The World of Content Neutrality: Effective Approaches to a Problematic Area of the First Amendment

"A special respect for individual liberty in the home has long been part of our culture and our law . . . that principle has special resonance when the government seeks to constrain a person's ability to speak *there."*[1]

I. INTRODUCTION

The United States Supreme Court has long recognized the importance of certain types of speech, and as a result, any law regulating speech of serious societal value must survive strict scrutiny—an extremely rigorous level of constitutional review.[2] At the same time, the Constitution affords other types of speech little to no protection.[3] The Supreme Court's jurisprudence regarding laws regulating socially important speech is separated into two categories, created to separate the way the law affects speech.[4] If the reviewing court holds the law is content based, meaning the law regulates speech based on the message conveyed, then the law is subject to strict scrutiny.[5] Alternatively, if the law is content neutral, meaning its regulation is not based on the expression itself, then the law is subject to intermediate scrutiny, a lower level of judicial review.[6]

1. City of Ladue v. Gilleo, 512 U.S. 43, 58 (1994).

2. *See* Miller v. California, 413 U.S. 15, 34 (1973) (holding First Amendment protects expression with serious societal value); *see also* Boos v. Barry, 485 U.S. 312, 321 (1988) (ruling "*content-based* restriction on *political speech* in a *public forum*" subject to strict scrutiny) (emphasis added). To overcome this burden, the government must show that the law is necessary to achieve a compelling state interest and is as narrowly drawn as possible. *See Boos*, 485 U.S. at 321.

3. *See* Roth v. United States, 354 U.S. 476, 483 (1957) (holding constitutional freedoms of speech and press not intended to protect obscenity); Chaplinksy v. New Hampshire, 315 U.S. 568, 570-71 (1942) (outlining classes of speech with no constitutional issues). Namely, historically unprotected categories of speech are lewd and obscene words, profanity, libel, and "fighting" words. *Chaplinsky*, 315 U.S. at 572. It is well settled that such speech adds no value to the public marketplace of ideas, and societal concern for ethics and order sufficiently offsets any interest in allowing the free communication of these types of speech. *Id.*

4. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (holding whether government regulates speech it disagrees with as court's principal inquiry); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 295 (1984) (holding park service's regulation prohibiting camping not based on disagreement with viewpoint).

5. *See Boos*, 485 U.S. at 320 (discussing role of governmental justification in content neutrality determination); Wilson R. Huhn, *Assessing the Constitutionality of Laws that Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801, 804-06 (2004) (discussing differing levels of review based on content-based or content-neutral determination).

6. *See* Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 642 (1994) (holding regulations unrelated to content subject to intermediate scrutiny); Huhn, *supra* note 5, at 805 (positing content-neutral laws evaluated under intermediate scrutiny).

Due to the demanding nature of strict scrutiny, a reviewing court's decision regarding a law's content neutrality is often dispositive as to its constitutionality.[7] As a result, any confusion surrounding this analysis could have negative consequences regarding the regulation of public speech and expression.[8] Confusion arises specifically in the context of an individual's use of political or religious signs on private property, or in any form of expression that relates to a matter of current social concern or evokes negative reactions from the viewing public.[9]

Recently, federal courts have struggled to employ a consistent and effective test to determine whether a law is content based or content neutral.[10] As explained in a recent Fourth Circuit decision, at least three courts chose to take an absolute approach, which holds a law is content based if it requires any examination of content.[11] Alternatively, at least five circuits followed a practical approach, meaning a review of the content does not automatically render a law content based, as long as it does not differentiate based on disagreement with the message expressed.[12] In *Reed v. Town of Gilbert*,[13] the Supreme Court seemingly adopted the absolutist approach while attempting to

7. *See* Clay Calvert, *Free Speech and Content-Neutrality: Inconsistent Applications of an Increasingly Malleable Doctrine*, 29 MCGEORGE L. REV. 69, 71-72 (1997) (arguing "profound" consequences of classifying law as content based or content neutral); Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 53 (2000) (discussing importance of distinction). As Professor Chemerinsky indicates, the Supreme Court's 1999-2000 Term is illustrative on the importance of distinction because almost all of the free speech cases from that period triggered and turned on the content-neutrality determination. *See* Chemerinsky, *supra*, at 53.

8. *See* Calvert, *supra* note 7, at 104-10 (outlining issues in need of resolution in future of content-neutrality analysis); *infra* Part III.A (discussing problems with governmental motive in content-neutrality analyses).

9. *See* City of Ladue v. Gilleo, 512 U.S. 43, 54 (1994) (recognizing even narrow prohibitions on residential signs leave open unsatisfactory alternatives); *see also* Kara N. Lundy, *Municipal Sign Ordinances: Three Common Constitutional Flaws and Their Solutions*, 94 ILL. B.J. 490, 491-93 (2006) (outlining ways municipalities successfully enact laws passing constitutional muster).

10. *See* Brown v. Town of Cary, 706 F.3d 294, 302 (4th Cir. 2013) (explaining circuit courts' disagreement over which approach to apply).

11. *See id.* (providing examples of cases employing each approach); Neighborhood Enters., Inc. v. City of St. Louis, 644 F.3d 728, 736 (8th Cir. 2011) (holding zoning code's definition of sign content-based because one must examine its content); Serv. Emps. Int'l. Union, Local 5 v. City of Hous., 595 F.3d 588, 596 (5th Cir. 2010) (holding regulatory scheme content based, regardless of its purpose, because examination of message's content required); Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1263 (11th Cir. 2005) (adopting absolutist approach to determine whether city sign code content based or content neutral).

12. *See Brown*, 706 F.3d at 302 (joining circuits using practical approach); Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583, 603 (7th Cir. 2012) (holding law content neutral if law does not target specific message or idea); Melrose, Inc. v. City of Pittsburgh, 613 F.3d 380, 389 (3d Cir. 2010) (applying "context-sensitive" analysis in determining content neutrality); H.D.V.-Greektown, LLC v. City of Detroit, 568 F.3d 609, 622 (6th Cir. 2009) (holding preferences for certain types of speech not content based); G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064, 1079 (9th Cir. 2006) (discussing examination of sign ordinance's message does not automatically render law content based).

13. 135 S. Ct. 2218 (2015).

alleviate the confusion surrounding the content-neutrality analysis.[14]

Part II.A of this Note will outline the basic principles of the content-neutrality doctrine and the general implications of a positive determination.[15] Parts II.B and II.C will discuss specific aspects of the Supreme Court's jurisprudence, namely the secondary effects doctrine and the distinction between speech on public and private property.[16] Part II.D will describe the role of governmental motive in courts' determinations and the conflicting approaches within court cases.[17] Part II.E will detail the current federal circuit split and the Supreme Court's responsibility to formulate a more effective rule or test.[18] Finally, Part III will argue that the determination of governmental motive should not be a necessary component of the content-neutrality determination, and that the absolute approach is preferable, particularly when evaluating laws that regulate speech on private property.[19]

II. HISTORY

A. Limitations on the First Amendment and the Birth of the Content Distinction

The First Amendment to the U.S. Constitution provides in part, "Congress shall make no law . . . abridging the freedom of speech."[20] Despite the sweeping language, the Supreme Court has long recognized that not all speech is equally protected; the Constitution affords certain types of speech little to no protection because of the speech's minimal value to public discourse.[21] The Court, however, has gone to great lengths to preserve the notion that free speech on topics of high value or public issues is crucial to a free and functioning democracy.[22] While the Court historically has not subjected the *content* of such speech to censorship, it has upheld the constitutionality of laws

14. *See id.* at 2227 (distinguishing facially content-based laws from laws requiring examination of content).

15. *See infra* Part II.A.

16. *See infra* Part II.B-C.

17. *See infra* Part II.D.

18. *See infra* Part II.E.

19. *See infra* Part III.

20. U.S. CONST. amend. I.

21. *See* Miller v. California, 413 U.S. 15, 36 (1973) (holding First Amendment affords no protection to obscene material); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (holding First Amendment affords no protection to libelous statements). In *Miller*, the Court held that states must carefully limit their definition of obscene material because it was wary of the inherent dangers that arise from regulating any form of expression; thus, the Court confined the definition of obscene to works possessing or depicting sexual conduct. *See Miller*, 413 U.S. at 23-24.

22. *See* Boos v. Barry, 485 U.S. 312, 322 (1988) (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988)) (stating public must bear disrespectful and sometimes shocking speech to protect First Amendment freedoms); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (recognizing freedom includes attacks or derogatory comments toward public officials). The Court opined that silencing speech because it offended one's dignity would undermine the Court's refusal to censor speech solely because it may have a negative emotional impact on listeners or viewers. *See Boos*, 485 U.S. at 322; *Hustler*, 485 U.S. at 55.

regulating the *manner* in which one makes such speech; these are "time, place, and manner" restrictions, which may reasonably restrict speech based on those three criteria, without regard to its subject matter.[23]

In the 1960s, the Supreme Court began to recognize the important distinction between regulating speech based on its content, and regulating all speech equally.[24] Rather than employing a First Amendment analysis, however, the Court initially considered the issue from an equal protection standpoint.[25] That analysis eventually evolved into one of the most important frameworks of free speech jurisprudence—the constitutional review applied to a law regulating speech is now based on whether the law is deemed "content based" or "content neutral."[26] A content-based law that regulates speech based on its subject matter or message is subject to strict scrutiny, the most rigorous level of constitutional review, whereas a content-neutral law that regulates regardless of the speech's subject matter or viewpoint must withstand intermediate scrutiny.[27] This distinction is ubiquitous within the Court's First Amendment analysis, and its determination is often dispositive of the

23. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (defining time, place, and manner restrictions). Such restrictions are "valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Id.*

24. *See* Cox v. Louisiana, 379 U.S. 536, 551-52 (1965) (holding statute cannot punish peaceful expression of ideas that may be disliked); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 123 (1981) (discussing *Cox* Court's concern for application of equal treatment to all viewpoints). Indeed, the Court reasoned that the fact that speech may cut against popular views is what necessitates protections on such speech. *See Cox*, 379 U.S. at 552. Doing otherwise would result in governments and courts commandeering all speech and silencing dissenters or those less politically powerful. *See id.* at 552.

25. *See* Carey v. Brown, 447 U.S. 455, 461-62 (1980) (holding regulation differentiating between different types of speech analyzed under Equal Protection Clause); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 94-95 (1972) (analyzing regulation of different types of picketing under Equal Protection Clause); Chemerinsky, *supra* note 7, at 51-53 (discussing *Carey* and *Mosley* decisions). In *Mosley*, the Court recognized that the equal protection claim was closely aligned with a free speech claim, and held that all equal protection cases ask whether the disparate treatment furthers a relevant government interest. *See Mosley*, 408 U.S. at 95. Nevertheless, the Court's analysis was identical to the traditional content-neutrality determination; it reasoned that the main issue with the ordinance in question was that it differentiated types of picketing based on subject matter. *See id.* at 95.

26. Calvert, *supra* note 7, at 73-78 (describing differing evaluations of content-neutral, content-based, and viewpoint-based laws); Chemerinsky, *supra* note 7, at 51 (distinguishing content based and content neutral). Content-neutral laws are ones that regulate speech or expression but do so without distinguishing between different topics. Calvert, *supra* note 7, at 73-74. On the other hand, content-based laws differentiate based on particular topics or viewpoints. Chemerinsky, *supra* note 7, at 51. A third type of regulation is characterized as viewpoint based and regulates one side of a topic or ideology over another. Calvert, *supra* note 7, at 76. Content-based regulations have occasionally passed constitutional muster, however, courts have never upheld viewpoint restrictions. *See* Chemerinsky, *supra* note 7, at 56.

27. *See* Boos v. Barry, 485 U.S. 312, 321 (1988) (holding content-based limitation on political speech in public place subject to exacting scrutiny). Intermediate scrutiny is a considerably lower burden than strict scrutiny, requiring the government to demonstrate that the regulation advances an important governmental interest unrelated to the suppression of the speech, and that the restriction is not larger than necessary to achieve that objective. United States v. O'Brien, 391 U.S. 367, 377 (1968).

constitutionality of the law at issue.[28] Further, this distinction, and the profound consequences it carries, is based on the Supreme Court's recognition that laws regulating the content of speech undermine the First Amendment's purpose because such laws single out certain views or subjects.[29]

B. The Evolution Continues: The Secondary Effects Doctrine

In the 1980s, the Supreme Court drew a crucial distinction by holding that a law aiming to curtail the direct impact of a specific opinion or subject matter on the viewing public is inherently content based, whereas a law concerned with the secondary effects of that speech is still content neutral.[30] For example, in *City of Renton v. Playtime Theatres, Inc.*,[31] the Court held that a law specifically regulating theaters showing adult films was not content based because the government aimed its purpose at the secondary effects of the speech: crime, property damage, and unsafe neighborhoods.[32] On the other hand, in *Boos v. Barry*,[33] the Court reinforced this distinction by holding that a law restricting signs critical of foreign governments within five hundred feet of government buildings was content based because it regulated the speech's direct impact on the viewing public.[34] Just one year later, in *Ward v. Rock*

28. *See* Chemerinsky, *supra* note 7, at 53 (stating distinction between content-based and content-neutral laws vital in most free speech cases); Seth F. Kreimer, *Good Enough for Government Work: Two Cheers for Content Neutrality*, 16 U. PA. J. CONST. L. 1261, 1265-66 (2014) (stating Court found content neutrality determinative in twenty-two of thirty-seven free speech cases over eight years); *see also* 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) (describing strict scrutiny as "strict in theory and fatal in fact"); Redish, *supra* note 24, at 125 (stating increased scrutiny for content-based regulations contradicts Court's uncertainty toward content-neutral restrictions).

29. *See* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 871-72 (1997) (noting vagueness of content-based regulation raises First Amendment concerns); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 192-93 (1984) (highlighting Court's concern over lower quantity of speech). One of the Court's chief concerns is that speech regulations can limit individuals' abilities to communicate their views and opinions to others. *See* Stone, *supra*, at 192-93.

30. *See* Boos v. Barry, 485 U.S. 312, 320-21 (1988) (deeming regulations concerned with direct impact of speech content based); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986) (holding laws aimed at regulating "secondary effects" of speech still content neutral); Connick v. Myers, 461 U.S. 138, 162 (1983) (stating must strike balance between interest of individual and interest of state); *see also* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 483-84 (1996) (summarizing secondary effects doctrine).

31. 475 U.S. 41 (1986).

32. *See id.* at 54 (explaining secondary effects not content based). In *City of Renton*, the regulation in question paid special attention to theaters showing adult films; however, because the law's purpose was to eliminate crime and protect property values—concerns more prevalent in areas containing adult film theaters—the government addressed the speech's secondary effects and the law was, therefore, not content based. *See City of Renton*, 475 U.S. at 48-49.

33. 485 U.S. 312 (1988).

34. *See id*. at 318-19 (holding law content based when restricting category of speech). The Court was careful to distinguish this situation from *City of Renton*. *See id.* at 320. In *Boos*, the law sought to reduce the speech's explicit impact on its audience, which directly contravenes the First Amendment's purpose. *See id.* at 321. Specifically, the law did not attempt to curtail effects such as congestion, obstruction of entranceways to

Against Racism,[35] the Court attempted to offer additional guidance by holding that the controlling consideration in assessing a regulation's neutrality is the government's purpose in enacting the regulation. If that purpose is unrelated to the speech's subject matter, it is considered content neutral regardless of its incidental effects on certain subject matters.[36] Similarly, in *Madsen v. Women's Health Center, Inc.*,[37] the Court held an injunction that restricted the speech of antiabortion protesters near an abortion clinic content neutral. The Court remained silent, however, on the speech of abortion supporters, because it issued the injunction due to the protesters' violation of a court order.[38]

C. Signs on Public and Private Property

The distinction between content-based and content-neutral laws frequently emerges when individuals challenge statutes regulating the use of physical signs in public and private settings.[39] The most common justifications for ordinances controlling sign placement are to ensure safety by removing unnecessary distractions from motorists and to maintain aesthetically pleasing environments through stripping unnecessary visual clutter from publically visible areas.[40] Further, regulations surrounding election signs abound due to

the buildings, or to prevent physical harm to government officials. *See id.* Rather, the law's sole purpose was to shield such officials from speech that may criticize their countries or governments, which defies the First Amendment's purpose. *See id.*

35. 491 U.S. 781 (1989).

36. *Id.* at 791. In *Ward*, the respondent, Rock Against Racism (RAR), was an association that put on rock concerts to promote antiracism. *Id.* at 784. Due to noise complaints at previous concerts, the city decided to implement high quality sound equipment and hire a sound technician to oversee sound quality. *Id.* at 787. Upon learning of this new regulation, RAR sought and was granted an injunction allowing it to continue to use the equipment and technician it had previously used. *Id.* at 787-88. Upon review, the Supreme Court found the regulation content neutral and thus subject to intermediate scrutiny. *Id.* at 792-93. The city did not regulate or differentiate based on the content or viewpoint of the music, but rather its concern was the overall sound quality at the concert. *Id.* Furthermore, the Court found RAR's argument that city officials retained too much discretion in controlling the sound unpersuasive. *Id.* at 794-95. In 2000, the Court held a law that prohibited any person from knowingly approaching a person to speak or counsel him or her within 100 feet of any healthcare facility entrance as content neutral because the law did not restrict or prohibit specific subject matter or viewpoints. *See* Hill v. Colorado, 530 U.S. 703, 723-24 (2000). The Court was not concerned with the fact that the legislature applied the law to specific locations, or that it enacted the law because of partisan influence. *See id.* at 724-25.

37. 512 U.S. 753 (1994).

38. *Id.* at 762-64. Chief Justice Rehnquist noted that whether the injunction applied to a specific viewpoint did not automatically categorize it as content or viewpoint-based. *Id.* at 763; *see also* KATHLEEN ANN RUANE, CONG. RESEARCH SERV., RL 95-815, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT 10-11 (2014) (discussing *Madsen* decision).

39. *See* Jules B. Gerard, *Election Signs and Time Limits*, 3 WASH. U. J.L. & POL'Y 379, 392-94 (2000) (arguing regulations limiting use of signs raise free speech issues); Brian J. Connolly, Note, *Environmental Aesthetics and Free Speech: Toward a Consistent Content Neutrality Standard for Outdoor Sign Regulation*, 2 MICH. J. ENVTL. & ADMIN. L. 185, 187 (2012) (arguing increase of sign owners challenging regulations after *Metromedia* upheld rights of commercial sign owners).

40. *See* Interstate Outdoor Advert., L.P. v. Zoning Bd. of Mount Laurel, 706 F.3d 527, 532 (3d Cir. 2013) (stating Supreme Court strongly considers legislatures' judgment in limiting billboards for safety and aesthetic

the inherently temporal nature of the signs significance, regardless of any recognition that political speech should enjoy a large degree of free speech protection.[41]

In the 1970s, the Supreme Court began to analyze the banning of commercial speech on outdoor signs.[42] The Court has historically deemed commercial speech of lesser value than other types of speech, and thus the Court subjects commercial speech to a lower level of scrutiny.[43] In a concurring opinion, however, Justice Harry Blackmun argued that when the Court finds such censorship to have the intention or effect of stifling certain speech or distorting public opinion, the Court applies strict scrutiny.[44]

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc*.[45] and *Linmark Associates v. Township of Willingboro*,[46] the Court held both statutes unconstitutional because they left open little to no alternative means of communication.[47] In *Linmark Associates*, the statute in question

reasons); Darrel C. Menthe, *Aesthetic Regulation and the Development of First Amendment Jurisprudence*, 19 B.U. PUB. INT. L.J. 225, 227 (2010) (noting universal nature of aesthetic regulation). Professor Menthe separates aesthetic justifications into two categories: content-neutral justifications, which include protection of property values and visual resources, traffic safety, and "visual blight"; and values and rights-based justifications, which include the community's rights and the protection of the listener's autonomy. *See* Menthe, *supra*, at 229-37.

41. *See* Burson v. Freeman, 504 U.S. 191, 193 (1992) (considering constitutionality of statute prohibiting election signs within one hundred feet of polling places); Gerard, *supra* note 39, at 390 (stating time-limited political speech not immune from censorship). Even though speech concerning elections is ordinarily thought to be an important category of expression under the First Amendment, laws that negatively impact political speech are not automatically unconstitutional. Gerard, *supra* note 39, at 390. In *Burson*, a decision with four opinions, the Court held the statute content based and subject to strict scrutiny. *See Burson*, 504 U.S. at 198. The law, however, survived strict scrutiny and the Court held it was as narrowly tailored as possible to achieve the compelling state interest of ensuring voters are free to cast their votes without being intimidated in the areas surrounding the polls. *Id.* at 211. The law withstood strict scrutiny because the Court was forced to balance two fundamental rights: the right to speak freely and the right to vote without being exposed to intimidation or fraud. *Id.*

42. *See* Linmark Assocs. v. Twp. of Willingboro, 431 U.S. 85, 86 (1977) (analyzing ordinance prohibiting use of "For Sale" signs); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 749-50 (1976) (considering law forbidding advertisement of prescription drugs).

43. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980) (explaining commercial speech test). The Court has set forth a four-part test to determine whether a law abridging commercial speech is constitutional. *See id.* First, the court determines whether the First Amendment protects the speech, i.e., whether the speech at issue is lawful and not misleading. *See id.* Second, the court examines whether the government's interest is substantial. *See id.* Third, the court asks whether the law directly advances the stated governmental interest. *See id.* Last, the court determines whether the restriction is more broad than necessary to achieve the governmental interest. *See id.*

44. *See id.* at 573 (Blackmun, J., concurring) (arguing four-part test denies sufficient protection to "truthful, nonmisleading, noncoercive commercial speech"). Justice Blackmun stated that the Court in *Linmark* made it clear that a rigorous standard of review applies to the censorship of commercial speech when that limitation's purpose is to keep information from citizens. *See id.* at 577 (Blackmun, J., concurring).

45. 425 U.S. 748 (1976).

46. 431 U.S. 85 (1977).

47. *See Va. State Bd. of Pharmacy*, 425 U.S. at 770 (explaining importance of open channels of expression and communication); *Linmark Assocs.*, 431 U.S. at 93-94 (answering issue of whether ordinance leaves open ample alternative channels for communication). In *Va. State Bd. of Pharmacy*, the statute at issue

outlawed the use of any "for sale" or "sold" signs on real estate property.[48] The town of Willingboro enacted the statute in response to the decline of its white population. Testimony revealed that citizens engaged in "panic selling" out of fear that the town was becoming predominantly African American.[49] The Court found the statute unconstitutional for two reasons: first, it left open no satisfactory channels to communicate the sale of real estate, and second, the town's motivation in enacting the statute was to eliminate the sign's content due to its direct effect on the citizens.[50]

In *Metromedia, Inc. v. City of San Diego*,[51] the Court addressed the novel issue of content neutrality regarding billboards. The decision yielded four separate opinions and no clear majority.[52] Based on aesthetic and safety concerns, the city of San Diego substantially reduced individuals' ability to post advertising display signs outdoors, exempting only onsite signs and twelve other narrow exceptions.[53] The plurality opinion, distinguishing between commercial and noncommercial speech, held the regulation was content based because it allowed display of specific commercial or nonpolitical messages in some zones but prohibited other political messages in the same areas.[54] Two dissenting justices, however, argued that this was not content discrimination because the law did not draw distinctions between particular political viewpoints or subject matter.[55] This disagreement embodies the modern conflict between the absolute and practical approaches to content neutrality.[56]

prohibited pharmacists from publicizing the prices of prescription drugs. *See Va. State Bd. of Pharmacy*, 425 U.S. at 752. After concluding commercial speech falls under the purview of the First Amendment and that intermediate scrutiny governs such speech, the Court held that the statute banning "for sale" or "sold" notifications was unconstitutional because it was intended to completely suppress specific content. *See id.* at 771.

48. *Linmark Assocs.*, 431 U.S. at 86.

49. *Id.* at 87-88.

50. *Id.* at 93-94. The Court, in dicta, described the ordinance using the precise definition of content based. Because the township had not outlawed all lawn signs or restricted their size or shape, it was not a time, place, or manner restriction, and the township was not seeking to curtail possible secondary effects. *Id.* at 93-94. Thus, the Court declared that if it upheld the law, it would be because of the township's interest in regulating the communication's content, not the communication's form. *See id.*

51. 453 U.S. 490 (1981).

52. *Id.* at 493.

53. *Id.* at 493-96.

54. *Id.* at 515. The Court stated, "The fact that the city may value commercial messages relating to onsite goods and services more than it values commercial communications relating to offsite goods and services does not justify prohibiting an occupant from displaying its own ideas or those of others." *Id.* at 513.

55. *See Metromedia, Inc.*, 453 U.S. at 552-55 (Stevens, J., dissenting); *see also id.* at 564-66 (Burger, J., dissenting). Justice Stevens found no bias in the city's action because it was not attempting to influence public opinion or debate. *Id.* at 552. Chief Justice Burger found the suggestion that allowing some signs but outlawing noncommercial signs violated freedom of speech to be borderline frivolous. *See id.* at 565 (Burger, J., dissenting). Chief Justice Burger further claimed it was counterintuitive for the Court to punish the city for exempting signs that burdened the public when banned, such as business signs, displays of time or weather, and historical plaques. *See id.* at 564 (Burger, J., dissenting).

56. *See* Alan Howard, City of Ladue v. Gilleo*: Content Discrimination and the Right To Participate in*

In *City of Ladue v. Gilleo*,[57] the Supreme Court analyzed the constitutionality of an ordinance that prohibited homeowners from displaying signs except "'residence identification signs,' 'for sale' signs, and signs warning of safety hazards."[58] In an attempt to justify this ordinance the city argued that its goal was to preserve the city's aesthetic quality by eliminating visual clutter and that another goal was to promote safety by lessening the distraction of signs.[59] In holding the statute unconstitutional, the Court opined that the city had almost eliminated an important form of communication because the posting of signs on public issues highlights change in communities.[60] Although the Court bypassed considering whether the regulation was content based, the Court was careful to note that eliminating signs that displayed one's views on private property left open no alternative channels for such communication elsewhere.[61]

D. Is Motive Dispositive?

As previously noted, the Supreme Court has held that in assessing content neutrality, the government's motive is the controlling consideration. In other

Public Debate, 14 ST. LOUIS U. PUB. L. REV. 349, 389-90 (1995) (defining government motive conception as "anti-distortion conception" of content neutrality); Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach To Protecting Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1364-65 (2006) (noting Court's movement toward permitting some content restrictions). The government can attempt to distort public debate either by directly suppressing particular viewpoints or by choosing which topics are open to public debate. *See* Howard, *supra*, at 390. Although the Supreme Court has mostly followed the "anti-distortion" principle when assessing content neutrality, many lower courts followed the *Metromedia, Inc.* plurality's opinion, finding all "political content-based laws suspect." *See* Howard, *supra*, at 390. On a similar note, although the Court seemed to do away with *Mosley*'s absolute neutrality approach, it seems to continue to substantially impact its interpretation of content-based laws. *See* McDonald, *supra*, at 1367.

57. 512 U.S. 43 (1994).

58. *Id.* at 45. In *City of Ladue*, the respondent initially placed a twenty-four by thirty-six inch sign on her lawn that said, "Say No to War in the Persian Gulf, Call Congress now." *Id.* The court issued a preliminary injunction against the ordinance, and the respondent then placed a smaller sign in her window that said, "For Peace in the Gulf." *Id.* at 46. The city amended the ordinance to prohibit all signs with certain exemptions, including residential identification signs, "for sale" signs, and signs for religious institutions and schools. *Id.* at 46-47. The district court struck down the law as unconstitutional, and the court of appeals affirmed, deeming the law content based because it granted more protection to commercial speech than noncommercial speech and because the law distinguished between different kinds of commercial speech. *Id.* at 48.

59. *See City of Ladue*, 512 U.S. at 47. The city expressed its wish to eliminate unpleasant signs and clutter and to ensure the safety of the community. *See id.* at 47. The city posited similar justifications in *Metromedia, Inc*. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 493 (1981) (conveying San Diego's purpose for banning signs).

60. *See City of Ladue*, 512 U.S. at 54.

61. *Id.* at 56 (noting importance of leaving open alternative channels of communication). The Court further emphasized the importance of placing signs on private property because such signs provide information about the speaker that is not as readily apparent compared to signs placed in a public area. *See id.* at 56; *see also* Spence v. Washington, 418 U.S. 405, 410-11 (1974) (suggesting context in which one uses symbol provides meaning). Professor Alan Howard suggests that the lack of any determination about whether the ordinance in question was a content-based law is subject to strict scrutiny. *See* Howard, *supra* note 56, at 352. Professor Howard also suggests that even though the Court has stated that the Court does not apply strict scrutiny to content-neutral laws, the decision in *City of Ladue* suggests that the Court may be acting otherwise. *See* Howard, *supra* note 56, at 351.

cases, however, the Court has held that such determination is not dispositive of finding a content-neutral law.[62] In *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*,[63] the Court considered a statute directing any entity that contracted with an individual convicted or accused of a crime to create a literary or dramatic reenactment to pay all proceeds to the victims of such crime.[64] The Court explicitly characterized the law as content based and cautioned that the government's power to place such encumbrances on speech implies that the law might eliminate particular viewpoints or ideas from public discussion.[65] The Court relegated any indepth discussion of a case decided just two years earlier, *Ward v. Rock Against Racism*,[66] to a footnote in the *Simon & Schuster, Inc.* decision, reasoning any discussion of content neutrality was unnecessary because the statute was so overbroad that the statute could not withstand scrutiny under either standard.[67]

Similarly, in *City of Cincinnati v. Discovery Network, Inc.*,[68] the Court held that a law prohibiting the distribution of commercial handbills was content based because it distinguished commercial from noncommercial speech, and the government's asserted safety and aesthetics interests were unrelated to the content-based distinction it had drawn.[69] The Court distinguished this scenario from *Ward* by reasoning that the precise purpose of Cincinnati's law was the disparity in content between commercial handbills and newspapers.[70]

62. *See* Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 117 (1991) (holding legislative intent not controlling in content neutrality determination). The Court rejected the argument that discriminatory financial treatment is unconstitutional only when legislatures intend to censor certain topics or viewpoints, for its previous cases have held that this intent is not the dispositive determination. *See id.* Therefore, a law need not enumerate a specific topic or viewpoint to censor to run afoul of the First Amendment. *See id*. A state may prohibit too much speech even absent a clearly improper legislative motive. *See id.*

63. 502 U.S. 105 (1991).

64. *Id.* at 108. The Court noted that the statute, nicknamed the "Son of Sam law," also covered any person not formally convicted of a crime but admits to one in a book or other expressive work. *See id.* at 110. A person, therefore, who has never been formally convicted or accused of a crime but who admits in a literary work to having committed a crime also falls within the statute's purview. *Id.*

65. *Simon & Schuster, Inc.*, 502 U.S. at 116. Specifically, when the law allows the government to impose financial regulations based on viewpoint or subject matter, the law gives the government the power to eliminate certain ideas from the marketplace. *Id.*

66. 491 U.S. 781 (1989).

67. *See Simon & Schuster, Inc.*, 502 U.S. at 122 n.*. It seems the Court may have inadvertently answered the question of content neutrality when it stated that the law was content-based, for the law was directed at profits resulting from a specific activity and only involved particular types of content. *See id.* at 116. The Court also discussed the oft-repeated notion that certain content may not be censored just because it may frighten or offend certain viewers. *See id.* at 118. Thus, the state's offered interest of censoring discussions of crime out of concern for readers was not sufficient to survive strict scrutiny. *Id.*

68. 507 U.S. 410 (1993).

69. *Id.* at 430.

70. *Id.*

E. The Circuit Split and Reed v. Town of Gilbert

The confusion and inconsistencies prevalent in the Supreme Court's decisions created a longstanding circuit split concerning the content neutrality determination.[71] In *Brown v. Town of Cary*,[72] the Fourth Circuit differentiated between an absolute approach to content neutrality, where any content distinction makes the law content based, and a practical approach, where a law is content neutral if the intent behind the law's enactment is unrelated to the message conveyed in the speech.[73] The Fourth Circuit adopted the practical approach, reasoning that an absolute approach would unnecessarily apply strict scrutiny to laws that do not violate the First Amendment.[74] The practical approach in the Fourth Circuit espouses the reasoning of the cases directing courts to look to the government's intent or motivation in enacting the laws.[75]

Other circuits have adopted an absolute approach, where a law is automatically rendered content based and subjected to strict scrutiny when it requires an examination of a sign's content.[76] For example, in *Neighborhood Enterprises, Inc. v. City of St. Louis*,[77] the Eighth Circuit held that the ordinance at issue was content based because in determining whether a sign is exempt, "one must look at the *content* of the object."[78] Thus, these cases adhere to the notion that the government's intent or motivation in enacting the law is not dispositive. Laws that abridge a topic or subject matter are still inextricably content based because they make distinctions based on the content of the speech or signs.[79] Contrary to the seemingly accepted notion that the Supreme

71. *See supra* notes 11-12 and accompanying text (describing disagreement causing circuit split).

72. 706 F.3d 294 (4th Cir. 2013).

73. *Id.* at 301-02. Further, the court rejected the notion that the need to search a sign's content is dispositive of a content-based distinction. *Id*. Such an inquiry should only be a factor in determining whether the government sought to restrict speech based on content. *Id.* Rather, the court held that a regulation remains content neutral even if it plainly differentiates among types of speech. *Id.* at 303.

74. *Id.* at 302.

75. *See* Hill v. Colorado, 530 U.S. 703, 721 (2000) (stating proper to view statements' content to determine if rule applies); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (holding main inquiry whether statute regulates speech based on disagreement with message); Brown v. Town of Cary, 706 F.3d 294, 301 (4th Cir. 2013) (holding practical approach preferable); Howard, *supra* note 56, at 390 (describing differing approaches to determine whether law attempts to distort public opinion).

76. *See supra* note 11 (outlining cases adopting approach).

77. 644 F.3d 728 (8th Cir. 2011).

78. *Id.* at 736. The law outlawed any sign and provided a broad definition, subject to specific exceptions such as flags, merchandise, and time and temperature devices. *See id.* at 739. In an earlier case, the Eighth Circuit similarly held that the Supreme Court had consistently rejected the proposition that a restriction on speech is content neutral because it is viewpoint neutral. Whitton v. City of Gladstone, 54 F.3d 1400, 1405 (8th Cir. 1995) (citing Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 537 (1980)).

79. *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993) (holding city's *mens rea* not dispositive if law clearly content based); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 117 (1991) (rejecting argument discriminatory treatment occurs only when legislature intentionally suppresses certain ideas); *Neighborhood Enters., Inc.*, 644 F.3d at 736-37 (holding any inquiry into content of sign renders law content based).

Court adopted a form of the practical approach, the absolutist approach remains active in the circuit courts.[80]

In a recent case, *Reed v. Town of Gilbert*,[81] the Court attempted to clarify disagreements existing in the federal circuit courts.[82] In the lower court proceedings, the Ninth Circuit adopted the practical approach, holding that an ordinance that distinguished between "temporary directional signs," "ideological signs," and "political signs" was content neutral and subject to intermediate scrutiny.[83] Petitioner Reed's main argument was that content neutrality is an objective test; if the law abridges one's free speech, that individual need not prove that the legislature enacted the law with a content-based purpose.[84] Respondent Town of Gilbert, on the other hand, urged the Supreme Court to adopt a form of the practical approach, thus reserving strict scrutiny for regulations that show partiality for certain ideas over others.[85]

In an attempt to resolve its seemingly conflicting definitions of content neutrality, the Court stressed that it has historically recognized two categories of content-based regulations.[86] A regulation that facially distinguishes between different messages or subjects is content based.[87] Alternatively, a facially content-neutral regulation may be subject to strict scrutiny if the government cannot justify the regulation without reference to the speech's content, or if the government enacted the regulation due to disagreement with the speech's message.[88]

80. *See* Howard, *supra* note 56, at 390 (stating many lower courts followed *Metromedia, Inc.* plurality's broader analysis of content neutrality); McDonald, *supra* note 56, at 1367 (suggesting "absolute neutrality" approach still influences Supreme Court although it appears eliminated). For example, in the years following *Metromedia, Inc.*, many courts were suspicious of any law that treated nonpolitical speech more favorably than political speech. Thus, courts applied strict scrutiny review and any justification for the disparate treatment was unable to meet that threshold. *See* Howard, *supra* note 56, at 390.

81. 135 S. Ct. 2218 (2015).

82. *Id.* at 2224 (holding content-based law imposes more restrictions on one message than another).

83. Reed v. Town of Gilbert, 707 F.3d 1057, 1071, 1073-74 (9th Cir. 2013), *rev'd*, 135 S. Ct. 2218 (2015) (explaining rationale for holding). The court based its decision primarily on *Hill v. Colorado*, which held that the main question in determining content neutrality is whether or not the government adopted a speech regulation due to a disagreement with what the speech conveys. *See id.* at 1071. The court also discussed the plurality opinion in *Metromedia, Inc.*, stressing that courts have refined the concerns from *Metromedia, Inc.* in the last thirty years. *See id.* at 1073.

84. Brief for Petitioner at 19, Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015) (No. 13-502), 2014 WL 4631957.

85. Brief for Respondent at 8, Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015) (No. 13-502), 2014 WL 6466937 (arguing intermediate scrutiny still protects rights and allows flexibility).

86. *See Reed*, 135 S. Ct. at 2227 (outlining different definitions of content based).

87. *See id.* (defining content-based regulation). The Court added that sometimes determining whether the law makes distinctions based on the speech's content is obvious, such as when it defines speech by specific subject matter. *See id.*

88. *See id.* (recognizing separate category for invalid facially neutral laws). If a law subtly creates content-based distinctions, such as a law defining a particular topic or subject by its function or purpose, the reviewing court must examine or determine governmental motive. *See id.* (explaining judicial inquiry requirement). The Court cited *Ward*, which held that to determine whether a regulation is content neutral,

The Court held that the regulation in question was facially content based because it differentiated between the three different types of signs, and thus turned on the sign's content.[89] The Court then rejected the Town's argument that the law was content neutral because the legislature did not enact it over a disagreement with a message because the law was content based on its face.[90] Although concurring with the judgment, Justices Breyer and Kagan found the Court's approach problematic. Justice Breyer opined that content discrimination should be a factor rather than an automatic trigger, and Justice Kagan suspected that the Court's ruling would put many reasonable laws in jeopardy.[91]

III. ANALYSIS

There exists a litany of criticism—some of which comes from the Court itself—directed at the Court's current approach to evaluating content neutrality.[92] As previously discussed, this is extremely problematic due to the prevalence of content neutrality in First Amendment jurisprudence and the consequences it has on individuals' ability to speak freely.[93] The state of disarray in the circuit courts is disconcerting, and hopefully, the Court's recent

courts should primarily inquire into the government's purpose in enacting the regulation. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (describing test warranting strict scrutiny).

89. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015) (determining sign regulation content based). The Court explained that it must treat signs inviting people to attend a certain event differently from signs expressing topics or ideas. *See id.* (comparing regulatory restrictiveness for different topics). For example, a sign providing information concerning a book club meeting discussing John Locke would be more restricted than a sign urging voters to vote for one of Locke's followers. *See id.*

90. *See id.* at 2228 (explaining first step in analysis as determining content neutrality on law's face). A law is subject to strict scrutiny if it is facially content based even if the government's motive in enacting the law was harmless. *See id.* That analysis applies, however, only if the statute is content neutral. *See id.* at 2229. The Court also rejected the town's argument that it should not consider the law content based if it does not discriminate among viewpoints on a topic because the First Amendment also protects against censorship on an entire topic. *See id.* at 2230.

91. *See id.* at 2234 (Breyer, J., concurring); *id.* at 2236 (Kagan, J., concurring). Justice Breyer advocated for treating content discrimination as a significant factor weighing against constitutionality, rather than as a determinative test. *See id.* at 2235 (Breyer, J., concurring). Justice Kagan said that the majority's decision will jeopardize many laws that do not require the application of strict scrutiny. For example, towns would need to establish a compelling interest in informing visitors where George Washington had slept. *See id.* at 2237 (Kagan, J., concurring).

92. *See, e.g.*, Calvert, *supra* note 7, at 72 (arguing categorizations of content neutrality "anything but tidy"); Kreimer, *supra* note 28, at 1267-68 (describing Justices Stevens, Breyer, and Kennedy's dissatisfactions with doctrine); McDonald, *supra* note 56, at 1430 (arguing current analytical framework threatens free expression). Justice Stevens found the content neutrality doctrine problematic, reasoning that the First Amendment did not require or foreclose the Court from scrutinizing regulations that had a negative impact on speech. *See* Kreimer, *supra* note 28, at 1267. Moreover, in recent years, Justice Breyer has preferred a case-specific analysis that weighs the justification of the regulation against the seriousness of the harm done to the speech, the importance of the law's objectives, the effectiveness of achieving those objectives, and whether there are less harmful regulations to speech. *See id.* at 1268.

93. *See supra* notes 7-8 and accompanying text (describing importance of content neutrality determination in First Amendment jurisprudence).

decision in *Reed* will at least partially dispel it.[94]

A. The Problem with Motive

The Supreme Court has consistently recognized the importance of free speech on matters of public concern and is historically suspicious of laws that seek to abridge such expression.[95] The Court even tolerates speech that could offend disagreeing members of the viewing public. In fact, one of the central tenets of freedom of speech is the reality that such reactions are inevitable.[96] In light of the Court's continued support for these principles, and the recognition that individuals should have wide latitude to express themselves in such areas, the courts should subject any restriction to the most scrupulous constitutional review.[97]

The Supreme Court's inconsistent and confusing guidance in evaluating such laws, however, created varying standards within its chambers, as well as in district courts evaluating such claims.[98] The contrast of the variety of standards is the starkest when considering Supreme Court cases that examine the importance of governmental motive in the context of such inquiries.[99] For example, in *Ward v. Rock Against Racism*, the Court held that, in evaluating whether a law is content neutral, "The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."[100]

94. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015) (setting forth content-neutrality rules); *supra* notes 11-12 (setting forth contradicting standards in federal circuits).

95. *See* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 871-72 (1997) (stating First Amendment concerns because vagueness of content-based regulations and "chilling effect on free speech"); Stone, *supra* note 29, at 192-93 (noting Supreme Court's central concern in content-neutrality analysis lessening of quantity of expression).

96. *See* Boos v. Barry, 485 U.S. 312, 321 (1988) (holding law enacted in response to speech offending individual's dignity content based and unconstitutional); Connick v. Myers, 461 U.S. 138, 162 (1983) (Brennan, J., dissenting) (arguing right to free speech meaningless without ability to criticize government officials).

97. *Boos*, 485 U.S. at 318 (recognizing Court has historically noted the importance of preserving speech on public topics); Chemerinsky, *supra* note 7, at 55-56 (positing government's ability to pick and choose what speech to censor distorts marketplace of ideas).

98. *See* Howard, *supra* note 56, at 351 (offering *City of Ladue*'s majority opinion suggests application of strict scrutiny to content-neutral law); *id*. at 390 (indicating lower courts adopt broader interpretation of content neutrality); McDonald, *supra* note 56, at 1367 (suggesting "absolute neutrality approach" eliminated by Court but still influences Court); *supra* notes 11-12 and accompanying text (setting forth conflicting approaches among circuits in content neutrality analysis).

99. *Compare* Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 117 (1991) (asserting governmental motive not dispositive in First Amendment cases), *with* Ward v. Rock Against Racism, 491 U.S. 781, 791-92 (1989) (arguing governmental motive "controlling consideration" in such cases).

100. *Ward*, 491 U.S. at 791; *accord* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986) (holding laws enacted for reasons unrelated to freedom of expression valid under First Amendment). In *City of Renton*, the Court held that the city's predominate motives in treating adult film theaters differently than other film theaters—preventing crime, preserving the city's retail trade, concerns about property value, and generally

Just two years later, however, in *Simon & Schuster, Inc.*, the Court held the opposite: that the law does not require illegitimate legislative motive to establish that the government unduly burdened First Amendment rights.[101] That decision mentioned *Ward* in a footnote by noting that because the law in question was over inclusive and the Court did not need to reach the question of whether the law was content neutral. In applying strict scrutiny and engaging in the preceding analysis, however, the Court implicitly reasoned that the law was content based.[102] Therefore, although *Reed* attempted to clarify content neutrality principles through separating facially content-based laws from those unjustified without reference to content, previous cases were not clear regarding this distinction.[103]

Even with the separation of content-based laws into those that are facially content-based and those that are content based due to governmental motive, the Court does not immunize the latter from overreaching governmental regulation.[104] Regardless of what the government posits is its motivation for enactment, the government is in the unique position of stifling one side of a debate, or an entire topic, through seemingly innocuous legislation.[105] A further problem arises because a panel of judges or justices, each of whom could have a different definition of content neutrality, undertakes this analysis and could create disparate interpretations of the government's motive in theory or fact.[106] Moreover, an individual justice's real or perceived ideological

preserving the city's quality of life—were sufficient justifications. *City of Renton*, 475 U.S. at 48.

101. *See Simon & Schuster, Inc.*, 502 U.S. at 117.

102. *See id.* at 122 n.* (applying strict scrutiny to law at issue). The Court specifically stated that because the Son of Sam Law financially discouraged publishing specific content, it must have been necessary to achieve a compelling state interest and was narrowly tailored to do so. *See id.* at 118. Therefore, despite any disclaimer to the contrary, the Court applied the practical consequences of a content-based determination to the law by exercising a strict scrutiny standard of review. *See id.*

103. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015) (distinguishing facially content-based regulations and laws not justified without reference to content); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (explaining Court's inquiry in determining content neutrality).

104. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 794 (1994) (Scalia, J., dissenting) (arguing content-based laws dangerous because such laws lend themselves to invidious purposes). Justice Scalia argued that the Court erred in ruling that the only issue with a content-neutral regulation is its purpose in suppressing a particular viewpoint. Regardless of the government's intent, a law regulating speech can unintentionally target a particular viewpoint. *See id.* at 794-95 (Scalia, J., dissenting).

105. *See* Hill v. Colorado, 530 U.S. 703, 766 (2000) (Kennedy, J., dissenting) (opining law restricting protest outside abortion clinics content based and unconstitutional); Boos v. Barry, 485 U.S. 312, 319 (1988) (recognizing Court precedent in holding censorship of entire topic also content based).

106. *See* Calvert, *supra* note 7, at 72 (detailing dangers of distinction between content-based and content-neutral laws); Kreimer, *supra* note 28, at 1275 (explaining search for "illicit motivation" provides "uncertain foundation" for content neutrality). A review of Supreme Court cases concerning content neutrality reveals that, more often than not, the government's motivation is not dispositive. *See* Kreimer, *supra* note 28, at 1274. The Court invalidates laws based on factors other than invidious governmental motive, and it labels laws as content based by ways other than finding evidence that the government attempted to stifle a particular topic or viewpoint. *See id.* Categorizing laws as content based or content neutral does not automatically solve the problem. Individual justices may reach contrary conclusions based on their individual interpretations of

leanings may also fuel content neutrality determinations, further increasing the risks and unreliability of a test with factors as elusive as the interpretation of governmental motive.[107]

B. Public and Private Property

In *City of Ladue*, decided almost twenty years ago, the Court had an opportunity to clarify some of the confusion still surrounding content neutrality.[108] The Court, however, sidestepped the larger issues, assuming the law was content neutral and abandoning any close examination of the issue or creation of a more efficient rule.[109] Nonetheless, the Court stressed the importance of an individual's freedom to express oneself on one's private property.[110] The Court's high regard for private speech further demonstrates its application of strict scrutiny.[111]

Thus, the unique implications associated with the regulation of speech and expression on one's private property should be a key consideration for the future of the content neutrality doctrine.[112] The concerns that necessitate legislation limiting signs or expression on public property are often absent from an individuals' placement of such items on their private property.[113] Failure to

legislative intent. *See* Calvert, *supra* note 7, at 72.

107. *See* Huhn, *supra* note 5, at 853-54 (describing pattern of alignment of laws' content neutrality with judges' ideological beliefs). Liberal justices tend to categorize laws regulating sexual expression as content based, whereas conservatives categorize them as content neutral. *See id.* at 853. Liberal justices consistently hold, however, that regulation of abortion protests are content neutral, whereas conservative justices hold those same laws content based. *See id.* at 853-54. This problem compromises the vitality of the content neutrality distinction. *See id.* at 854. To reduce this problem for judges—because most of the laws under review have both content-neutral and content-based components—the Supreme Court has eschewed any categorical classification in favor of a balancing test. *See id.* at 854.

108. *See* City of Ladue v. Gilleo, 512 U.S. 43, 54 (1994) (assuming statute in question content neutral); Howard, *supra* note 56, at 352 (explaining public's expectation for clarification on content neutrality analysis and Court's "apparent silence" on issue).

109. *See City of Ladue*, 512 U.S. at 60 (O'Connor, J., concurring) (expressing desire to pursue content neutrality issue to examine its weaknesses). Despite the Court's silence, however, the Court at least implicitly held the statute was content neutral and thus subject to strict scrutiny. *See* Howard, *supra* note 56, at 351. Justice O'Connor approved of the content neutrality rule, positing that a clear rule, rather than a subjective balancing test, better serves the determinations the legislature intended. *See City of Ladue*, 512 U.S. at 60 (O'Connor, J., concurring).

110. *See City of Ladue*, 512 U.S. at 58 (declaring importance of one's freedom from restraint on speaking on private property).

111. *See* Howard, *supra* note 56, at 351 (arguing Court applied strict scrutiny although it held law content neutral).

112. *See City of Ladue*, 512 U.S. at 59 (O'Connor, J., concurring) (reasoning content discrimination in regulating private speech on private property almost always presumptively impermissible).

113. *See* City of Ladue v. Gilleo, 512 U.S. 43, 58 (1994) (Stevens, J., concurring) (arguing government's need to regulate publicly "constant and unavoidable," whereas private regulation "surely much less pressing"); *see also* Spence v. Washington, 418 U.S. 405, 410-11 (1974) (stressing importance of context of speech). In *Spence*, the appellant affixed a peace sign made of removable tape on an American flag and displayed it out of his window. *Spence*, 418 U.S. at 405. The lower court convicted him for violating a statute that prohibited exhibiting an American flag emblazoned with any extraneous material. *See id.* While overturning his

consider this contextual problem and providing legislatures broad latitude in enacting regulations that abridge such speech takes an unacceptable toll on freedom of expression.[114] As Justice Stevens discussed in *City of Ladue*, speech on one's private property serves different purposes and has dissimilar effects than speech on public property.[115] Not only does the speech occur on a homeowner's private property, but it also presents an opportunity for that individual to express him or herself—particularly by throwing a personal hat into the public arena.[116]

C. The Absolutist Approach Is Preferable, Particularly on Private Property

In light of these considerations, the best approach regarding content neutrality in sign regulation is one that maximizes the latitude with which individuals may express themselves without compromising the government's ability to accomplish legitimate objectives.[117] Requiring challengers of such ordinances to display evidence of governmental motive increases the possibility that ordinance drafters will impermissibly overburden public and private speech.[118] As previously discussed, the Court in some cases has stated that such evidence is sufficient but not necessary to establish that a law is content based.[119]

To that end, the Supreme Court took at least one effective step in holding

conviction, the Supreme Court noted the importance of the context of the act. *See id.* at 410. The majority of the viewing public would understand that, given the timing, his display of the symbol coincided with controversial political events. At another moment in time, however, such an expression would not have carried the same meaning. *See id.*

114. *See* Stone, *supra* note 29, at 193 (emphasizing such restrictions impairs citizens' ability to communicate views).

115. *See City of Ladue*, 512 U.S. at 54-55 (discussing unique importance and functions of signs placed on private property); Howard, *supra* note 56, at 368-69 (discussing Justice Stevens' differentiation).

116. *See City of Ladue*, 512 U.S. at 56 (discussing importance of identifying oneself to persuade in public debate). The message "peace in the gulf" carries different implications when placed on the property of a retired war general, in the window of a young child, or on a car bumper. *See id.* The Court in *City of Ladue* also stressed the importance and practicality of lawn signs by indicating that they are relatively inexpensive, and no equally effective substitute exists for individuals of modest means to express themselves. *See id.* at 57.

117. *See* Connolly, *supra* note 39, at 220 (arguing for clearer content neutrality doctrine with stricter requirements for regulators). Clarifying content neutrality, even if strict on legislatures, will provide confidence to regulators, stress the importance of governments' First Amendment obligations, and reduce free speech litigation for governments. *See id.* Some have argued that a less strict content neutrality standard would be more effective, but the fact that legislatures have drafted a number of ordinances that are completely content neutral under the stricter test defeats this contention. *See id.* at 222-23. Thus, a less stringent test does not necessarily better serve lawmakers. *See id*. at 223.

118. *See* Brief for Petitioner at 22, Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015) (No. 13-502), 2014 WL 4631957 (declaring Court rejects idea government can uphold facially discriminatory laws by asserting content-neutral motives).

119. *See* Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 642 (1994) (announcing content-based purpose sufficient, but not necessary, to show content-based regulation); Brief for Petitioner at 24, Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015) (No. 13-502), 2014 WL 4631957 (arguing content-neutral purpose not enough to shield from strict scrutiny if facially content based).

that facially content-based laws are subject to strict scrutiny, even though the Court did not specifically declare whether it was adopting the absolute or practical approach.[120] Although it is possible for legislatures to enact laws with an invidious purpose to censor speech based on disagreement with its message, such censorship can also occur even absent such intent.[121] Furthermore, even though such a law may not single out a particular viewpoint, a blanket prohibition on one subject matter may be an impermissible burden on speech.[122] The Court also correctly pointed out that, under this model, governments can still craft effective sign regulations without referencing the sign's subject matter or governments can outlaw signs altogether.[123]

The Court should continue on this path, for an examination of the Eleventh Circuit's decision in *Solantic, LLC v. City of Neptune Beach*[124] reveals the problematic practical consequences that result from abandoning the absolutist approach.[125] The Eleventh Circuit examined several of the provisions in the city's ordinance that exempted certain content or subject matter from obtaining a permit. For example, one provision allowed signs on private property if they were intended to aid traffic or parking.[126] The court noted the effects such regulations could have on the regulation of private expression: "[W]ithout a permit, a homeowner could post a sign reading, 'Parking in Back' and bearing a flashing neon arrow pointing toward the rear of the property, but not a

120. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015) (holding law content-based if it singles out specific topic or subject matter); *supra* note 11 (naming circuit courts adopting absolutist approach). In *Neighborhood Enters., Inc.*, the Eighth Circuit disregarded any examination of legislative intent as a prerequisite to the determination of content neutrality because such justification, even if valid, is not the controlling consideration. *See* Neighborhood Enters., Inc. v. City of St. Louis, 644 F.3d 728, 737 (8th Cir. 2011).

121. *See Reed*, 135 S. Ct. at 2229 (arguing content-neutral motives insufficient because future legislators may still use them for content-based purposes).

122. *See id.* at 2230 (holding law aimed at specific subject matter, but not specific viewpoint, still content based). A law that bans all political speech without differentiating between different candidates or ideologies is still content based because it forecloses the topic of politics generally. *See id.* In *Reed*, the Court pointed out that the ordinance was less restrictive about messages professing an ideology than ones promoting a specific candidate, which are in turn less regulated than ones giving information about a meeting of individuals sharing a particular viewpoint. *See id.*

123. *See id.* at 2232 (explaining town's alternative options in formulating sign regulations). For example, towns can regulate factors, such as size, lighting, parts, and portability, to achieve their aesthetic and safety-related objectives. *See id.* (listing factors and alternatives). The towns can address these concerns with regulations drafted in an even-handed way across all content and viewpoints. *See id.* at 2233 (Alito, J., concurring). Justice Alito, in a concurring opinion, provided a list of regulations not considered content based that still achieve the town's stated objectives, such as regulation of signs' size, locations, lighting, and distinctions between placement on public and private property. *See id.* (Alito, J., concurring). This list clarifies the reality that legislatures can design laws in a content-neutral manner by requiring equal application across all topics and subject matter, while at the same time serving the interests of aesthetics and public safety. *See id.* (Alito, J., concurring).

124. 410 F.3d 1250 (11th Cir. 2005).

125. *See id.* at 1264-66 (describing in detail issues with provisions of content-based law).

126. *See id.* at 1264.

traditional yard sign . . . with a political message like 'Support Our Troops' or 'Bring Our Troops Home.'"[127] This point demonstrates not only the distinctions these types of laws make, but also that speech on issues historically deemed of high importance become more censored than signs displaying commonplace or low-value subject matter.[128] Preventing the government from regulating based on viewpoints or subject matter, which stifles certain topics or opinions, is universally accepted as a keystone of the First Amendment.[129] Such restrictions should be read broadly to ensure that hypothetical situations in *Solantic, LLC* do not materialize.[130]

IV. CONCLUSION

Due to the prevalence and outcome-determinative nature of the content neutrality distinction, the Supreme Court proceeded in the right direction by enunciating the two categories of content-based laws in *Reed*. This enunciation will likely alleviate the disarray existing within the Court's precedent, which has caused confusion in the lower courts.

Although the absolute approach is broad, it does not prevent lawmakers from crafting effective laws that apply equally to all viewpoints and subjects. Instead, this approach provides certainty for lawmakers in drafting laws by offering clear instructions on what the Constitution permits, thereby limiting the legal challenges lawmakers must field. The absolute approach also alleviates judges of the often Herculean task of extracting and interpreting legislative motive. Lastly, the absolute approach provides maximum freedom to individuals to express themselves and eliminates the consequence of high-value speech becoming secondary to speech ordinarily deemed less important.

The role of governmental motive in these determinations is problematic. Allowing such a subjective element to be a controlling consideration lends itself to unpredictability and the possibility that judges could interpret

127. *See id.* An additional provision included signs "related to elections, political campaigns or a referendum," which were exempt only to the extent of the town's permit requirement, limited to a size of four square feet in residential areas, and allowed to be displayed between two weeks before and two days after elections. *See id.* at 1264-65. Combining this and the aforementioned exemption, the court deduced that while a "Re-Elect Mayor Smith" yard sign could only be displayed for a maximum of sixteen days, parking signs had no restrictions. *Id.* at 1265. The court further noted that this exemption only applied to elections—a topic of a temporal nature—therefore, any sign that references a pervasive political issue unrelated to a current election is subject to the restrictions. *Id.* at 1265. As a result, signs expressing a pervasive issue would be restricted, but ones pertaining to parking would not be subject to the restriction. *See id.*

128. *See* Gerard, *supra* note 39, at 390 (arguing laws disfavoring political speech anticipated unconstitutional yet upheld based on time restrictions); Howard, *supra* note 56, at 390 (stating Court repeatedly invalidates laws making distinctions among political viewpoints or subjects).

129. *See* Howard, *supra* note 56, at 390 (arguing few would disagree with notion First Amendment designed to safeguard against such discrimination).

130. *See* Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1264-66 (11th Cir. 2005) (outlining ways laws could have effect of prohibiting political speech while allowing less important expression).

governmental motive differently. Now that the Court has differentiated between facially content-based laws and those not justified without reference to content, courts should be wary of delving into legislative motive when analyzing the latter.

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