2017

Reed v. Town of Gilbert, Arizona, and the Rise of the Anti-Classificatory First Amendment

Genevieve Lakier

REED V. TOWN OF GILBERT, ARIZONA AND THE RISE OF THE ANTI-CLASSIFICATORY FIRST AMENDMENT

Genevieve Lakier*

The distinction between content-based and content-neutral regulations of speech is one of the most important in First Amendment law. For decades now, the Supreme Court has insisted that content-based laws—laws that restrict speech because of its ideas or messages or subject matter—are presumptively unconstitutional, and will be sustained only if they can satisfy strict scrutiny.[1] In contrast, content-neutral laws—laws that regulate speech for some reason other than its content—are reviewed under a lesser, and often quite deferential, standard.[2] Whether a law is found to be content-based or content-neutral therefore determines, in many cases, whether a First Amendment challenge to it succeeds.

Despite the importance of the distinction, the Court has had trouble settling on a single test of content-based lawmaking. Instead, it has vacillated between two different tests. In one line of cases, the Court has insisted that laws are content-based whenever they treat speakers differently because of the content of their speech—that is to say, whenever they employ explicit content distinctions. In another line of cases, the Court has instead insisted that laws are content-based only when they cannot be justified by a content-neutral purpose—that is to say, when the government cannot adequately demonstrate that the distinction the laws draws furthers some purpose other than to restrict speech because the government dislikes its content, or fears its communicative effects.

These two tests of content-based lawmaking are not merely different; in many cases, they lead to different results. Hence lower courts tasked with determining whether a given law is content-neutral or content-based have had to choose between two competing but incompatible lines of precedent. The result has been the creation of what commentators have described as a confused,[3] inconsistent, [4] and highly malleable body of law.[5]

---

* Assistant Professor of Law, The University of Chicago Law School. This paper benefited enormously from the comments of Amy J. Cohen, Aziz Huq, Richard McAdams, Geoffrey R. Stone, Louis Michael Seidman, David Strauss, Nelson Tebbe, and Laura Weinrib. I am also grateful for the feedback I received from participants in the Brooklyn Law School Faculty Workshop and the University of Chicago Law School Works in Progress Workshop. Excellent research assistance was provided by Lisa Frasco, Kathrine Gutierrez, Kevin Oliver, Jacob Walley, and Katie Ryan.

[1] See, for example, *United States v Playboy Entertainment Group, Inc*, 529 US 803, 817 (2000); *R.A.V. v City of St Paul, Minn*, 505 US 377, 382 (1992).

[2] The standard articulation of this test can be found in *Ward v Rock Against Racism,* 491 US 781, 791 (1989) (requiring content-neutral speech regulations to be "narrowly tailored to serve a significant governmental interest, and [to] leave open ample alternative channels for communication of the information").

[3] Leslie Gielow Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations*, 34 McGeorge L Rev 595, 602 (2003) ("[T]he Court has experienced increasing difficulty in making [content determinations], and in making them consistently.").

[4] Barry McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting Freedom of Expression*, 81 Notre Dame L Rev 1347, 1353 (2006).

[5] Dan V. Kozlowski, *Content and Viewpoint Discrimination: Malleable Terms Beget Malleable Doctrine*, 13 Comm L & Pol 131, 132–34 (2008).

Two terms ago, in *Reed v. Town of Gilbert*,[6] the Court attempted to bring some clarity to this messy area of First Amendment jurisprudence when it held that laws that employ content distinctions are *always* content-based, regardless of the purposes they serve.[7] The Court acknowledged that in earlier cases it had looked at the government's purposes when deciding whether a given law was or was not content-based. It insisted, however, that those cases dealt only with regulations that did not treat speakers differently because of what they said—that did not make what it described as "obvious" or "subtle" content distinctions.[8] The Court thus construed the test of content neutrality as a two-step inquiry in which courts first determine whether a law makes facial content distinctions, and second, if—but only if—it doesn't, do they look at the purposes that justify the law.[9]

By insisting that both the face of the law and the government's purposes have a role to play in the content-neutrality inquiry, the *Reed* Court managed to reconcile what up until then had appeared to be irreconcilable precedents. What this required, however, was the implicit overruling of the multiple decisions in which the Court did what the *Reed* majority said it had never done: namely, it held that a law that made facial content-distinctions was content neutral because it could be justified by reference to a content-neutral purpose.[10] And what it means, going forward, is that the government will have a much harder time defending facially content-based laws against constitutional challenges than it did in the past, when, notwithstanding the conflicting instructions they received from the Supreme Court, lower courts frequently held that laws that made facial content distinctions were content-neutral.

Reed thus represents an important change in First Amendment doctrine, and one that will in all likelihood have a significant impact in many areas of law. Indeed, we are already seeing evidence of *Reed*'s effects across the country, as courts apply strict scrutiny—and strike down—laws that previously were, or likely would have been, upheld as content neutral prior to *Reed*.[11] This may only be the tip of the iceberg. By insisting that strict scrutiny applies to all laws that treat speakers differently because of the content of their speech, *Reed* potentially imperils the hundreds, even perhaps thousands, of local, state, and federal laws that make subject matter or viewpoint distinctions.[12] The decision

[6] 135 S Ct 2218 (2015).

[7] Id at 2227.

[8] Id.

[9] Id.

[10] See note 88, and accompanying text.

[11] See *Free Speech Coal., Inc. v Attorney Gen. United States*, 825 F3d 149 (3rd Cir 2016); *Sarver v. Chartier*, 813 F3d 891, 905-06 (9th Cir 2016); Cent Radio Co v City of Norfolk, 811 F3d 625, 631 (4th Cir 2016); *Norton v City of Springfield, Ill,* 806 F3d 411 (7th Cir 2015).

[12] Laws that make facial content distinctions include local, state, and federal sign laws; laws that zone adult movie theatres and bookstores differently than other kinds of theatres and bookstores; laws that impose special tax burdens on lobbying and other expressive activities; campaign finance laws that distinguish between electioneering and non-electioneering communications; mail regulations that allow certain kinds of publications lower rates on their mail; and even portions of the Digital Copyright Millennium Act that prohibit the posting of certain kinds of information. See *Universal City Studios, Inc v Corley*, 273 F3d 429, 447–55 (2d Cir 2001). This is by no means a complete list. For more discussion of some of the laws that *Reed* may affect, see Part II.B.

thus demonstrates once again the pronounced deregulatory tilt of the Roberts Court's First Amendment jurisprudence.[13]

This Article examines the change that *Reed* makes to First Amendment doctrine, and its normative justifications. It does so by means of an analogy to the Court's equal protection jurisprudence, and specifically its case law dealing with race discrimination.

As the Article demonstrates, the shift that *Reed* enacts in First Amendment law resembles in many respects the shift that occurred several decades ago in equal protection law, when the Court squarely embraced what scholars have described as an anti-classificatory test of race discrimination and insisted that all laws that employ racial distinctions are presumptively invalid, no matter the purposes the government invokes to justify them.[14] *Reed* insists, similarly, that all laws that employ content distinctions are presumptively invalid, no matter the purposes the government invokes to justify them. It announces what we might thus describe as an anti-classificatory test of content discrimination. In so doing, it makes it—in theory at least—as difficult for the government to defend facially content-based laws against constitutional challenge as it is to defend racially classificatory laws.

The question that *Reed* raises is whether it *should* be as difficult to defend facially content-based laws against constitutional challenge as it is to defend racially classificatory ones. Some scholars have argued that the answer to this question is an obvious and unqualified yes.[15] This Article suggests that the answer is a good deal more complicated than that. This is because of the value that content distinctions possess, as regulatory tools.

In its equal protection cases, the Court has insisted that all laws that employ racial distinctions should be treated as presumptively invalid because these distinctions are not, in the vast majority of circumstances, relevant to the government's legitimate regulatory concerns. It is this fact, the Court has insisted, that allows courts to presume that when the government employs racial distinctions as regulatory tools, either prejudice or animus motivates its actions.

Content distinctions are not, however, usually irrelevant to the government's legitimate regulatory concerns. Instead, they play an important role in the regulation of both the public and private spheres. What this means is that the mere fact that a law employs content distinctions is not enough to create a presumption of bad intent. The consequence is that the *Reed* Court's embrace of an anti-classificatory test of content-based lawmaking is likely to result in the invalidation of a good many laws that are not in fact the product of a discriminatory purpose and that do not otherwise pose a significant

---

[13] For other perspectives on the Roberts Court's approach to the First Amendment, see Genevieve Lakier, *The Invention of Low-Value Speech,* 128 Harv L Rev 2166 (2016); Gregory P. Magarian, *Marrow of Tradition: The Roberts Court and Categorical First Amendment Speech Exclusions*, 56 Wm & Mary L Rev 1339 (2015); Erwin Chemerinsky, *The Roberts Court and Freedom of Speech*, 63 Fed Comm L J 579 (2011).

[14] Jack M. Balkin and Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U Miami L Rev 9, 10 (2003) ("Roughly speaking, [the anti-classification] principle holds that the government may not classify people either overtly or surreptitiously on the basis of a forbidden category: for example, their race"). For more discussion, see notes 114-121 and accompanying text.

[15] See, for example, Seth F. Kreimer, *Good Enough for Government Work: Two Cheers for Content Neutrality*, 16 U Pa J Const L 1261, 1305 (2014); Chemerinsky, 63 Fed Comm L J at 59–61 (cited in note 13).

threat to First Amendment interests. The costs of the *Reed* rule are likely, in other words, to be significant.

The fact that the test of content-based lawmaking announced in *Reed* is likely to result in the invalidation of a good number of laws that pose no apparent threat to any significant First Amendment interest suggest that it can be justified only if there is no other, less costly, means of protecting speakers against discrimination. It is by no means obvious, however, that there isn't. Indeed, in her concurring opinion in *Reed,* Justice Kagan suggested an alternative test of content-based lawmaking that may be superior to *Reed* in a variety of ways.

By exploring the connections between equal protection and free speech law, this Article attempts to shed new light on familiar First Amendment questions. It proceeds in four parts. Part I examines the decades-long struggle on the Court between two competing approaches to the identification of content-based laws, and the significant shift *Reed* enacts in the doctrine. Part II explores *Reed*'s virtues as a test of content-based lawmaking. Part III explores its significant drawbacks by means of an analogy to the Equal Protection Clause. Part IV explores the alternative tests the Court could employ to identify content-based regulations of speech and suggests why these would be superior to the very broad anti-classificatory test that *Reed* announces.

I. IDENTIFYING CONTENT DISCRIMINATION

The First Amendment guarantees expressive freedom—specifically, "the freedom of speech, and press."[16] For over seventy years, however, the Court has held that the First Amendment prohibits not only state actions that make it very difficult for individuals to express themselves but also regulations—even not very repressive ones—that "unfairly discriminate" among speakers based on the content of their speech.[17] It has interpreted the First Amendment, in other words, to guarantee not only expressive liberty but also expressive equality, of a sort.

The Court has read an anti-discrimination principle into the First Amendment because it has recognized that what freedom of speech requires is not only that individuals can speak but that they can do so in a public arena that is free from governmental manipulation and control.[18] It has accordingly interpreted the First Amendment to guarantee not only an individual right to speak but also the existence of a particular kind of social institution—what is commonly referred to today as the "marketplace of ideas."[19]

---

[16] US Const Amend I.

[17] The quote comes from *Cox v New Hampshire*, which is the first case I know of that explicitly recognizes the First Amendment antidiscrimination principle. 312 US 569, 576 (1941) (recognizing that municipalities have the "authority to control the use of [their] public streets for parades or processions" and to impose "time, place and manner" restrictions on those who wish to participate in parades, so long as they do so "without unfair discrimination").

[18] See, for example, *Cohen v California*, 403 US 15, 24–25 (1971) (arguing that the "constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion"); *Roth v United States*, 354 US 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.").

[19] See generally Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth,* 1984 Duke L J 1 (1984).

Laws that discriminate among speakers based on the content of their speech, the Court has argued, threaten the vitality and independence of this marketplace of ideas. They do so by giving a competitive advantage to ideas and messages the government likes.[20] They also, the Court has argued, undermine the "equality of status" of those who participate in public debate.[21] For these reasons, the Court has insisted that "regulations that permit the Government to discriminate on the basis of the content of its message cannot be tolerated under the First Amendment."[22]

Ensuring that regulations that permit the government to engage in content discrimination *aren't* tolerated has proven to be no easy matter, however. This is in part a consequence of what the Court has interpreted the prohibition against discrimination to mean.

Even though the primary argument that the Court has relied upon to explain why discriminatory laws violate the First Amendment is a consequentialist one—namely, that laws of this sort pose a threat to the "robust [and] wide-open" debate the First Amendment is intended to guarantee[23]—the Court has unequivocally rejected the idea that laws might be considered discriminatory merely on the basis of their effects on the speech marketplace.[24] Instead, the Court has tended to equate discrimination with discriminatory purpose. The Court has not done so explicitly.[25] Nevertheless, it has, almost without exception, insisted that the evil the prohibition against content discrimination guards against are efforts by the government to "proscrib[e] speech, or . . . expressive conduct, because of disapproval of the ideas expressed," or to otherwise advance what Justice Scalia once described as "thought-control purposes."[26]

The Court has nevertheless expressed considerable skepticism about the ability of courts to accurately identify, in individual cases, when the government acts with bad

---

[20] *R.A.V.*, 505 US at 387 (content discrimination "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace"); *City of Ladue v Gilleo*, 512 US 43, 60 (1994) (O'Connor concurring) (noting that "the free speech principle" makes it "improper [for the government to] attempt[] to value some forms of speech over others, or . . . to distort public debate").

[21] *Police Department of the City of Chicago v Mosley*, 408 US 92, 96 (1972).

[22] *Regan v Time, Inc*, 468 US 641, 648–49 (1984).

[23] *NY Times Co v Sullivan*, 376 US 254, 270 (1964).

[24] *Ward*, 491 US at 791 ("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.").

[25] Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U Chi L Rev 413, 428 (1996) (noting that the Court "has hesitated to discuss the [role that] illicit motive [plays in First Amendment law] in any detail or with any directness").

[26] *R.A.V.*, 505 US at 382; *Madsen v Women's Health Center, Inc*, 512 US 753, 794–95 (1994). See also *Gilleo*, 512 US at 51 (arguing that regulations that treat some speakers differently from others threaten First Amendment interests because of the risk that they "may represent a governmental attempt to give one side of a debatable public question an advantage in expressing its views to the people . . . [or] to control . . . the search for political truth") (quotation marks omitted); id at 60 (O'Connor concurring) (noting that "the free speech principle" makes it "improper [for the government to] attempt[] to value some forms of speech over others, or . . . to distort public debate"); *Arkansas Writers' Project, Inc v Ragland*, 481 US 221, 228–29 (1987) (arguing that discriminatory taxes are prohibited by the First Amendment because they give the government "a powerful weapon against the taxpayer selected"). See also Kagan, 63 U Chi L Rev at 414 (cited in note 25) (arguing that "First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives"); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U Pa L Rev 615, 617 (1991) ("The Court . . . has interpreted content discrimination quite narrowly as involving a particular type of government purpose served by the regulation of speech.").

purposes of this sort. It has insisted that "[i]nquiries into congressional motives or purposes are a hazardous matter" and one that judges are ill-suited to perform.[27]

As a result, the Court has generally refused to engage in a direct analysis of discriminatory intent. Instead, it has attempted to identify discrimination indirectly, by analyzing the "fit" between the ends the government claims a particular law advances and the means chosen to advance those ends. It has insisted that laws that reveal a very poor fit between statutory means and ends should be struck down—even in cases where the poor fit results from the narrowness of the statutory prohibition, not its breadth.[28] Underinclusive speech regulations are considered as suspect as overinclusive speech regulations, the Court has explained, because, in both cases, what the poorness of the fit between the statute's means and ends produces is doubt about the credibility of the government's purported motivations.[29]

This indirect approach to the analysis of discrimination provides an elegant solution to the problems created by the fact-finding limitations of judges. It also has the benefit of making it difficult for the government to restrict speech even when its actions are not in fact motivated by dislike of the targeted speech but are instead merely the product of carelessness or laziness, or political expediency on the legislature's part.[30] This is because in all cases, what the government must demonstrate in order to justify the restriction of constitutionally protected speech is the existence of a substantial or, at least, a legitimate state interest—and the Court has made clear that administrative convenience does not qualify as an interest of this sort.[31]

The approach has a significant drawback, however. Because it operates prophylactically, it may be used to invalidate laws that are not in fact a product of discriminatory purpose, nor the consequence of legislative laziness or political self-interest. Depending on how tight a fit between means and ends is required, it may in fact make it extremely difficult for the government to ever justify regulating speech. This is a problem because, as the Court has long recognized, speech regulations can further important constitutional, as well as extra-constitutional, goals, by creating the conditions under which individuals can effectively utilize their free speech rights, and by protecting the "safety and convenience" of the people.[32] Even if the ability of the government to

---

[27] *United States v O'Brien*, 391 US 367, 383–84 (1968).

[28] Cases in which the Court struck down laws that failed to apply broadly enough include *Florida Star v B.J.F.*, 491 US 524 (1989); *Carey v Brown*, 447 US 455, 465 (1980); *Mosley*, 408 US at 96.

[29] *Gilleo*, 512 US at 51–52 ("Exemptions from an otherwise legitimate regulation of a medium of speech . . . may diminish the credibility of the government's rationale for restricting speech in the first place. . . . [A]n exemption from an otherwise permissible regulation of speech may represent a governmental attempt to give one side of a debatable public question an advantage in expressing its views to the people.").

[30] Id at 51.

[31] *Mosley*, 408 US at 102 n 9; *Schneider v New Jersey, Town of Irvington*, 308 US 147, 151 (1939) ("Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.").

[32] As the Court put it in *Cox*: "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they

regulate is not entirely foreclosed, a very high fit requirement grants judges a great deal of power to second-guess legislative choices, and thus threatens what the Court has recognized in the post-*Lochner* era to be an important value: namely, the regulatory autonomy of the democratically elected legislature.[33]

The Court has been unwilling as a result to construe the First Amendment to require a very close fit between means and ends in *all* cases in which the government restricts protected expression. Instead, in most cases involving the regulation of speech, it requires only that the fit between statutory means and statutory ends be a reasonable one. Hence, when the government regulates speech in limited or nonpublic forums—that is, in spaces and institutions that have not traditionally served as important sites for the public expression of ideas—the Court requires only that the restrictions the government imposes on expression are "reasonable in light of the purpose served by the forum."[34] What this means is that the government may not restrict speech because it dislikes its viewpoint or its ideas, but it may reserve the forum "for use by certain speakers, or for the discussion of certain subjects."[35] Similarly, when the government restricts speech by government employees, the Court has made clear that it need only show that the restriction serves a legitimate workplace goal and that the government's interest in regulating the speech outweighs the employee's interest in speaking.[36] The Court applies even more lenient review to the regulation of the private workplace.[37]

The Court applies more stringent scrutiny when the government regulates speech that takes place in the public forum—that is, on government property that has traditionally or by design been used for the public expression of ideas.[38] It also applies more stringent scrutiny when the government regulates speech on private property that

---

ultimately depend." 312 US at 574. The suggestion here is that governmental regulation of the public sphere may not only be constitutional; it may be constitutionally required.

[33] See, for example, *United States v Albertini*, 472 US 675, 689 (1985) (arguing that the constitutionality of speech regulations "does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests"); *Clark v Community for Creative Non-Violence*, 468 US 288, 299 (1984) (rejecting lower court decision striking down park service regulation preventing protestors from sleeping in two national parks because "[w]e do not believe . . . that [the First Amendment] assign[s] to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained").

[34] *Cornelius v NAACP Legal Defense & Educational Fund, Inc*, 473 US 788, 806 (1985).

[35] Id at 802 (citing *Perry Education Association v Perry Local Educators' Association*, 460 US 37, 45, 46 n 7 (1983)).

[36] *Garcetti v Ceballos*, 547 US 410, 418 (2006) (citing *Pickering v Board of Education of Township High School District 205, Will County, Ill*, 391 US 563, 568 (1968)) (noting that, when a public employee speaks on matters of public concern, "[t]he question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public").

[37] See, for example, Julius Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 Md L Rev 4 (1984); James Q. Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 Hastings Const L Q 189 (1984); Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U Ill L Rev 939, 949 (2007); Terry Ann Halbert, *The First Amendment in the Workplace: An Analysis and Call for Reform*, 17 Seton Hall L Rev 42 (1987).

[38] *Perry Education Association*, 460 US at 45.

addresses itself to the public sphere.[39] This is because it recognizes that the government has fewer legitimate reasons to regulate the public sphere than to regulate the private.[40] Hence, the risk that when it does regulate, it does so to achieve impermissible ends, is greater.

Even in such cases, however, the Court imposes only a relatively modest burden of justification when the government regulates speech in a content-neutral manner. In such cases, the Court requires only that the regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation," that it does so by means that are neither significantly overbroad nor significantly underbroad, and that it leave open adequate alternative channels for those impacted by it to communicate.[41]

The Court imposes a much heavier burden of justification when the government engages in the content-based regulation of speech—at least high-value speech. For decades now, the Court has insisted that regulations that restrict high-value speech because of its content are "presumptively invalid" under the First Amendment.[42] As a result, they can be upheld only if the government can satisfy strict scrutiny by demonstrating that the regulation advances a compelling interest by the least restrictive means available.[43] This is a demanding standard; and one the government usually has trouble satisfying.[44]

The Court has explained that strict scrutiny is necessary because of the significant risk that content-based speech regulations either are the product of, or can be used to further, discriminatory purposes. As Justice Powell noted in *Consolidated Edison Co of New York v Public Service Commission of New York*[45] in 1980: "[W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully [than in other cases] to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views.'"[46] The implication, of course, is that regulations that are not "based on the content of the speech" are subject to less

---

[39] See, for example, *Metromedia, Inc v City of San Diego*, 453 US 490 (1981); *Erznoznik v City of Jacksonville*, 422 US 205, 211–12 (1975).

[40] Compare *Garcetti*, 547 US at 418 ("Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services.") and *Adderley v Fla*, 385 US 39, 47 (1966) ("The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.'') with *Mosley*, 408 US at 96 ("[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. And it may not select which issues are worth discussing or debating in public facilities. . . . Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.").

[41] *Ward*, 491 US at 797–800.

[42] *Playboy*, 529 US at 817 (citing *R.A.V.*, 505 US at 382).

[43] *Playboy*, 529 US at 813.

[44] Kreimer, 16 U Pa J Const L at 1293 (cited in note 15). In a recent survey of content neutrality cases in the lower federal courts, Kreimer found that, at least in cases involving the regulation of public forums, content-based restrictions were struck down 97 percent of the district court cases and 87 percent of court of appeals case. Id. In contrast, he found that laws deemed content-neutral were struck down only 28 percent of the time in the district court cases and 56 percent of the time in the court of appeals. Id.

[45] 447 US 530 (1980).

[46] Id at 536.

careful scrutiny because they pose less of a risk that they were enacted "merely because public officials disapprove of the speakers' views."

By requiring a higher burden of justification in cases in which it is more likely that invidious purposes are at work and a lesser burden of justification in cases in which this is less likely the case, the Court has attempted to effectively enforce the prohibition against discriminatory speech regulations without unduly limiting the government's regulatory power. This is an obviously worthy goal. Nevertheless, it is one that has proven, in practice, extremely hard to implement, given serious and pervasive disagreement on the Court about how broadly the prophylactic instrument of strict scrutiny should apply.

A. The Fight Over the Meaning of Content-Based Lawmaking

For decades now, scholars have complained about the "[p]rofound problems [that] plague the . . . use of the judicially created categories of content-neutral and content-based speech regulations and orders."[47] They have argued that the distinction between content-based and content-neutral laws that the cases draw is "inconsistent" and prone to manipulation.[48] They have blamed this on the results-oriented nature of the Court's jurisprudence and its theoretical incoherency.[49] In fact, much of the doctrinal inconsistency that scholars have identified can be blamed on the significant, and persistent, disagreement among members of the Court about how broadly the presumption against content-based lawmaking should apply.

Some on the Court have argued that the presumption should apply broadly: that strict scrutiny is the appropriate standard of review for all speech regulations that make regulatory distinctions that turn on the content of speech. This is because, they have argued, laws of this kind are more likely than other kinds of laws to be used for "thought-control purposes" given the power they give the government to target ideas or messages or topics it dislikes. Justice Scalia made this argument, for example, in his concurring and dissenting opinion in *Madsen v Women's Health Center*: "The danger of content-based statutory restrictions upon speech," Scalia wrote, "is that they may be designed and used *precisely* to suppress the ideas in question rather than to achieve any other proper governmental aim."[50] The fact that laws of this sort "lend [themselves] . . . readily to the targeted suppression of particular ideas . . . render[] [them] deserving of the high standard of strict scrutiny."[51]

Other members of the Court have argued for a narrower application of strict scrutiny. Justice Stevens, for example, argued that because there are many legitimate

---

[47] Clay Calvert, *Free Speech and Content-Neutrality: Inconsistent Applications of an Increasingly Malleable Doctrine*, 29 McGeorge L Rev 69, 71 (1997).

[48] McDonald, 81 Notre Dame L Rev at 1353 (cited in note 4). See also Robert Post, *Recuperating First Amendment Doctrine*, 47 Stan L Rev 1249, 1265 (1995) ("Whatever the ultimate merits of a First Amendment focus on content neutrality, the Court's doctrinal elaboration of [it] has been haphazard, internally incoherent, and for these reasons inconsistent with any possible principled concern for content neutrality."); Williams, 139 U Pa L Rev at 616 (cited in note 26) ("The doctrinal web surrounding the free speech clause of the [F]irst [A]mendment is one of the most complicated and confusing in constitutional law.").

[49] McDonald, 81 Notre Dame L Rev at 1353 (cited in note 4).

[50] *Madsen*, 512 US at 792 (Scalia concurring in part and dissenting in part).

[51] Id at 793–94 (emphasis omitted).

reasons why the government might want to distinguish between speakers based on the content of their speech, a rule that subjected all facially content-based laws to strict scrutiny would intrude too much on the government's legitimate regulatory powers.[52] He argued that strict scrutiny should therefore apply only when there was some reason to suspect that the government's motivations for acting were improper. This was always the case, Justice Stevens argued, when the purposes the government invoked to justify the law were constitutionally prohibited—such as, for example, when the government enacted a law in order "to curtail expression of a particular point of view on controversial issues of general interest."[53] In other cases, however, Stevens argued that strict scrutiny was only appropriate when there was some evidence that the "regulation [was] biased in favor of one point of view or another, or [provided the government] . . . a subtle method of regulating the controversial subjects that may be placed on the agenda for public debate[.]"[54] But the mere fact that a law made content-based distinctions did not, he insisted, mean that it should be treated as a presumptively invalid "content-based" regulation of speech.[55]

In different cases, these different points of view managed to persuade a shifting majority of the Court. The result was the creation of two distinct and inconsistent tests of content-based lawmaking.

In one line of cases, the Court employed the strict test of content-based lawmaking that Justice Scalia advocated. That is to say, it treated laws that made facial content distinctions as *necessarily* content-based. In *Burson v Freeman*,[56] for example, the Court concluded that a Tennessee law that prohibited election-related speech near polling places was content-based because "[w]hether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign."[57] In *Arkansas Writers' Project, Inc v Ragland*, the Court similarly held that a state tax law that taxed magazines but exempted "religious, professional, trade and sports journals" from the tax was content-based because the law required state officials to "examine the content of the message . . . conveyed" by the magazine to determine whether it was subject to the tax.[58] And in *Simon & Schuster, Inc v Members of New York State Crime Victims Board*,[59] the Court concluded that a New York law that

[52] See, for example, *R.A.V.*, 505 US at 420 (Stevens concurring) (arguing that "[a]lthough the Court has, on occasion, declared that content-based regulations of speech are 'never permitted' . . . our decisions demonstrate that content-based distinctions . . . are an inevitable and indispensable aspect of a coherent understanding of the First Amendment"); *Consolidated Edison Co*, 447 US at 545–46 (Stevens concurring) ("There are . . . many situations in which the subject matter, or, indeed, even the point of view of the speaker, may provide a justification for a time, place, and manner regulation [of speech]. . . . As is true of many other aspects of liberty, some forms of orderly regulation actually promote freedom more than would a state of total anarchy.").

[53] Id at 546.

[54] *Metromedia, Inc*, 453 US at 552 (Stevens dissenting in part).

[55] *Consolidated Edison Co*, 447 US at 545–46.

[56] 504 US 191 (1992).

[57] Id at 197.

[58] 481 US at 229–30.

[59] 502 US 105 (1991).

prohibited convicted felons from making a profit off stories of their crimes was content-based because it was "directed only at works with a specified content."[60]

In another line of cases, the Court employed instead the more purpose-oriented test of content-based lawmaking that Justice Stevens championed. In this line of cases, the Court insisted that speech regulations were content-based when, but only when, they could not be "justified without reference to the content of the speech they regulated."[61] Although, as we shall see later, what precisely this meant varied over time, in its most rigorous form, the Court interpreted this test to require it to first look at the purposes the government claimed the regulation furthered. If these purposes evinced a concern with the communicative effects of the speech—that is to say, if they evinced a concern with the effect of the expression of its ideas or messages on an audience—the Court concluded that the risk that the government was acting because it disliked the speech, or for some other impermissible reason, was sufficiently great to warrant strict scrutiny and accordingly deemed the law content-based.[62] If not, the Court examined whether there was evidence that the purposes the government invoked to justify the law were actually furthered by the distinctions it drew.[63] If there was, the Court treated the law as content-neutral; if not, it treated the law as content-based.[64]

Although these two lines of cases could easily be reconciled when it came to facially content-neutral laws—in such cases, the Court rather unproblematically applied the "justified without reference to the content of speech" test[65]—they could not be easily reconciled when it came to facially content-based laws. Consider, for example, *City of*

---

[60] Id at 116. Other cases in which the Court concluded that a law was content-based on the basis of an analysis of its text alone include *McCullen v Coakley*, 134 S Ct 2518, 2525 (2014); *Republican Party of Minnesota v White*, 536 US 765, 770 (2002); *Holder v Humanitarian Law Project*, 561 US 1, 27 (2010); *McIntyre v Ohio Elections Commission*, 514 US 334 (1995); *Leathers v Medlock*, 499 US 439, 449 (1991); *Regan*, 468 US at 648.

[61] Cases stating this as the test of content discrimination include *Sorrell v IMS Health Inc*, 564 US 552, 566 (2011); *Bartnicki v Vopper*, 532 US 514 (2001); *Hill*, 530 US 703; *Playboy*, 529 U.S. 803; *City of Erie v Pap's A.M.*, 529 US 277, 294 (2000); *Madsen*, 512 US 753; *City of Cincinnati v Discovery Network, Inc*, 507 US 410 (1993); *Ward*, 491 US 781; *Boos v Barry*, 485 US 312 (1988).

[62] In *Boos v Barry*, for example, the Court concluded that a DC law that prohibited the display of signs within 500 feet of foreign embassies that "tend[ed] to bring that foreign government into 'public odium'" was content-based not because it applied differently to speakers based on the messages they communicated but because the purpose the government invoked to justify "focuse[d] *only* on the content of the speech and the direct impact that speech has on its listeners" rather than on other, secondary effects, such as "congestion . . . [or] the need to protect the security of embassies." 485 US at 316, 321. See also *Playboy*, 529 US at 811 (holding that a law requiring cable providers to scramble channels dedicated to sexually oriented programming was content-based because "[t]he overriding justification for the regulation is concern for the effect of the subject matter on young viewers.").

[63] *Discovery Network*, 507 US at 42 (requiring the city to establish some empirical "basis" for the distinctions it drew).

[64] Id at 428 (concluding that "the absence of some basis for distinguishing between 'newspapers' and 'commercial handbills' that is relevant to an interest asserted by the city" meant that a law that distinguished between the two kinds of speech was not "justified without reference to the content. . ."). See also *Erznoznik*, 422 US at 214–15 (concluding that a regulation that prohibited the showing of nudity in places viewable from the public road could not be adequately justified by the city's interest in traffic safety given no evidence that speech involving nudity was more distracting to drivers than "a wide variety of other scenes in the customary screen diet, ranging from soap opera to violence") (quotation marks omitted).

[65] See, for example, *Bartnicki*, 532 US at 526; *Ward,* 491 US at 791; *Clark*, 468 US at 293.

Renton v Playtime Theatres, Inc,[66] a case in which the Court held that a zoning ordinance that prohibited adult movie theaters from locating within 1000 feet of any residences, churches, parks, or schools was content-neutral even though the law identified adult movie theatres by reference to the content of the movies they exhibited.[67] The Court acknowledged that the law made distinctions based on the content of speech but nevertheless concluded that strict scrutiny was not the appropriate standard of review because the law "aimed not at the *content* of the films shown [by adult movie theaters] but rather at the *secondary effects* of such theaters on the surrounding community."[68] Because the purpose of the ordinance, the Court found, was to "prevent the crime, protect the city's retail trade, maintain property values, and generally protect and preserve the quality of the city's neighborhoods, . . . not to suppress the expression of unpopular views," and because the Court found that the city council had a reasonable basis for its beliefs that the speech it restricted differed in a relevant way from the speech it left unrestricted, the majority concluded that the ordinance was "completely consistent with our definition of content-neutral speech regulations as those that are *justified* without reference to the content of the regulated speech."[69]

Justice Brennan wrote an impassioned dissent in which he argued that, because the ordinance "selectively imposes limitations on the location of a movie theater based exclusively on the content of the films shown there," it could not be treated as a content-neutral regulation of speech.[70] And indeed, the holding in *Renton* is impossible to reconcile with the various precedents in which the Court had insisted that laws were content-based whenever their application depended upon "the nature of the message . . . conveyed" by the speech they regulated.[71]

Nevertheless, in subsequent cases, the Court continued to construe as content-neutral laws that made content distinctions on their face but that it found to be adequately justified by a content-neutral purpose.[72] In other cases, however, it continued to insist that laws were content-based if their application "depend[ed] on what [individuals] say."[73]

The persistence of these two distinct and inconsistent tests of content-based lawmaking in the Court's First Amendment cases created a very confusing, and contentious body of law. As Seth Kreimer noted in 2014, members of the Supreme Court

---

[66] 475 US 41.

[67] Id at 47.

[68] Id (emphasis in original).

[69] Id at 48 (quotation marks omitted) (emphasis in original). See also id at 50-52 (noting detailed evidence of the harm of adult movie theatres that the City Council relied upon when it enacted the law).

[70] Id at 55 (Brennan dissenting).

[71] *Regan*, 468 US at 648; see also *Carey*, 447 US at 462 (concluding that a law was content-based because "it is the content of the speech that determines whether it is within or without the statute's blunt prohibition").

[72] See, for example, *Alameda Books*, 535 US at 431–32 (concluding that a law that prohibited the establishment of more than one adult bookstore or video arcade in the same building could be considered content-neutral); *Hill*, 530 US at 703–04 (concluding that law that prohibited "oral protest, education, or counseling" near the entrance to abortion clinics was content-neutral because it was not "adopted because of disagreement with the message [the speech it regulated conveys]"); *Taxpayers for Vincent*, 466 US at 793 n 1 (construing as content-neutral a law that prohibited the posting of any handbill or signs on public property, but exempted from the ban "metal plaque[s] or plate[s] . . . commemorating an historical, cultural, or artistic event, location or personality for which the Board of Public Works, with the approval of the Council, has granted a written permit").

[73] *Humanitarian Law Project*, 561 US at 27.

"regularly [fell] into acrimonious disputes" about whether laws were content-based or content neutral—frequently because of disagreement about which test to apply—and a "similar perplexity . . . afflicted the lower courts."[74] Indeed, on multiple occasions, different courts—and sometimes different members of the same court—applied different tests of content-based lawmaking to reach opposite conclusions about the content neutrality, or lack thereof, of the same or very similar laws.[75] Even the Supreme Court acknowledged that "[d]eciding whether a particular regulation is content based or content neutral [was] not always a simple task."[76]

B. *Reed* and the Turn Away from Purposes

The decision two terms ago in *Reed* can be understood as an attempt, by at least some members of the Court, to finally resolve the endemic confusion that has plagued the content discrimination cases by asserting explicitly what no prior opinion had: namely, that all laws that employ content classifications trigger strict scrutiny, no matter what purposes the government invokes to justify them and no matter how innocuous they may seem.

The case involved a municipal sign ordinance promulgated by the small town of Gilbert, Arizona.[77] The ordinance imposed a general permit requirement on those who wished to erect signs within the city limits but it exempted twenty-three types of signs from the requirement, including "Temporary Directional Signs Relating to a Qualifying Event," "Political Signs," and "Ideological Signs."[78] To qualify for the exemption, a sign not only had to fall into one of the exempt categories; it also had to comply with the detailed restrictions the ordinance imposed on the display of each type of exempted sign. These restrictions varied in severity. To qualify as a Temporary Directional Sign Relating to a Qualifying Event, for example, a sign had to direct viewers to an event organized by a religious, charitable, or other non-profit group, be no more than six square feet in size, and to be put up no more than twelve hours before and be taken down no more than one hour after the event it gave directions to ended.[79] In contrast, Political Signs (defined as "temporary sign[s] designed to influence the outcome of an election called by a public

---

[74] Kreimer, 16 U Pa J Const L at 1269–70 (cited in note 15).

[75] Compare *Norton v City of Springfield, Ill*, 768 F3d 713, 714 (7th Cir 2014) (holding that a city ordinance that prohibited panhandling—which it defined as "an oral request for an immediate donation of money"—was content neutral because it did not target specific ideas or reflect governmental disapproval of a message), with *ACLU of Nev v City of Las Vegas*, 466 F3d 784, 788, 796 (9th Cir 2006) (quotation marks omitted) (holding city policy that made it illegal "to ask, beg, solicit or plead . . . for the purpose of obtaining money" was content-based because "[u]nder the city's . . . policy, whether any particular [communication] falls within the ban is determined by the content of the [communication]"); compare *Reed v Town of Gilbert, Ariz*, 707 F3d 1057, 1068 (9th Cir 2013) (concluding that the Gilbert sign code was a reasonable content-neutral regulation of speech that was "adequately justified without reference to the content of the regulated speech") with id at 1079 (Watford dissenting) (holding that Gilbert sign code "violates the First and Fourteenth Amendments by drawing content-based distinctions among different categories of non-commercial speech").

[76] *Turner Broadcasting Systems, Inc v FCC*, 512 US 622, 642 (1994).

[77] *Reed*, 135 S Ct at 2224.

[78] Id.

[79] Id at 2225.

body") could be up to thirty-two square feet and could be displayed up to sixty days before a primary election, and up to fifteen days following a general election.[80]

The law treated speakers differently, in other words, based on the content of their speech. Nevertheless, both the district court and Ninth Circuit concluded that the law was a content-neutral regulation of speech because it could be justified without reference to the speech it regulated.[81]

Justice Thomas, writing for six members of the Court, rejected the lower courts' conclusion that the sign ordinance was content-neutral, as well the test of content discrimination they employed to reach this result. "Government regulation of speech is content based," he wrote, "if a law applies to particular speech because of the topic discussed or the idea or message expressed."[82] Therefore, because the Gilbert law applied different rules to signs depending on the topic or idea or message they expressed, the Court "ha[d] no need to consider the government's justifications or purposes . . . to determine whether it is subject to strict scrutiny."[83]

Thomas acknowledged that in earlier cases the Court had looked at the government's purposes to determine whether laws were content-based but insisted that these cases dealt with an entirely "separate and additional category of laws"—namely, laws that did not make subject matter or viewpoint-based distinctions on their face (that were, as he put it, "facially content neutral").[84] But laws that "appl[y] to particular speech because of the topic discussed or the idea or message expressed," Thomas insisted, are "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."[85] Therefore the "crucial first step" courts have to employ when confronted with a First Amendment challenge to a law is to look at the face of the law and determine whether it makes either "subtle" or "obvious" content distinctions.[86] Only if the statute does not make these kinds of facial content distinctions, Thomas explained, should the court proceed to the second step of the analysis and look at the purposes the government invoked to justify the law.[87]

By insisting that the "justified without reference" test applied only to facially content-neutral laws, the opinion finally provided lower courts what they had been missing: namely, clear instructions on what to do when faced with facially content-based laws. What this required, however, was the implicit overruling of the multiple decisions in which the Court had done precisely what the *Reed* majority asserted it never had: namely, construed facially content-based laws as content neutral because of the purposes that justified them.[88] What *Reed* means, going forward, is that it will be much more

---

[80] Id at 2224–25.

[81] *Reed*, 707 F3d at 1069–72 (affirming 832 F Supp 2d 1070, 1078 (D Ariz 2011)).

[82] *Reed*, 135 S Ct at 2227.

[83] Id.

[84] Id.

[85] Id at 2228.

[86] Id at 2227.

[87] Id.

[88] Besides *Renton*, decisions that fall into this category include *City of Los Angeles v Alameda Books, Inc*, 535 US 425 (2002), *Hill v Colorado*, 530 US 703 (2000), and *Members of City Council of City of Los Angeles v Taxpayers for Vincent*, 466 US 789 (1984).

difficult than previously for the government to defend facially content-based regulations of speech against constitutional challenge.

The decision thus raises anew the question that has been simmering for more than three decades: namely, does *Reed*'s approach better advance First Amendment interests than the alternative, "justified without reference" standard? Answering this question turns out to be quite difficult. In the next Part, I examine the advantages of the *Reed* approach and I then turn in Part III to an examination of its costs.

II. *REED'S* VIRTUES

The case for the *Reed* test is an easy one to make. It is absolutely true, as Justice Scalia argued on multiple occasions, that laws that treat speakers differently because of the ideas or messages or subject matter of their speech "lend themselves" to invidious uses.[89] This is because content distinctions give the government the power to target *only* those specific ideas or messages or topics it dislikes. They thus lower the costs of repression, by making it possible for the government to repress only the speech of its enemies and not the speech of its friends.[90] They provide in other words an attractive vehicle for advancing constitutionally prohibited purposes.

Certainly there are plenty of examples of facially content-based laws that have been used to repress speech because the government disliked it or feared its effect on an audience.[91] The history of speech regulation in the United States thus provides vivid testament to the dangers inherent in facially content-based lawmaking. And the willingness of courts to uphold, in various circumstances, laws that targeted the speech of communists, radicals, Jehovah's Witnesses, and other groups on what seem to us today to

---

[89] *Hill*, 530 US at 743 (quoting *Madsen*, 512 US at 794) (Scalia concurring in part and dissenting in part) ("'The vice of content-based legislation—what renders it deserving of the high standard of strict scrutiny—is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes.' A restriction that operates only on speech that communicates a message of protest, education, or counseling presents exactly this risk.").

[90] Geoffrey R. Stone, *Content Regulation and the First Amendment,* 25 Wm & Mary L Rev 189, 230–31 (1983) ("[T]he probability that an improper motivation has tainted a decision to restrict expression is far greater when the restriction is directed at a particular idea, viewpoint, or item of information than when it is content-neutral . . . for government officials considering the adoption of such a restriction will almost invariably have their own opinions about the merits of the restricted speech. . .").

[91] The complex network of oath laws and loyalty tests that emerged across the United States in the 1930s, 1940s, and 1950s and that played a tremendously important role in the distribution of welfare benefits and jobs during that period provides a good example of how viewpoint-based laws have been used in the past to stigmatize and marginalize unpopular speakers. See generally Ralph S. Brown Jr, *Loyalty and Security: Employment Tests in the United States* (1958). Laws that required teachers, doctors, civil servants, and the like to disavow radical political beliefs, or to submit to tests of their loyalty, were justified by the pressing needs of national security. In practice, however, they functioned equally well if not better to stigmatize those who, because of their sexuality, their political leanings or their lifestyle, appeared to those who enforced these laws to be "un-American." See, for example, Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S Cal L Rev 1083, 1111 (2002). Content-based laws have also been used to suppress the speech of Jehovah's Witnesses, radical abolitionists, and Socialists—to name only a few of the unpopular groups targeted by facially content-based laws. See generally Geoffrey R. Stone, Perilous Times: Free Speech in Wartime: From the Sedition Act of 1798 to the War on Terrorism (2005).

be reed-thin pretexts provide a good example of how easily judges can be persuaded to acquiesce in the repressive impulses of legislatures.[92]

The bright-line test of content-based lawmaking that *Reed* announced appears, at least at first glance, to provide a more effective means of constraining the repressive and censorial impulses of both legislators and judges than the alternative, more complicated justification test the *Reed* majority rejected, at least as applied to facially content-based laws. This is because, by making the statutory text the primary determinant of the level of scrutiny, it limits the ability of courts to afford stricter scrutiny to laws they dislike and lesser scrutiny to laws they like. It vests courts with less discretion than does a test that requires courts to evaluate whether the government's purposes are adequately justified before determining the standard of scrutiny that applies. As a result, it makes it harder for courts to apply a lower standard of scrutiny in cases in which they are sympathetic to the government.

Of course, no test is entirely foolproof. Judicial power carries with it inherent discretion, and the tiered system of scrutiny provides particular room for maneuver. As the Court's own cases reveal, what it means for a law to be narrowly tailored to further a compelling interest, or to serve a significant interest by reasonably tailored means, can vary considerably from case to case.[93] Furthermore, in *Reed's* wake, courts retain considerable discretion to determine how broadly the decision applies, although this discretion may ultimately be limited by the articulation of clear rules.[94]

Nevertheless, it is not difficult to understand why a majority of the Court believed that a bright-line test of content-based lawmaking would provide better protection against judges' and legislator's worst impulses than the alternative. This is particularly the case given plenty of evidence that, prior to *Reed*, lower courts frequently applied the "justified without reference" test in a manner that was excessively deferential to government interests. Rather than requiring the government to provide evidence that the content distinctions it drew actually furthered the purposes it invoked to justify the law, courts frequently took the government's claims of statutory purpose at face value.

The lower court opinion in *Reed* provides a good example of how little evidence courts sometimes required to conclude that a law that made facial content distinctions was adequately justified by a content-neutral purpose. In her concurring opinion in *Reed,* Justice Kagan argued that the arguments the town of Gilbert provided to explain why directional signs were treated differently from political signs and ideological signs were

---

[92] For an excellent analysis of judges' willingness to "vastly exaggerate and react against the threats posed by disfavored groups," see Christina Wells, *Fear and Loathing in Constitutional Decision-Making,* 2005 Wisc L Rev 115, 119 (2005). See also Kreimer, 16 U Pa J Const L at 1309 (cited in note 15) ("A robust line of research demonstrates that decision makers are less willing to accord weight to free speech principles when they feel threatened by the ideology or actions of the groups at issue.").

[93] Compare for example the Court's very lenient application of strict scrutiny in *Burson v Freeman*, 504 US 191 (1992), with its very rigorous application of strict scrutiny in *Ashcroft v ACLU,* 535 US 564 (2002).

[94] Justice Thomas's opinion in *Reed* failed almost entirely to specify in what circumstances the decision applied. *Reed*, 135 S Ct at 2227 (noting simply that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed" and that content-based regulations are "subject to strict scrutiny"). This has led to considerable debate among the lower courts about the scope of the rule—and for reasons I discuss below—has led some courts to read it quite narrowly. See generally Note, *Free Speech Doctrine After* Reed v Town of Gilbert, 129 Harv L Rev 1981, 1990–92 (2016) (noting that courts have distinguished *Reed* "up, down, and sideways.").

so weak they couldn't pass the "laugh test," let alone strict or intermediate scrutiny.[95] The town failed entirely, for example, to explain why only four such signs could be placed on any given private property.[96] The only argument the town could come up to explain why temporary directional signs had to be so much smaller than other signs was that they had "to direct travelers along a route."[97] But of course one would think precisely the opposite would be the case. Meanwhile the only argument the town provided to explain why directional signs had to be taken down within one hour after the event they advertised had concluded, but election-related signs could stay up for ten days after the election they advertised had concluded, and ideological signs never had to be taken down at all, was that "Ideological Signs and Political Signs . . . retain expressive value" even when they advertise a completed event and moreover "do not have the same potential to confuse travelers because [they do not provide] guidance to a specific location for a time-sensitive event."[98] It is far from clear, however, why a sign advertising a now-concluded religious meeting should prove any less expressively meaningful or more confusing than a sign advertising a now-concluded election. Nor did the town provide any evidence to back up its claim that directional signs had more potential to confuse travelers than other kinds of signs.[99]

Notwithstanding the problems with the arguments the town made to justify the law, both the district court and two panels of the Ninth Circuit held that the Gilbert sign ordinance was adequately justified by the town's interests in aesthetics and traffic safety. The lower courts were untroubled by the logical problems with the town's arguments that Kagan identified because they did not encounter them. Rather than asking the town to explain why it drew the distinctions it did, the lower courts asked only whether the restrictions the sign code imposed on directional signs could be plausibly justified by traffic safety and aesthetic concerns. The Ninth Circuit concluded, for example, that the size restrictions the law imposed on the display of temporary directional signs "actually advance[d]" the town's aesthetic and safety interests because they did "not appear substantially broader … than required to make sure the rights-of-way are not so thicketed with signs as to pose a safety hazard or create an aesthetic blight."[100] At no point, however, did the court require the town to explain why political and ideological signs—which were allowed to be considerably larger than directional signs—did not pose an equivalent threat to rights-of-way to cause the same problems.[101] Nor did it require the

[95] *Reed*, 135 S Ct at 2239 (Kagan concurring).

[96] Id.

[97] Oral Argument, *Reed v Town of Gilbert, Ariz*, Docket No 13-502, *40 (US filed Jan 12, 2015) (available on Westlaw at 2015 WL 2399396).

[98] Brief for Respondents, *Reed v Town of Gilbert, Ariz*, Docket No 13-502, *48–49 (US filed Nov 14, 2014) (available on Westlaw at 2014 WL 6466937).

[99] *Reed*, 135 S Ct at 2232 (Kagan concurring) ("The Town similarly has not shown that limiting temporary directional signs is necessary to eliminate threats to traffic safety, but that limiting other types of signs is not. The Town has offered no reason to believe that directional signs pose a greater threat to safety than do ideological or political signs. If anything, a sharply worded ideological sign seems more likely to distract a driver than a sign directing the public to a nearby church meeting.").

[100] *Reed v Town of Gilbert, Ariz*, 587 F3d 966, 980 (9th Cir 2009).

[101] Id.

town to produce any empirical evidence that directional signs posed the problems it said they did.[102]

The Ninth Circuit failed to ask whether the distinctions the Sign Code drew were justified because it found that the signs that fell into each of the exempted categories were "not in competition" with one another and that "the erection of one type of temporary sign does not preclude the placement of another."[103] But this is to mistake the nature of the inquiry: what the analysis of the government's justifications for distinguishing between different kinds of speakers and different kinds of speech seeks to ensure is *not* that those engaged in direct competition in the marketplace of ideas are treated equally but instead that the government has legitimate reasons for acting as it does. The Ninth Circuit's application of the justified without reference test entirely failed to achieve this aim.

The Ninth Circuit opinion is a striking but by no means exceptionally egregious example of how leniently courts applied the justified without reference test in the years prior to the Court's decision in *Reed*. Courts engaged in a similarly cursory analysis of the government's justifications in many other cases. In *Thorburn v Austin*,[104] for example, the Eighth Circuit held that a local law that prohibited the targeted picketing of residences—and defined targeted picketing to mean picketing that was "directed towards a specific person or persons"—was content-neutral because the city's justification for the law (namely, that it protected residential privacy and tranquility) had "nothing to do with the content of the regulated speech."[105] The Court reached this conclusion even though the city provided no evidence that targeted picketing posed a greater threat to residential privacy and tranquility than other kinds of picketing, let alone evidence demonstrating that it posed a greater threat to residential privacy for reasons *other* than the presumably personal messages it conveyed.

Similarly, in, *Norton v City of Springfield*,[106] the Seventh Circuit held that a city law that prohibited panhandling—which it defined as the oral request for an immediate donation of money—was content-neutral because it did not, on its face, distinguish between speakers based on their viewpoint or message.[107] In reaching this conclusion, the court presumed that the distinction the law drew between oral requests for the immediate donation of money and other kinds of oral requests was justified by the city's interest in protecting its residents against a particularly intrusive and disruptive kind of speech.[108] But neither the court, nor the city, pointed to any evidence that panhandling, as the city defined it, in fact posed any significant threat to the wellbeing of pedestrians in the downtown area, or any more threat than other kinds of speech.[109] Absent this kind of

---

[102] In a later opinion, the Ninth Circuit did analyze whether the distinction the code drew between commercial and noncommercial speech was adequately justified, but its analysis was again extremely cursory. *Reed*, 707 F3d at 1074 (noting that "courts generally defer to a city's determinations of size and duration").

[103] *Reed*, 707 F3d at 1075.

[104] 231 F3d 1114 (8th Cir 2000).

[105] Id at 1117.

[106] 678 F3d 713.

[107] Id at 717.

[108] Id at 714.

[109] The closest the city's brief came to an assertion of this fact was its claim that solicitation "is unquestionably a particular form of speech that is disruptive of business." Brief of the Defendant-Appellee,

evidence, the court had no way of telling whether the city enacted the ordinance for the purposes it claimed or instead did so to suppress unpopular speech.

By accepting the government's justifications at face value, courts—in these and other cases--essentially allowed the government to determine, through artful pleading, the standard of review that applied to its speech regulations. The effect, as Mark Rienzi and Stuart Buck noted critically, was to make the "justified without reference" test "a shallow and easily evaded inquiry into whether the government [could] name just one neutral purpose served by the law."[110]

Given this shoddy record, one can well understand why, after decades of vacillation on the question of what makes a law content-based, the Court was no longer willing to put up with the "justified without reference" test, at least as applied to facially content-based laws. And to the extent the rule announced in *Reed* makes it harder for the government to "make an end run around the First Amendment" than was the case under the pre-*Reed* regime, the decision represents a doctrinal step forward.[111]

The benefits that *Reed* produces, however, come with serious costs. This is because, by requiring courts to treat *all* facially content-based laws as presumptively invalid—at least to the extent they regulate speech to which the presumption against content-based regulation applies—the decision will make it very difficult for the government to defend even entirely legitimate laws against constitutional challenge. This is because, although the Court has sometimes described the purpose of strict scrutiny to be the "smok[ing] out [of] illegitimate [government purposes]," in fact the prophylactic rule does much more than that.[112] By requiring the government to demonstrate a compelling and not just a legitimate purpose, and that the means it has chosen to achieve that end are the least restrictive possible, strict scrutiny makes it difficult to defend even laws that are not the product of a bad intent.[113] The result is that *Reed* may imperil many laws that employ content distinctions to achieve entirely legitimate aims. In this respect, *Reed* extends the prophylactic rule of strict scrutiny further than the Court in other contexts has been willing to go. The analogy to the law of race discrimination illuminates just how broad the *Reed* test truly is.

Norton v City of Springfield, Docket No 13-3581, *11 (7th Cir filed Feb 11, 2014) (available on Westlaw at 2014 WL 688306). This assertion was unsupported by any evidence, however.

[110] Mark Rienzi and Stuart Buck, Neutral No More: *Secondary Effects Analysis and the Quiet Demise of the Content-Neutrality Test*, 82 Fordham L Rev 1187, 1191 (2013).

[111] Marcy Strauss, *From Witness to Riches: The Constitutionality of Restricting Witness Speech*, 38 Ariz L Rev 291 (1996).

[112] *Adarand Constructors, Inc v Pena*, 515 US 200, 226 (1995) (quoting *City of Richmond v J.A. Croson Co*, 488 US 469, 493 (1989) (plurality)).

[113] This is of course why Gerald Gunther famously quipped that strict scrutiny was "fatal in fact, if not in theory." Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv L Rev 1, 8 (1972). Although later empirical work has suggested that strict scrutiny is *not* always fatal, Seth Kreimer's analysis of lower court decisions in content discrimination cases makes clear how frequently fatal it can be. Compare Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand L Rev 793, 815 (2006) (reporting reports of empirical study finding that courts applying strict scrutiny in First Amendment cases upheld the challenged law in 22 percent of cases) with Kreimer, 16 U Pa J Const L at 1293 (cited in note 15) (finding that, in cases involving the regulation of speech in public forums, laws subjected to strict scrutiny were struck down in 97 percent of district court cases and 87 percent of appellate cases).

III. REED'S VICES

In insisting that all laws that employ either "obvious" or "subtle" content distinctions should be considered, for constitutional purposes, presumptively invalid and subject to strict scrutiny, the *Reed* majority articulated, what we might call, borrowing from equal protection scholarship, an "anti-classificatory" test of content discrimination.

Equal protection scholars use the term anti-classification to refer to the view of the Equal Protection Clause that has been dominant on the Court since at least the early 1990s.[114] On this view, the government presumptively violates its obligation to provide equal protection of the law whenever it classifies individuals on the basis of a limited number of constitutionally "suspect" categories, such as race or nationality or alienage.[115] Or, at least, on this view, the government presumptively discriminates whenever it classifies individuals on the basis of a suspect category and the result is to burden or benefit those classified.[116] When the government acts in this way, proponents of this view of the Equal Protection Clause insist that its actions will be constitutional only if they satisfy strict scrutiny.[117]

Reed articulates an almost identical approach to the analysis of allegedly discriminatory speech regulations. It too insists that whenever the government classifies individuals on the basis of a constitutionally "suspect" category, and the result is to burden or benefit those so classified, it acts presumptively unconstitutionally.[118] The only real difference between the *Reed* test of content discrimination and the test of discrimination articulated in the Court's recent equal protection cases is the identity of the suspect categories. If, in the equal protection context, the categories that are considered suspect are racial categories or categories of national origin or alien status, the categories that *Reed* identifies as constitutionally suspect are instead content-based categories. Indeed, the first question that *Reed* requires courts to ask when confronted with an allegedly discriminatory content-based speech regulation is essentially the same

---

[114] See, for example, Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 Harv L Rev 1470, 1475–76 (2004); Balkin and Siegel, 58 U Miami L Rev at 9 (cited in note 14).

[115] The most succinct recent articulation of this view can be found in Chief Justice Roberts' assertion in his plurality opinion in *Parents Involved in Community Schools v Seattle School District Number 1* that "[t]he way to stop discrimination on the basis of race is to stop discriminating"—that is, making legal distinctions—"on the basis of race." 551 US 701, 747–48 (2007) (plurality). Although race remains the archetypal suspect category, the Court has recognized the existence of other suspect categories such as nationality and alienage. *Graham v Richardson*, 403 US 365, 371–72 (1971).

[116] Racial classifications that merely describe social reality—such as, for example, the racial classifications employed on the census—are not in fact usually reviewed under strict scrutiny. See Balkin and Siegel, 58 U Miami L Rev at 18 (cited in note 14) (noting that "courts seem to act on the belief that a group-based classification must inflict some dignitary or distributive harm to violate the anticlassification principle"); see also *Morales v Daley*, 116 F Supp 2d 801, 813–15 (SD Tex 2000) (declining to apply strict scrutiny to census policies that require the collection of individual racial as well as other demographic information because it is "differential treatment, not classification [per se], that implicates equal protection").

[117] *Adarand Constructors*, 515 US at 227.

[118] Hence, the Court concluded that the Gilbert ordinance was facially content-based—and therefore subject to strict scrutiny—because it "treated [speakers] differently" based on nothing other than the content of their signs. *Reed*, 135 S Ct at 2227.

question courts must ask when confronted with an allegedly discriminatory race-based regulation: does the law treat individuals differently on a constitutionally suspect basis?

Nor is it only in its first step that the *Reed* test mirrors contemporary equal protection doctrine. So too does its second step, which requires courts faced with a speech regulation that does not make a facial content distinction to determine whether the regulation was enacted in order to further illegitimate ends.[119] This is essentially the same inquiry that courts must engage in when faced with an equal protection challenge to a facially neutral law. This is the case even though, in First Amendment cases, it is the government that has the burden of demonstrating that a speech regulation is adequately justified by a legitimate purpose and in equal protection cases, it is the litigant who bears the burden of establishing the existence of a discriminatory purpose.[120] In practice, this differences matters very little, given how easy it is for the government to establish that a facially neutral law is adequately justified and how difficult it is for litigants to establish a discriminatory purpose.[121] The result is that, after *Reed*, what will determine in the vast majority of both free speech and equal protection cases whether strict scrutiny applies is whether the challenged law employs a "suspect" classification on its face.

That *Reed* makes the rules that govern content discrimination cases so similar to those that govern race discrimination cases is not entirely surprising. There are, after all, deep continuities between First Amendment and equal protection law. In equal protection law, for example, as in free speech law, the Court has tended to equate discrimination with discriminatory purpose.[122] And in both bodies of law, the tiered system of scrutiny has come to serve essentially the same doctrinal function: by imposing very rigorous scrutiny on constitutionally "suspect" laws, it "ensure[s] that courts are most skeptical in cases in which it is highly predictable that illegitimate motives are at work" and less skeptical in other cases.[123]

Nor are these the only similarities between these two bodies of law. As in its First Amendment cases, the Court's equal protection cases have generated sharp disagreement among the justices about how broadly strict scrutiny should apply. For a time, this disagreement produced the kind of vacillation in the Court's race discrimination cases that has characterized First Amendment doctrine. This is evident in the Court's decisions in the 1970s, 1980s, and 1990s addressing equal protection challenges to affirmative

---

[119] *Reed,* 135 S Ct at 2227 ("[L]aws 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, . . . like those that are content based on their face, must also satisfy strict scrutiny.") (quoting *Ward,* 491 US at 791) (quotation marks omitted).

[120] *Village of Arlington Heights v Metropolitan Housing Development Corp*, 429 US 252, 264–66 (1977) (requiring "[p]roof of racially discriminatory intent or purpose . . . to show a violation of the Equal Protection Clause" in cases involving facially neutral laws).

[121] Reva Siegel, *Why Equal Protection No Longer Protects*: *The Evolving Forms of Status-Enforcing State Action,* 49 Stan L Rev 1111, 1136 (1997) (noting that the very high evidentiary standards required to establish discriminatory purpose "insulate[] many, if not most, forms of facially neutral state action from equal protection challenge").

[122] *McCleskey v Kemp*, 481 US 279, 292 (1987) ("[A] defendant who alleges an equal protection violation has the burden of proving the existence of purposeful discrimination."); *Washington v Davis*, 426 US 229, 240 (noting that it is a "basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose") (quotation marks omitted).

[123] Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv L Rev 4, 78 (1996).

action programs and to other minority empowerment policies that classified individuals on the basis of race, but did so in order to integrate and equalize, rather than to segregate and divide. In some cases, the Court insisted that strict scrutiny was the appropriate standard of review in these cases; but in other cases the Court applied a less demanding standard because it found that the purposes that led the government to enact these programs were constitutionally legitimate.[124] In yet other cases, the Court failed to articulate a standard of scrutiny at all, because it could not agree on what standard should govern.[125]

In its equal protection cases, the Court struggled to decide, in other words, between an anti-classificatory approach and a more purpose-oriented approach to racial classifications—just as it struggled to decide, in its First Amendment jurisprudence, between an anti-classificatory and a more purpose-oriented test of content discrimination. In this respect, the histories of the two constitutional doctrines of discrimination are quite similar.

In other respects, however, the histories of the two doctrines of discrimination are quite dissimilar. In the Court's equal protection cases, after several decades of uncertainty and vacillation, the anti-classificatory view won the day. In 1995, in *Adarand Constructors, Inc v Pena*,[126] for example, the Court unequivocally rejected the possibility that a benign governmental purpose could justify treating laws that classify on the basis of race as anything less than constitutionally suspect.[127] In subsequent cases, the Court has adhered to this position, despite persistent dissent.[128]

In the Court's First Amendment cases, in contrast, the struggle between the two tests of content discrimination continued for much longer. Justices who readily signed on to the anti-classificatory view of equal protection continued to join—and even to author—opinions in which the Court upheld as content-neutral laws that made content distinctions on their face.[129] The result was that, whereas the Court, by the mid-1990s,

---

[124] *Metro Broadcasting, Inc v FCC*, 497 US 547, 564–65 (1990) (holding that "benign race-conscious measures mandated by Congress—even if . . . not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives").

[125] *Wygant v Jackson Board of Education*, 476 US 267 (1986); *Regents of University of California v Bakke*, 438 US 265, 325 (1978).

[126] 515 US 200.

[127] *Adarand Constructors*, 515 US at 227.

[128] For recent critiques of the majority's anti-classificatory approach, see *Fisher v University of Texas at Austin*, 133 S Ct 2411, 2434 n 4 (2013) (Ginsburg, J dissenting) ("Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated.") (quoting *Gratz v Bollinger*, 539 US 244, 301 (2003); *Parents Involved,* 551 US at 836–37 (Breyer dissenting).

[129] This was true of Justice Powell, for example, who was a vigorous advocate for a purposive approach to First Amendment equality but an equally vigorous advocate of an anti-classifactory approach to the Equal Protection Clause. Compare *Bakke*, 438 US at 289–90 ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.") with *Young v American Mini Theatres, Inc*, 427 US 50, 73–84 (1976) (Powell concurring) (voting to uphold city zoning law that applied only to adult movie theatres because "[i]t is clear from both the chronology and from the facts that Detroit has not embarked on an effort to suppress free expression"). Justice Powell was not the only member of the Court, however, who showed much more distaste for laws that classified on the basis of race than they did for laws that classified on the basis of content. The same was also true of Justices Rehnquist,

had firmly embraced the view that to stop discriminating on the basis of race, government must stop classifying on the basis of race, the Court had not embraced the view that to stop discriminating on the basis of content, one must stop classifying on the basis of content.

It is *Reed* that brings the First Amendment doctrine of content discrimination and the Fourteenth Amendment doctrine of race discrimination into alignment. In so doing, it makes it as difficult, at least in theory, for the government to make content distinctions as racial distinctions.

It is not obvious, however, that the same rules that apply to all racially classificatory laws *should* apply to all laws that classify on the basis of content. This is because of what we might call the different ontological status of race and content in American constitutional law.

A. The Constitutional Irrelevance of Racial Distinctions

It is a basic principle of equal protection law that racial distinctions are "in most circumstances irrelevant" to the government when it regulates.[130] This is what the Court asserted, in *Hirabayashi v United States* in 1943, to explain why "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[131] Since then, the Court has repeated that claim on multiple occasions, often without further elaboration or exploration.[132]

The claim is not a self-evident one, however. After all, we live in a racially stratified society, one in which racial and ethnic disparities are evident in almost all arenas of public and private life. Racial differences are closely correlated to where people live, their access to medical care, the likelihood that they will be victims of crime, and many other economic, social, and political differences.[133] There are consequently many reasons, we might think, why the government might want to take race into account when making regulatory policy that have nothing to do with prejudice or animus.

The Court has nevertheless refused to allow the government to take race into account, even in response to the obvious racial differences in the society it governs. It has made clear that, even when the government makes what appear to be rational racial

---

White, and O'Connor. Compare *Renton*, 475 US 41 (applying a purpose test of content discrimination) with *J.A. Croson Co*, 488 US at 476 (plurality) (applying an anti-classificatory test of race discrimination) (plurality). Others on the Court, meanwhile, were strong proponents of anticlassification in the First Amendment context but strong critics of an anti-classificatory approach to equal protection. This was true, for example of Justices Marshall and Brennan. *Compare Renton*, 475 US at 55–56 (Brennan dissenting) *with J.A. Croson Co*, 488 US at 528–30 (Marshall dissenting).

[130] *Hirabayashi v United States*, 320 US 81, 100 (1943).

[131] Id.

[132] See, for example, *Parents Involved,* 551 US at 741; *Adarand Constructors*, 515 US at 214; *McLaughlin v Fla*, 379 US 184 (1964).

[133] See, for example, Sara Sternberg Greene, *Race Class, and Access to Civil Justice*, 101 Iowa L Rev 1263 (2016) (noting significant racial disparities in housing); Nicholas O. Stephanopoulos, *Race, Place, and Power,* 68 Stan L Rev 1323, 1357–59 (2016) (finding robust and stable differences in racial voting patterns); David R. Williams, *Race, Health, and Health Care*, 48 SLU L J 13, 15 (2003) (noting that "[r]acial and ethnic disparities are pervasive across a broad range of health outcomes and for multiple populations in the United States").

distinctions—that is to say, when it treats individuals differently because of observable, even perhaps statistically significant, differences in the characteristics of different racial groups—its actions offend the Equal Protection Clause.[134]

The Court's refusal to allow the government to engage in what David Strauss has described as "rational discrimination" reflects its underlying belief that race is a social construct; or at least, that racial differences do not reveal anything about the individual's inherent "ability to perform or contribute to society."[135] Hence, the Court presumes that differences in the characteristics of different racial groups are not inherent but the product of centuries of racial subordination and inequality. They are the product of private biases, in other words, to which the government cannot give effect without risking reinforcing.[136]

As a result, the situations in which the government may constitutionally take racial differences into account are few and far between. The Court has acknowledged that the government can take race into account in order to promote diversity in the university setting, or to undo the effects of the government's own prior acts of discrimination.[137] But in the vast majority of cases, the Court has taken the view that government may not treat its citizens differently because of their race.[138] The consequence is a public sphere in which the *explicit* use of racial distinctions are extremely rare.

B. The Constitutional Relevance of Content Distinctions

The situation is very different when it comes to content distinctions. Unlike racial distinctions, content distinctions play a pervasive role in the regulation of both private and public life.

Consider, for example, the rules that govern the private workplace. Federal labor laws prohibit employers from engaging in certain kinds of speech during union election

---

[134] David Strauss, *The Myth of Colorblindness*, 1986 S Ct Rev 99, 111 (1986) ("[I]t is well established that the prohibition against discrimination established by *Brown* extends to what I have called rational discrimination. A court's decision to strike down rational discrimination would be constitutionally required."); compare *J.E.B. v Ala*, 511 US 127, 139 n 11 (1994) ("Even if a measure of truth can be found in some of the gender stereotypes . . ., that fact alone cannot support discrimination on the basis of gender in jury selection. We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization.").

[135] Strauss, 1986 S Ct Rev at 108 (cited in note 134); *Frontiero v Richardson*, 411 US 677, 686 (1973) (plurality) (noting that racial differences, like sexual differences, "frequently bears no relation to [the individual's] ability to perform or contribute to society"). See also Michael J. Klarman, *An Interpretive History of Modern Equal Protection,* 90 Mich L Rev 213, 314 (1991) (arguing that the Court's affirmative action decisions reveal the belief of the majority of justices on the Court that "race almost invariably should be irrelevant to governmental decisionmaking").

[136] *Palmore v Sidoti*, 466 US 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."). This helps explain why racial profiling is considered discriminatory, even when those who engage in it do so for the purpose of combatting crime, not harming minorities. See Albert Alschuler, *Racial Profiling and the Constitution The Scope of Equal Protection*, U Chi Legal F 163, 211 (2002) ("[T]reat[ing] race . . . as an indicator of criminality . . . [has the effect of] ratify[ing] and encourag[ing] the view that minorities are crime-prone [and] . . . is likely to encourage discrimination, not only in the administration of criminal justice, but throughout society.").

[137] *Parents Involved*, 551 US at 721–22.

[138] See, for example, *Johnson v California*, 543 US 499, 515–16 (2005) (Ginsburg concurring).

campaigns.[139] Title VII of the Civil Rights Act of 1964, as well as many state and local laws, prohibit the use of speech that creates a hostile work environment.[140] Health and safety regulations require employers to post signs containing certain kinds of information where their workers can see them.[141] Rules of professional conduct—rules that the government helps to enforce—govern what doctors and lawyers may say when talking to their clients, or when soliciting new work.[142]

All of these rules involve distinctions between certain kinds of speech and others—distinctions that ultimately depend on the content of the expression. What employers are prohibited from doing under federal labor law is expressing certain messages (such as, for example, that a union strike will cause the workplace to close).[143] What workers are prohibited from doing under Title VII is expressing certain kinds of messages (such as, "you're a slut").[144] What doctors are prohibited from doing is giving their patients medically unsound advice.[145] What employers are required to do under a plethora of federal laws is conveying specific information to their workers.[146]

Although some of these rules have proven to be more controversial than others, courts have recognized that the government has legitimate reasons to regulate speech in these ways.[147] They have recognized, for example, that the government can penalize

---

[139] Getman, 43 Md L Rev at 5 (cited in note 37) (noting that federal labor regulations "regularly enforced by the courts of appeals, limit the campaign arguments, the method of delivery, and even the tone of rhetoric that an employer may use" during the course of union elections).

[140] Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L Rev 1791, 1799 (1992) (quotation marks omitted) ("Harassment, courts have held—whether it is harassment by speech or by nonspeech conduct—violates Title VII if it is sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment because of the worker's sex, race, religion, or national origin.").

[141] See, for example, 29 CFR § 516.4 ("Every employer employing any employees subject to the [Fair Labor Standard] Act's minimum wage provisions shall post and keep posted a notice explaining the Act, as prescribed by the Wage and Hour Division, in conspicuous places in every establishment where such employees are employed so as to permit them to observe readily a copy."); 29 CFR § 1903.2(a)(1) ("Each employer shall post and keep posted a notice or notices . . . informing employees of the protections and obligations provided for in the [Occupational Safety and Health] Act, and that for assistance and information, including copies of the Act and of specific safety and health standards, employees should contact the employer or the nearest office of the Department of Labor.").

[142] Post, 2007 U Ill L Rev at 949 (cited in note 37) (noting that "[w]hen a physician speaks to the public, his opinions cannot be censored and suppressed, even if they are at odds with preponderant opinion within the medical establishment. But when a physician speaks to a patient in the course of medical treatment, his opinions are normally regulated on the theory that they are inseparable from the practice of medicine."); Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 Fordham L Rev 569, 569 (1998) ("Lawyers, as professionals, are subjected to speech restrictions that would not ordinarily apply to lay persons. These restrictions have been particularly prevalent in the areas of solicitation of clients, lawyer interaction with the media, and lawyer advertising.").

[143] *NLRB v Gissel Packing*, 395 US 575, 588–89.

[144] See, for example, *EEOC v Hacienda Hotel*, 881 F2d 1504, 1507 (9th Cir 1989).

[145] Post, 2007 U Ill L Rev at 949–50 (cited in note 37).

[146] See note 141.

[147] There is a vigorous debate for example about whether the breadth of the prohibition against sexually harassing speech violates the First Amendment. See, for example, Volokh, 39 UCLA L Rev (cited in note 140); Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 Tex L Rev 687 (1997). Even critics of the rules acknowledge however that some sexually harassing speech at work can be punished *because of its content*. Volokh, 39 UCLA L Rev

harassing speech in order to ensure equality of access to the workplace;[148] that it can limit employer speech during union election campaigns in order to ensure that union elections are free and fair;[149] and that it can limit the speech of doctors and lawyers in order to promote the integrity of their professions and the wellbeing of their patients and clients.[150] The widespread recognition that content-based distinctions play an important role in the regulation of the workplace helps explain why the standard of means-end scrutiny that applies in work environments tends to be relatively lenient, and why the strong presumption against content-based regulation does not apply.

Even when it comes to the regulation of speech in the public sphere—to speech to which the presumption against content-based restrictions *does* apply—content distinctions play an important regulatory role. This is true even though the range of purposes that may legitimately motivate the government to employ content distinctions in the public sphere is more limited than when it regulates in the private sphere. This is because First Amendment doctrine recognizes the distinction between what Immanuel Kant famously described as the "public" and the "private use of one's reason."[151] That is to say, it recognizes, or at least presumes, that speech that addresses itself to a public audience is especially important to the marketplace of ideas.[152] Thus, when the government regulates public speech, the constitutional constraints on its authority are much greater. In such cases, the government is barred not only from punishing speech because it dislikes it, as it is prohibited from doing when it regulates the private sphere,[153]

---

at 1807 (cited in note 140) ("Many harassment cases involve truly harrowing abuse, abuse that can shut women and minorities out of the workplace almost as surely as would explicit discrimination in hiring.").

[148] See, for example, *Henson v City of Dundee*, 682 F2d 897, 902 (11th Cir 1982) (noting that "[s]exual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality").

[149] *Gissel Packing,* 395 US at 619 (holding that government may prohibit employers from communicating, even indirectly, a "threat of reprisal or force or promise of benefit," during the course of a union election, in order to protect economically dependent employees against employer coercion).

[150] *Planned Parenthood of Se Pa v Casey*, 505 US 833, 838 (1992) (affirming state's right to compel physicians to provide specific information to their patients about abortion and holding more generally that "the physician's First Amendment rights not to speak are implicated only as part of the practice of medicine, which is licensed and regulated by the State"); *Ohralik v Ohio State Bar Association*, 436 US 447, 460 (1978) (upholding state professional rule prohibiting certain kinds of legal solicitation given the state's "general interest in protecting consumers and regulating commercial transactions" and its "special responsibility for maintaining standards among members of the licensed professions").

[151] Immanuel Kant, *An Answer to the Question: What is Enlightenment?*, in H.S. Reiss, ed, *Political Writings* 54, 55 (1991) ("[T]he public use of one's reason must be free at all times, and this alone can bring enlightenment to mankind. On the other hand, the private use of reason may frequently be narrowly restricted without especially hindering the progress of enlightenment. By 'public use of one's reason' I mean that use which a man, as *scholar*, makes of it before the reading public. I call 'private use' that use which a man makes of his reason in a civic post that has been entrusted to him.").

[152] This helps explain the persistent emphasis in the cases on *public speech*. See, for example, *Cohen*, 403 US at 24 (arguing that the "constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of *public* discussion") (emphasis added); *Thornhill v Ala*, 310 US 88, 101–02 (1940) ("The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss *publicly* and truthfully all matters of *public* concern without previous restraint or fear of subsequent punishment.") (emphasis added).

[153] See, for example, *Waters v Churchill*, 511 US 661, 675 (1994) (holding that the government has greater power to regulate speech when operating as a public employer because of its interest in "achieving its goals as effectively and efficiently as possible" but that it may not restrict speech that does not interfere with its legitimate workplace goals).

but when it pursues legitimate ends via paternalistic means.[154] For example, in contrast to when the government regulates private speech, when the government regulates public speech, it may not limit the speech of the more powerful in order to protect the less powerful against indirect forms of threat and coercion. Instead, it may prohibit coercive speech only when it represents a "serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[155] Nor may the government limit speech because it may persuade people to do bad things, or because it is offensive or threatening to the status quo, as it can when it regulates in the private sphere.[156]

Even given these constraints, though, there are good reasons why the government might want to, and regularly does, make content distinctions when regulating the speech of public citizens. Consider, for example, privacy laws. Laws of this sort frequently prohibit the use or distribution—including the public use and distribution—of personally identifiable information.[157] They make, in other words, a content-based distinction between information that can be used to identify a person and information that cannot. We can well understand why the government might want to employ a distinction of this sort. This is because the unconstrained dissemination of such information poses a distinction threat to personal privacy.[158]

We cannot therefore presume that when the government distinguishes between these two kinds of information it does so in an attempt to "control the search for truth" or to "give one side on a debatable public question an advantage in expressing its views to the public." Nor is it necessarily acting paternalistically. In fact, it is highly unlikely that when the government regulates personal information its motive is to prevent people from being persuaded by "bad" speech to do bad things, or to shield them from offensive or unpleasant speech. The best explanation of these laws is that they represent an effort to

---

[154] Stone, 25 Wm & Mary L Rev at 212 (cited in note 90) ("The Court has long embraced an 'antipaternalistic' understanding of the [F]irst [A]mendment.").

[155] *Virginia v Black*, 538 US 343, 359 (2003).

[156] See, for example, *Waters,* 511 US at 672 (noting that while, when it comes to the regulation of public speech "[t]he First Amendment demands a tolerance of verbal tumult, discord, and even offensive utterance, as necessary side effects of . . . the process of open debate,. . . a government employer may bar its employees from using . . . offensive utterance[s] to members of the public or to the people with whom they work"; and that "though a private person is perfectly free to uninhibitedly and robustly criticize a state governor's legislative program, we have never suggested that the Constitution bars the governor from firing a high-ranking deputy for doing the same thing") (quotation marks omitted); Post, 2007 U Ill L Rev at 977 (cited in note 37) ("[W]hen physicians address the general public, they are . . . free to express themselves as they wish, without the constraints of ordinary professional responsibility. But when physicians speak to us as our personal doctors, they must assume a fiduciary obligation faithfully and expertly to communicate the considered knowledge of the 'medical community.'").

[157] See, for example, Health Insurance Portability and Accountability Act ("HIPAA") Privacy Rule, 45 CFR § 164.502 (imposing significant constraints on the use and dissemination of "individually identifiable health information"); Driver's Privacy Protection Act ("DDPA"), 18 USC § 2721 et seq (prohibiting individuals from knowingly obtaining or disclosing "personal information" from motor vehicle records); See generally Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 Duke L J 967, 971–73 (2003) (describing the many and varied state and federal laws that regulate the disclosure of personal information).

[158] As the Court has recognized, "[t]he capacity of technology to find and publish personal information … presents serious and unresolved issues with respect to personal privacy and the dignity it seeks to secure." *Sorrell*, 564 US at 579.

protect individual autonomy, by allowing individuals to maintain some control over who knows what about them.[159]

This is not to say that privacy laws pose no First Amendment problems. Like any regulations of speech, they can be employed for bad purposes. And when they deprive the press or other relevant actors of important information on matters of public concern, they can undermine the quality of public debate and thereby violate the First Amendment.[160] But there is nothing *inherently* problematic about privacy laws from a standpoint of discriminatory purpose—which is why courts have frequently upheld the constitutionality of such laws when they restrict speech that does not touch on "matters of public concern."[161]

The same is true of many other kinds of facially content-based regulations of public speech. Consider, for example, campaign finance laws. These frequently impose restrictions on electioneering speech that are not imposed on other kinds of speech.[162] This is a content distinction—what makes something electioneering speech is the fact that it refers to a candidate for elected office.[163] Yet the Court has recognized that the government has a compelling interest in regulating electoral speech in order to preserve the integrity of the electoral process.[164]

---

[159] The Court has recognized on multiple occasions the important First Amendment interests promoted by privacy laws. See, for example, *Bartnicki*, 532 US at 532–33 (noting that "[p]rivacy of communication is an important interest" and that "the fear of public disclosure of private conversations might well have a chilling effect on private speech"); *Griswold v Connecticut*, 381 US 479, 483 (1965) ("[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion.").

[160] In such cases, the Court has not hesitated to strike laws of this kind down. See, for example, *Florida Star*, 491 US 524; *Smith v Daily Mail Publishing Co*, 443 US 97 (1979).

[161] See, for example, *Dahlstrom v Sun-Times Media, LLC*, 777 F3d 937, 949 (7th Cir 2015) (upholding the DDPA against constitutional challenge on the grounds that the government has a "legitimate interest in preventing stalkers and criminals [from] acquir[ing] personal information from state DMVs") (quotations omitted); *Law School Admission Council, Inc v State*, 222 Cal App 4th 1265, 1271–72 (2014), as modified (Feb 11, 2014) (reversing injunction against enforcement of California law that prohibited the LSAC from informing law schools that candidates received an accommodation when taking the LSAT); *Individual Reference Services Group, Inc v FTC*, 145 F Supp 2d 6, 43–44 (DDC 2001), affd sub nom; *Trans Union LLC v FTC*, 295 F3d 42 (DC Cir 2002) (upholding constitutionality of regulation that requires banks to inform customers when using or disseminating their personally identifiable information).

[162] See, for example, 52 USC § 30104(f) (imposing detailed reporting requirements on anyone who "makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year"); 52 USCA § 3012(a) (requiring electioneering communications to clearly state if funded and/or authorized by a political committee, or candidate, or by some other source).

[163] 11 CFR § 100.29 (defining electioneering communications as "any broadcast, cable, or satellite communication that: (1) [r]efers to a clearly identified candidate for Federal office; (2) [i]s publicly distributed within 60 days before a general election . . .; or within 30 days before a primary or preference election [and] (3) [i]s targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives").

[164] *Citizens United v Federal Election Commission*, 558 US 310, 370–71 (2010) ("With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. . . . This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."); *Buckley v Valeo,* 424 US 1, 66–68 (1976) (noting that disclosure requirements "provide[] the electorate with information as to where political campaign money comes from . . . [and therefore aid] the voters in evaluating those who seek federal office . . .[,] deter actual corruption and avoid

Or consider the many laws that prohibit making false statements to government agents[165] or falsely claiming to be a government agent.[166] In distinguishing between true and false speech, these laws make an obvious content distinction. Nevertheless, it is easy to understand why he government might want to penalize false speech to and about government agents. This is because false speech creates harms that true speech does not: it undermines the integrity of government processes. It undermines the ability of law enforcement to effectively investigate crime, the ability of federal agents to distribute benefits in accordance with law, and the ability of the public to trust that government officials are who they say they are.[167]

These examples merely hint at the diverse range of contexts in which content distinctions help the government tailor its coercive force to the specific harms that different kinds of speech can create. Indeed, one can easily come up with many other examples of content distinctions that, until *Reed*, played a relatively unproblematic role in the regulation of the public sphere. Sign laws, for example, regularly distinguish between directional and non-directional signs.[168] Federal aviation law requires pilots to ensure that passengers are provided specific safety information at the beginning of all flights.[169] Right of publicity laws impose penalties on those who misappropriate another person's

---

the appearance of corruption by exposing large contributions and expenditures to the light of publicity . . . [and provide] the data necessary to detect violations of [campaign finance laws]").

[165] See, for example, 18 USC § 1001 (making it a crime to knowingly and willfully "make[] any materially false, fictitious, or fraudulent statement or representation; or make[] or use[] any false writing or document . . . in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States"); Ala Code § 13A-10-9 (making it a crime to "knowingly make[] a false report . . . to law enforcement authorities of a crime or relating to a crime"); DC Code Ann § 5-117.05 (same); Fla Stat Ann § 817.49 (same). For a list of dozens of similar laws, see *United States v Gaudin*, 28 F3d 943, 961 n 3 and 4 (9th Cir 1994) (Kozinski dissenting).

[166] 18 USC § 912 (criminalizing the actions of those who "falsely assume[] or pretend[] to be an officer or employee acting under the authority of the United States or any department, agency, or officer thereof, and acts as such"); 18 USC § 709 (prohibiting a speaker's unauthorized use of federal agencies' names in a manner reasonably calculated to convey the impression that the speaker's message was approved or endorsed by the agency).

[167] Courts have recognized as much. See, for example, *Bryson v United States*, 396 US 64, 70 (1969) (noting the "valid legislative interest in protecting the integrity of official inquiries"); *People v Morera-Munoz*, 210 Cal Rptr 3d 409, 420 (Ct App 2016) (holding that a state law that prohibited the making of false reports to police officers protected against "th[o]se falsities [that] have the potential to corrupt an official investigation"); *United States v Barnow*, 239 US 74, 78 (1915) ("In order that the vast and complicated operations of the government of the United States shall be carried on successfully and with a minimum of friction and obstruction, it is important . . . that a spirit of respect and good will for the government and its officers shall generally prevail. And what could more directly impair this spirit than to permit unauthorized and unscrupulous persons to go about the country falsely assuming, for fraudulent purposes, to be entitled to the respect and credit due to an officer of the government?").

[168] See, for example, Dover, Del Code of Ordinances, Pt II, App B, Art 5, § 4.5(F) (exempting directional signs from general licensing requirement provided such signs are no more than three square feet in size). City of Fort Worth Sign Ordinance, 6.403 (exempting from general permit requirement "[w]arning, security and directional signs for parking or vehicle access" as well as "informational, directional or traffic signs").

[169] 14 CFR § 136.7 (requiring pilots to ensure before takeoff that each passenger has been briefed on emergency and smoking regulations).

name or likeness for their own economic benefit.[170] National security laws criminalize the distribution of material containing secret or classified information.[171]

The fact that content distinctions play such an important role in regulation reflects what we might call the different ontological status of content and racial distinctions in contemporary constitutional law. It reflects the fact that, in contrast to racial distinctions, the Court does *not* consider content distinctions to be merely social constructions—the product of unjust social forces, mystifications that hide from us our essential humanity. Instead, it recognizes that content distinctions sometimes reflect real differences in the characteristics of different kinds of speech.[172] Or at least, it recognizes this to be true of content distinctions *other* than those based on viewpoint.

The Court has not upheld an explicitly viewpoint-based regulation of public speech in almost thirty years.[173] One could thus interpret the Court's First Amendment jurisprudence as establishing the principle that viewpoint distinctions—like racial distinctions—are so rarely relevant to the government's legitimate aims that they are, for all intents and purposes, impermissible mechanisms of lawmaking.[174]

The same is not true, however, of other kinds of content distinctions, which the Court has, on many occasions, upheld. And certainly the Court has never suggested that, when making these kinds of content distinctions, the government may not rely upon generalizations about the characteristics of the different kinds of speech. It has instead insisted that when the government relies upon generalizations, they should be *accurate*.[175] The result is that there are many contexts in which the government can, and regularly does, take subject matter—and various other kinds of content—distinctions into account.

---

[170] See, for example, Cal Civ Code § 3344 ("Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof."); Ohio Rev Code Ann § 2741.02 (prohibiting the use of "any aspect of an individual's persona for a commercial purpose" for a period of sixty years after their death).

[171] See, for example, 18 USC § 793; 18 USC § 798.

[172] This helps explain why content distinctions play such an important role in the doctrinal rules the Court applies in First Amendment cases. See Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 Va L Rev 203, 211–14 (1982).

[173] The last case in which the Court upheld a viewpoint-based regulation of high-value speech was, as far as I can discern, *Meese v Keene*, 481 US 465 (1987) (upholding law imposing registration requirements on foreign agents who disseminate "political propaganda," defined to include material which "advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence"). Even still, the Court upheld the law as constitutional only after finding that it did not restrict any speech or impose any "burden on protected expression." Id at 480.

[174] Stone, 25 Wm & Mary L Rev at 200 (cited in note 90) (noting the Court's tendency to apply strict scrutiny even to modest viewpoint-based laws).

[175] See, for example, *Mosley*, 408 US at 100 (holding that city may not prohibit some types of pickets but not others unless it demonstrates "that [the] picketing [it prohibits] is clearly more disruptive than the picketing [it] already permits"); *Tinker v Des Moines Independent Community School Distict*, 393 US 503, 508–09 (1969) ("[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. . . . In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.").

C. The Consequence of the Difference Between Content and Race

The fact that the government may employ content distinctions to further all sorts of ends but may not employ racial distinctions undermines the implicit analogy that *Reed* draws between the law of content discrimination and the law of race discrimination. This is because one of the primary justifications the Court has provided for treating all laws that employ racial classifications as suspect is that there are so few legitimate reasons for government to employ such distinctions, thus suggesting improper motivation when it does so. As Justice White explained in *Cleburne v Cleburne Texas Living Center*:[176]

> The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. … The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others.[177]

The irrelevance of racial distinctions is not the only justification the Court has provided for treating all racially classificatory laws as suspect. It has also argued that laws that employ racial distinctions are especially likely to be the product of invidious motivations, given the "long and tragic" history out of which they emerge.[178] It has also suggested that laws that employ racial distinctions are particularly problematic because they discriminate on the basis of an immutable characteristic—one for which the individual bears no responsibility.[179]

The Court has nevertheless made clear that, even if not a sufficient condition for suspect class status, the fact that race is "seldom relevant to the achievement of any legitimate state interest" is a necessary condition for it. Conversely, the Court has made clear that classifications that do not share these characteristics need not be subjected to strict scrutiny. In *Cleburne,* for example, the Court explained that mental disability should not count as a suspect or even semi-suspect classification for equal protection purposes because legislation … singling out the retarded for special treatment reflects the

---

[176] 473 US 432 (1985).

[177] Id at 440.

[178] See, for example, *Bakke*, 438 US at 303 ("[T]he perception of racial classifications as inherently odious stems from a lengthy and tragic history"); *Mass Board of Retirement v Murgia*, 427 US 307, 313 (1976) (denying suspect class status to the aged because "[w]hile the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a history of purposeful unequal treatment") (quotation marks omitted).

[179] *Frontiero*, 411 US at 686 ("[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility.") (quotation marks omitted); *Fullilove v Klutznick*, 448 US 448, 525 (1980) (Stewart dissenting) ("The color of a person's skin and the country of his origin are immutable facts that bear no relation to ability, disadvantage, moral culpability, or any other characteristics of constitutionally permissible interest to government.").

real and undeniable differences between the retarded and others"—differences that were "not only legitimate but desirable" for the government to take into account.[180] Hence, the Court argued, to treat the mentally disabled as a suspect or semi-suspect class would do more harm than good, because although "legislation designed to benefit, rather than disadvantage, the retarded would generally withstand examination under a test of heightened scrutiny . . . merely requiring the legislature to justify its efforts in these terms may lead it to refrain from acting at all."[181] And, indeed, the affirmative action cases provide a vivid illustration of how severe a constraint on government power the declaration of suspect class status can be.[182]

There is no reason to think that a similar concern with the constraining and even perhaps chilling effects of strict scrutiny should not apply in the First Amendment context as well. Here too, the Court has long recognized, as we saw in Part I, that the regulation of speech furthers important constitutional as well as extra-constitutional goals. For that reason, the Court should be as concerned about the costs of strict scrutiny in the First Amendment as in the equal protection context.

And yet, if the same concerns apply, the *Reed* test starts to look much less attractive. This is because, given the many legitimate reasons the government has to make content distinctions when it regulates speech, what *Reed* seems to require is the application of strict scrutiny to many laws that are not in fact the product of a discriminatory purpose. And given how difficult it is for the government to satisfy the demands of strict scrutiny, the likely result will be to invalidate many laws that are *not* discriminatory, as the Court understands the term.[183]

Nor can the *Reed* test easily by justified by recourse to a theory of discriminatory effect. Even if one rejected the focus on discriminatory purpose, and instead construed strict scrutiny as a defense against regulations that are particularly likely to disparately effect the expression of particular ideas or topics, *Reed* would still require applying strict scrutiny to many laws that do not pose a significant threat to First Amendment interests. This is because the presence or absence of content classifications is not a reliable predictor of a law's disparate effects. Some facially content-based laws may have a very modest impact on the ability of speakers to communicate.[184] Laws prohibiting the

---

[180] *Cleburne*, 473 US at 444.

[181] Id.

[182] Siegel, 49 Stan L Rev at 1142 (1997) (cited in note 121) ("[T]oday, especially in the area of race, doctrines of heightened scrutiny are functioning primarily as a check on affirmative action programs."). See also David Schraub, *The Siren Song of Strict Scrutiny*, 84 UMKC L Rev 859 (2016) (arguing that supporters of gay rights should not push the Court for suspect class status because doing so would limit, rather than enhance, their ability to protect their interests in the political process).

[183] One could make the same argument about the use of strict scrutiny to review affirmative action laws. This is because the Court has recognized that, when the government acts to regulate admissions to universities, there are at least two legitimate, even "compelling," reasons why it might want to take race into account—namely, to promote diversity and remedy past racial discrimination. *Parents Involved*, 551 US at 721–22. In these cases, as well, the application of strict scrutiny may therefore result in the invalidation of many laws that are not in fact a product of impermissible purposes. The argument is somewhat weaker in the affirmative action context, however, given the fewer range of permissible purposes the Court has recognized racially classificatory laws can promote when compared to facially content-based speech regulations. Nevertheless, the same logic holds.

[184] See Stone, 25 Wm & Mary L Rev at 200 (cited in note 90) (noting that "not every law that restricts the communication of a particular idea, viewpoint, or item of information substantially prevents the message from being communicated" and that "[t]o the contrary, such restrictions are often limited in

impersonation of government officers, for example, burden speech only minimally. They prevent speakers from falsely pretending to be government officials, but not from criticizing, condemning, or praising government officers.[185] As a result, they seem unlikely to have anything close to a significant disparate impact on the ability of different speakers to participate in the marketplace of ideas. The same is true of many other facially content-based laws.[186]

Other content-based distinctions, meanwhile, operate to *lessen* the disparate effects of a law, by exempting or partially exempting from its operation those who are most likely to be severely burdened by it.[187] The result is that many facially content-based laws are unlikely to have the kind of disparate effects that critics have argued First Amendment doctrine should take into account.[188]

What this means is that *Reed* likely imperils many laws that pose no significant threat to First Amendment interests. This is certainly what Justice Kagan argued in her concurring opinion in *Reed*, which Justices Breyer and Ginsburg joined.[189] Contra the majority claim that strict scrutiny is the correct standard of review whenever the government employs regulatory distinctions that turn on the content of speech, Kagan argued that it is only when there is a "realistic possibility that [the] official suppression of ideas is afoot," that courts should—and had in the past—applied strict scrutiny.[190] By refusing to employ this "common sense" approach to the content neutrality analysis, Kagan argued, the majority imperiled thousands of "eminently reasonable" sign laws for no good reason.[191]

There is some evidence already, just two years after the decision was handed down, that Justice Kagan was correct when she predicted that *Reed* would result in the invalidation of many "eminently reasonable" laws. Indeed, by focusing entirely on *Reed*'s impact on sign laws, Justice Kagan may have underestimated the impact of the decision. In *Reed*'s aftermath, lower courts have relied upon the decision to strike down

---

scope, restricting expression in only narrowly defined circumstances."). id at 219 (noting that the disparate effects of facially content-based laws is not necessarily greater than the disparate effects of facially content-neutral laws that impose only a modest burden on expression).

[185] 18 USC § 912.

[186] Stone, 25 Wm & Mary L Rev at 200-01 (cited in note 90) (canvassing other examples of facially content-based laws that have only a minimal impact on the speech marketplace).

[187] See notes 206-207, and accompanying text.

[188] Susan Williams has argued, for example, that the Court has understood the anti-discrimination principle too narrowly to adequately protect free speech interests and that laws that "reduc[e] the availability of [particular] point[s] of view in the marketplace" or that "remove[] certain symbols or symbolic activities from the range of expression available to speakers" should also be considered discriminatory. Williams, 139 U Pa L Rev at 620 (cited in note 26). While some facially content-based regulations of speech probably will have these effects, it is unlikely all, even most, will. Even when evaluated according to this more expansive conception of content discrimination, the *Reed* test is in some respects too broad and in other respects too narrow, as I argue in Part IV.

[189] *Reed,* 135 S Ct at 2236 (Kagan concurring).

[190] Id at 2238–39.

[191] Id at 2239 ("As the years go by, courts will discover that thousands of towns have [content-based] ordinances, many of them entirely reasonable. And as the challenges to them mount, courts will have to invalidate one after the other. . . . And courts will strike down those democratically enacted local laws even though no one—certainly not the majority—has ever explained why the vindication of First Amendment values requires that result.").

not only sign laws[192] but also panhandling laws,[193] election laws,[194] trademark laws,[195] and even state right-of-publicity statutes.[196]

In at least some of these cases, it is far from obvious what First Amendment interests have been vindicated. Consider for example two recent decisions in which courts applied *Reed* to strike down facially content-based regulations of speech.

Billboard Control

The first case involved a constitutional challenge to the Texas Highway Beautification Act.[197] The Texas law was enacted in 1972 in response to the passage of the Federal Highway Beautification Act, which, in an effort to "protect the public investment in . . highways, . . . promote the safety and recreational value of public travel, and . . . preserve natural beauty" required states to impose strict limits on what "advertising signs, displays, and devices" could be erected adjacent to its interstate highways or risk losing a substantial portion of their federal highway funding.[198] As required by the federal law, the Texas Highway Beautification Act prohibited the display, outside of urban areas, of any advertising signs or devices within 660 feet of the interstate highways.[199] Like the federal law, however, it carved out a limited number of exemptions from the general ban on advertising signs and devices. It exempted, for example, "directional [signs], including advertising pertaining to a natural wonder or a scenic or historic attraction"; "outdoor advertising for the sale or lease of the property on which it is located"; "outdoor advertising solely for activities conducted on the property on which it is located"; and "outdoor advertising erected on or before October 22, 1965, that [is] determine[d] to be a landmark of such historic or artistic significance that preservation is consistent with the purposes of [the Act]."[200]

---

[192] See, for example, *Central Radio Co Inc v City of Norfolk, Va*, 811 F3d 625, 629 (4th Cir 2016) (applying *Reed* to reverse earlier decision holding that sign code that applied to "any sign within the city which is visible from any street, sidewalk or public or private common open space" was content-neutral) (quotation marks omitted); *Citizens for Free Speech, LLC v County of Alameda*, 194 F Supp 3d 968, *3 (ND Cal 2016) (holding that sign code that exempted official public signs from its restrictions was content-based under *Reed* and striking it down on equal protection grounds); *Auspro Enterprises, LP v Tex Department of Transportation*, 2016 WL 7187475, *13 (Tex App) (striking down as unconstitutional content-based regulations of speech sections of the Texas Highway Beautification Act); *Thomas v Schroer*, 127 F Supp 3d 864, 872–73 (WD Tenn 2015) (granting preliminary injunction to enjoin enforcement of Tennessee Billboard Act after finding that plaintiff had a strong likelihood of succeeding on the merits of a First Amendment challenge to the law).

[193] In *Norton v City of Springfield, Ill*, for example, the Seventh Circuit reversed its previous decision upholding as content-neutral Springfield's anti-panhandling law. 806 F3d 411, 413 (7th Cir 2015), cert. denied, 136 S Ct 1173 (2016). See also *Thayer v City of Worcester*, 144 F Supp 3d 218, 221 (D Mass 2015) (reaching the same result based on an application of the *Reed* test); *McLaughlin v City of Lowell*, 140 F Supp 3d 177 (D Mass 2015) (same); *Browne v City of Grand Junction*, 136 F Supp 3d 1276, 1280–82 (D Colo 2015) (same).

[194] *Rideout v Gardner*, 123 F Supp 3d 218 (D NH 2015); *Cahaly v Larosa*, 796 F3d 399, 402 (4th Cir 2015).

[195] *In re Tam*, 808 F3d 1321, 1356 (Fed Cir 2015), as corrected (Feb 11, 2016).

[196] *Sarver v Chartier*, 813 F3d 891, 905–06 (9th Cir 2016).

[197] *Auspro*, 2016 WL 7187475, at *5–6.

[198] 23 USCA § 131(a); 23 USCA § 131(b).

[199] Tex Transportation Code Ann § 391.031(a).

[200] Id at § 391.031(b).

The Act distinguished between permitted and prohibited billboards by reference to their content. In a pre-*Reed* decision, the Texas Supreme Court upheld the law as a reasonable content-neutral regulation of speech because it found it was adequately justified by the government's legitimate interest in "stemming visual clutter on the landscape, . . . and promoting travel safety."[201]

Reed changed the rules of the game, however, and when a constitutional challenge to the Texas law was brought before the Texas Court of Appeals in 2016, it concluded that the law should now be considered a content-based regulation of speech to which strict scrutiny applied.[202] After a very cursory analysis of the relationship between the Highway Beautification Act's means and ends, the court found that the law could not satisfy strict scrutiny because the signs it exempted from its billboard ban were not categorically less ugly or less dangerous to the traveling public than the signs it banned.[203] The court therefore concluded that the Act was therefore fatally underinclusive with respect to the goal of preventing visual clutter and enhancing traffic safety.[204]

This conclusion is understandable given the tight fit between statutory means and statutory ends that strict scrutiny requires. Indeed, the Court has held that a law fails strict scrutiny if it fails to restrict a significant amount of speech that threatens the same kind of harm as the speech it does restrict.[205] This is because, as noted in Part I, such underinclusiveness casts doubt on the legislature's purported motivations for the law.

In the context of the Texas Highway Beautification Act, though, the statutory exemptions *do not* cast doubt on the legislature's motivations. This is so because to the extent they privilege any particular type of speech it is speech about historically significant places located near the highway and speech advertising goods and services located adjacent to the highway (gas stations, as well as antique stores).[206] This is precisely the kind of speech the state would logically want to privilege if it was trying to promote the recreational value of public travel—which of course was exactly what Congress was trying to do when it passed the Highway Beautification Act, and what the Texas legislature claimed it was trying to do when it enacted the Texas Beautification Act.[207]

Nor are there other reasons to be concerned about the law's effect on free speech. Its impact on the marketplace of ideas is unlikely to be significantly distorting. Although the Act privileges speech about attractions and activities located near the highway, it does not privilege or burden any particular ideas or messages or topics. Directional markers

---

[201] *Texas Department of Transportation v Barber*, 111 SW3d 86, 100 (Tex 2003).

[202] *Auspro*, 2016 WL 7187475, at *6 ("Under *Reed*'s standard for content neutrality—which simply asks whether the law applies to particular speech because of the topic discussed or the idea or message expressed—the Texas Act's outdoor-advertising regulations are clearly content based.").

[203] Id.

[204] Id.

[205] See, for example, *Florida Star*, 491 US at 540; *Carey*, 447 US at 468.

[206] See *State v Lauderdale, LP*, 2003 WL 1948903, at *1 (Tex App) (noting that to qualify as exempt under the Texas law, directional signs must provide "information useful to the traveler in locating [an] attraction or activity, such as mileage, route numbers, or exit numbers . . . cannot contain descriptive words or phrases or pictorial or photographic representations of the activity . . . and must meet the size and spacing requirements set forth in the statute.").

[207] Tex Transportation Code Ann § 391.002 (declaring the purposes of the law to be to "(1) promote the health, safety, welfare, morals, convenience, and enjoyment of the traveling public; and (2) protect the public investment in the interstate and primary systems").

can direct travelers to all kinds of places. Local advertising signs can advertise all kinds of goods. And the law defines advertising broadly to include noncommercial as well as commercial messages.[208] In fact, at least some of the statutory exemptions can reasonably be understood as efforts by Congress, and by proxy, by the Texas legislature, to *lessen* the distorting effects of the Act by exempting from its application those most likely to have no other feasible alternative than highway billboards to advertise their goods and services to the public: namely, those small businesses located along the side of the road.[209]

The most obvious reading of the law, in other words, is that it represents an effort to reconcile a number of important but competing interests: on the one hand, its aesthetic interest in the "natural beauty" of the landscape; on the other hand, its interest in the safety and convenience of the traveling public; and on the third hand, its interest in ensuring that the Act does not deprive those who rely especially upon highway advertising to communicate information about their products, land, or services of what for them is an important means of communicating. This is the kind of reconciling of interests that legislatures are routinely allowed to do when they enact content-neutral laws..[210]

It is therefore not surprising that, when characterized as content-neutral, the Texas Highway Beautification Act was found to be sufficiently narrowly-tailored to survive constitutional scrutiny but, when characterized as content-based, it was not. Indeed, it is difficult to see how any of the remaining forty-nine state highway beautification acts, or the federal law, will be able to survive strict scrutiny, given the stringent tailoring now required by *Reed*.[211] In fact, a Tennessee court recently issued an injunction against

---

[208] Tex Transportation Code Ann § 391.001 (defining "outdoor advertising" to mean "an[y] outdoor sign, display, light, device, figure, painting, drawing, message, plaque, poster, billboard, or other thing designed, intended, or used to advertise or inform"); *Barber*, 111 SW3d at 99 ("T[he] [Texas] Act defines "outdoor advertising" broadly. It includes both commercial and noncommercial speech.").

[209] This is at least how courts have understood these exemptions. See *State v Lotze*, 593 P2d 811, 814 (Wash 1979), abrogated on other grounds by *Collier v City of Tacoma*, 854 P2d 1046 (Wash 1993) (interpreting the exemption in the Washington Highway Beautification Act as a legislative effort to ensure that those who owned property adjacent to the highway did not lose all means of advertising to the public); id at 815 (noting that "[a] total prohibition of on-premise business signs . . . may violate the First Amendment [by] deny[ing] the only available channel of communication to one trying to Identify, rather than merely advertise his business or property").

[210] See *Taxpayers for Vincent*, 466 US at 810–11 (concluding that a content-neutral law that prohibited the posting of all signs on public property was narrowly tailored to promote the city's aesthetic interests even though it failed to do anything about the aesthetic problems created by the posting of signs on private property because "[t]he private citizen's interest in controlling the use of his own property justifies the disparate treatment"); *Metromedia, Inc*, 453 US at 510–12 (plurality) (upholding as content-neutral city ordinance that banned offsite advertising but not onsite advertising on the grounds that "the prohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics" and "[t]his is not altered by the fact that the ordinance is underinclusive because it permits onsite advertising").

[211] The federal government was sufficiently worried about this possibility when *Reed* made its way to the Court that it filed an *amicus* brief in which it urged the Court to strike the Gilbert sign law down but not by applying so broad a test of content-based lawmaking that it would imperil the Federal Highway Beautification Act. See Brief for the United States as Amicus Curiae Supporting Petitioners, *Reed v Town of Gilbert, Ariz*, Docket No 13-502, *8 (US filed Sept 22, 2014) (available on Westlaw at 2014 WL 472504) (arguing that the Court should apply intermediate scrutiny to strike down the Gilbert sign law but not "the more carefully calibrated Highway Beautification Act").

enforcement of the Tennessee Billboard Act after finding, on similar grounds as the Texas court, that the plaintiff had a strong likelihood of succeeding on his First Amendment challenge to the Act.[212] It is nevertheless hard to see what First Amendment interests are promoted by requiring Congress and the states either to prohibit all highway billboards or to prohibit none of them. Yet this is what the Texas decision portends.

Robocalls

Consider now a second post-*Reed* case—this time involving a First Amendment challenge to South Carolina's anti-robocall law.[213] The law prohibited the use of automatic dialing devices to make unsolicited phone calls ("robocalls") for commercial and some political purposes.[214] The law exempted from its general ban calls made to persons with whom the robocaller had an existing or previous business relationship but imposed numerous restrictions on those robocalls that were allowed.[215]

Robert Cahaly, a Republican political consultant, challenged the law on First Amendment grounds after he was charged with illegally making political robocalls in six South Carolina legislative districts in the weeks leading up to an election.[216] Invoking *Reed*, the Fourth Circuit invalidated the law as a content-based regulation of speech.[217] The court assumed, for purposes of argument, that the law furthered a compelling state interest—namely, it protected residential privacy and tranquility from the unwanted intrusion of unsolicited robocalls.[218] It nevertheless found that the law failed strict scrutiny because it was not the least restrictive means by which the state could have promoted this compelling interest. The court argued that, rather than banning only select robocalls, South Carolina could have protected residential privacy by imposing time-of-day limitations, requiring mandatory disclosure of the robocaller's identity, or creating a do-not-call-list.[219]

This conclusion follows naturally from *Reed*. The least restrictive means requirement has been an integral part of the strict scrutiny analysis for many decades;[220] it has been justified as yet another means by which courts ensure that the government's motivations are what it says they are.[221]

In this case, however, the fact that South Carolina did not employ what the court considered to be the least restrictive means available does not suggest that its motivations for enacting the anti-robocall law were censorial. This is so because all of the supposed

---

[212] *Schroer*, 127 F Supp 3d at 874–75 (finding that the Tennessee Billboard Act was content-based but unlikely to satisfy strict scrutiny because it was "hopelessly underinclusive").

[213] *Cahaly*, 796 F3d 399.

[214] Id at 402.

[215] Id at 402–03 (quoting SC Code Ann § 16-17-446) (noting that the law required permitted robocalls to "disconnect immediately when the called party hangs up"; [to be] made between 8:00 AM and 7:00 PM" and required those who made robocalls to disclose their identity and the purpose of the call to those they called).

[216] Id at 404.

[217] Id at 402.

[218] Id at 405.

[219] Id.

[220] *Playboy*, 529 US at 813; *Sable Communications of Cal, Inc v FCC*, 492 US 115, 126 (1989).

[221] See Stone, 25 Wm & Mary L Rev at 231 (cited in note 90) (interpreting the requirement as a means of ensuring that "the government would have adopted the restriction even in the absence of improper motivation").

less-restrictive alternatives have obvious and significant weaknesses. There is by now plenty of evidence that do-not-call lists provide relatively weak protection against the problem of robocalls.[222] Mandatory disclosure does little to prevent one of the problems associated with robocalls: namely, the annoying ringing of the telephone, particularly at dinnertime.[223] And, of course, time-of-day limitations preserve residential privacy only during certain times of the day.

One can therefore well understand why South Carolina might have chosen to address the problem of robocalls directly, by means of a ban on *some* robocalls. The problem of invasive robocalls exists almost entirely because of commercial telemarketers who, over the past three decades, have increasingly turned to inexpensive automated calling technology to reach consumers.[224] The result has been what some have described as an "epidemic" of robocalling.[225] As the FTC noted in 2013 testimony to the Senate, complaints about commercial robocalls increased from 63,000 per month in the fourth quarter of 2009 to 200,000 per month in the fourth quarter of 2012.[226] There is also some evidence that consumers perceive commercial robocalls—robocalls made by telemarketers—as more invasive than robocalls made by schools, charitable organizations, and other nonprofit entities. Indeed, this is precisely what Congress found in 1991, when it enacted the federal anti-robocall law, the Telephone Consumer Protections Act.[227]

---

[222] See Maria G. Hibbard, *Hanging Up Too Early: Remedies to Reduce Robocalls*, 5 Case W Reserve J L Tech & Internet 79, 79–80 (2014) ("Despite the prevalence of the National Do Not Call Registry, telemarketing still plagues millions of Americans… Although the F[ederal] T[rade] C[omission]'s Do Not Call Registry, the national list of consumers who do not wish to receive telemarketing calls, has significantly reduced the number of unwanted telemarketing calls … from legitimate marketers who honor the system and recognize the importance of respecting consumer choice, illegitimate companies and telemarketers … continue to abuse the market with growing frequency.") (quotations omitted).

[223] The Minnesota Supreme Court put the point very nicely in *Humphrey v Casino Marketing Group, Inc*. 491 NW2d 882 (Minn 1992). The Court wrote: "[T]he residential telephone is uniquely intrusive. The caller, who can convey messages which very young children can understand, is able to enter the home for expressive purposes without contending with such barriers as time or distance, doors or fences. . . . Moreover, the shrill and imperious ring of the telephone demands immediate attention. . . . Indeed, for the elderly or disabled, the note of urgency sounded by the ring of the telephone signals a journey which may subject the subscriber to the risk of injury. Unlike the radio or the television, whose delivery of speech, either commercial or noncommercial, depends on the listener's summons, the telephone summons the subscriber, depriving him or her of the ability to select the expression to which he or she will expose herself or himself." Id at 888-89.

[224] Hibbard, 5 Case W Reserve J L Tech & Internet at 82–85 (cited in note 222).

[225] *Rage Against Robocalls* (Consumer Reports, July 28, 2015).

[226] *Stopping Fraudulent Robocall Scams: Can More Be Done?: Hearing Before the Subcommittee on Consumer Protection, Product Safety, and Insurance of the Senate Committee on Commerce, Science, and Transportation*, 113th Cong, 1st Sess 10 (2013) (testimony of Lois Greisman, Associate Director of the Division of Marketing Practices, FTC Bureau of Consumer Protection). See also *Telephone Advertising Consumer Rights Act*, HR Rep No 102-317, 102d Cong, 1st Sess 16 (1991) ("Complaint statistics show that unwanted commercial calls are a far bigger problem than unsolicited calls from political or charitable organizations.").

[227] Telephone Consumer Protection Act ("TCPA"), 47 USC § 227; HR Rep No 102-317 at 16 (cited in note 226) (noting that evidence gathered during drafting of the TCPA suggested that "[i]n addition to the relative low volume of non-commercial calls, . . . such calls are less intrusive to consumers because they are more expected" and concluding that "the two main sources of consumer problems–high volume of solicitations and unexpected solicitations–-are not present in solicitations by nonprofit organizations").

By prohibiting commercial but not charitable robocalls—by making it illegal to use an automated dialing device to sell products but allowing it to be used to invite friends to a birthday party or to send out a weather forecast—South Carolina was not making an arbitrary, and therefore presumably invidious, distinction.[228] It was instead targeting the primary source of the evil it was trying to combat.

This is not to say that the South Carolina law was unproblematic. In addition to prohibiting commercial robocalls, it also prohibited some political robocalls.[229] The state was unable to provide any evidence to the court for why these kinds of robocalls posed a more serious threat to residential privacy than the nonprofit robocalls the law permitted.[230] In this respect, the law was, as the Fourth Circuit noted, overinclusive, insofar as it prohibited both speech the state had reason to believe posed a particular threat to residential privacy and speech that didn't.[231]

Nothing in the Fourth Circuit opinion turned on the overinclusivity of the South Carolina law, however. It was its failure to employ the least restrictive means available to protecting residential privacy that doomed the law. This suggests that the Fourth Circuit would have struck down the law had South Carolina, like many states and the federal government, prohibited only unsolicited commercial robocalls. Yet it is not clear what First Amendment interests would be advanced by doing so. There is little reason to believe that these laws are the product of a discriminatory purpose. Nor is their impact on the marketplace of ideas likely to be significant. The South Carolina law, like the federal and many similar state anti-robocall laws, do not prohibit phone calls; they merely prohibit automated phone calls.[232]

By raising the costs of making robocalls, these laws attempt to encourage those who use this device to be more selective in whom they call. Given pervasive consumer unhappiness with the problem of unwanted robocalls, this does not seem to be an unreasonable thing for the legislature to attempt to do. And yet, in the name of expressive equality, *Reed* imperils these, as well as other, anti-robocall laws.

C. Implications

These examples demonstrate how difficult *Reed* makes it for the government to defend facially content-based laws against constitutional challenge, even when there are good reasons for the government to employ the content distinctions it did. They give some idea of why, although the ideal of the colorblind society has long been an aspirational trope (wrongly or rightly) in equal protection law, free speech law has never been organized around the ideal of a content-blind society. This is because what Paul Brest argued was

---

[228] See Opening and Response Brief of Appellee/Cross-Appellant, *Canhaly v Larosa*, Docket No 14-1651(L), 14-1680, *35 (4th Cir filed Oct 21, 2014) (available on Westlaw at 2014 WL 5360252).

[229] The South Carolina Attorney General, clearly uncomfortable about the scope of the prohibition against political robocalls, wrote an opinion shortly before the incidents that led to Cahaly's arrest that interpreted the South Carolina law, despite its broad wording, to prohibit only those political robocalls that were most like commercial robocalls: namely, those that specifically advocated for a particular candidate. *Cahaly*, 796 F3d at 403–04. Survey and other election-related robocalls, the Attorney General indicated, were permitted by the South Carolina law. Id at 404.

[230] Id at 406.

[231] Id.

[232] See, for example, 47 USC § 227; SC Code Ann § 16-17-446.

true of racial classifications is absolutely not true of content classifications: namely, they do not "correlate[] so weakly with the legitimate characteristics for which [they] might be used as a proxy that … society loses little if they are presumptively forbidden."[233] Instead, the costs may be significant.

Of course, any system of prophylactic rules is likely to result in the invalidation of some laws that do not pose the problem the prophylaxis is designed to combat. That is the nature of prophylactic rules, and what makes them both useful and frequently controversial.[234] In this case, however the number of false positives that *Reed* is likely to produce is higher than the Court has indicated, in its equal protection cases at least, it will ordinarily allow.

That it is willing to allow a significant number of entirely legitimate speech regulations to be invalidated under the *Reed* test presumably reflects the Court's view that there is no adequate alternative test of content-based lawmaking, given the very evident problems with the "justified without reference" test canvassed in Part II. This is not an unreasonable belief, but as the next Part argues, it may be a mistaken one. This is because it is far from obvious that the problems with the justification test are an inevitable feature of the test, or evidence of lower courts' unwillingness to protect speech unless absolutely forced to do so by the Court. Instead, many of the problems with the justified test can be blamed on the Court itself. In this respect, *Reed* may be a case of chickens coming home to roost: the Court turning to an extremely broad test of content-based lawmaking in response to its own failure to interpret the more nuanced "justified without reference" test with rigor.

What this suggests is that, even if the test of content-based lawmaking that *Reed* announces is an improvement over what came before, it may nevertheless represent a second-best solution to the very serious problem of pretextual discrimination—and one that is likely to create significant doctrinal problems in the future.

IV. ALTERNATIVES AND IMPLICATIONS

The fact that the anti-classificatory test of content-based lawmaking that *Reed* announces imposes such significant constraints on the government's legitimate regulatory authority suggests that the decision should be considered a good solution to the problem of pretextual discrimination only if there are no other, less restrictive but equally effective means of guarding against the repressive impulses of both judges and legislatures.

One might think, given the discussion of pre-*Reed* lower court opinions in Part II, that there isn't: that when provided with the more discretionary "justified without reference to content" test of content-based lawmaking, lower courts failed to interpret it in a way that vigorously enforced free speech values or protected speakers against pretextual discrimination. Given that record, one might argue that a highly formal, bright-line test like the one announced in *Reed* provides the only effective, if imperfect, means of enforcing the First Amendment's anti-discrimination principle.[235]

---

[233] Paul Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 Harv L Rev 1, 11 (1976).

[234] On this point, see David Strauss, *The Ubiquity of Prophylactic Rules*, 55 U Chi L Rev 190 (1988).

[235] Seth Kreimer has argued so much. In a pre-*Reed* article, he argued that the anti-classificatory test of content-based lawmaking articulated in cases such as *Arkansas Writers Project* and *Simon &*

It is not obvious, however, that this is true. Although lower courts tended to apply the "justified without reference" test in the years prior to *Reed* in an overly lenient manner, there is no reason to assume that this leniency was due to the lower courts' refusal to vigorously enforce the speech-protective rules the Supreme Court handed them. To the contrary, in taking the government's claimed justifications at face value, the lower courts were simply following the Court's own example. Indeed, almost all of the problems with the lower courts' approach to the justification inquiry during this period can be traced to the Supreme Court itself.

A. The Devolution of the Justification Test

In *Police Department of the City of Chicago v Mosley*,[236] the Court first articulated the general framework for cases involving potentially discriminatory regulations of public speech. The case involved a Chicago ordinance that prohibited the picketing of city public schools while they were in session and for half an hour before and after school was in session but that made an exception for picketing that occurred outside schools involved in labor disputes.[237] The city interpreted the ordinance to ban all kinds of picketing outside schools (including schools involved in labor disputes) *except* labor pickets.[238] The Court concluded that, construed as such, the ordinance violated both the Equal Protection Clause and the First Amendment because it restricted speech because of its content.[239]

The Court reached the conclusion that the ordinance was content-based because the city was unable to offer any legitimate reason for the distinction between labor and non-labor picketing. The city argued, for example, that it prohibited picketing, except for labor pickets, near schools in order to prevent disruption of the educational experience. The Court rejected this argument because the government provided no evidence demonstrating that non-labor pickets were more disruptive than labor pickets. "Although preventing school disruption is a city's legitimate concern," Justice Marshall noted, "Chicago itself has determined that peaceful labor picketing during school hours is not an undue interference with school. Therefore . . . Chicago may not maintain that other picketing disrupts the school unless that picketing is *clearly more disruptive* than the picketing Chicago already permits."[240]

Similarly, the Court rejected the government's claim that it exempted labor pickets from the law in order to avoid intruding on a sphere of activity normally governed by federal labor law.[241] It rejected this argument because it found that the city's desire to avoid the legal headaches caused by the potentially preemptive effect of federal labor law

---

Schuster was superior to the alternative because, as a bright-line test, it generated results that were "less likely to be distorted by heuristics of fear and outrage" and therefore was "well adapted to counterbalance [the] predictable cognitive biases that warp [judicial] judgments." Kreimer, 16 U Pa J Const L at 1316, 1318 (cited in note 15).

[236] 408 US 92.

[237] Id at 102.

[238] Id at 94 n 2 (noting that although "[b]y its terms, the statute exempts 'the peaceful picketing of any school involved in a labor dispute[,]' [i]t is undisputed that this exemption applies only to labor picketing of a school involved in a labor dispute.").

[239] Id at 92.

[240] Id at 212.

[241] Id at 102 n 9.

was insufficient to justify the labor exemption. "This attenuated interest," Marshall wrote, "at best a claim of small administrative convenience and perhaps merely a confession of legislative laziness, cannot justify the blanket permission given to labor picketing and the blanket prohibition applicable to others."[242]

Mosley established the principle that what is required to justify a speech regulation that involves "differential treatment" on the basis of content is clear evidence that the distinction actually furthers, or is likely to further, a significant governmental interest. In *Carey v Brown*, eight years later, the Court re-emphasized this point when it insisted, in the course of striking down a similar law, that "[w]hen government regulation discriminates among speech-related activities in a public forum . . . any distinctions it draws must be carefully scrutinized."[243]

In subsequent decisions, however, the Court failed to insist on clear evidence that the distinctions speech regulations drew actually furthered an "appropriate government interest." Instead, it interpreted the justification test to require only evidence showing that the government did not *intend* to repress ideas.

Renton provides perhaps the most egregious example of the Court's tendency, in these cases, to shy away from a rigorous application of *Mosley.* As noted earlier, *Renton* involved a First Amendment challenge to a local zoning ordinance that prohibited adult movie theaters from locating close to schools, churches, and other specified places.[244] The Ninth Circuit held that the zoning ordinance was unconstitutional because the city was unable to show that it actually furthered, or was likely to further, a substantial government interest.[245] To justify the law, the city relied almost entirely on studies of the secondary effects of adult movie theatres in other cities, of very different size and character.[246] The Ninth Circuit held that this was not adequate. "Renton has not studied the effects of adult theaters and applied any such findings to the particular problems or needs of Renton," the court wrote. "We do not say that Renton cannot use the experiences of other cities as part of the relevant evidence upon which to base its actions, but in this case those experiences simply are not sufficient to sustain Renton's burden of showing a significant governmental interest.[247]

The Supreme Court reversed this decision because it concluded that the city *was* entitled to rely upon the evidence compiled by other cities. "The First Amendment does not require a city," Justice Rehnquist wrote, "before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon *is reasonably believed to be relevant* to the problem that the city addresses."[248] The Court held that any more rigorous standard would limit the ability of municipalities like Renton to adequately respond to

---

[242] Id.

[243] *Carey*, 447 US at 461–62.

[244] Id at 47.

[245] *Playtime Theaters, Inc v City of Renton*, 748 F2d 527, 537 (9th Cir 1984).

[246] Renton relied, for example, upon studies conducted in Detroit, a much larger city and one in which the legislature had implemented a very different zoning law than that which Renton implemented. *Renton*, 475 US at 46 (noting that the Detroit law dispersed theatres, rather than concentrating them).

[247] 748 F2d at 536–37.

[248] *Renton*, 475 US at 51–52.

novel social problems.[249] The result of the Court requiring (as Justice Kennedy later put it) only "very little evidence" to uphold facially content-based zoning laws was to make it easier for governments to pretextually justify discrimination.[250] *Renton*, in other words, "elevate[d] motive—which is easy for governments to fake and hard for courts to assess—over the more objective application and justification inquiries" the Court had previously used to deal with content-based discrimination.[251]

Renton was not the only Supreme Court opinion to embrace this approach. A few years later, in *Ward v Rock Against Racism*, the Court once again emphasized intent over evidence, albeit this time in a case involving a challenge to a facially content-neutral law. The case involved a regulation that required performers at a Central Park bandshell to use a sound amplification engineer provided by the city.[252] Rock Against Racism, a group that organized charity rock concerts in the bandshell, argued that the law was content-based because it privileged a particular conception of sound quality (the city's conception) and discriminated against its very different conception of what counted as quality sound. The Court rejected this argument because it found no evidence in the record that the city was attempting to impose a particular aesthetic ideal on performers. To the contrary, it found evidence that the city "require[d] its sound technician to defer to the wishes of event sponsors concerning sound mix."[253] More generally, the Court concluded that the regulation was content-neutral because "the principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." In this case, the Court found that the city's principal justification for the regulation—namely, that it was intended to "control noise levels at bandshell events"—did not evince a desire to repress speech because the government disliked its message.

In reaching the conclusion that the sound regulation was adequately justified by a content-neutral purpose, the Court may have been correct. There was ample evidence that New York was not trying to repress the expression of messages or music it disliked, nor attempting to do anything other than what it said it was trying to do.[254] The Court's conclusion that the law was content neutral did not rest on this evidence, however. Instead, the Court relied solely on the city's assertions of regulatory purpose—and the district court's finding that the city enforced the law with deference to the wishes of concert organizers.[255]

The opinion thus suggested that what the government had to show to establish the content neutrality of a speech regulation was *not* clear evidence that the speech it restricted differed in some relevant way from the speech it did not restrict, but merely the

---

[249] Id at 52 ("The city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems" (quoting *American Mini Theatres, Inc*, 427 US at 71 (plurality)).

[250] *Alameda Books*, 535 US at 451 (Kennedy concurring) ("[W]e have consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required.").

[251] Rienzi and Buck, 82 Fordham L Rev at 1200 (cited in note 110).

[252] *Ward*, 491 US at 787–88.

[253] Id at 792–93.

[254] Prior to enacting the speech regulation, the city attempted on several occasions to achieve a less speech-restrictive solution to the problem of excessive noise at the bandshell, and specifically the noise problems generated by the respondent in the case. Id at 784–88 (noting the "numerous complaints about excessive sound amplification" the city received and its multiple efforts to negotiate a solution with Rock Against Racism).

[255] Id at 792.

existence of some plausible, non-discriminatory purpose it intended the regulation to further. This is certainly how lower courts subsequently interpreted the decision. The Eighth Circuit, for example, relied heavily on *Ward*'s "principal inquiry" language to justify its conclusion in *Thorburn* that, because the targeted picketing law was not intended to suppress any particular messages, but applied to all targeted picketing, it was content neutral and subject only to intermediate scrutiny.[256] The Ninth Circuit also relied upon *Ward* to conclude that the Gilbert sign ordinance was content-neutral because it was not obviously motivated by *animus*.[257]

These opinions do not, in other words, demonstrate the unwillingness of lower courts to follow Supreme Court precedents. Rather, they demonstrate how inconsistent the Court has been in articulating the requirements of the justification test. They suggest, as a result, that the Court did not necessarily need to embrace the highly formalist test of content-based lawmaking that *Reed* announced in order to ensure that lower courts carefully evaluated potentially discriminatory speech regulations. Instead, the Court could merely have reaffirmed the rigorous standards that *Mosley* and other earlier cases insisted courts should apply when reviewing regulations of speech.

B. A Missed Opportunity

Imagine an alternative universe in which, rather than denying that government purpose has any role to play in the content neutrality inquiry, the Court in *Reed* had instead concluded that the Gilbert ordinance was unconstitutional because the town failed to present any clear evidence that the distinctions it drew actually furthered its legitimate interests in reducing traffic accidents and maintaining the municipality's aesthetic appeal. This is largely what Justice Kagan's concurring opinion concluded.[258]

Such an approach would have been superior to the approach taken in *Reed* in a number of ways. First, it would not have established a significantly overbroad rule. It would not, in other words, have required the application of strict scrutiny even in cases where the government has good reasons to employ the distinctions it employs.

Second, and as a consequence, it would not have created a situation in which courts would be encouraged to apply the test narrowly, or to dilute the meaning of strict scrutiny to uphold laws they perceived to be entirely reasonable but that *Reed* designated as content-based. Justice Breyer warned in his concurring opinion that the majority rule might lead courts to "water[] down the force of the presumption against constitutionality that 'strict scrutiny' normally carries with it," thereby "weaken[ing] the First

---

[256] *Thorburn*, 231 F3d at 1117 ("Because the Lincoln ordinance regulates protected speech in a public forum, we first determine whether the ordinance is content-neutral or content-based in order to apply the appropriate level of scrutiny. The government cannot regulate speech because it disagrees with the message conveyed. . . . Lincoln does not disagree with a particular message; the ordinance applies equally to anyone engaged in focused picketing without regard to his message. Because Lincoln's justification for the ordinance is the protection of residential privacy and tranquility and has nothing to do with the content of the regulated speech, the ordinance is content-neutral.").

[257] *Reed*, 707 F3d at 1074–75.

[258] *Reed*, 135 S Ct at 2239 (Kagan concurring) ("The absence of any sensible basis for [the distinctions between directional, ideological, and political signs] dooms the Town's ordinance under even the intermediate scrutiny that the Court typically applies to 'time, place, or manner' speech regulations. Accordingly, there is no need to decide in this case whether strict scrutiny applies to every sign ordinance in every town across this country containing a subject-matter exemption.").

Amendment's protection in instances where 'strict scrutiny' should apply in full force."[259] This is certainly a concern. But it is equally plausible that courts will simply apply the decision as narrowly as possible to avoid reaching unpalatable conclusions.

Indeed, there is already plenty of evidence that courts are construing *Reed* narrowly in order to avoid reaching undesirable results. For example, in cases involving the regulation of strip clubs and other forms of adult entertainment, courts have continued to apply the *Renton* test of content neutrality rather than the much stricter *Reed* test.[260] This is notwithstanding the fact that, as a judge on the First Circuit acknowledged recently, the two opinions are "logically irreconcilable."[261]

These decisions demonstrate how *Reed's* potentially more radical implications may be domesticated by the lower courts. They also, however, complicate the argument that *Reed*, because it is a formal test, provides more reliable protection against discrimination than the "justified without reference" inquiry. They suggest that formalism is not necessarily the best way to combat judicial bias, particularly in cases where the formal rule strikes judges as unreasonable. This is particularly the case given the very complicated doctrinal structure of much of First Amendment law.[262] The proliferating array of categorical distinctions that populate free speech doctrine make it quite easy for courts to distinguish *Reed* "up, down, and sideways."[263] The result may be to only intensify what is already a pronounced threat: namely, overarching doctrinal incoherency.[264] It also may inoculate from stringent constitutional scrutiny what are in fact very troubling laws, like the zoning laws at issue in *Renton*.

By not requiring courts to distinguish the decision away, a revitalized justification test might, ironically, have provided more protection to speakers targeted by certain kinds of facially content-based laws. It also would have altered the standards that apply to the

---

[259] Id at 2235 (Brennan concurring).

[260] See, for example, *Cricket Store 17, LLC v City of Columbia*, 2017 WL 360545 (4th Cir); *American Entertainers, LLC v City of Rocky Mount, NC*, 2016 WL 4728077, *11 (EDNC); *BBL, Inc v City of Angola*, 809 F3d 317, 326 n 1 (7th Cir 2015) (refusing to apply *Reed* on the grounds that "[w]e don't think *Reed* upends established doctrine for evaluating regulation of businesses that offer sexually explicit entertainment, a category the Court has said occupies the outer fringes of First Amendment protection"). See also *Free Speech Coalition, Inc v Attorney General United States*, 825 F3d 149, 161 n 8 (3d Cir 2016) (citation omitted) ("Although we do not reach the issue, we . . . [think] that it is doubtful that *Reed* has overturned the *Renton* secondary effects doctrine.").

[261] *Free Speech Coalition*, 825 F3d at 174 (Rendell dissenting).

[262] See for example Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 Pepp L Rev 273, 274 (2009) (noting that First Amendment doctrine is "maddeningly complex"); Kagan, 63 U Chi L Rev at 515 (cited in note 25) ("noting that the "technical, complex classificatory schemes of First Amendment law" have only become "more intricate [over time], as categories have multipled, distinctions grown increasingly fine, and exceptions flourished and become categories of their own"); Williams, U Pa L Rev at 616 (cited in note 26) ("The doctrinal web surrounding the free speech clause of the first amendment is one of the most complicated and confusing areas in constitutional law.").

[263] Note, *Free Speech Doctrine After* Reed v. Town of Gilbert, 129 Harv L Rev 1981, 1990-1992 (2016) (documenting the various ways in which courts have distinguished *Reed*).

[264] Post, 47 Stan L Rev at 1275 (cited in note 48) (arguing that the "Court's First Amendment jurisprudence, which is a lively and growing area of constitutional law, dances now macabrely on the edge of complete doctrinal disintegration"); Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L Rev 1497, 1497 (2007) (noting "increasing sense" that First Amendment doctrine "has become incoherent").

review of facially content-neutral as well as to the review of facially content-based regulations.

One of the great disadvantages of anti-classificatory rules like the one announced in *Reed* is that they make the stringency of the constitutional analysis depend almost entirely on the presence of proscribed classifications. But the fact that a statute fails to employ suspect classifications does not, by any means, imply that it is not a tool of discriminatory aims. Although it may be the case, for reasons discussed in Part II, that statutes that classify on the basis of race, or content, or other suspect classifications are more likely than other kinds of laws to reflect a discriminatory purpose, facially neutral laws can also provide a perfectly serviceable tool for the carrying out of unlawful purposes. Scholars of the Equal Protection Clause have argued in fact that today it is *primarily* by means of facially neutral laws that race and gender biases continue to be given effect in American law.[265] The Court's unwavering commitment to an anti-classificatory approach to equal protection, they argue, provides as a result extremely poor protection against the often subtle forms of discrimination that perpetuate racial and other kinds of inequality in contemporary society.[266]

The Court's embrace of an anticlassificatory approach to the First Amendment raises the same concern. As Timothy Zick has noted, facially neutral speech regulations—regulations that distinguish between speakers on the basis of their location, or the genre of their speech, or some other, non-content features of that speech—can serve as "powerful weapon[s] of social and political control."[267] *Reed* certainly incentivizes legislators who want to discriminate to figure out a facially neutral means of doing so. And yet the decision does nothing to address the very palpable weaknesses with the justification test, as it presently exists.

---

[265] Siegel, 49 Stan L Rev at 1143) (cited in note 121) ("Today doctrines of heightened scrutiny function primarily to constrain legislatures from adopting policies designed to reduce race and gender stratification, while doctrines of discriminatory purpose offer only weak constraints on the forms of facially neutral state action that continue to perpetuate the racial and gender stratification of American society."); John Tyler Clemons, *Blind Injustice: The Supreme Court, Implicit Racial Bias, and the Racial Disparity in the Criminal Justice System*, 51 Am Crim L Rev 689, 700 (2014) (arguing that the facially neutral operation of the criminal justice system is pervaded by racial bias, both implicit and explicit).

[266] Siegel, 49 Stan L Rev at 1137 (cited in note 121) (arguing that "the empirical literature on racial bias suggests that . . . [given contemporary precedents], most race-dependent governmental decisionmaking will elude equal protection scrutiny"); Randall L. Kennedy, McClesky v. Kemp: *Race, Capital Punishment, and the Supreme Court,* 101 Harv L Rev 1388, 1419–20 (1988) (noting that, by requiring evidence of purposeful discrimination—at least in cases involving facially neutral laws—the Court has "articulate[d] a conception of discrimination that ignores the chameleonlike ability of prejudice to adapt unobtrusively to new surroundings and, further, to hide itself even from those firmly within its grip" and "manifest views attuned only to the most blatant deprivations of the equal protection of the laws").

[267] Timothy Zick, *Speech and Spatial Tactics*, 84 Tex L Rev 581, 582 (2006). Zick cites as an example of this the 25-block restricted zone that prohibited all protests within 25 blocks of the 1990 World Trade Organization meetings in Seattle. Id. These protests obviously tremendously impacted the ability of the antiglobalization protestors who gathered in Seattle to communicate their message. Nevertheless, when faced with a First Amendment challenge to the zone, the Ninth Circuit upheld it as content-neutral, after applying the deferential *Ward* test. Menotti v. City of Seattle, 409 F3d 1113, 1129–30 (9th Cir 2005).

Of course, nothing prevents the Court from making clear, in a future decision, that a law is not justified by a content-neutral purpose simply because the government says it is. The analogy to the equal protection cases suggests, however, is that this is unlikely to occur. Scholars have complained for decades now about the weakness of the test of discrimination the Court has developed to smoke out discriminatory purpose in equal protection cases involving facially neutral laws, but to no avail.[268] This is not surprising if one understands the Court's turn to an anticlassificatory test of race discrimination as motivated, at least in part, by its discomfort with vesting courts with the discretionary authority that a more vigorous purposive inquiry would require. In its equal protection jurisprudence, the Court has demonstrated a pronounced unwillingness to allow courts to strike down facially neutral laws absent extremely pronounced evidence of bad intent. There is no reason to believe its approach in First Amendment cases will be any different. The result is that *Reed* is likely to produce a test of content-based lawmaking that is both too broad and too narrow.

C. The Drawbacks

This is not to say that a reinvigorated justification test would have no drawbacks. By requiring courts to determine in most cases whether there is sufficiently clear evidence to justify the differential treatment of speech, it would vest courts with considerably more discretion than they possess under *Reed*.

This discretion could be cabined somewhat by embedding within the test a much narrower anticlassificatory rule. In her concurring opinion, Justice Kagan argued that, although courts should only apply strict scrutiny to laws that make subject matter and other kinds of content distinctions when they raise the "realistic possibility that [the] official suppression of ideas is afoot," they should always apply strict scrutiny to laws that make viewpoint distinctions because laws of this sort always raise doubts about the government's motivations.[269]

This approach to the content discrimination inquiry would certainly not create the problems that the extension of strict scrutiny to subject matter-based and other kinds of content-based laws would, given how infrequently the government employs viewpoint distinctions when it regulates the public sphere, and how difficult it is to think of legitimate reasons why the government might wish to do so. It would also limit the range of cases in which courts would be required to evaluate the evidentiary basis of the government's justifications in order to determine the standard of scrutiny that applies.

What a test that applied strict scrutiny to all laws that make viewpoint distinctions would require courts to do, however, is to identify when laws make a viewpoint as opposed to some other kind of content distinction. Given how blurry the line between subject matter and viewpoint distinctions frequently turns out to be, it is not all clear how

[268] See for example Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan L Rev 317, 366-370 (1987); Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 Colum L Rev 1023, 1038-1039 (1979); Alan David Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 Minn L Rev 1049, 1053-1055 (1978).

[269] Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2237 (2015) (Kagan J., concurring).

much in practice Justice Kagan's narrower anti-classificatory rule would actually constrain the discretion vested courts under the justification test.[270]

A revitalized justification test would constrain judicial discretion in another way, however: namely, by reminding courts of the fundamental constitutional values that motivate the doctrinal rules. Over seventy years ago, in *Schneider v. State*, Justice Roberts asserted what remains today a fundamental principle of First Amendment law: namely, that although "[m]ere legislative preferences or beliefs respecting matters of public convenience may . . . support regulation directed at other personal activities, [they are] insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions" as the rights protected by the First Amendment.[271] Hence, Justice Roberts concluded, "the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the[se] rights."[272] A test of content-based lawmaking that required courts, in almost all cases, to evaluate the empirical evidence provided to justify restricting speech in order to determine the level of scrutiny that applies would operate as a continuing reminder of this central First Amendment norm.

This may be, ultimately, the best way to guard against the repressive impulses of judges, given the inherent power of courts to make even bright-line tests fuzzy. Vincent Blasi has argued that "[i]t would be a mistake to assume that the strategy for protecting the central norms of the first amendment must emphasize the tactic of doctrinal compulsion——the fashioning of specific, highly protective tests that would bind lower courts and officials in times of stress."[273] This is because, Blasi argued, it is difficult to fashion any legal rule "with sufficient prescience and precision to achieve that type of behavioral effect to any great degree."[274] The complicated ways in which lower courts are already trying to limit the effects of the *Reed* decision provide a good illustration of Blasi's point.

In articulating what Justice Thomas described in his opinion in *Reed* as a "clear and firm" test of content-based lawmaking, the Court may have thus been attempting to guarantee a kind of predictability that no formal test can provide.[275] Meanwhile, it created a test that overly constrains the government's regulatory autonomy in some respects and provides, in other respects, insufficient protection to those targeted by facially neutral laws. Given these serious problems with the *Reed* test, it is hard to see why a revitalized

---

[270] See Frederick Schauer, *Codifying the First Amendment:* New York v. Ferber, 1982 Sup Ct Rev. 285, 317 (1982) (expressing skepticism about the existence of a "clear line of demarcation between viewpoint and subject-matter discrimination"); Leslie Kendrick, *Content Discrimination Revisited*, 98 U Va L Rev 231, 243 (2012) (noting the many have argued "that viewpoint classifications are very difficult to distinguish, both descriptively and normatively, from subject-matter classifications.") Members of the Court have certainly disagreed, at times quite vigorously, about whether particular laws can be classified as viewpoint based. See for example *R.A.V. v City of St Paul, Minn*, 505 US 377, 391-92 (1992) (concluding that law that prohibits use of racially-motivated fighting words makes a viewpoint-based distinction); id at 433 (Stevens J., dissenting) (rejecting the conclusion that the law makes a viewpoint-based distinction).

[271] Schneider v. State of New Jersey, 308 US 147, 161 (1939).

[272] Id.

[273] Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 Colum L Rev 449, 467 (1985).

[274] Id.

[275] *Reed*, 135 S Ct at 2231.

justificiation test would have provided a worse solution to the problem of content discrimination than that which the *Reed* test provides—and in many respects it would have been far superior.

Of course, the *Reed* majority did not embrace Justice Kagan's alternative solution. *Reed* remains, for now at least, the law. The sheer breath of the *Reed* test makes it likely, however that Justice Kagan was correct when she predicted that its application would not be easy or without contestation: that litigants would continue to seek ways to narrow the test and that these efforts would continue to generate difficult questions about the scope and the meaning of the presumption against content-based lawmaking.[276] Despite its efforts to do so, the *Reed* majority may not, in other words, have resolved the decades-long fight over the meaning of the First Amendment anti-discrimination principle. Going forward, it therefore behooves both scholars and courts to remember the costs, as well as the benefits, of an anti-classificatory approach.

[276] Id. at 2239 (Kagan concurring) (I suspect this Court and others will regret the majority's insistence today on answering that question in the affirmative. As the years go by, courts will discover that thousands of towns have such ordinances, many of them 'entirely reasonable.' . . . And as the challenges to them mount, courts will have to invalidate one after the other. (This Court may soon find itself a veritable Supreme Board of Sign Review.)").