NOTE

FREE SPEECH DOCTRINE AFTER *REED v. TOWN OF GILBERT*

After Justice Scalia's death, it seems everything is up for grabs: gun rights, reproductive rights, voting rights, environmental protection, labor unions, campaign finance. In every major area where the late Justice provided a crucial fifth vote, a new Justice may shift the Supreme Court majority and, in turn, the law for decades to come.

But perhaps not everything has changed. Specifically, not five, but six Justices have supported the Court's invocation of the First Amendment's protection of free speech to strike down commercial regulation,[1] meaning that even without Justice Scalia, the commercialization of the First Amendment may continue apace.[2]

This Note focuses on understanding the doctrinal implications of *Reed v. Town of Gilbert*,[3] the Court's most recent invocation of the First Amendment's expansive deregulatory potential. In *Reed*, by articulating a broad standard for deeming a regulation to be content based, a six-Justice majority risked subjecting numerous reasonable regulations to strict scrutiny when faced with a First Amendment challenge.[4] In its immediate wake, many feared that *Reed* had quietly reshaped free speech doctrine in the image of economic libertarianism.[5]

This Note maps the synapse between cases and doctrine in attempting to understand the extent of *Reed*'s reach and its potential impact on First Amendment doctrine. It argues that no, *Reed* is not a free speech test for all seasons.[6] Rather than applying to all free speech cases, *Reed* only applies to certain regulations of noncommercial speech and can be distinguished up, down, and sideways in other

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[1] *See* Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2667, 2672 (2011) (invalidating commercial regulation on First Amendment grounds in a majority opinion by Justice Kennedy joined by Chief Justice Roberts and Justices Scalia, Thomas, Alito, and Sotomayor).

[2] *Cf.* John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 248–65 (2015); Amanda Shanor, The New *Lochner* (Sept. 2, 2015) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2652762 [http://perma.cc/S7YZ-D8JV].

[3] 135 S. Ct. 2218 (2015).

[4] *See infra* section I.B, pp. 1984–87. The six-Justice majority in *Reed* was identical to that in *Sorrell*, 131 S. Ct. 2653, suggesting that Justice Sotomayor might become an unexpected swing vote in future free speech cases.

[5] *See* Adam Liptak, *Court's Free-Speech Expansion Has Far-Reaching Consequences*, N.Y. TIMES (Aug. 17, 2015), http://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html.

[6] *Cf.* Staughton Lynd, Comment, Brandenburg v. Ohio*: A Speech Test For All Seasons?*, 43 U. CHI. L. REV. 151 (1975).

contexts.[7] *Reed* does not displace existing commercial speech doctrine, nor does it apply to general regulations of economic conduct. By analyzing numerous cases decided in the aftermath of *Reed*, this Note argues that lower courts have (for the most part) already begun the process of narrowing *Reed* from below.[8]

As a result, *Reed* may have an unexpected impact on the structure of First Amendment doctrine. Rather than cementing the centrality of the division between content-based and content-neutral regulations, *Reed* may have instead diminished the distinction's importance.[9] By elevating a simple rule of content analysis above its underlying purpose of ferreting out impermissible government regulation of speech, *Reed* exposed the flaws of strict content analysis as an organizing principle for free speech doctrine. Lower courts can best protect core First Amendment values, and might encourage the Supreme Court to do the same, by refusing to let the content-based tail wag the First Amendment dog.

I. *REED* AND THE CONTENT DISTINCTION

A. A Capsule Summary of Free Speech Doctrine

Current First Amendment free speech doctrine is, in a word, doctrinal. It aggressively subdivides the known world into endless categories and describes distinctive rules and tests to evaluate the constitutionality of regulations that fall within those categories.[10]

The core division at the heart of current free speech doctrine separates regulations that are content based from those that are content neutral.[11] Regulations that distinguish speech on the basis of its con-

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[7] *See infra* Part II, pp. 1987–98.

[8] *See* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2699607 [http://perma.cc/9XAM-HUJ4].

[9] *See infra* Part III, pp. 1998–2002.

[10] *See, e.g.*, 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, 803 (2004) ("[D]issatisfaction has arisen because current First Amendment doctrine relies heavily on categorical analysis. The categorical distinctions that the Court has previously established . . . are too rigid to adequately explain the complexity of First Amendment law."); Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2355 (2000) ("The free speech jurisprudence of the First Amendment is notorious for its flagrantly proliferating and contradictory rules, its profoundly chaotic collection of methods and theories.").

[11] Content analysis, of course, does not apply in First Amendment challenges to all regulations of speech. Some narrowly defined categories of content-based speech, most notably obscenity, are outside the First Amendment's protection wholesale. *See generally* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769–75 (2004) (discussing the boundaries of the First Amendment's coverage). Neither does content analysis, under current doctrine, necessarily demand strict scrutiny in

tent are subject to strict scrutiny, whereas those that are neutral with respect to the content of the regulated speech are evaluated under a less searching, intermediate scrutiny standard of review.[12] As Professor Leslie Kendrick puts it: "Given that almost all laws fail strict scrutiny and almost all laws pass intermediate scrutiny, the pivotal point in the doctrinal structure is the content analysis."[13]

The content distinction is intended, many scholars argue, to guide courts in identifying regulations "improperly motivated . . . by hostility to targeted speech."[14] While there may be other justifications for the content distinction, "it is difficult to formulate it in a way that is not concerned with *why* the government is regulating."[15] Independent of the legislature's subjective intent, the content distinction serves to identify objectively heightened risk that the government's actions violated the First Amendment. The content distinction thus provides courts with a ready guide for a first-order determination of whether the regulation of the speech in question risks impermissible government intervention in the marketplace of ideas.

In practice, however, the content distinction is quite messy and only roughly tracks the division between permissible and impermissible regulation.[16] As a first cut of possible speech regulations, requiring all content-based regulations to be subjected to strict scrutiny results in problems of both over- and underinclusion. Overinclusion in that certain content-based regulations pose no risk of official interference with the channels of democracy or the search for truth. And underinclusion in that content-neutral regulations of the time, place, and manner of expression still have the potential to "devastate expressive content."[17]

As a result of the awkward fit between the content distinction and the real-world contours of desirable speech regulation, courts have developed a series of categorical exceptions, reducing the level of scrutiny for certain types of content-based regulations of speech — such as regulations of commercial speech.[18] Some scholars, Justice Breyer chief

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challenges to regulation of speech by certain actors, including students, prisoners, and government employees, or to speech by the state itself. *See generally* LAURENCE TRIBE & JOSHUA MATZ, UNCERTAIN JUSTICE 121–53 (2014).

12 Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 237 (2012).

13 *Id.* at 238.

14 Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 362 (1997) (arguing that, though this is the justification for the distinction, it is an insufficient one).

15 Kendrick, *supra* note 12, at 248.

16 *Cf.* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (arguing that First Amendment law's unstated objective is identifying improper governmental motives).

17 John D. Inazu, *The First Amendment's Public Forum*, 56 WM. & MARY L. REV. 1159, 1181 (2015).

18 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

among them, have advocated for replacing the current structure of rigid tiers of scrutiny and fixed categorical exceptions with a case-by-case ad hoc balancing approach.[19]

In addition to the clunkyness of the content distinction itself, there is also the practical problem of how to decide which regulations fall on which side of the line. How are courts to define the difference between regulations that are content based and those that are content neutral? It has been hard to say.[20] But in *Reed*, a majority of the Supreme Court seemed to adopt a clear statement of the distinction that broadly deems regulations to be content based.

B. Reed v. Town of Gilbert

In *Reed*, the Supreme Court invalidated the Sign Code[21] enacted by the Town of Gilbert, Arizona, as a content-based regulation of speech.[22] The Sign Code singled out different types of signs for special treatment, specifying requirements for their size and the locations and times at which they could be displayed.[23] A small church challenged the Sign Code as a violation of freedom of speech under the First Amendment.[24]

Writing for the Court, Justice Thomas held that the Sign Code's distinctions among different types of signs were content based and did not satisfy strict scrutiny.[25] In finding the Sign Code to be content

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[19] *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2551–53 (2012) (Breyer, J., concurring in the judgment). In opting for a categorical approach, we end up facing similar questions: what is the process by which the relevant categories are determined and defined, and at what level of generality? *See* Mark Tushnet, *The First Amendment and Political Risk*, 4 J. LEGAL ANALYSIS 103, 116–19, 122 (2012).

[20] *See* Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1353 (2006).

[21] TOWN OF GILBERT, ARIZ., LAND DEVELOPMENT CODE (Sign Code) ch. 1, § 4.402 (2005) .

[22] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2224 (2015).

[23] Specifically, the Sign Code distinguished between "Ideological Sign[s]," "Political Sign[s]," and "Temporary Directional Signs." *Id.* at 2224–25 (alterations in original). Ideological signs were treated most favorably under the Sign Code; they were permitted "to be up to 20 square feet in area and to be placed in all 'zoning districts' without time limits." *Id.* at 2224 (quoting Sign Code § 4.402(J)). Political signs were allowed to be "up to 16 square feet on residential property and up to 32 square feet" elsewhere, and were allowed to "be displayed up to 60 days before a primary election and up to 15 days following a general election." *Id.* at 2224–25. Temporary directional signs were not to be "larger than six square feet," were permitted to "be placed on private property or on a public right-of-way" so long as "no more than four signs [were] placed on a single property at any time," and could "be displayed no more than 12 hours before the 'qualifying event' and no more than 1 hour afterward." *Id.* at 2225 (internal citations omitted) (quoting Sign Code § 4.402(P)).

[24] *Id.* at 2225–26.

[25] *Id.* at 2231–32. *Reed* is a rare occasion on which Chief Justice Roberts assigned the majority opinion in a salient case to Justice Thomas. *See* Richard J. Lazarus, *Back to "Business" at the*

based, the Court announced a broad new standard. It held 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."[26] "This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys."[27] Facially content-based regulations are automatically "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."[28] Even where a regulation does not address content on its face, it will be considered content based if it cannot be "justified without reference to the content of the regulated speech."[29] The majority in *Reed* held that the Town of Gilbert's Sign Code was content based on its face and thus subject to strict scrutiny, which it failed — epically.[30]

Attempting to mitigate the apparent breadth of the majority's holding, Justice Alito, concurring,[31] listed a number of different regulations that he believed would still be content neutral under *Reed*'s new rule.[32] Justice Alito's concurrence, however, did not offer a theoretical basis for distinguishing its protected categories from the reach of the majority's standard.[33]

Three Justices flatly disagreed with the majority's reasoning. Justice Kagan, joined by Justices Ginsburg and Breyer, admitted that the Sign Code did not pass First Amendment muster but criticized the breadth of the Court's holding, arguing that strict scrutiny should be applied to content-based regulations of speech only where there is a

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Supreme Court: The "Administrative Side" of Chief Justice Roberts, 129 HARV. L. REV. F. 33, 58–59, 60 n.161 (2015).

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

[27] *Id.* (quoting Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2664 (2011)).

[28] *Id.* at 2228 (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)).

[29] *Id.* at 2227 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). The Court also affirmed that a regulation is content based if it was "adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Id.* (alteration in original) (quoting *Ward*, 491 U.S. at 791).

[30] *Id.* at 2231–32. Justice Kagan, concurring in the judgment, argued that the Town's defense of the Sign Code "does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test." *Id.* at 2239 (Kagan, J., concurring in the judgment).

[31] Justice Alito was joined by Justices Kennedy and Sotomayor.

[32] *See Reed*, 135 S. Ct. at 2233 (Alito, J., concurring).

[33] At least two of Justice Alito's exceptions — the seventh, involving the on-premises/off-premises distinction, and the ninth, dealing with signs advertising one-time events — seem irreconcilable with the broad rule asserted by the majority. A lower court has already found a regulation distinguishing between on-premises and off-premises signs to be content based. *See infra* notes 79–83 and accompanying text. And Justice Kagan noted the dissonance between the one-time event exception and the facts of *Reed* itself. *See Reed*, 135 S. Ct. at 2237 n.* (Kagan, J., concurring in the judgment).

"realistic possibility that official suppression of ideas is afoot."[34] The majority would require courts to "strike down . . . 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."[35] In a separate opinion, Justice Breyer argued against a rigid approach requiring strict scrutiny for content-based regulations, as "[r]egulatory programs almost always require content discrimination. And to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity."[36]

The majority's articulation of the standard for deeming a regulation content based is notable for two main reasons. First, it divorces the content distinction from its intended purpose of ferreting out impermissible government motive.[37] Even where government motive is completely benign, the Court affirmed that content-based regulations are nonetheless suspect and should be subjected to strict scrutiny.[38] Second, it defines the category of content-based regulations in language sufficiently broad to cover nearly all regulations. Finding a regulation to be content based whenever it cannot be "justified without reference to the content of the regulated speech"[39] could be read to include any regulation that even incidentally distinguishes between activities or industries.

After *Reed*, commentators echoed Justice Breyer's concerns and cautioned that the majority and its formalist, absolutist approach to content neutrality had transformed First Amendment doctrine, with effects reaching far beyond the case's immediate context.[40] Crafty litigants immediately made First Amendment arguments challenging all sorts of government regulation under *Reed*: other municipal sign

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[34] *Reed*, 135 S. Ct. at 2237 (Kagan, J., concurring in the judgment) (quoting Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 189 (2007)).

[35] *Id.* at 2239.

[36] *Id.* at 2234 (Breyer, J., concurring in the judgment). As early as oral argument, Justice Breyer recognized that a broad test for deeming regulations to be content based could imperil wide swaths of reasonable government regulation. *See* Transcript of Oral Argument at 21, *Reed*, 135 S. Ct. 2218 (2015) (No. 13-502) ("[T]he entire U.S. Code is filled with content distinctions. All of crime is filled with content distinctions. All of regulation has content distinctions."); *see also, e.g.*, Schauer, *supra* note 11, at 1778–84 (describing securities regulation, antitrust law, labor law, and numerous other legal regimes as content-based regulations of speech). Justice Breyer would have invalidated the Sign Code in *Reed* under an ad hoc balancing test. *See Reed*, 135 S. Ct. at 2235–36 (Breyer, J., concurring in the judgment).

[37] *See, e.g.*, Kagan, *supra* note 16, at 450–56.

[38] This requirement of strict scrutiny for any and all content-based regulations of speech seems to conflict with an earlier decision refusing to apply strict scrutiny in a challenge to a municipal sign law with an exception for commemorative markers and address numbers. *See* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 792 n.1, 804–10 (1984).

[39] *Reed*, 135 S. Ct. at 2227 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

[40] *See* Liptak, *supra* note 5.

codes,[41] antipanhandling regulations,[42] commercial speech regulations,[43] and regulations of general commercial conduct.[44]

But, as the next Part argues, despite numerous post-*Reed* challenges to diverse government regulations, lower courts have generally resisted *Reed*'s deregulatory potential.

II. READING *REED*: DIMENSIONS OF DISTINCTION

If interpreted at full breadth, *Reed* could provide a grant for transforming First Amendment doctrine and limiting government power to enforce reasonable regulations. Its broad test for what counts as a content-based regulation of speech risks destabilizing vast swaths of the regulatory state by requiring more regulations to stand up to strict scrutiny when faced with a First Amendment challenge.

But it need not be this way. *Reed* itself does not necessitate such a broad interpretation. *Reed* can be distinguished up, down, and sideways. Down, by deeming a regulation to cover conduct rather than speech, thereby subjecting it to rational basis review. Sideways, by pushing *Reed* aside in evaluating challenges to regulations of commercial speech — and preserving the *Central Hudson*[45] standard of intermediate scrutiny. And up, by finding the regulation to be content neutral or by diluting the standard of strict scrutiny.[46] This Part addresses each of these dimensions of distinction in turn.[47] It marshals lower-court decisions addressing *Reed*[48] to suggest that lower courts' interpretations of *Reed* have narrowed the case's reach in a manner consistent with the majority opinion's text.

A. Distinguishing Reed *Down: The Speech/Conduct Divide*

Seeing in *Reed* a valuable ally in the fight against regulation, creative First Amendment advocates have challenged general economic regulations as impermissible content-based restrictions on speech. *Reed* thus risks becoming the strongest and shiniest arrow in the quiver of

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[41] *See infra* p. 1993.

[42] *See infra* pp. 1994–95.

[43] *See infra* section II.B, pp. 1990–92.

[44] *See infra* section II.A, pp. 1987–90.

[45] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).

[46] This last move, diluting strict scrutiny, is the most dangerous. *See infra* section II.C, pp. 1992–98.

[47] The order in which these dimensions are considered (down then sideways then up) provides, perhaps, a best-practice approach for a court considering a First Amendment challenge after *Reed*: First, determine whether the regulation addresses conduct rather than speech. If it covers speech, determine whether the regulation addresses commercial speech. Only when the answer to the first two questions is decisively "no" should courts confront content analysis under *Reed*.

[48] In just its first six months, *Reed* was cited in fifty-six cases, including ten decisions by eight different federal Courts of Appeals.

those seeking to Lochnerize the First Amendment.[49] But unlike regulations of speech, which at least raise the specter of government censorship and thus risk impinging protected First Amendment values, general regulations of economic behavior do not and should not raise First Amendment concerns.[50]

On its face, *Reed* should not apply to regulations of conduct. *Reed* did not address a regulation of conduct, nor does the text of the majority opinion suggest that it should apply to such regulations. In *Reed*, the Town of Gilbert's Sign Code distinguished between different types of signs — a canonical First Amendment medium — on the basis of the language they contained.[51] The speech/conduct distinction was not at issue in *Reed*, and while the decision might be interpreted to reflect increasing skepticism from the Court over regulations of *speech*, it says nothing about extending the First Amendment to cover regulations of *conduct*.

Two conflicting cases interpreting *Reed* from the Second and Eleventh Circuits illustrate the importance of the threshold determination of whether a regulation governs speech or conduct. The cases address First Amendment challenges to state laws prohibiting merchants from charging higher prices to customers paying with credit cards than to those paying with cash. These two cases illuminate *Reed*'s potential reach and also how courts have distinguished the decision down by refusing to apply it to regulations of conduct with only tenuous connections to speech.

In *Expressions Hair Design v. Schneiderman*,[52] the Second Circuit held that *Reed* did not apply in a challenge to New York's antisurcharge regulation, as it was a regulation of conduct, not speech.[53] The court noted explicitly that *Reed* did not impact the threshold *speech v. conduct* determination, as it only applied to regulations of speech[54] and that the law at issue only addressed whether a merchant could charge customers more for using credit cards.[55] The court treated the law as a regulation of prices, and in particular the relationship between prices, rather than as a regulation of the seller's

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[49] It is not clear to what degree strength or shine are attractive qualities in an arrow, but one hopes the point is sufficiently sharp.

[50] Bracketing, for our purposes, expressive conduct, where a communicative function is implicated by particular conduct. *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968); *see also* Texas v. Johnson, 491 U.S. 397 (1989).

[51] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2224–25 (2015).

[52] 808 F.3d 118 (2d Cir. 2015).

[53] *Id.* at 132, 134–35.

[54] *Id.* at 132 (deeming content analysis, as exemplified by *Reed*, "of no relevance whatsoever with respect to the threshold question whether the restriction at issue regulates speech or, instead, conduct").

[55] *See id.* at 131–32.

speech in describing its prices. Judge Livingston explained: "Plaintiffs' chief error . . . is their bewildering persistence in equating the actual imposition of a credit-card surcharge . . . with the words that speakers of English have chosen to describe that pricing scheme (i.e., the term 'credit-card surcharge')."[56] Distinguishing between the regulatory burden itself and its relationship to the speech allegedly infringed helps illuminate the distinction between conduct and speech.

In *Dana's Railroad Supply v. Florida*,[57] the Eleventh Circuit reached a contrary conclusion, treating a similar regulation as a restriction on speech and finding that the regulation did not satisfy heightened scrutiny.[58] The Eleventh Circuit focused on the fact that the challenged Florida statute prohibited the imposition of a *surcharge* on customers paying by credit card while permitting a *discount* for those paying by cash.[59] The court argued that the distinction drawn by the regulation was purely semantic, making it a regulation of speech rather than conduct, and suggested that the regulation was "muddled by less savory notes of plain old-fashioned speech suppression."[60] However, in doing so, the court disregarded the fact that the actual regulation prohibited treating different customers differently based on their choice of payment method; it did not restrict vendors from describing any particular price as either a "surcharge" or a "discount."[61] The Eleventh Circuit's elision repeats what Judge Livingston described as the plaintiff's chief error in the analogous Second Circuit case — that is, equating a substantive regulatory impact with the words people choose to describe it.

On the surface, the conflict between the Second and Eleventh Circuits is not about the interpretation of *Reed* at all, but rather about the contours of the speech/conduct distinction. But on closer inspection, the two cases illustrate that after *Reed*, deeming a regulation to cover speech increases the likelihood that it will be subjected to strict scrutiny (and most likely invalidated) under *Reed*'s broadened standard. Thanks to *Reed*, the pre-game has become the game. Courts seeking to preserve the regulatory status quo where it does not raise genuine

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[56] *Id.*

[57] 807 F.3d 1235 (11th Cir. 2015).

[58] *See id.* at 1246. The Eleventh Circuit left open the possibility that the statute in question might be given more leeway as a regulation on commercial speech, finding no need to decide the category question as the court believed that the law did not satisfy any heightened level of scrutiny. *Id.* This move, leaving undecided the appropriate level of First Amendment scrutiny where it would not change the result, is one practiced by the Court itself. *See, e.g.*, Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2667 (2011).

[59] *Dana's R.R. Supply*, 807 F.3d at 1247–48.

[60] *Id.* at 1247.

[61] *Id.* at 1245–46.

First Amendment concerns may find a ready escape hatch in the speech/conduct distinction.

Indeed, the Second Circuit is not alone in finding reasonable police-power regulations to be outside of *Reed*'s reach. In a number of early post-*Reed* challenges, other courts have similarly distinguished *Reed* down, finding a challenged regulation to cover conduct rather than speech and thereby avoiding a dispositive determination of whether *Reed* might require strict scrutiny.[62]

B. Distinguishing Reed *Sideways: Commercial Speech*

Even where a regulation addresses speech rather than conduct, *Reed* probably does not apply if the challenged regulation addresses only commercial speech. Historically, because of the strained relationship between commercial speech and the core values underpinning First Amendment protection, courts have subjected regulations of commercial speech to a standard of intermediate scrutiny rather than the oft-insurmountable barrier of strict scrutiny.[63]

Some have worried that *Reed* supplanted existing commercial speech doctrine.[64] But *Reed*'s new rule for determining when a regulation is content based does not apply to the commercial speech context. First, the Supreme Court has already told us that regulations of commercial speech are content based but are categorically deserving of weakened scrutiny, so *Reed*'s new test for whether a regulation is con-

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[62] Though these cases do not rely on *Reed* in the predicate *conduct v. speech* determination, as *Reed* itself did not address this question, the decision's shadow looms large: If the cases had treated the regulation as covering speech rather than conduct then *Reed* likely would have required the courts to apply strict scrutiny, or at the very least required wading into the interpretive uncertainty about what *Reed* does require. For example, the Ninth Circuit rejected First Amendment arguments brought by franchisors against Seattle's minimum wage ordinance, instead treating the ordinance as an economic regulation that did not trigger any form of heightened scrutiny. Int'l Franchise Ass'n, Inc. v. City of Seattle, 803 F.3d 389, 409 (9th Cir. 2015) (upholding a lower court's refusal to grant a preliminary injunction). And the Southern District of New York, in a challenge brought by a religious congregation seeking to build a rabbinical college, held that building the college was not itself speech entitled to First Amendment protection, even though it might "*enable* [such] speech." Congregation Rabbinical Coll. of Tartikov, Inc. v. Village of Pomona, No. 07-CV-6304(KMK), 2015 WL 5729783, at *51 (S.D.N.Y. Sept. 29, 2015); *see id.* at *1. Similarly, the North Carolina Supreme Court upheld as a regulation of conduct a criminal statute banning registered sex offenders from using commercial social networking websites accessible to minors. State v. Packingham, 777 S.E.2d 738, 741, 744 (N.C. 2015). The court there, however, noted that if the regulation were to govern speech, it would nonetheless be deemed content neutral under *Reed*. *Id.* at 745.

[63] *See generally* Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153 (2012).

[64] And with good reason, as Justice Thomas, who wrote for the Court in *Reed*, has elsewhere expressed his skepticism about weakened scrutiny for regulations of commercial speech. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 572 (2001) (Thomas, J., concurring in part and concurring in the judgment); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518 (1996) (Thomas, J., concurring in part and concurring in the judgment).

tent based is not relevant.[65] Second, *Reed* itself provided no indication that it intended to upset this area of settled doctrine. *Reed* never considerd regulations of commercial speech explicitly, as the challenged categories in the Town of Gilbert's Sign Code involved noncommercial expression,[66] nor did it address *Central Hudson* or the Court's other commercial speech precedents. Lower courts can take the Supreme Court at its word (or rather, its silence) by distinguishing *Reed* sideways and continuing to evaluate challenges to regulations of commercial speech under intermediate scrutiny.

And that's precisely what most lower courts considering challenges to commercial speech regulations after *Reed* have done. In one case, a federal district court found *Reed* inapposite in a challenge to an ordinance imposing requirements on negotiations between landlords and tenants.[67] Stating that *Reed* "does not concern commercial speech,"[68] the court considered the ordinance as a regulation on commercial speech and concluded that it satisfied intermediate scrutiny under *Central Hudson*.[69] Similarly, another federal district court upheld under *Central Hudson* a statute prohibiting healthcare providers from soliciting people involved in motor vehicle accidents, finding that "[b]ecause the [statute] constrains only commercial speech, the strict scrutiny analysis of *Reed* is inapposite."[70] Even in contexts closely analogous to the facts of *Reed*, as in challenges to regulation of commercial signs and billboards, multiple courts have found *Reed* to be entirely immaterial and have instead applied intermediate scrutiny under *Central Hudson*.[71] Perhaps the strongest statement about *Reed*'s inapplicability in the commercial speech context comes from the Northern District of California: "The Supreme Court has clearly made a distinction between commercial speech and noncommercial speech, and nothing in

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[65] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562–63 (1980).

[66] *See supra* note 23 and accompanying text.

[67] *See* S.F. Apartment Ass'n v. City & County of San Francisco, No. 15-cv-01545-PJH, 2015 WL 6747489, at *6–7 (N.D. Cal. Nov. 5, 2015).

[68] *Id.* at *7.

[69] *Id.* at *6, *9.

[70] Chiropractors United for Research & Educ., LLC v. Conway, No. 3:15-CV-00556-GNS, 2015 WL 5822721, at *5 (W.D. Ky. Oct. 1, 2015).

[71] *See* Cal. Outdoor Equity Partners v. City of Corona, No. CV 15-03172 MMM (AGRx), 2015 WL 4163346, at *10 (C.D. Cal. July 9, 2015) ("*Reed* does not concern commercial speech . . . . The fact that *Reed* has no bearing on this case is abundantly clear from the fact that *Reed* does not even *cite Central Hudson*, let alone apply it."); *see also* Peterson v. Village of Downers Grove, No. 14C9851, 2015 WL 8780560, at *10 (N.D. Ill. Dec. 14, 2015); Timilsina v. West Valley City, No. 2:14-cv-00046-DN-EJF, 2015 WL 4635453, at *7 (D. Utah Aug. 3, 2015); Contest Promotions, LLC v. City & County of San Francisco, No. 15-cv-00093-SI, 2015 WL 4571564, at *4 (N.D. Cal. July 28, 2015).

its recent opinions, including *Reed*, even comes close to suggesting that that well-established distinction is no longer valid."[72]

A more troubling application of the commercial/noncommercial distinction after *Reed* came in the trademark context. In *In re Tam*,[73] the Federal Circuit struck down as content based a section of the Lanham Act allowing the Patent and Trademark Office to deny registration to a disparaging mark.[74] In doing so, the court tripped over itself to separate the commercial and expressive aspects of trademark registration — a distinction contested hotly in a dissent.[75] *In re Tam*, while confirming the vitality of intermediate scrutiny for commercial speech after *Reed*, also suggests that courts must avoid classifying commercial speech as noncommercial given the enhanced likelihood that regulation of the latter is now vulnerable to strict scrutiny.[76]

C. Distinguishing Reed *Up (or Not at All): Noncommercial Speech*

Reed's impact will be most strongly felt in challenges to regulations closely analogous to the facts of *Reed* itself: regulations of noncommercial speech. *Reed* will likely require future courts to analyze such regulations as content based and subject to strict scrutiny. Since the Court's decision, most cases with fact patterns closely analogous to *Reed*'s — challenges to other sign codes or regulations of noncommercial person-to-person communication — have resulted in invalidation of the challenged regulation. However, there remain two paths to distinguishing *Reed* up: First, and more problematically, by deeming a regulation content based under *Reed* but finding that it satisfies strict scrutiny. Second, by finding regulations to be content neutral, notwithstanding the feared post-*Reed* squeeze-out of the zone of content-neutral regulations.

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[72] CTIA-The Wireless Ass'n v. City of Berkeley, No. C-15-2529 EMC, 2015 WL 5569072, at *10 (N.D. Cal. Sept. 21, 2015) (citation omitted) (rejecting a First Amendment challenge to an ordinance requiring cell-phone retailers to provide notice to customers regarding radiofrequency emissions).

[73] 808 F.3d 1321 (Fed. Cir. 2015) (en banc).

[74] *Id.* at 1334–36.

[75] *See id.* at 1337–39; *id.* at 1376 (Reyna, J., dissenting). The Federal Circuit's willingness to treat trademark registration as a hybrid act of commercial and noncommercial speech seems an unprecedented and dangerous way to erode commercial speech doctrine by transforming the relevant unit of analysis. *See id.* at 1377 ("[T]he Supreme Court has routinely held that various examples of speech 'constitute commercial speech notwithstanding the fact that they contain discussions of important public issues.'" (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67–68 (1983))).

[76] Similarly, in *Rosemond v. Markham*, No. 13-42-GFVT, 2015 WL 5769091 (E.D. Ky. Sept. 30, 2015), the court relied on *Reed* to find a regulation of professional conduct to be content based as applied to a nonprofessional, *id.* at *7. However, the court in that case nonetheless retained a strong commercial/noncommercial distinction, maintaining that the regulation would likely have had to satisfy only intermediate scrutiny if it were to be treated as commercial speech. *See id.* at *10.

Most directly, lower courts post *Reed* have found sign regulations that treat different types of noncommercial communication differently to be content based and have invalidated them under strict scrutiny.[77] Courts have even signaled receptivity to *Reed* challenges to sign ordinances where they have not been raised.[78]

At the extreme, one lower court even interpreted *Reed* so broadly as to run afoul of a clear limitation imposed by Justice Alito's concurrence. In *Thomas v. Schroer*,[79] the District Court for the Western District of Tennessee found that a sign code distinguishing between off-premises and on-premises signs was content based,[80] even though Justice Alito described the off-premises/on-premises distinction as content neutral.[81] This decision — though perhaps an outlier[82] — illustrates the inconsistency between the *Reed* majority's far-ranging reasoning and Justice Alito's attempt to identify exceptions.[83]

Such reasoning also imperils the federal Highway Beautification Act,[84] which conditions the grant of a state's federal highway funds on

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[77] *See, e.g.*, Cent. Radio Co. v. City of Norfolk, No. 13-1996, 13-1997, 2016 WL 360775, at *4–8 (4th Cir. Jan. 29, 2016); Marin v. Town of Southeast, No. 14-CV-2094 (KMK), 2015 WL 5732061, at *13–17 (S.D.N.Y. Sept. 30, 2015).

[78] For example, a state court in Oregon, though "not presented with any First Amendment issues," nonetheless noted that "as of the close of the 2014 term of the United States Supreme Court, it is fairly clear that the [county sign code is] vulnerable to invalidation . . . under the First Amendment." State *ex rel* Icon Groupe, LLC v. Washington County, 359 P.3d 269, 275 n.7 (Or. Ct. App. 2015).

[79] 116 F. Supp. 3d 869 (W.D. Tenn. 2015).

[80] *Id.* at 876 ("Similar to the sign code exemptions in *Reed*, . . . [t]he only way to determine whether a sign is an on-premise sign, is to consider the content of the sign and determine whether that content is sufficiently related to the 'activities conducted on the property on which they are located.' Consequently, under the *Reed* test, the on-premise exemption is facially content-based." (quoting Billboard Regulation and Control Act of 1972, TENN. CODE ANN. § 54-21-104 (2012))).

[81] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2233 (2015) (Alito, J., concurring).

[82] *See* Contest Promotions, LLC v. City & County of San Francisco, No. 15-cv-00093-SI, 2015 WL 4571564, at *4 (N.D. Cal. July 28, 2015) ("[A]t least six Justices continue to believe that regulations that distinguish between on-site and off-site signs are not content-based . . . ."). Regulations distinguishing between on-premises and off-premises signs should probably be treated as content-neutral regulations of place as the very same sign is treated differently only because of the location in which it is placed. *Cf.* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 511 (1981) (plurality opinion).

[83] The same district court said as much in a later opinion: "Justice Alito's concurrence in *Reed* is inapposite to the instant analysis. Not only is the concurrence not binding precedent, but the concurrence fails to provide any analytical background as to why an on-premise exemption would be content neutral. The concurrence's unsupported conclusions ring hollow in light of the majority opinion's clear instruction . . . ." Thomas v. Schroer, No. 2:13-cv-02987-JPM-cgc, 2015 WL 5231911, at *5 (W.D. Tenn. Sept. 8, 2015). In yet another opinion, the court made clear in the qualified immunity context that this broad interpretation of *Reed* ought to be "clearly established going forward." Thomas v. Schroer, No. 2:13-CV-02987-JPM, 2015 WL 5797599, at *15 (W.D. Tenn. Oct. 2, 2015).

[84] Highway Beautification Act of 1965, Pub. L. No. 89-285, § 101, 79 Stat. 1028 (codified at 23 U.S.C. § 131 (2012)).

the state's regulation of outdoor signs near highways.[85] The federal government filed an amicus brief in *Reed* expressing its concern for the future of the Act.[86] Though no court has yet squarely considered a First Amendment challenge to the Highway Beautification Act's sign regulations under *Reed*, such a challenge now seems inevitable.[87]

Additionally, courts have generally deemed regulations governing noncommercial person-to-person communications to be content based under *Reed*.[88] For example, multiple courts have invalidated antipanhandling regulations under *Reed*.[89] Even broader second-generation antipanhandling ordinances drafted in the wake of *Reed* that attempt to satisfy its expanded standard are beginning to face

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[85] *See id.*

[86] *See* Brief for the United States as Amicus Curiae Supporting Petitioners at 1, Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015) (No. 13-502), 2014 WL 4726504, at *1. The federal government argued against strict scrutiny for the Sign Code, *id.* at 24–27, asserting that the Highway Beautification Act would survive intermediate scrutiny (even while the Sign Code would not), *id.* at 8, but not discussing whether the Highway Beautification Act would pass muster under strict scrutiny. Given the specificity of exceptions to the Highway Beautification Act — like its exception for signs advertising free coffee, 23 U.S.C. § 131(c)(5) — which certainly "appl[y] to particular speech because of the topic discussed or the idea or message expressed," *Reed*, 135 S. Ct. at 2227, it is likely that a First Amendment challenge to the Highway Beautification Act would merit strict scrutiny, and succeed under *Reed*.

[87] Justice Kagan noted in *Reed* that the majority's reasoning puts the Act "in jeopardy." *Reed*, 135 S. Ct. at 2236 (Kagan, J., concurring in the judgment). Indeed, the District Court for the Western District of Tennessee all but invited just such a challenge. *See Thomas*, 2015 WL 5231911, at *7.

[88] In general, regulations that target political speech, which lies at the heart of First Amendment protection, are (and probably ought to be) especially difficult to sustain after *Reed*. Several early post-*Reed* cases have confirmed this intuition. *See* Cahaly v. Larosa, 796 F.3d 399, 405–06 (4th Cir. 2015) (striking down a statute prohibiting political robocalls as content based under *Reed*); Rideout v. Gardner, No. 14-cv-489-PB, 2015 WL 4743731, at *9, *15 (D.N.H. Aug. 11, 2015) (striking down as content based a statute prohibiting voters from taking and disclosing pictures of completed election ballots); *see also* Commonwealth v. Lucas, 34 N.E.3d 1242, 1251–52, 1251 n.10 (Mass. 2015) (striking down a statute criminalizing certain false statements about political candidates, relying primarily on the Massachusetts Declaration of Rights but noting that *Reed* "casts additional doubt on the Commonwealth's position," *id.* at 1251 n.10).

[89] *See, e.g.*, Thayer v. City of Worcester, No. 13-40057-TSH, 2015 WL 6872450, at *1, *11–12 (D. Mass. Nov. 9, 2015) (invalidating as content based an ordinance making it "unlawful for any person to beg, panhandle or solicit in an aggressive manner," *id.* at *1 (quoting WORCESTER, MASS., REVISED ORDINANCES OF 2008, ch. 9, § 16(d) (2008))); *see also, e.g.*, Norton v. City of Springfield, 806 F.3d 411, 412–13 (7th Cir. 2015); McLaughlin v. City of Lowell, No. 14-10270-DPW, 2015 WL 6453144, at *4, *12 (D. Mass. Oct. 23, 2015); Browne v. City of Grand Junction, No. 14-cv-00809-CMA-KLM, 2015 WL 5728755, at *9–11 (D. Colo. Sept. 30, 2015). *But see* Watkins v. City of Arlington, No. 4:14-cv-381-O, 2015 WL 4755523, at *7 (N.D. Tex. Aug. 12, 2015) (finding that an ordinance that regulates all interactions between pedestrians and the occupants of vehicles stopped at traffic lights is content neutral). *See generally* Anthony Lauriello, Note, Reed v. Town of Gilbert *and the Death of Panhandling Regulation*, 116 COLUM. L. REV. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2666679 [http://perma.cc/73ZQ-25E6] (arguing that after *Reed*, virtually no panhandling regulations can withstand First Amendment scrutiny).

successful First Amendment challenges.[90] Similar challenges have been successfully mounted against ordinances prohibiting solicitation in a pedestrian-only historic district,[91] prohibiting solicitation of day labor,[92] and requiring a license for door-to-door solicitation.[93]

These cases nicely illustrate how content analysis unmoored from context places regulators in a bind. Rather than limiting the amount of protected speech subject to government regulation, *Reed* requires legislatures to regulate all speech in order to regulate any speech.[94]

One path to distinguishing *Reed* up is for courts to find that a challenged regulation is content based but nonetheless satisfies strict scrutiny. However, this approach risks weakening the protection of speech at the heart of the First Amendment by offering a version of strict scrutiny that is strict in name only.[95] A panel of the Eleventh Circuit followed this path in the so-called "Docs vs. Glocks" challenge to a law limiting doctors' ability to ask about and record patients' firearm

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[90] In an early post-*Reed* case, the Seventh Circuit reversed a previous decision and held that the City of Springfield's ordinance prohibiting oral requests for money was content based and thus subject to strict scrutiny. *Compare Norton*, 806 F.3d at 412–13 (finding the regulation content based), *with* Norton v. City of Springfield, 768 F.3d 713, 717–18 (7th Cir. 2014) (finding the regulation content neutral). After the Seventh Circuit's ruling, the City recrafted the antipanhandling ordinance. Norton v. City of Springfield, No. 15-3276, 2015 WL 8023461, at *1 (C.D. Ill. Dec. 4, 2015). The revised statute closely mirrored the Colorado statute providing for floating buffer zones around individuals visiting abortion clinics upheld by the Supreme Court in *Hill v. Colorado*, 530 U.S. 703, 707 (2000). *But cf.* McCullen v. Coakley, 134 S. Ct. 2518, 2545 (2014) (Scalia, J., concurring in the judgment) (concluding that *Hill* ought to be overruled).

The revised Springfield ordinance was again challenged as content based under *Reed*. *See Norton*, 2015 WL 8023461, at *1. The district court denied the City's motion to dismiss, finding that unlike the statute in *Hill*, the revised Springfield ordinance "allows solicitations . . . unless the speaker is making a vocal appeal for an immediate donation. Because the Springfield ordinance prohibits this type of speech in the designated area while allowing other types, the Court must conclude it is content-based." *Id.* at *2.

[91] FF Cosmetics FL Inc. v. City of Miami Beach, No. 14-cv-22072-KING, 2015 WL 5145548 (S.D. Fla. Aug. 31, 2015).

[92] Centro de la Comunidad Hispana v. Town of Oyster Bay, No. 10-CV-2262 (DRH), 2015 WL 5178147 (E.D.N.Y. Sept. 3, 2015).

[93] Working America, Inc. v. City of Bloomington, No. 14-1758 ADM/SER, 2015 WL 6756089 (D. Minn. Nov. 4, 2015).

[94] Though to the extent that antipanhandling ordinances have the effect of criminalizing homelessness and poverty, legislators might consider reallocating resources away from speech regulation in any form and toward more constructive and inclusive programs for alleviating the root causes of financial and social marginalization. *See* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE 20–21, https://www.nlchp.org/documents/No_Safe_Place [http://perma.cc/JKV5-6XW6]. *See generally* MATTHEW DESMOND, EVICTED (2016).

[95] *See Reed*, 135 S. Ct. at 2235 (Breyer, J., concurring in the judgment) ("I recognize that the Court could escape the problem by watering down the force of the presumption against constitutionality that 'strict scrutiny' normally carries with it. But, in my view, doing so will weaken the First Amendment's protection in instances where 'strict scrutiny' should apply in full force.").

ownership,[96] but the decision has been vacated pending rehearing en banc.[97]

Finally, while *Reed* expanded the zone of content-based regulations, it did not totally eliminate the possibility that some carefully crafted regulations may yet be deemed content neutral. At least six Justices — the three who concurred in the judgment (Justices Kagan, Breyer, and Ginsburg) along with Justice Alito and the two who joined his concurring opinion (Justices Kennedy and Sotomayor) — are open to finding reasonable sign regulations to be content neutral, even if the reasoning of the *Reed* majority opinion might suggest otherwise.[98]

Following *Reed*, a handful of lower courts have found regulations of speech to be content neutral and have thus evaluated them under intermediate scrutiny.[99] In a case that had been GVR-ed (granted, vacated, and remanded) by the Supreme Court after *Reed*, the Ninth Circuit affirmed that restrictions on the height and size of signs were

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[96] *See* Wollschlaeger v. Governor of Fla., No. 12-14009, 2015 WL 8639875 (11th Cir. Dec. 14, 2015), *reh'g en banc granted*, No. 12-14009 (11th Cir. Feb. 3, 2016). The court found that under *Reed*, the regulation was content based as "it applies to speech based on the 'topic discussed.'" *Id.* at *19 (quoting Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015)). However, the court found that the statute nonetheless satisfied strict scrutiny. *Id.* at *24–31. The court considered, but did not decide, whether the law ought to be subjected to less rigorous scrutiny as a regulation on professional speech, while also noting that "[b]roadly reading the Supreme Court's recent *Reed* decision may suggest that any and all content-based regulations, including commercial and professional speech, are now subject to strict scrutiny." *Id.* at *24.

[97] Not only does this case illustrate the risk of a weakened strict scrutiny standard, it also shows the huge danger of letting Second Amendment culture trump First Amendment protections. *See* Eugene Volokh, *Can Florida Restrict Doctors' Speech to Patients About Guns?*, WASH. POST: VOLOKH CONSPIRACY (Feb. 4, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/04/can-florida-restrict-doctors-speech-to-patients-about-guns [http://perma.cc/7FFB-4DXJ].

[98] *Compare Reed*, 135 S. Ct. at 2233 (Alito, J., concurring), *and id.* at 2238–39 (Kagan, J., concurring in the judgment), *with id.* at 2227–28 (majority opinion). While counting to five may be the best way to predict the results of a future Supreme Court challenge, in the interim, lower courts are bound by the opinion of the Court.

[99] Early evidence also suggests that the secondary effects doctrine — another categorical carveout from unitary application of content analysis — also survived *Reed*. The secondary effects doctrine allows "intermediate rather than strict scrutiny" for zoning ordinances that are facially content based (especially so after *Reed*) but are "designed to decrease secondary effects and not speech." City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 448 (2002) (Kennedy, J., concurring in the judgment). The doctrine is a contested exception to content analysis that has largely been limited to the context of sexually explicit speech. *See* Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 PEPP. L. REV. 723, 730 (2001). The Seventh Circuit, in a challenge brought by the would-be proprietors of an adult-entertainment venue to a zoning ordinance prohibiting new "sexually oriented businesses" from operating within 750 feet of a residence, rejected the possibility that *Reed* "upend[ed] established doctrine for evaluating regulation of businesses that offer sexually explicit entertainment." BBL, Inc. v. City of Angola, 809 F.3d 317, 326 n.1 (7th Cir. 2015) (citing City of Erie v. Pap's A.M., 529 U.S. 277, 292 (2000) (plurality opinion)).

content neutral.[100] Another court deemed a ban on painted wall signs to be content neutral.[101] The First Circuit held that an ordinance prohibiting standing, sitting, staying, driving, or parking on median traffic strips was content neutral because it "does not take aim at — or give special favor to — any type of messages conveyed in such a place because of what the message says."[102] Similarly, the District Court for the Northern District of Texas found a regulation that prohibited all pedestrians from soliciting, selling, or distributing materials to occupants of cars stopped at traffic lights to be content neutral.[103] And in the Northern District of Illinois, an ordinance prohibiting peddling on public sidewalks adjacent to a stadium was deemed content neutral.[104] In two other examples involving firearm regulations, courts have deemed the regulations in question to be content neutral,[105] in one case by apparently ignoring *Reed*'s rule for determining whether a regulation is content based.[106] These cases suggest that though *Reed* increased the likelihood that a regulation will be deemed content based,

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[100] *See* Herson v. City of Richmond, No. 11–18028, 2016 WL 284430, at *1 n.1 (9th Cir. Jan. 22, 2016).

[101] Peterson v. Village of Downers Grove, No. 14C9851, 2015 WL 8780560, at *5 (N.D. Ill. Dec. 14, 2015).

[102] Cutting v. City of Portland, 802 F.3d 79, 85 (1st Cir. 2015). The court nonetheless invalidated the ordinance as an impermissible regulation of speech in a public forum. *See id.* at 83, 92.

[103] Watkins v. City of Arlington, No. 4:14-cv-381-O, 2015 WL 4755523, at *7 (N.D. Tex. Aug. 12, 2015). The decision, however, did not give much consideration to *Reed*, citing it only in its description of the plaintiffs' position and not relying on it in its analysis. *Id.* at *5. Given that the ordinance covered solicitation, it would have been difficult to distinguish *Reed* down (claiming the ordinance regulated only conduct); and since it covered both commercial and noncommercial solicitation — the plaintiffs were advocating for gun rights — it would also have been difficult to distinguish *Reed* sideways. *Id.* at *1.

[104] Left Field Media LLC v. City of Chicago, No. 15C3115, 2015 WL 5881604, at *6 (N.D. Ill. Oct. 5, 2015).

[105] In one case, a district court rejected a challenge brought by a nonprofit that designed 3D-printed firearms to a law restricting disclosure of "technical data" relating to "defense articles." Defense Distributed v. U.S. Dep't of State, No. 1-15-CV-372 RP, 2015 WL 4658921, at *1 (W.D. Tex. Aug. 4, 2015) (quoting 22 C.F.R. § 120.6 (2015)). In the other case, a Texas state court considered and rejected a First Amendment challenge to a law prohibiting an individual from carrying a handgun in a vehicle at any time the individual displays an identifying gang sign or symbol. The court, mentioning *Reed* only in passing, found the regulation to be content neutral and held that "[a]lthough the content of the sign or symbol might need to be examined to determine whether it is identifying, such an examination does not violate the First Amendment." *Ex parte* Flores, No. 14-14-00663-CR, 2015 WL 6948828, at *3 n.2 (Tex. App. Nov. 10, 2015); *see also id.* at *3.

[106] In *Defense Distributed*, the court relied on a pre-*Reed* decision from the Fifth Circuit holding that "[a] regulation is not content-based . . . merely because the applicability of the regulation depends on the content of the speech." 2015 WL 4658921, at *7 (quoting Asgeirsson v. Abbott, 696 F.3d 454, 459 (5th Cir. 2012)). This line of reasoning seems to conflict directly with *Reed*'s assertion that "regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015).

it did not entirely eliminate the possibility that legislators and regulators may yet craft satisfactory content-neutral regulations.

III. *REED*'S IMPACT ON FIRST AMENDMENT DOCTRINAL ARCHITECTURE

At the level of doctrinal architecture, rather than revolutionizing free speech doctrine, *Reed* has instead been absorbed into the doctrine's fragmentary status quo. By further exposing the warts of content analysis as an organizing heuristic, *Reed* may have pushed courts to develop new ways to avoid the strict scrutiny it seems to demand. This Part claims that this may be a desirable outcome, and advocates against courts treating *Reed* as a warrant for deregulation through First Amendment litigation.

The content distinction has traditionally been seen as a proxy for identifying impermissible government restrictions on speech. But in *Reed*, the majority disavowed the connection between enhanced scrutiny for content-based regulations and concern for impermissible government suppression of speech. Where the application of a law "depend[s] entirely on the communicative content" of covered speech, it will be deemed content based and subject to strict scrutiny.[107] This approach gave no heed to the possibility of purely benign government motives and the absence of any indication of state suppression of protected speech.[108] That is, *Reed* goes far beyond just affecting viewpoint-based regulations of speech — like a regulation that treats pro-life and pro-choice signs differently. Such regulations ought to be invalidated for impairing the ability of a particular perspective to compete in the marketplace of ideas. *Reed* also mandates equal treatment for positions that don't compete against each other in any meaningful way — say, a regulation that treats signs backing a pro-life position differently from signs advertising free coffee.[109]

After *Reed*, any law that draws content-based distinctions may be suspect, including numerous regulations that are entirely unproblematic from the perspective of concern for suppression of democracy-enhancing speech. Whether or not the content distinction was an effective proxy for identifying impermissible regulations of speech in the first place (and most believe that it was not[110]), courts might no longer

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107 *Reed*, 135 S. Ct. at 2227.

108 *See id.* at 2228.

109 *Cf.* Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 139 (1981) ("When distinctions are drawn between commercial and political speech, or . . . other forms of expression, it makes little sense to criticize the distinctions solely because different forms of speech are receiving unequal treatment." (citations omitted)).

110 *See, e.g.*, McDonald, *supra* note 20, at 1430 (describing how the content-based approach has "caused the Court to develop and employ often inconsistent, unprincipled, or ad hoc rules to allow

have the flexibility to treat its invocation as anything other than outcome determinative. This is especially troubling given that strict scrutiny review of every local regulation will both cripple the ability of local governments to run smoothly[111] and expend limited judicial resources on active antidemocratic deregulation.[112]

With *Reed*, the Court risked imposing a unitary standard of strict scrutiny for nearly all regulations of speech — and regulations of conduct that litigants could convince a court to treat as regulations of speech.[113] In doing so, the Court elevated its concern for rule-bound doctrine over sensitivity to facts on the ground and the purposes underlying enhanced First Amendment protection.[114] Using *Reed* to extend the full protection of the First Amendment to challenge regulation of commercial speech or, even more drastically, general economic regulation, would result in a wholesale restructuring of well-settled free speech doctrine without any accompanying justification.[115]

This doctrinal devolution is concerning given the likely beneficiaries of expanded free speech protection. The modern First Amendment has two faces: it is (too rarely) a great shield protecting civil rights and "free[ing] men from the bondage of irrational fears"[116] and (too often) a gilded sword advancing moneyed interests against reasonable government regulation.[117] By divorcing content from context and not differentiating between civil and economic rights, a content-blind approach to First Amendment protection further increases the cost and difficulty of regulation without any corresponding reduction of impermissible government suppression of protected speech. To be clear, a narrow interpretation of *Reed* protects the First Amendment where underlying policy justifies its application, but prevents its weaponization as a libertarian lance against reasonable regulation.

The *Reed* decision thus brings to the surface the underlying problems with the content distinction as a governing superstructure for free

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it to reach common sense results in many cases where those results would otherwise be elusive under current doctrine").

111 *See Reed*, 135 S. Ct. at 2237 (Kagan, J., concurring in the judgment).

112 *See id.* at 2239.

113 *See supra* p. 1989.

114 In this sense, the interpretive tension over content analysis mirrors the conflict over the Equal Protection Clause of the Fourteenth Amendment between those who would interpret the clause to be color blind and those who believe that the clause embodies an antisubordination ideal. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); *see also* Kendrick, *supra* note 12, at 286–96.

115 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980); United States v. Carolene Prods. Co., 304 U.S. 144, 152 & n.4 (1938).

116 Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

117 *See, e.g.*, Coates, *supra* note 2, at 224; Shanor, *supra* note 2 (manuscript at 20–28).

speech doctrine.[118] As a threshold matter, if the Court is concerned with government officials using content-based regulations as a vehicle for ideologically discriminatory treatment,[119] that discriminatory treatment should be challenged outright; it should not be assumed that it flows necessarily from reasonable line-drawing in statutory text. And to the extent that a concern for equality motivates the shift to a liberal identification of content-based regulations,[120] the Court's all-or-nothing approach to regulation — requiring the state to regulate *everything* in order to regulate *anything* — treads even more harshly on competing First Amendment values.[121]

Mercifully, then, *Reed* is not the end of the story. As discussed above, lower courts have resisted *Reed*'s potential to require a unitary standard of strict scrutiny and upend settled First Amendment doctrine. To the extent that lower court reception of *Reed* is beginning to define a doctrinal equilibrium, *Reed*'s impact has been narrow.

Lower court cases have shown that adopting a narrow interpretation of *Reed* may prove difficult in certain areas. In challenges to sign codes and antipanhandling regulations, for example, courts have generally found *Reed* to apply and have struck down many such regulations.[122] But for other challenges brought under *Reed* to broader police power regulations, *Reed* seems to be readily distinguishable up, down, and sideways. Up, by finding that *Reed* applies, but nonetheless deeming the regulation content neutral, or else applying a diluted strict-scrutiny analysis.[123] Down, by finding that the challenged law regulates not speech, but instead conduct, and thus subjecting it to rationality review.[124] And sideways, by finding that preexisting doctrine continues to allow weakened First Amendment review in certain predetermined doctrinal categories, like commercial speech.[125]

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[118] *See* Ashutosh Bhagwat, Reed v. Town of Gilbert*: Signs of (Dis)Content?*, 9 N.Y.U. J.L. & LIBERTY 137, 144 (2015) (describing "developing (albeit subterranean) discomfort" with enhanced scrutiny for content-based regulations in the context of the lower court decisions in *Reed*). In a very recent piece, Professor Bhagwat argues that the "all-speech-is-equal principle" implicit in strict content analysis is in "deep tension" with the premise that "the primary purpose of the First Amendment is to advance democratic self-governance"; he argues that "it is time to rethink our hostility to all content regulation, and consider whether a more nuanced approach is required." Ashutosh Avinash Bhagwat, In Defense of Content Regulation (manuscript at 3) (Feb. 10, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2730936 [http://perma.cc/BX62-AL2C].

[119] *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2229 (2015).

[120] *See, e.g.*, Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 21 (1975).

[121] Not to mention the possibility of overbreadth. *See* Redish, *supra* note 109, at 135–38.

[122] There, where regulations specifically treat certain communications differently on the basis of their content, *Reed*'s command to apply strict scrutiny is harder to avoid.

[123] *But see supra* pp. 1995–96.

[124] Renewed focus on the relatively ill-defined conduct/speech distinction could limit the need to consider challenges to such regulations under *Reed*'s strict scrutiny. *See supra* pp. 1987–90.

[125] *See supra* note 71; p. 1991.

These limits can also guide legislators and regulators seeking to draft statutes and regulations that will be protected from First Amendment challenges in *Reed*'s wake. First, regulations that can be characterized as governing conduct rather than speech ought to say as much explicitly. Second, regulations of speech that can be focused only on commercial speech will likely be protected as outside *Reed*'s reach. Finally, where noncommercial speech must be regulated, legislators should attempt to do so without reference to the content of the regulated speech, perhaps taking Justice Alito's concurrence in *Reed* as a starting point.[126]

Reed thus appears to have further fragmented First Amendment doctrine, not unified it. Doctrinal pathology in First Amendment law may necessitate the preservation of a hyper-categorical approach, rather than the adoption of ad hoc balancing throughout. But by interpreting *Reed* narrowly, lower courts can better align First Amendment doctrine with the values it is meant to protect.

This divergence between *Reed*'s apparent doctrine and lower-court dispositions in turn complicates the values of stability and predictability that are meant to justify a rigid, categorical approach in the first place.[127] While pushing toward a unitary standard of strict scrutiny ought to simplify the doctrine, resistance from the lower courts seems to suggest that *Reed* has instead induced more doctrinal gymnastics in order to stick the same landing.

This resistance will likely frustrate Court-focused doctrinalists. But given that it is consistent with *Reed*'s language (if not its deregulatory spirit), it may be a feature rather than a bug of our judicial system. Narrowing from below helps "domesticate potentially transformative rulings" and also "mitigate[s] the risk that bad facts or one-offs make permanently bad law."[128] Where lower courts find Supreme Court doctrine out of step with equity or common sense, narrow interpretation helps resist disruptive results and signals to the Court that it ought to revisit the issue.[129] When the Court does revisit *Reed*, it might recognize the degree to which the First Amendment has been

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[126] Though unlike the commercial speech workaround, which required *narrowing* the realm of regulated activity in order to satisfy First Amendment scrutiny, the solution for regulating noncommercial speech requires *broadening* proposed regulations to ensure that they include all such speech regardless of its content. *See generally* Alan C. Weinstein & Brian J. Connolly, Sign Regulation After *Reed*: Suggestions for Coping with Legal Uncertainty (manuscript at 49–64) (Sept. 14, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2660404 [http://perma.cc/4CV7-UJTW] (providing more specific guidance for local governments).

[127] *Cf.* Kendrick, *supra* note 12, at 234 (justifying rule-bound First Amendment doctrine on the basis of its predictability).

[128] Re, *supra* note 8 (manuscript at 49).

[129] Professor Re suggests that this happened in the Second Amendment context after *District of Columbia v. Heller*, 554 U.S. 570 (2008). *See* Re, *supra* note 8 (manuscript at 50–52).

captured by the logic and lobby of economic libertarianism, and might consider whether it is desirable for the judiciary to be in the business of policing politically accountable regulation of commercial activity.

For First Amendment doctrine, *Reed* may have the perverse effect of diminishing the centrality of the content distinction. It may instead enhance the fact sensitivity of courts considering First Amendment challenges. By making clear the folly of elevating the content distinction over legitimate concerns about government suppression of speech for which it is meant to be a proxy, *Reed* may have sown the seeds of its own demise. Rather than erecting a doctrinal master concept, *Reed* may have reduced the category of content-based regulations to a mere collection of similar fact patterns, with little claim to legitimacy as a general analytic tool. It profits the Court nothing to give its soul for the whole world . . . but to deem more regulations content based?[130]

[130] *See* ROBERT BOLT, A MAN FOR ALL SEASONS 158 (Vintage Int'l 1990) (1960); *see also* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1960 (2015) (Roberts, C.J., dissenting); *Mark* 8:36.