpose is

[1] *See, e.g.*, Seth F. Kreimer, *Good Enough for Government Work: Two Cheers for Content Neutrality*, 16 U. PA. J. CONST. L. 1261, 1270 (2014) ("The Court has regularly fallen into acrimonious disputes over the question of whether a particular regulation is 'content-based' or 'content-neutral,' and which strand of analysis should serve as the dividing line. A similar perplexity has afflicted the lower courts." (footnote omitted)); Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1353 (2006) ("[T]he 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 by the Court."). Not everyone agrees that the Court's content-neutrality jurisprudence lacks sufficient clarity. *See, e.g.*, Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 232–33 (2012) ("[C]laims of incoherence [in content discrimination doctrine] are greatly overstated. In fact, the case law largely reflects a coherent position—though, to be fair to the critics, not a position the Court has clearly claimed for itself.").

the "principal inquiry."[2] Additionally, in some cases the law's likely or inevitable effect was considered to be important, while in others it was essentially ignored. The resulting confusion and uncertainty ultimately threatens the robust exercise of First Amendment rights by giving government actors unduly broad leeway to burden that exercise.[3]

This Article will analyze the law concerning the boundaries between content-based (including viewpoint-based) laws and content-neutral laws with respect to speech activities in public and limited forums. The Supreme Court's decisions in *McCullen v. Coakley*[4] and *Reed v. Town of Gilbert*[5] provided a degree of clarity on certain points, but they are also ample proof that the lines of demarcation are not firmly established in many respects.

The Court's shift toward emphasizing the government's asserted motive for enacting a law that restricts speech has, as Justice Brennan once feared, "set the Court on a road that will lead to the evisceration of First Amendment freedoms."[6] The considerable narrowing of the class of laws considered to be content-based has also, by extension, narrowed the class of laws considered to be viewpoint-discriminatory; in numerous cases discussed herein, the majority held a law to be content-neutral, and therefore viewpoint-neutral, while concurring or dissenting Justices argued that the law was both content- and viewpoint-discriminatory.

This Article will suggest a formulation of the relevant test, drawn from various majority, concurring, and dissenting opinions issued over the past several decades, that would be appropriately protective of free speech while leaving ample room for narrowly tailored government regulations. In particular, this Article argues that the following five categories of laws are inherently suspect under the Free Speech Clause and should be treated as such:

1. The government's actual purpose is to suppress speech based on its content or viewpoint, or to impose subjective editorial control over content or viewpoint.

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[2] Ward v. Rock Against Racism, 491 U.S. 781, 791–92 (1989); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95–96 (1972); United States v. O'Brien, 391 U.S. 367, 383 (1968).

[3] "Constitutional doctrine . . . . should allow citizens to know enough to invoke their rights successfully without seeking adjudication in every case. . . . [and] should be easily understood by the officials charged with administering it and should lead them fairly reliably to decisions that are consistent with constitutional commitments to free expression." Kreimer, *supra* note 1, at 1304.

[4] 134 S. Ct. 2518 (2014).

[5] 135 S. Ct. 2218 (2015).

[6] Boos v. Barry, 485 U.S. 312, 338 (1988) (Brennan, J., concurring).

2. The government interest that the law is intended to further relates to an aspect of the direct or emotive communicative impact of regulated expression, rather than the manner of its delivery.

3. The law, on its face, treats speakers differently due to the content or viewpoint of their message, or excludes from its coverage speech or conduct relating to different subject matter or viewpoints that pose similar threats to the government's asserted interests.

4. The actual or inevitable effect of the law is to prevent speakers espousing certain messages from effectively reaching their intended audience, such as by targeting a particular location or manner of expression that is closely tied to one subject matter or viewpoint.

5. The law lends itself to use for content- or viewpoint-discriminatory purposes, or there is a realistic possibility that official suppression is afoot.

As discussed herein, numerous Supreme Court opinions have explained why these five categories of laws should be characterized as content-or viewpoint-based, and subject to strict scrutiny. Formal recognition by the Court that these five categories of laws should be subject to strict scrutiny would bring much needed clarity to this area of law while affording the government ample room to enact reasonable, narrowly tailored laws that address legitimate concerns.

I. A REVIEW OF THE SUPREME COURT'S CONTENT- AND VIEWPOINT-NEUTRALITY JURISPRUDENCE REVEALS MULTIPLE AREAS OF DISAGREEMENT AND DISPUTE

While the Supreme Court has consistently held that content- and viewpoint-based laws are highly suspect under the First Amendment, the formulation of the test for determining whether a law is actually content- or viewpoint-based has not been consistent. Rather, the most consistent aspect of this area of law is the presence of sharp division among the Justices concerning the nature and proper scope of the content- and viewpoint-neutrality tests. This section will review many of the leading cases that address content- and viewpoint-neutrality, detailing various aspects in which there is confusion or division among the Justices and also highlighting instances in which the Court failed to adequately protect the freedom of speech.

A. Foundational Content-Neutrality Cases: O'Brien *to* Reed

Although nearly half a century elapsed between the Court's decisions in *United States v. O'Brien*[7] and *Reed v. Town of Gilbert*,[8] some key aspects of the areas of law that they addressed remain unsettled or in dispute. Since *Ward v. Rock Against Racism*[9] has emerged as perhaps the most important case in this area, this section will be divided into three parts: pre-*Ward* cases, *Ward*, and post-*Ward* cases.

1. Content-Neutrality Cases Before Ward

The standards set forth in *O'Brien* for determining whether a law is content-neutral are arguably more protective of free expression than the language appearing in more recent cases. O'Brien burned his Selective Service registration certificate as a means of symbolically expressing his anti-war views.[10] He was convicted under a law that prohibited the intentional destruction of registration certificates.

The Court unanimously upheld the law on its face and as applied, holding that it was a content-neutral regulation of conduct that only incidentally impacted expression.[11] The Court stated that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[12] The Court set forth the following four-part test for the review of laws that only incidentally impact free expression:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[13]

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7 391 U.S. 367 (1968).
8 135 S. Ct. 2218.
9 491 U.S. 781 (1989).
10 391 U.S. at 369–70.
11 *Id.* at 386.
12 *Id.* at 376.
13 *Id.* at 377.

The Court's analysis focused primarily on the nature of the interest furthered by the law and the law's actual effects in practice, and the Court held that "both the governmental interest and the operation of the 1965 Amendment are limited to the noncommunicative aspect of O'Brien's conduct."[14] Concerning the interest furthered by the law, the Court held that preserving the efficient functioning of the Selective Service system was unrelated to the suppression of free speech.[15] The Court distinguished the case at bar from "one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful."[16]

Moreover, the Court concluded that, while "the inevitable effect of a statute on its face may render it unconstitutional,"[17] "there is nothing necessarily expressive about" the knowing destruction of registration certificates.[18] The Court noted that the law "does not punish only destruction engaged in for the purpose of expressing views. . . . [and] no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records."[19] Elaborating on the "inevitable effect" issue, Justice Harlan noted in his concurring opinion that the Court's analysis would "not foreclose consideration of First Amendment claims in those rare instances when an 'incidental' restriction upon expression, . . . in practice has the effect of entirely preventing a 'speaker' from reaching a significant audience with whom he could not otherwise lawfully communicate."[20]

Importantly, the Court expressly rejected the notion that a review of the government's subjective motive is necessary to determine whether a law is content-neutral, stating that "under settled principles the purpose of Congress . . . is not a basis for declaring this legislation unconstitutional."[21] Certainly, under *O'Brien*, evidence of the government's motive may be relevant in the consideration of whether the government's stated interest during litigation is contrived, or whether the interest "arises in some measure because the communication allegedly integral to the conduct is itself thought to be

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14 *Id.* at 381–82.
15 *Id.* at 381.
16 *Id.* at 382.
17 *Id.* at 384.
18 *Id.* at 375.
19 *Id.*
20 *Id.* at 388–89 (Harlan, J., concurring).
21 *Id.* at 383 (majority opinion).

harmful,"[22] but evidence of the government's motive, *standing alone*, is neither necessary nor sufficient to show that a law is content-based.

The Supreme Court has often considered the extent to which regulations of specific locations are consistent with the Free Speech Clause where a speaker's target audience is closely connected to that location. In *Police Department of Chicago v. Mosley*,[23] the Court held that an ordinance prohibiting picketing or demonstrating within 150 feet of a school from a half hour before to a half hour after school sessions, except for peaceful labor dispute picketing, was unconstitutional.[24] The speech at issue was an individual's peaceful picket of a school's alleged racial discrimination; as such, requiring the speaker to move to another location would have seriously diminished the speech's intended communicative impact.[25]

The Court's analysis included both free speech and equal protection principles, and it rested on the fact that the expressive activities allowed at the location (peaceful labor picketing) affected the government's asserted interest (preventing disruption to school activities) to a similar extent as the activities prohibited at the location (all non-labor picketing, regardless of whether it was peaceful).[26] Despite the government's assertion of a neutral purpose, the Court held the law to be content-based.[27] The Court stated,

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . .
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> . . . [G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . . Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.[28]

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22 *Id.* at 382.

23 408 U.S. 92 (1972).

24 *Id.* at 93–94.

25 *Id.* at 93.

26 *Id.* at 94–102.

27 *Id.* at 95–96.

28 *Id.* In *Carey v. Brown*, 447 U.S. 455 (1980), the Court held that a law that prohibited the picketing of residences or dwellings, but included an exception for labor picketing at a place of employment, was "constitutionally indistinguishable from the ordinance invalidated in *Mosley*." *Id.* at 460. Three Justices dissented on the grounds that the law was not content-based but rather distinguished between types of residences: those utilized as businesses, for instance, were potentially subject to more picketing than those that were not. *Id.* at 482 (Rehnquist, J., dissenting) ("The State has differentiated only when the residence has been

The degree to which *Mosley* should continue to impact the content-neutrality analysis depends upon one's perspective. *Mosley* can be read broadly to suggest that laws that limit certain expressive activities at a particular location, while leaving untouched other expressive activities that impact the government's asserted interests in a similar manner, are likely content-based. Or, *Mosley* can be read narrowly for the proposition that laws that expressly differentiate, on their face, between categories of subject matter are content-based.

The Court was sharply divided in *Members of City Council of Los Angeles v. Taxpayers for Vincent*[29] over the importance of purpose and the possibility of discriminatory effects in the content-neutrality inquiry, a divide that continues today. In *Taxpayers for Vincent*, the Court upheld a law prohibiting the posting of signs on public property that included exemptions for plaques that commemorated historical, cultural, or artistic events or locations, as well as address numbers painted on street curbs.[30] The Court held that the law was content-neutral because "[t]he text of the ordinance is neutral—indeed it is silent—concerning any speaker's point of view," and "there is not even a hint of bias or censorship in the City's enactment or enforcement of this ordinance."[31] The Court also rejected the idea that the city could have provided an exemption for political campaign signs, stating,

> [E]ven though political speech is entitled to the fullest possible measure of constitutional protection, there are a host of other communications that command the same respect. An assertion that "Jesus Saves," that "Abortion is Murder," that every woman has the "Right to Choose," or that "Alcohol Kills," may have a claim to a constitutional exemption from the ordinance that is just as strong as "Roland Vincent—City Council." To create an exception for appellees' political speech and not these other types of speech might create a risk of engaging in constitutionally forbidden content discrimination.[32]

Justice Brennan dissented, joined by Justices Marshall and Blackmun, to explain his view that "the Court's lenient approach towards the restriction of

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used as a place of business, a place for public meetings, or a place of employment, or is occupied by the picket himself.").

[29] 466 U.S. 789 (1984).

[30] *Id.* at 817.

[31] *Id.* at 804.

[32] *Id.* at 815–16 (citation omitted).

speech for reasons of aesthetics threatens seriously to undermine the protections of the First Amendment."[33] He argued that

> a reviewing court faces substantial difficulties determining whether the actual objective is related to the suppression of speech. The asserted interest in aesthetics may be only a facade for content-based suppression. . . . [A] governmental interest in aesthetics cannot be regarded as sufficiently compelling to justify a restriction of speech based on an assertion that the content of the speech is, in itself, aesthetically displeasing. Because aesthetic judgments are so subjective, however, it is too easy for government to enact restrictions on speech for just such illegitimate reasons and to evade effective judicial review by asserting that the restriction is aimed at some displeasing aspect of the speech that is not solely communicative—for example, its sound, its appearance, or its location. An objective standard for evaluating claimed aesthetic judgments is therefore essential; for without one, courts have no reliable means of assessing the genuineness of such claims.[34]

Justice Brennan added, "The fact that a ban on temporary signs applies to all signs does not necessarily imply content-neutrality. Because particular media are often used disproportionately for certain types of messages, a restriction that is content-neutral on its face may, in fact, be content-hostile."[35] In other words, a disproportionate or discriminatory impact may indicate that a law is content-based.

In an apparent departure from *O'Brien*, the Court elevated the government's purpose to the forefront of content-neutrality analysis in *City of Renton v. Playtime Theatres, Inc*.[36] In *Renton*, the Court held that a zoning ordinance prohibiting adult movie theaters from locating within 1,000 feet of a residential zone, single- or multiple-family dwelling, church, park, or school was a valid, content-neutral time, place, and manner regulation.[37]

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[33] *Id.* at 818 (Brennan, J., dissenting).

[34] *Id.* at 822–23 (citation omitted).

[35] *Id.* at 823 n.5. A similar divide occurred in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), in which the Court held that a regulation prohibiting camping in certain national parks, which had the effect of preventing demonstrators from sleeping in a park as a means of drawing attention to homelessness, was content-neutral because it was "not being applied because of disagreement with the message presented." *Id.* at 295. Justice Marshall dissented, joined by Justice Brennan, to argue that the Court's content-neutrality analysis provided insufficient protection for the freedom of speech, as content-neutral laws may have a stifling effect on the ability to speak effectively, and tend to have a disproportionate impact on certain groups or viewpoints. *Id.* at 313–16, 313 n.14 (Marshall, J., dissenting).

[36] 475 U.S. 41 (1986).

[37] *Id.* at 46, 48, 54–55.

The Court stated that, although "regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment,"[38] "the Renton ordinance is aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community."[39] Therefore, the law was "justified without reference to the content of the regulated speech."[40] The Court rejected the view that "if 'a motivating factor' in enacting the ordinance was to restrict respondents' exercise of First Amendment rights the ordinance would be invalid."[41] Rather, "[t]he District Court's finding as to 'predominate' intent . . . is more than adequate to establish that the city's pursuit of its zoning interests here was unrelated to the suppression of free expression."[42]

Justice Brennan dissented, joined by Justice Marshall. He argued that the law was content-based on its face, as it "selectively imposes limitations on the location of a movie theater based exclusively on the content of the films shown there."[43] He added:

> Other motion picture theaters, and other forms of "adult entertainment" . . . are not subject to the same restrictions. This selective treatment strongly suggests that Renton was interested not in controlling the "secondary effects" associated with adult businesses, but in discriminating against adult theaters based on the content of the films they exhibit. . . .
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> . . . The ordinance's underinclusiveness is cogent evidence that it was aimed at the content of the films shown in adult movie theaters.[44]

The dissent also criticized the Court for its heavy reliance on the city's assertion of a neutral purpose, noting that

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[38] *Id.* at 46–47.

[39] *Id.* at 47.

[40] *Id.* at 48 (emphasis omitted) (quoting Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)).

[41] *Id.* at 47 (emphasis omitted) (quoting Playtime Theatres, Inc. v. City of Renton, 748 F.3d 527, 537 (9th Cir. 1986)).

[42] *Id.* at 48.

[43] *Id.* at 55 (Brennan, J., dissenting). As one article has argued, "content *neutrality* means (or *should* mean) . . . that the applicability of the law has absolutely nothing to do with the nature of the proscribed speech." Marc Rohr, De Minimis *Content Discrimination: The Vexing Matter of Sign-Ordinance Exemptions*, 7 ELON L. REV. 327, 338 (2015) (emphasis omitted). In practice, however, that has not always been the case. *See, e.g.*, McDonald, *supra* note 1, at 1352 ("[T]he vast majority of speech regulations reviewed by the Court make content distinctions on their face, and . . . the Court has taken quite often to designating them as content-neutral . . . ." (emphasis omitted)).

[44] *City of Renton*, 475 U.S. at 57–58 (Brennan, J., dissenting) (emphasis omitted).

> the circumstances here strongly suggest that the ordinance was designed to suppress expression . . . . Only [a broader view of what makes a law content-based] can insure that cities will not use their zoning powers as a pretext for suppressing constitutionally protected expression.[45]

The dissent also argued that the law was viewpoint-discriminatory:

> As a practical matter, the speech suppressed by restrictions such as those involved [here] will almost invariably carry an implicit, if not explicit, message in favor of more relaxed sexual mores. Such restrictions, in other words, have a potent viewpoint-differential impact. . . . To treat such restrictions as viewpoint-neutral seems simply to ignore reality.[46]

The extent to which *Renton*'s analysis should be extended outside the context of the regulation of adult businesses was debated in *Boos v. Barry*.[47] In *Boos*, the Court considered a Washington, D.C. law that banned both the display of signs that tend to bring a foreign government into public odium or disrepute within 500 feet of that government's foreign embassies or consulates (the display clause) as well as any congregation of three or more persons within 500 feet of a foreign embassy or consulate (the congregation clause).[48]

The Court held that the display clause was content-based, but upheld the congregation clause.[49] In a portion of the lead opinion joined by only three Justices, Justice O'Connor stated that the display clause was content-based because "[o]ne category of speech has been completely prohibited within 500 feet of embassies. Other categories of speech . . . are permitted."[50] The opinion also distinguished *Renton*, stating,

> We spoke in that decision only of *secondary effects* of speech, referring to regulations that apply to a particular category of speech because the regulatory targets happen to be associated with that type of speech. So long as the justifications for regulation have nothing to do with content, . . . we concluded that the regulation was properly analyzed as content neutral.

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45 *Id.* at 62.

46 *Id.* at 56 n.1 (alterations in original) (quoting Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 111–12 (1978)).

47 485 U.S. 312 (1988).

48 *Id.* at 315–18.

49 *Id.* at 318–21, 329–34.

50 *Id.* at 319.

> Regulations that focus on the direct impact of speech on its audience present a different situation. Listeners' reactions to speech are not the type of "secondary effects" we referred to in *Renton*. . . .
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> . . . Because the display clause regulates speech due to its potential primary impact, we conclude it must be considered content-based.[51]

Justice Brennan wrote a concurring opinion, joined by Justice Marshall, to reiterate his disagreement with *Renton* and also "to object to Justice O'Connor's assumption that the *Renton* analysis applies not only outside the context of businesses purveying sexually explicit materials but even to political speech."[52] Justice Brennan stated,

> [S]econdary effects offer countless excuses for content-based suppression of political speech. No doubt a plausible argument could be made that the political gatherings of some parties are more likely than others to attract large crowds causing congestion, that picketing for certain causes is more likely than other picketing to cause visual clutter, or that speakers delivering a particular message are more likely than others to attract an unruly audience. Our traditional analysis rejects such *a priori* categorical judgments based on the content of speech . . . . The *Renton* analysis, however, creates a possible avenue for governmental censorship whenever censors can concoct "secondary" rationalizations for regulating the content of political speech. . . .
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> . . . [A] content-based law . . . intended to aim at the "secondary effects" of certain types of speech . . . would still offend fundamental free speech interests by denying speakers the equal right to engage in speech and by denying listeners the right to an undistorted debate. . . .
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> . . . [T]oday's application of the *Renton* analysis to political speech . . . . could set the Court on a road that will lead to the evisceration of First Amendment freedoms.[53]

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[51] *Id.* at 320–21.

[52] *Id.* at 334–35 (Brennan, J., concurring in part and concurring in the judgment).

[53] *Id.* at 335–38. One article has noted that "the secondary effects doctrine . . . has had a powerful distorting effect on the traditional content-neutrality analysis that lies at the heart of much of the Court's free speech analysis. These changes to the traditional neutrality test have created precisely the First Amendment problems feared by *Renton*'s early critics." Mark Rienzi & Stuart Buck, *Neutral No More: Secondary Effects Analysis and the Quiet Demise of the Content-Neutrality Test*, 82 FORDHAM L. REV. 1187, 1190 (2013).

2. Ward v. Rock Against Racism

The Court further cemented the primacy of purpose in the content-neutrality test in *Ward*, which heavily impacted subsequent content-neutrality jurisprudence.[54] In *Ward*, the Court upheld rules governing the use of a public bandshell in New York City's Central Park.[55] Performers were required to use sound amplification equipment and a sound technician provided by the city due to concerns raised over sound technician inexperience and volume control at previous events held at the bandshell.[56] The city sound technician's practice was to allow the musicians to maintain autonomy over the sound mix.[57] Organizers of an annual event argued that the rules were content-based because sound volume and mix have some expressive elements to them.[58]

The Court was split 6-to-3 over the proper analysis to determine whether the law was content-neutral, the scope of the narrow-tailoring aspect of the test for content-neutral laws, and whether the law was ultimately constitutional.[59] The majority opinion, authored by Justice Kennedy, stated that

> [t]he 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. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content-neutral so long as it is "*justified* without reference to the content of the regulated speech."[60]

The majority held that the law was content-neutral because its purpose was to prevent excessively high volume levels, which is a goal "unrelated to the content of expression."[61] On the other hand, the Court acknowledged that "[a]ny governmental attempt to serve purely esthetic goals by imposing

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[54] Ward v. Rock Against Racism, 491 U.S. 781 (1989).
[55] *Id.* at 784, 803.
[56] *Id.* at 801.
[57] *Id.* at 788.
[58] *Id.* at 792–93.
[59] *Id.* at 791–803.
[60] *Id.* at 791–92 (citations omitted) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).
[61] *Id.*

subjective standards of acceptable sound mix on performers would raise serious First Amendment concerns."[62]

Justice Marshall dissented, joined by Justices Brennan and Stevens. The emphasis of the dissent's content-neutrality analysis was more in line with that of *O'Brien*: "[t]he Guidelines indisputably are content-neutral, as they apply to all bandshell users irrespective of the message of their music. . . . They also serve government's significant interest in limiting loud noise in public places."[63] The dissent also stated that

> the majority's reliance on *Renton* . . . is unnecessary and unwise. . . . Today, for the first time, a majority of the Court applies *Renton* analysis to a category of speech far afield from that decision's original limited focus. Given the serious threat to free expression posed by *Renton* analysis, . . . I fear that its broad application may encourage widespread official censorship.[64]

The extent to which *Ward* altered the content-neutrality test is a matter of ongoing debate. On the one hand, *Ward* elevated the government's purpose to the "principal inquiry"; this is one of the main reasons why three Justices dissented. It is not difficult, however, to come up with a plausible content-neutral justification for virtually any law. For instance, as one article notes, "A law that bans all civil rights marches would of course protect *some* purposes unrelated to the content of expression, as it would reduce litter and traffic congestion. But the law would still be obviously content based and should be treated as such."[65] Additionally, whereas *O'Brien* implied that the inevitable impact of a regulation could, in some cases, render it content-based, *Ward* seems to minimize the relevance of that inquiry.

On the other hand, three of the Justices who joined the *Ward* majority opinion—Chief Justice Rehnquist and Justices Kennedy and Scalia—joined an opinion three years later in *R.A.V. v. City of St. Paul*[66] that asserted that "the *O'Brien* test differs little from the standard applied to time, place, or manner restrictions."[67] This would be an odd statement to make if *Ward* was intended

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62 *Id.* at 793.

63 *Id.* at 804 (Marshall, J., dissenting).

64 *Id.* at 804 n.1.

65 Rienzi & Buck, *supra* note 53, at 1213, 1234; *see also* McDonald, *supra* note 1, at 1376 ("By importing [*Renton*'s emphasis on purpose] without an explicit secondary effects qualifier, the Court threw the door wide open to content-neutral defenses for selective content restrictions.").

66 505 U.S. 377 (1992).

67 *Id.* at 386 (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 298 (1984)).

to drastically alter the analysis that had been set forth in *O'Brien*, and it would be quite bizarre if the standard applicable to laws that incidentally impact speech was more protective of expression than the standard for laws that directly regulate speech. Moreover, as discussed later, Justices Kennedy and Scalia repeatedly expressed their view in subsequent cases that purpose should not always be the predominant consideration, at least where a law draws content-related distinctions on its face or has the inevitable impact of handicapping one side of a debate.

3. *Content-Neutrality Cases After* Ward

The Court was again sharply divided when it decided *R.A.V.* In *R.A.V.*, the Court unanimously held that an ordinance that prohibited the use of objects or symbols "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" was unconstitutional,[68] but the Court split 5-to-4 on the rationale.

The Court stated that "[a]ssuming, *arguendo*, that all of the expression reached by the ordinance is proscribable under the 'fighting words' doctrine, . . . the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."[69] The majority stated that fighting words "can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content*,"[70] but they cannot "be made the vehicles for content discrimination unrelated to their distinctively proscribable content."[71]

The Court emphasized that the rationale for the content-neutrality principle is that "content discrimination 'raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'"[72] Conversely, a law is likely not content-based where "there is no realistic possibility that official suppression of ideas is afoot."[73] The Court reiterated that "[l]isteners' reactions to speech" and "[t]he emotive impact of speech on its audience" are not "secondary effects" under *Renton*,[74] and the Court also rejected "the revolutionary proposition that the suppression of particular ideas

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68 *Id.* at 380, 396.
69 *Id.* at 381.
70 *Id.* at 383.
71 *Id.* at 383–84.
72 *Id.* at 387 (quoting, *inter alia*, Leathers v. Medlock, 499 U.S. 439, 448 (1991)).
73 *Id.* at 390.
74 *Id.* at 394.

can be [considered to be a content-neutral regulation] when only those ideas have been a source of trouble in the past."[75] Rather, *Renton* referred to a regulation of speech that "happens to be associated with particular 'secondary effects' of the speech, so that the regulation is '*justified* without reference to the content of the . . . speech.'"[76]

Furthermore, the Court held that the law was viewpoint discriminatory, as

> [o]ne could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion." St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules.[77]

Justice White concurred to argue that "[a] prohibition on fighting words is not a time, place, or manner restriction; it is a ban on [an unprotected] class of speech that conveys an overriding message of personal injury and imminent violence."[78] He also suggested that hypothetical laws that draw distinctions between subsets of unprotected speech on an improper basis (such as the speaker's political affiliation) would violate the Equal Protection Clause, not the First Amendment.[79] Justice Stevens also concurred, stating,

> Conduct that creates special risks or causes special harms may be prohibited by special rules. Lighting a fire near an ammunition dump or a gasoline storage tank is especially dangerous; such behavior may be punished more severely than burning trash in a vacant lot. Threatening someone because of her race or religious beliefs may cause particularly severe trauma or touch off a riot, and threatening a high public official may cause substantial social disruption; such threats may be punished more severely than threats against someone based on, say, his support of a particular athletic team. There are legitimate, reasonable, and neutral justifications for such special rules.[80]

R.A.V. highlighted division on the Court over the proper characterization of government attempts to directly regulate speech that the government deems to be especially harmful. The majority viewed the harm targeted by the

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[75] *Id.* at 396 n.8.

[76] *Id.* at 389 (ellipsis in original) (quoting City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)).

[77] *Id.* at 391–92.

[78] *Id.* at 408 (White, J., concurring).

[79] *Id.* at 406–07.

[80] *Id.* at 416 (Stevens, J., concurring).

government as a communicative aspect of the speech, thus making it a content-based law, whereas the concurring Justices viewed the harm as non-communicative in nature.

Turner Broadcasting System, Inc. v. FCC[81] also generated significant division among the Justices. In *Turner Broadcasting*, the Court held that provisions of a federal law that required cable television systems to make some of their channels available for local broadcast stations were content-neutral.[82] The Court discussed the line between content-based and content-neutral laws in detail:

> Government action that stifles speech on account of its message, ... pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion. . . .
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> . . . Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. . . . In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.
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> Deciding whether a particular regulation is content based or content neutral is not always a simple task. . . . [W]hile a content-based purpose may be sufficient in certain circumstances to show that a regulation is content-based, it is not necessary to such a showing in all cases. Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content. . . .
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> As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based. By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral.
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> . . . .

[81] 512 U.S. 622 (1994).
[82] *Id.* at 661–62.

> . . . Our cases have recognized that even a regulation neutral on its face may be content-based if its manifest purpose is to regulate speech because of the message it conveys.[83]

Justice O'Connor wrote a separate opinion, joined by Justices Scalia, Ginsburg, and, in part, Thomas, which argued that the law was content-based:

> Preferences for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make reference to content. They may not reflect hostility to particular points of view, or a desire to suppress certain subjects because they are controversial or offensive. They may be quite benignly motivated. But benign motivation, we have consistently held, is not enough to avoid the need for strict scrutiny of content-based justifications. The First Amendment does more than just bar government from intentionally suppressing speech of which it disapproves. It also generally prohibits the government from excepting certain kinds of speech from regulation because it thinks the speech is especially valuable. . . .
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> It may well be that Congress also had other, content-neutral, purposes in mind when enacting the statute. But we have never held that the presence of a permissible justification lessens the impropriety of relying in part on an impermissible justification. In fact, we have often struck down statutes as being impermissibly content based even though their primary purpose was indubitably content neutral. . . . [W]hen a content-based justification appears on the statute's face, we cannot ignore it because another, content-neutral justification is present.[84]

The Court was once again divided in *Madsen v. Women's Health Center, Inc.*[85] In *Madsen*, the Court considered an injunction that prohibited demonstrating in certain ways and locations outside of an abortion clinic. It included, among other things, a 36-foot buffer zone and a 300-foot ban on approaching any person who had not indicated a desire to communicate.[86] Evidence indicated that the sole factor determining whether unnamed individuals would be deemed to be "acting in concert or participation" with the

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[83] *Id.* at 641–45 (citations omitted).
[84] *Id.* at 677–80 (O'Connor, J., concurring in part and dissenting in part) (citations omitted).
[85] 512 U.S. 753 (1994).
[86] *Id.* at 758–61.

individuals named in the injunction was whether they expressed opposition to abortion.[87]

The Court stated that the government's purpose was the "threshold consideration" and the "principal inquiry" for purposes of determining content-neutrality.[88] The Court concluded that the purpose of addressing violations of a previous court order was neutral, adding that "the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based."[89] The Court also asserted that "targeted picketing of a hospital or clinic threatens not only the psychological, but the physical, wellbeing of the patient held 'captive' by medical circumstance,"[90] and added that "[t]he First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests."[91] The Court ultimately upheld part and invalidated part of the injunction under a new standard that was less rigorous than strict scrutiny.[92]

Justice Scalia concurred in part and dissented in part, stating that

> [t]he danger of content-based statutory restrictions upon speech is that they may be designed and used precisely to suppress the ideas in question, rather than to achieve any other proper governmental aim. But that same danger exists with injunctions. . . . The injunction was sought against a single-issue advocacy group by persons and organizations with a business or social interest in suppressing that group's point of view. . . .
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> . . . [T]he Court errs in thinking that the vice of content-based statutes is that they necessarily have the invidious purpose of suppressing particular ideas. . . . The vice of content-based legislation . . . is not that it is always used for invidious, thought-control purposes, but that it *lends itself* to use for those purposes. . . .

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87 *Id.* at 795–97 (Scalia, J., concurring in part and dissenting in part).

88 *Id.* at 763 (majority opinion).

89 *Id.* at 763–64.

90 *Id.* at 768.

91 *Id.* at 772–73.

92 *Id.* at 763–76. In *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), the Court applied *Madsen* in holding that an injunction that banned demonstrations within fifteen feet of an entrance or driveway of an abortion clinic, or any person or vehicle seeking access to or leaving a clinic, was content-neutral. *Id.* at 374, 384–85. The Court upheld the fixed buffer zone but invalidated the floating buffer zone. *Id.* at 380–81.

> . . . [T]he injunction in the present case was content-based (indeed, viewpoint-based) to boot. . . . All those who wish to express the same views as the named defendants are deemed to be "acting in concert or participation" [with them and are thereby restricted by the injunction]. . . .
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> . . . The pro-abortion demonstrators who were often making . . . *more* noise than the petitioners, can continue to shout their chants at their opponents exiled across the street to their hearts' content.[93]

In *Hill v. Colorado*,[94] the Court revisited these issues again and was deeply divided. The Court upheld a law that made it unlawful for a person to "'knowingly approach' within eight feet of another person," within 100 feet of the entrance to a health care facility, "without that person's consent, 'for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person.'"[95] The impetus for the law was the activities of abortion opponents outside of abortion clinics, although the law could potentially be applied to other speakers and subjects.[96]

The Court held that the law was a regulation of the location and manner of expression, not subject matter or viewpoint.[97] The Court concluded that the law's purpose was to protect, at one particular type of location, "'the right to be free' from persistent 'importunity, following and dogging' after an offer to communicate has been declined,"[98] and to "protect those who seek medical treatment from the potential physical and emotional harm suffered when an unwelcome individual delivers a message . . . by physically approaching an individual at close range."[99]

The Court asserted that the fact that statements may need to be examined to determine whether they constitute "oral protest, education, or counseling" did not render the law content-based.[100] Justice Souter concurred to state that "[t]here is always a correlation with subject and viewpoint when the law regulates conduct that has become the signature of one side of a controversy.

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93 512 U.S. at 792–95, 810 (Scalia, J., concurring in part and dissenting in part).
94 530 U.S. 703 (2000).
95 *Id.* at 707, 735.
96 *Id.* at 709–10, 724–25.
97 *Id.* at 719–25.
98 *Id.* at 718.
99 *Id.* at 718 n.25.
100 *Id.* at 720–23.

But that does not mean that every regulation of such distinctive behavior is content based."[101]

Justice Scalia dissented to explain his view that the law was content-based:

> Whether a speaker must obtain permission before approaching within eight feet . . . depends entirely on *what he intends to say* when he gets there. I have no doubt that this regulation would be deemed content-based *in an instant* if the case before us involved antiwar protesters, or union members seeking to "educate" the public about the reasons for their strike. . . .
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> . . . There comes a point . . . at which the regulation of action intimately and unavoidably connected with traditional speech is a regulation of speech itself. The strictures of the First Amendment cannot be avoided by regulating the act of moving one's lips; and they cannot be avoided by regulating the act of extending one's arm to deliver a handbill, or peacefully approaching in order to speak. . . .
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> . . . The Court makes too much of the [principal inquiry] statement in *Ward* . . . That is indeed "the *principal* inquiry"—suppression of uncongenial ideas is the worst offense against the First Amendment—but it is not the only inquiry. Even a law that has as its purpose something unrelated to the suppression of particular content cannot irrationally single out that content for its prohibition. . . .
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> In sum, it blinks reality to regard this statute . . . as anything other than a content-based restriction upon speech in the public forum.[102]

Justice Kennedy—the author of the *Ward* decision—also dissented. He stated,

> The law imposes content-based restrictions on speech by reason of the terms it uses, the categories it employs, and the conditions for its enforcement. It is content based, too, by its predictable and intended operation. Whether particular messages violate the statute is determined by their substance. . . .
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[101] *Id.* at 737 (Souter, J., concurring).
[102] *Id.* at 742, 745–46, 748 (Scalia, J., dissenting).

> . . . [A] statute of broad application is not content neutral if its terms control the substance of a speaker's message. If oral protest, education, or counseling on every subject within an 8-foot zone present a danger to the public, the statute should apply to every building entrance in the State. . . . We would close our eyes to reality were we to deny that "oral protest, education, or counseling" outside the entrances to medical facilities concern a narrow range of topics—indeed, one topic in particular. By confining the law's application to the specific locations where the prohibited discourse occurs, the State has made a content-based determination.[103]

Justice Kennedy also explained his view that the law was viewpoint discriminatory:

> Viewpoint-based rules are invidious speech restrictions, yet the Court approves this one. The purpose and design of the statute—as everyone ought to know and as its own defenders urge in attempted justification—are to restrict speakers on one side of the debate: those who protest abortions. . . . The legislature's purpose to restrict unpopular speech should be beyond dispute.
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> The statute's operation reflects its objective.[104]

The Court was once again sharply divided concerning the scope and applicability of the content-neutrality test in *McCullen v. Coakley*.[105] In *McCullen*, the Court considered a free speech challenge to a law that made it illegal to knowingly stand on a sidewalk or other public way within thirty-five feet of an entrance or driveway to an abortion clinic.[106] Several classes of individuals were exempted from the law, including clinic employees or agents acting within the scope of their employment.[107]

While the Court unanimously held that the law violated the First Amendment, the Justices were split 5-to-4 on the issue of whether the law was content-neutral. The majority opinion, written by Chief Justice Roberts, concluded that the law was content-neutral, but it was not sufficiently narrowly tailored.[108] The Court concluded that the law drew no content-based

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103 *Id.* at 766–67 (Kennedy, J., dissenting).

104 *Id.* at 768–69; *see also* McDonald, *supra* note 1, at 1407–08 (calling *Hill* "the poster child . . . for a deeply flawed free speech doctrine"); Rohr, *supra* note 43, at 348 ("*Hill* was wrongly decided . . . [and] has left the law of content discrimination in an unclear and unpredictable state.").

105 134 S. Ct. 2518 (2014).

106 *Id.* at 2525.

107 *Id.* at 2526.

108 *Id.* at 2529–41.

distinctions on its face, nor did it require government authorities to examine the content of expression to determine if a violation had occurred.[109] Moreover, the purposes served by the law—such as relieving congestion and promoting safety—were unrelated to any discriminatory motive.[110]

The Court emphasized that "the Act would not be content neutral if it were concerned with undesirable effects that arise from 'the direct impact of speech on its audience' or '[l]isteners' reactions to speech.'"[111] The Court also concluded that there was a lack of evidence showing that, in practice, the employee exemption was utilized to allow clinic escorts to discuss abortion inside the regulated areas; otherwise, the exemption "would then facilitate speech on only one side of the abortion debate—a clear form of viewpoint discrimination that would support an as-applied challenge to the buffer zone at that clinic."[112]

Justice Scalia wrote a concurring opinion that argued that the law was content- and viewpoint-discriminatory. The existence of various other means to protect the government's interests, coupled with the fact that the law only applied at abortion clinics, was problematic: "It blinks reality to say, as the majority does, that a blanket prohibition on the use of streets and sidewalks where speech on only one politically controversial topic is likely to occur—and where that speech can most effectively be communicated—is not content based."[113] Moreover, concerning the exemption for clinic employees and agents, Justice Scalia stated that "a statute that forbids one side but not the other to convey its message does not become viewpoint neutral simply because the favored side chooses voluntarily to abstain from activity that the statute permits."[114] Justice Alito also wrote a concurring opinion, stating that "[s]peech in favor of the clinic and its work by employees and agents is permitted; speech criticizing the clinic and its work is a crime. This is blatant viewpoint discrimination."[115]

McCullen's holding that the law at issue was content-neutral is incorrect and highlights the need for broader protection of the freedom of speech. As

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109 *Id.* at 2531–34.
110 *Id.* at 2531.
111 *Id.* at 2531–32 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)).
112 *Id.* at 2532–34.
113 *Id.* at 2543 (Scalia, J., concurring in the judgment).
114 *Id.* at 2547.
115 *Id.* at 2549 (Alito, J., concurring in the judgment).

one article that was generally supportive of laws like the one at issue in *McCullen* acknowledged,

> Justice Scalia's incredulity in the face of the majority's finding that the Act was content neutral reflects a commonsense intuition: when a law disproportionately—or indeed exclusively—burdens speech on a single topic, that law is in an important sense "based" on that topic. Abortion clinic buffer zones place specific and targeted burdens on antiabortion speech like that of Eleanor McCullen and her coplaintiffs. Such laws should be subject to the highest scrutiny. . . .
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> . . . [A]s Justice Scalia recognized, laws that carry such disproportionate burdens because they are limited to a specific location carry a high risk of concealing improper motives. . . . [E]ven Justice Kagan—a member of the *McCullen* majority—previously argued that "a facially general law that operates to restrict only speech of a particular kind ought to confront the strictest review." Laws like the Act that limit speech at specific, politically salient locations are particularly likely to impose this sort of disparate burden. When a facially neutral restriction foreseeably places a substantial burden on speech concerning a single topic, the Court should acknowledge that this restriction is content based and subject it to strict scrutiny.[116]

The Court rejected a common misinterpretation of *Ward* in *Reed v. Town of Gilbert*,[117] although the Court was split on the broader question of whether strict scrutiny *ought* to be applied where a law is facially content-based for purportedly benign reasons. In *Reed*, a town's comprehensive code governing outdoor signs created various classifications of signs based on the information that they conveyed, and treated signs in different classifications differently.[118] For instance, signs considered to be "Ideological" or "Political" signs were treated more favorably in terms of their permissible size and duration than "Temporary Directional Signs Relating to a Qualifying Event."[119] The latter category encompassed temporary signs posted each weekend by a church whose Sunday services were held at various locations, and the church received multiple citations for failing to comply with the outdoor sign code.[120]

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116 *The Supreme Court, 2013 Term—Leading Case*—McCullen v. Coakley, 128 HARV. L. REV. 221, 225, 227–28 (2014) (footnotes omitted).

117 135 S. Ct. 2218 (2015).

118 *Id.* at 2224.

119 *Id.* at 2224–25.

120 *Id.* at 2225.

After the church brought suit, the Ninth Circuit held that the sign code was content-neutral because the town did not adopt it due to disagreement with any particular message, and the code served interests unrelated to the content of speech, and the Court ultimately held that the code was constitutional.[121] The Supreme Court reversed, holding that the law was content-based and could not withstand strict scrutiny.[122]

Six Justices joined the majority opinion, which stated that there are two general categories of content-based laws: (1) "a regulation of speech [that] 'on its face' draws distinctions based on the message a speaker conveys" (*i.e.*, "a law [that] applies to particular speech because of the topic discussed or the idea or message expressed");[123] and (2) "laws that cannot be 'justified without reference to the content of the regulated speech,' or that were adopted by the government 'because of disagreement with the message [the speech] conveys.'"[124]

The Court explained that the Ninth Circuit erred by treating the government's purpose as the controlling consideration, thereby improperly skipping the first step in the analysis: determining whether the law was content-based on its face.[125] As the Court noted, "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech," and "an innocuous justification cannot transform a facially content-based law into one that is content neutral."[126]

The Court stated that because "[t]he restrictions in the Sign Code that apply to any given sign . . . depend entirely on the communicative content of the sign. . . . [w]e thus have no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny."[127] The Court distinguished *Ward* by noting that the case involved a

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121 *Id.* at 2226 (citing Reed v. Town of Gilbert, 707 F.3d 1057, 1071–76 (9th Cir. 2013)).

122 *Id.* at 2224.

123 *Id.* at 2227.

124 *Id.* (alteration in original) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

125 *Id.* at 2228.

126 *Id.* (quoting City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)).

127 *Id.* at 2227. In *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), the Court held that a ban on the posting of on-site "For Sale" signs—enacted in an effort to minimize the perceived flight of white homeowners from an integrated community—was an unconstitutional restriction of commercial speech. *Id.* at 97–98. While the township argued that the law should be viewed as a regulation of the location (front lawns) or manner (signs) of speech, the Court concluded that the township "proscribed particular types

facially content-neutral regulation, in which case analysis of the government's purpose becomes the key consideration, but *Ward* does not stand for the proposition that facially content-based laws are actually content-neutral where the government's purpose is benign.[128] The Court added,

> Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech. That is why the First Amendment expressly targets the operation of the laws—*i.e.*, the "abridg[ement] of speech"—rather than merely the motives of those who enacted them. "The vice of content-based legislation . . . is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes."[129]

Furthermore, the Court held that the Ninth Circuit erred by concluding that the sign code was content-neutral because it was viewpoint-neutral.[130] As the Court explained,

> This analysis conflates two distinct but related limitations that the First Amendment places on government regulation of speech. Government discrimination among viewpoints—or the regulation of speech based on "the specific motivating ideology or the opinion or perspective of the speaker"—is a "more blatant" and "egregious form of content discrimination." But it is well established that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." . . .
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> Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.[131]

Justice Alito wrote a concurring opinion that was joined by Justices Kennedy and Sotomayor, all of whom had also joined the majority opinion. The opinion stated that content-based laws "present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on

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of signs based on their content because it fears their 'primary' effect—that they will cause those receiving the information to act upon it." *Id.* at 93–94.

128 *Reed*, 135 S. Ct. at 2228–29.

129 *Id.* at 2229 (citation omitted) (quoting Hill v. Colorado, 530 U.S. 703, 743 (2000) (Scalia, J., dissenting)).

130 *Id.* at 2229–30.

131 *Id.* (citations omitted). The Court also rejected the notion that a law that draws distinctions based on who is speaking, or whether an event is occurring, is necessarily content-neutral. *Id.* at 2230–31.

viewpoint. Limiting speech based on its 'topic' or 'subject' favors those who do not want to disturb the status quo. Such regulations may interfere with democratic self-government and the search for truth."[132]

Justice Kagan wrote a concurring opinion, joined by Justices Ginsburg and Breyer, expressing alarm over the possibility that countless seemingly benign sign regulations throughout the country will be invalidated under the majority's reasoning: "[W]e may do well to relax our guard so that 'entirely reasonable' laws imperiled by strict scrutiny can survive. . . . We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function."[133]

Justice Kagan argued that applying strict scrutiny is warranted when, unlike in the case at hand, "there is any 'realistic possibility that official suppression of ideas is afoot,'" or when the government might effectively skew the marketplace of ideas by hampering the expression of certain viewpoints.[134] In Justice Kagan's view, the law at issue would not "pass strict scrutiny, or intermediate scrutiny, or even the laugh test,"[135] so the Court did not need to reach the issue of whether strict scrutiny was warranted.[136]

Justice Breyer also wrote a concurring opinion in which he argued that "the category 'content discrimination' is better considered in many contexts, including here, as a rule of thumb, rather than as an automatic 'strict scrutiny' trigger, leading to almost certain legal condemnation."[137] Justice Breyer explained,

> I would use content discrimination as a supplement to a more basic analysis, which, tracking most of our First Amendment cases, asks whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives. Answering this question requires examining the seriousness of the harm to speech, the importance of the countervailing objectives, the extent to which the law will achieve

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132 *Id.* at 2233 (Alito, J., concurring).

133 *Id.* at 2238 (Kagan, J., concurring in the judgment).

134 *Id.* at 2237–38 (quoting Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 189 (2007)).

135 *Id.* at 2239.

136 *Id.* Justice Kagan relied upon *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), in which the Court invalidated a sign regulation without determining the applicable level of scrutiny because the law would have been unconstitutional under any First Amendment standard. *Id.* at 53.

137 *Reed*, 135 S. Ct. at 2234 (Breyer, J., concurring in the judgment).

> those objectives, and whether there are other, less restrictive ways of doing so.[138]

The various majority and separate opinions in the foregoing cases provide some points of clarity concerning the determination of whether a law is content- or viewpoint-based, but they also provide plenty of conflicting views on key issues. Part II of this Article suggests how this area of law can be clarified in a way that is appropriately protective of free speech and also provides government actors with clarity when they consider possible regulatory options.

B. A Review of Other Content- and Viewpoint-Neutrality Cases of Note

There are countless other Supreme Court cases addressing content- and viewpoint-neutrality over the past several decades, but several of them are worth discussing further because they either illustrate particular points of agreement among most of the Justices or they are representative of key points of disagreement that affect important doctrinal issues.

Regan v. Time, Inc.[139] stands for the proposition that laws that provide exemptions based on the content of expression are content-based even if they are enacted for benign reasons. In *Regan*, the Court considered a federal statutory provision that generally prohibited the photographic reproduction of currency but made an exception for reproductions for "philatelic, numismatic, educational, historical, or newsworthy purposes."[140] The Court stated,

> A determination concerning the newsworthiness or educational value of a photograph cannot help but be based on the content of the photograph and the message it delivers. Under the statute, one photographic reproduction will be allowed and another disallowed solely because the Government determines that the message being conveyed in the one is newsworthy or educational while the message imparted by the other is not. The permissibility of the photograph is therefore often "dependent solely on the nature of the message being conveyed." Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.[141]

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138 *Id.* at 2235–36.

139 468 U.S. 641 (1984).

140 *Id.* at 644–46.

141 *Id.* at 648–49 (citation omitted) (quoting Carey v. Brown 447 U.S. 455, 461 (1980)). The Court was divided on other aspects of the case.

The Court's decision in *United States v. Eichman*[142] is in accord with *Regan*, although four Justices dissented to express an opposing view. In *Eichman*, the Court held that a federal law making it a crime to knowingly mutilate, deface, physically defile, burn, or trample upon an American flag was content-based and unconstitutional.[143] The Court explained,

> Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted *interest* is "related 'to the suppression of free expression,'" and concerned with the content of such expression. . . . [T]he Government's desire to preserve the flag as a symbol for certain national ideals is implicated "only when a person's treatment of the flag communicates [a] message" to others that is inconsistent with those ideals. . . .
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> . . . [The law] suppresses expression out of concern for its likely communicative impact. . . . [I]ts restriction on expression cannot be "justified without reference to the content of the regulated speech."[144]

Justice Stevens, joined by Chief Justice Rehnquist and Justices White and O'Connor, dissented to argue that the law was reasonable and content-neutral.[145] They argued that, since people who destroy or deface American flags have a diverse array of reasons for doing so, the government's interest in preserving the symbolic value of the flag was not related to the suppression of any particular message.[146] In other words, they argued that the category of viewpoints that individuals may desire to express through the destruction of the American flag is so diverse that it is not accurate to describe a ban on such conduct as content- or viewpoint-based.

The Court provided further elaboration on content-neutrality principles in a pair of cases reviewing state tax provisions. In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,[147] the Court held that a state tax that was imposed on the cost of paper and ink products consumed in the

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142 496 U.S. 310 (1990).

143 *Id.* at 319. The law was enacted in response to *Texas v. Johnson*, 491 U.S. 397 (1989), in which the Court held that a conviction for burning the American flag under a Texas law prohibiting the desecration of venerated objects was unconstitutional. *Id.* at 314.

144 *Id.* at 315–18 (citations omitted) (quoting Boos v. Barry, 485 U.S. 312, 320 (1988)).

145 *Id.* at 319–22 (Stevens, J., dissenting).

146 *Id.* at 320–22.

147 460 U.S. 575 (1983).

production of a publication was unconstitutional.[148] The first $100,000 worth of ink and paper used by a publication in a year was exempt, which resulted in roughly two-thirds of the revenue from the tax coming from one large newspaper company.[149] The Court held that the tax provision was "facially discriminatory" by singling out the press,[150] which "suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional."[151] The Court further stated,

> [The tax] violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers. . . . [O]nly a handful of publishers pay any tax at all, and even fewer pay any significant amount of tax. . . . Whatever the motive of the legislature in this case, we think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme. . . .
>
> We need not and do not impugn the motives of the Minnesota Legislature in passing the ink and paper tax. Illicit legislative intent is not the sine qua non of a violation of the First Amendment. . . . A tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action.[152]

Justice Rehnquist dissented, stating, "The 'differential treatment' standard that the Court has conjured up is unprecedented and unwarranted. To my knowledge this Court has never subjected governmental action to the most stringent constitutional review solely on the basis of 'differential treatment' of particular groups."[153]

Similarly, in *Arkansas Writers' Project, Inc. v. Ragland*,[154] the Court held that a state sales tax scheme under which general interest magazines were taxed but newspapers and religious, professional, trade, and sports journals

148 *Id.* at 575, 593.
149 *Id.* at 578–79.
150 *Id.* at 581–82.
151 *Id.* at 585.
152 *Id.* at 591–93.
153 *Id.* at 598 (Rehnquist, J., dissenting).
154 481 U.S. 221 (1987).

were exempt, violated the First Amendment.[155] The Court held that the tax at issue was content-based, explaining,

> [T]he Arkansas sales tax cannot be characterized as nondiscriminatory, because it is not evenly applied to all magazines. To the contrary, the magazine exemption means that only a few Arkansas magazines pay any sales tax . . . .
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> . . . [T]he basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its *content*. . . .
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> . . . In order to determine whether a magazine is subject to sales tax, Arkansas' "enforcement authorities must necessarily examine the content of the message that is conveyed . . . ." Such official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press.[156]

Justice Scalia, joined by Chief Justice Rehnquist, dissented on the grounds that "tax exemptions, credits, and deductions are 'a form of subsidy that is administered through the tax system,' and . . . 'a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny.'"[157]

Additionally, in *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*,[158] the Court held that a law requiring that any income generated by an accused or convicted criminal's works describing his crimes be held in an escrow account to be made available to his victims and creditors was content-based and did not survive strict scrutiny because it was overbroad.[159] The law was content-based because "[i]t single[d] out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content."[160]

The Court rejected the argument that the law should be viewed as content-neutral since the government did not intend to suppress certain

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155 *Id.* at 233.

156 *Id.* at 229–30 (citation omitted) (quoting FCC v. League of Women Voters of Cal., 468 U.S. 364, 383 (1984)).

157 *Id.* at 236 (Scalia, J., dissenting) (quoting Regan v. Taxation with Representation, 461 U.S. 540, 544, 549 (1983)).

158 502 U.S. 105 (1991).

159 *Id.* at 116, 123.

160 *Id.* at 116.

viewpoints, repeating its statement from *Minneapolis Star* that "'illicit legislative intent is not the sine qua non of a violation of the First Amendment.'"[161] The Court also emphasized that "'[t]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.'"[162]

Justice Kennedy concurred to argue that content-based laws should be categorically unconstitutional, without any need to apply strict scrutiny.[163] He stated,

> Here, a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent. No further inquiry is necessary to reject the State's argument that the statute should be upheld.
>
> Borrowing the compelling interest and narrow tailoring analysis is ill advised when all that is at issue is a content-based restriction, for resort to the test might be read as a concession that States may censor speech whenever they believe there is a compelling justification for doing so. Our precedents and traditions allow no such inference. . . .
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> . . . .
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> . . . When we leave open the possibility that various sorts of content regulations are appropriate, we discount the value of our precedents and invite experiments that in fact present clear violations of the First Amendment, as is true in the case before us.[164]

In addition, in *Burson v. Freeman*,[165] the Court was in agreement that the law at issue was content-based, but was fractured on the proper test to be applied and also the outcome. A four-Justice plurality held that a law prohibiting the display or distribution of campaign materials, or the solicitation

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[161] *Id.* at 117 (quoting Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 592 (1983)).

[162] *Id.* at 118 (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988)).

[163] *Id.* at 124 (Kennedy, J., concurring).

[164] *Id.* at 124–27.

[165] 504 U.S. 191 (1992).

of votes, within 100 feet of the entrance of a polling place was content-based but survived strict scrutiny.[166] The plurality opinion stated that

> [t]he Tennessee restriction under consideration . . . is not a facially content-neutral time, place, or manner restriction. Whether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign. The statute does not reach other categories of speech, such as commercial solicitation, distribution, and display.[167]

Justice Kennedy concurred to take issue with the idea that "a State may restrict speech based on its content in the pursuit of a compelling interest," as he believed that "neither a general content-based proscription of speech nor a content-based proscription of speech in a public forum can be justified unless the speech falls within one of a limited set of well-defined categories."[168] He believed the law at issue was constitutional because "there is a narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right," and the law was enacted "to protect the integrity of the polling place where citizens exercise the right to vote."[169]

Justice Scalia concurred to state that, in light of the historical prevalence of polling place restrictions of this nature, the law should be viewed as a reasonable, viewpoint-neutral regulation of a non-public forum.[170] Three Justices dissented to argue that the law could not survive strict scrutiny.[171]

Furthermore, in *City of Cincinnati v. Discovery Network, Inc.*,[172] the Court held that a ban on the distribution of commercial publications through newsracks located on public property was unconstitutional.[173] The government argued that the ban was content-neutral because it was enacted for legitimate reasons unrelated to any desire to censor particular viewpoints.[174] The Court stated:

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166 *Id.* at 211.
167 *Id.* at 197.
168 *Id.* at 211–12 (Kennedy, J., concurring).
169 *Id.* at 213–14.
170 *Id.* at 214–16 (Scalia, J., concurring in the judgment).
171 *Id.* at 217 (Stevens, J., dissenting).
172 507 U.S. 410 (1993).
173 *Id.* at 412.
174 *Id.* at 428–29.

> The argument is unpersuasive because the very basis for the regulation is the difference in content between ordinary newspapers and commercial speech. True, there is no evidence that the city has acted with animus toward the ideas contained within respondents' publications, but . . . . [r]egardless of the *mens rea* of the city, it has enacted a sweeping ban on the use of newsracks that distribute "commercial handbills," but not "newspapers." Under the city's newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack. Thus, by any commonsense understanding of the term, the ban in this case is "content based."[175]

The Court reached further consensus in *Lamb's Chapel v. Center Moriches Union Free School District*.[176] In *Lamb's Chapel*, the Court unanimously held that a public school policy that allowed school property to be used by private groups for social, civic, or recreational purposes, while forbidding use for religious purposes, was viewpoint-discriminatory and unconstitutional.[177] The Court framed the issue as whether the school district engaged in viewpoint discrimination by "permit[ting] school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint."[178] The Court held that the fact that all religious viewpoints were treated the same (by being excluded) did not make the rule viewpoint-neutral, as the school treated non-religious viewpoints more favorably than religious viewpoints.[179]

Additionally, in *Sorrell v. IMS Health Inc.*,[180] the Court held that a Vermont law restricting the sale and use of pharmacy records in order to limit certain marketing practices was content-based and unconstitutional.[181] The Court stated,

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175 *Id.* at 429. The Court added that "there are no secondary effects attributable to respondent publishers' newsracks that distinguish them from the newsracks Cincinnati permits to remain on its sidewalks." *Id.* at 430.

176 508 U.S. 384 (1993).

177 *Id.* at 392–97.

178 *Id.* at 393.

179 *Id.* at 393–94; *cf.* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination." (citation omitted)). In some respects, *Lamb's Chapel* is analogous to *Mosley*; both cases involved provisions that, on their face, expressly treated speakers differently on the basis of content or viewpoint, and in both cases the Court's treatment of such laws as highly suspect was unanimous.

180 131 S. Ct. 2653 (2011).

181 *Id.* at 2659.

> On its face, Vermont's law enacts content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information. . . . The law on its face burdens disfavored speech by disfavored speakers. . . .
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> . . . .
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> . . . Just as the "inevitable effect of a statute on its face may render it unconstitutional," a statute's stated purposes may also be considered. . . . The legislature designed [the law] to target those speakers and their messages for disfavored treatment. . . .
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> . . . .
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> . . . A government bent on frustrating an impending demonstration might pass a law demanding two years' notice before the issuance of parade permits. Even if the hypothetical measure on its face appeared neutral as to content and speaker, its purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional.[182]

Justice Breyer's dissent, joined by Justices Ginsburg and Kagan, argued that strict scrutiny was improper because the impact on expression was "inextricably related to a lawful governmental effort to regulate a commercial enterprise," and "[r]egulatory programs necessarily draw distinctions on the basis of content."[183]

In sum, the Court's content- and viewpoint-neutrality jurisprudence continues to perplex judges and litigators alike who try to reconcile conflicting rationales and holdings spanning the past several decades. The following Part offers a suggestion as to how the Court can clarify the applicable standards and, in the process, restore a more robust protection for free expression.

II. A MORE SPEECH-PROTECTIVE CONTENT-NEUTRALITY TEST IS NEEDED

The fractured nature of the Court's jurisprudence in this area is due, in part, to sharply different views of the proper scope of the Free Speech Clause held by distinct groups of Justices. For example, Justices Scalia, Kennedy, and Thomas have generally expressed a more robust speech-protective view of the First Amendment. For example, their vote to strike down the law in *R.A.V.* was premised on the view that the government cannot regulate a subset of speech,

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182 *Id.* at 2663–64 (citation omitted).
183 *Id.* at 2673, 2677 (Breyer, J., dissenting).

whether "unprotected" or otherwise, "solely on the basis of the subjects the speech addresses."[184] They also dissented or concurred in *Madsen*, *Hill*, and *McCullen* to critique the majority opinions for misreading *Ward* and for failing to provide sufficiently broad protection for free speech. In many respects, this group has raised concerns similar to those previously expressed by Justices Marshall and Brennan, who believed that some of the Court's decisions failed to give sufficient protection to the exercise of the freedom of speech.

Conversely, Justices Stevens, O'Connor, Ginsburg, Breyer, and Kagan have often voiced an opposing view in favor of standards that are less favorable to speakers in various cases. Those who were on the Court at the time concurred in *R.A.V.* (joined by Justice White) to critique the majority opinion as too speaker-friendly, and they joined the majority decisions in *Madsen*, *Hill*, and *McCullen*, which set forth narrower conceptions of free speech than the view of Justices Scalia, Kennedy, and Thomas. In both *Sorrell* and *Reed*, Justices Ginsburg, Breyer, and Kagan argued against the applicability of strict scrutiny when six other Justices held that it was appropriate.

The view of the Free Speech Clause espoused by Justices Scalia, Kennedy, and Thomas in the content- and viewpoint-neutrality cases, reflective in many aspects of the previously expressed views of Justices Marshall and Brennan, should be expressly adopted by the Court, as it is more consistent with the Court's broader jurisprudence concerning fundamental rights and also averts the tangible dangers to free expression caused by the position that legislative purpose is the controlling consideration. The Court's predominant focus on facial discrimination and government motive, to the exclusion of other important factors, leaves government actors with far too free a hand to hamper the effectiveness of speakers while evading strict scrutiny.

There are five (somewhat overlapping) kinds of situations in which the Court should treat a law as being content-based, viewpoint-based, or both, and therefore subject to strict scrutiny:

1. The government's actual purpose is to suppress speech based on its content or viewpoint, or to impose subjective editorial control over content or viewpoint.

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[184] R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992).

It is an uncontroversial, bedrock principle of First Amendment jurisprudence that the government cannot intentionally target speakers due to disagreement with the content or viewpoint of their expression.[185]

2. The government interest that the law is intended to further relates to an aspect of the direct or emotive communicative impact of regulated expression, rather than the manner of its delivery.

There is broad support for the principle that this category of laws should be treated as content- or viewpoint-based—see *O'Brien*, *Boos*, *R.A.V.*, *Eichman*, Justice O'Connor's separate opinion in *Turner Broadcasting*, Justice Scalia's dissent in *Hill*, and *McCullen*[186]—but there is often disagreement over whether a particular government interest does, in fact, target communicative impact as opposed to the manner of delivery. What happens when a speaker's manner of delivery is intended to, and actually does, make up a significant component of the communicative impact that the speaker seeks to achieve? In many cases, laws that truly target communicative impact will fall into one or more of the other suspect categories mentioned herein, whereas laws that truly target the manner of delivery will not.

3. The law, on its face, treats speakers differently due to the content or viewpoint of their message, or excludes from its coverage speech or conduct relating to different subject matter or viewpoints that pose similar threats to the government's asserted interests.

Although there has traditionally been strong support for the principle that facially discriminatory laws should be subject to strict scrutiny—see *Mosley*, *Regan*, *Minneapolis Star*, *Arkansas Writers' Project*, Justice Brennan's dissent in *Renton*, *Simon & Schuster*, *Discovery Network*, the plurality opinion in *Burson*, the majority and Justice O'Connor opinions in *Turner Broadcasting*, *Lamb's Chapel*, Justice Scalia's concurrence in *Madsen*, Justices Scalia and Kennedy's dissents in *Hill*, *Sorrell*, Justices Scalia and Alito's concurrences in *McCullen*, and *Reed*[187]—the Court has not always categorized laws that

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185 *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015); McCullen v. Coakley, 134 S. Ct. 2518 (2014); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994); Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994); United States v. Eichman, 496 U.S. 310 (1990); Ward v. Rock Against Racism, 491 U.S. 781 (1989); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); United States v. O'Brien, 391 U.S. 367 (1968).

186 *McCullen*, 134 S. Ct. 2518; Hill v. Colorado, 530 U.S. 703 (2000); *Turner Broad. Sys.*, 512 U.S. 622; R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); *Eichman*, 496 U.S. 310; Boos v. Barry, 485 U.S. 312 (1988); *O'Brien*, 391 U.S. 367.

187 *Reed*, 135 S. Ct. 2218; *McCullen*, 134 S. Ct. 2518; *Sorrell*, 131 S. Ct. 2653; *Hill*, 530 U.S. 703; *Madsen*, 512 U.S. 753; *Turner Broad. Sys.*, 512 U.S. 622; Lamb's Chapel v. Center Moriches Union Free

actually differentiate among speakers based on the content of their message as content-based. Additionally, separate opinions in *Sorrell* and *Reed* implied that not all laws that differentiate among speakers based on content should necessarily be subject to strict scrutiny.[188]

The Court should continue to subject laws of this nature to strict scrutiny; it should be an exceedingly rare case in which the government is allowed to treat speakers differently due to the content or viewpoint of their expression. Additionally, laws that burden certain types of speakers while leaving other types of speakers who impact the government's asserted interests in a similar manner untouched would rarely survive review regardless of what standard is applied, so categorically subjecting them to strict scrutiny would bring doctrinal clarity without causing widespread change in practice.

4. The actual or inevitable effect of the law is to prevent speakers espousing certain messages from effectively reaching their intended audience, such as by targeting a particular location or manner of expression that is closely tied to one subject matter or viewpoint.

Support for treating this category of laws as content- or viewpoint-based can be found in the majority and Harlan concurring opinions in *O'Brien*, the Marshall dissent in *Clark*, *Minneapolis Star*, *Arkansas Writers' Project*, the Brennan dissent in *Renton*, *R.A.V.*, *Eichman*, the Brennan concurrence in *Boos*, the Scalia concurrence in *Madsen*, the Scalia and Kennedy dissents in *Hill*, *Sorrell*, and the Scalia and Alito concurrences in *McCullen*.[189] As discussed previously, several of these opinions explain, in detail, why laws that disproportionately and significantly burden one discrete group of speakers are highly suspect and should be treated as such.

A law's actual impact usually reflects, or at least strongly relates to, the government's intended purposes; as Justice Kennedy noted in *Hill*, "The

School Dist., 508 U.S. 384 (1993); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993); Burson v. Freeman, 504 U.S. 191 (1992); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105 (1991); Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987); *City of Renton*, 475 U.S. 41; Regan v. Time, Inc., 468 U.S. 641 (1984); Minneapolis Star & Tribune Co. v. Minn. Comm'r of Rev., 460 U.S. 575 (1983); Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972).

188 *Reed*, 135 S. Ct. 2218; *Sorrell*, 131 S. Ct. 2653.

189 *McCullen*, 134 S. Ct. 2518; *Sorrell*, 131 S. Ct. 2653; *Hill*, 530 U.S. 703; *Madsen*, 512 U.S. 753; *R.A.V.*, 505 U.S. 377; *Eichman*, 496 U.S. 310; *Boos*, 485 U.S. 312; *Ark. Writers' Project, Inc.*, 481 U.S. 221; *City of Renton*, 475 U.S. 41; *Clark*, 468 U.S. 288; *Minneapolis Star & Tribune Co.*, 460 U.S. 575; *O'Brien*, 391 U.S. 367.

statute's operation reflects its objective."[190] In addition, it would be anomalous and indefensible if it were the case that the primary effect of government action may render it unconstitutional under the Establishment Clause despite a legitimate government purpose,[191] but may *not* subject it to strict scrutiny under the Free Speech Clause no matter how devastating the impact is upon those seeking to discuss one particular subject matter or espouse one particular viewpoint.

5. The law lends itself to use for content- or viewpoint-discriminatory purposes, or there is a realistic possibility that official suppression is afoot.

Support for treating this category of laws as content- or viewpoint-based can be found in the Brennan dissent in *Taxpayers for Vincent*, *R.A.V.*, the Scalia concurrence in *Madsen*, the Scalia and Alito concurrences in *McCullen*, and *Reed*.[192] Laws that lend themselves to use for content- or viewpoint-discriminatory purposes pose the same type of threat to the exercise of free speech as laws that give government officials unfettered or unduly broad discretion; both are suspect not because they will *always* be used for nefarious purposes, but rather that they *can* easily be so used.

CONCLUSION

It is difficult to justify excluding any of the five categories of laws identified herein from strict scrutiny review, and subjecting them to strict scrutiny would bring a broader degree of consistency to the Court's jurisprudence. For each of these categories, numerous majority or separate opinions outline the dangers posed by laws of this nature, making them inherently suspect. Conversely, the more narrow view of the Free Speech Clause set forth in various opinions gives insufficient protection for the freedom of speech. The Court should expressly refine the content-neutrality test to include all of the above-discussed categories of laws.

The proposed test for determining whether a law is content- or viewpoint-based set forth in this Article would help to ensure that freedom of speech receives the robust protection that it deserves. It would minimize the need of courts and litigators alike to attempt to divine the government's actual

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190 *Hill*, 530 U.S. at 768–69 (Kennedy, J., dissenting).

191 Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

192 *Reed*, 135 S. Ct. 2218; *McCullen*, 134 S. Ct. 2518; *Madsen*, 512 U.S. 753; *R.A.V.*, 505 U.S. 377; Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984).

motives behind a speech regulation. This approach would also encourage the government to pursue available regulatory measures that steer clear of burdening expression whenever possible.