SALVAGING COMMERCIAL SPEECH DOCTRINE: RECONCILING *REED V. TOWN OF GILBERT* WITH CONSTITUTIONAL FREE SPEECH TRADITION

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INTRODUCTION

Pastor Clyde Reed and His Good News Community Church

Each Sunday in the small town of Gilbert, Arizona, Pastor Clyde Reed would meet with his small congregation for services at Good News Community Church.[1] What separated Good News Community Church from all the other churches in the area was that it met at temporary locations because it lacked its own building.[2] This did not stop the church from worshipping though; its members "worship[ped] and fellowship[ped] together, learn[ed] biblical lessons, s[a]ng religious songs, pray[ed] for their community, and encourage[d] others whenever possible."[3] In fact, the situation was ideal for the church because it only averaged around twenty-five to thirty adults and four to ten children each week at its services.[4] For these people, Good News Community Church was merely where they worshipped, but how they worshipped made all the difference in their lives. The building simply facilitated the experience.

Although they were small in numbers, this congregation desired to share their joy and worship experience with others in the community. They wished to fulfill the Christian call to "Go ye therefore, and teach all nations, baptizing them in the name of the Father, and of the Son, and of the Holy Ghost: Teaching them to observe all things what-

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1 Brief for Petitioner at 7, Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015) (No. 13-502).

2 *Id.* at 8.

3 *Id.* at 7.

4 *Id.* at 8.

soever I have commanded you."[5] Because of this call from Christ, Good News Community Church tried to reach out to as many members of the community as it could.[6] The church had very limited financial means, so it chose how to advertise carefully to get the most value out of its dollar.[7] Pastor Reed and the church chose to use small, directional signs as their main source of advertising because "[t]hey [we]re inexpensive, require[d] little manpower, and play[ed] a critical role in ensuring people kn[e]w where to find a Church that periodically move[d]."[8] This method seemed to fulfill all of the church's goals and needs until it ran into an obstinate barrier: the government.

The Town of Gilbert's Sign Code

The Town of Gilbert created a sign code to manage the impact signs had on safety and aesthetics.[9] The general sign code required all signs to be registered with a permit unless there were specific exemptions listed in the code.[10] If a sign fell into an exempted category, then the code provided how the sign was to be regulated, such as by size and duration of its posting.[11] Failure to abide by the regulations subjected the violator to sign confiscation, fines, or even a jail sentence.[12]

Although there were several exemptions in the code, three exemptions would become the focus of litigation: political signs, ideological signs, and temporary directional signs.[13] Because Pastor Reed's signs promoted a religious assembly and led people to the assembly, they were classified as temporary directional signs. Temporary directional signs were defined as "a temporary sign intended to direct pedestrians, motorists, and other passersby to a 'qualifying event.'"[14] A qualifying event was defined as "any assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a relig-

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5 *Matthew* 28:19-20 (King James); Brief for Petitioner, *supra* note 1, at 7.

6 Brief for Petitioner, *supra* note 1, at 7.

7 *Id*. at 8.

8 *Id.*

9 *Id.* at 13; *see also* GILBERT, ARIZ. CODE § 4.401 (2016).

10 Brief for Petitioner, *supra* note 1, at 9; *see also* GILBERT, ARIZ. CODE § 4.402 (2016).

11 Brief for Petitioner, *supra* note 1, at 12; *see also* GILBERT, ARIZ. CODE § 4.402 (2016).

12 Brief for Petitioner, *supra* note 1, at 13; *see also* GILBERT, ARIZ. CODE § 4.4013 (A)-(D) (2016).

13 Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015).

14 Brief for Petitioner, *supra* note 1, at 10.

ious, charitable, community service, educational, or other similar non-profit organization."[15]

Because Good News Community Church signs were classified as temporary directional signs under the Code, the signs could only be posted twelve hours before the event, removed within one hour after the event, could only be posted if the event was within the Gilbert town limits, and were limited to four per property.[16] Political and ideological signs had their own separate regulations.[17]

The Showdown

Good News Community Church was advertising and carrying on with its business as usual until the town code enforcement office began clamping down on the church's signs.[18] The church would put up the signs early on Saturday and remove them a few hours after services on Sunday.[19] The town cited the church for two violations of the sign code in 2005, one in July and another in September, because it posted the signs earlier and later than the allotted time, and officers even confiscated one sign and required Pastor Reed to come pick it up in person.[20] To avoid further fines and citations, the church reduced both the number of signs it posted and the number of hours it posted each sign, which greatly impacted the effectiveness of the church's advertising.[21]

Realizing this was causing great harm to the church, Pastor Reed approached city officials to try to work out an accommodation; however, city officials refused and stated they would continue citing any future violations.[22] In response to their refusal to work with him, Pastor Reed and the church filed suit against the town in federal district court.[23]

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15 *Id.*

16 *Id.* at 12-15.

17 *See Reed*, 135 S. Ct. at 2224-25.

18 Brief for Petitioner, *supra* note 1, at 13.

19 *Id.*

20 *Id.*

21 *Id.* at 13.

22 *Id.* at 14.

23 *Id.* at 14.

Procedural History

To try to settle the suit, the town stipulated to a preliminary injunction, and then it partially amended the sign code.[24] However, the changes still greatly burdened the church's advertising efforts, so Pastor Reed again filed suit for violation of the church's First Amendment rights.[25] It was at this time that the requirement permitting only signs for events occurring in the Town of Gilbert itself was added to the code, causing Good News Community Church to move to a nearby town to avoid the heavy regulations already in existence.[26] In the district court, Pastor Reed sought declaratory and injunctive relief as well as nominal damages, citing the sign code as unconstitutional both facially and as applied.[27]

In the first instance, the district court ruled the temporary directional sign category was content-neutral, so it applied intermediate scrutiny, and the code survived.[28] The church appealed the ruling to the Ninth Circuit, which affirmed the district court's finding but remanded for analysis on the issue of whether regulating political, ideological, and temporary directional signs differently posed a constitutional problem.[29] On remand, the district court again ruled the sign code neutral, which the Ninth Circuit affirmed on appeal.[30] Pastor Reed and the church petitioned the United States Supreme Court for a writ of certiorari to resolve a three-way circuit split on how to determine if a regulation was content-based.[31] On those grounds, the Court granted certiorari.[32]

On the merits, the Court unanimously struck down the town's sign code as unconstitutional, but the justices disagreed on the rationale to use in identifying content-based legislation. Justice Thomas, writing for the Court, stated, "Government regulation of speech is content-based if a law applies to particular speech because of the topic

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[24] Brief for Petitioner, *supra* note 1, at 14.

[25] *Id.* at 14-17.

[26] *Id.* at 15.

[27] *Id.* at 17.

[28] Ashutosh Bhagwat, *Reed v. Town of Gilbert: Signs of (Dis)Content?*, 9 N.Y.U. J.L. & LIBERTY 137, 140 (2015).

[29] *Id.*; *see also* Reed v. Town of Gilbert, 587 F.3d at 966, 971 (9th Cir. 2009).

[30] Bhagwat, *supra* note 29, at 140; *see also Reed*, 707 F.3d at 1057.

[31] Bhagwat, *supra* note 29, at 140.

[32] *Id.*

discussed or the idea or message expressed."[33] Simply stated, the Court held that if you had to look at what is on the sign to determine how to regulate it, then the regulation was content-based and thus, subject to strict scrutiny. Justices Alito, Breyer, and Kagan each wrote separate concurring opinions.

Impact

Although this may make sense in the context of signs, almost immediately, lower courts have applied this rationale to other areas of speech law where it makes less sense.[34] For instance, this ruling has impacted securities regulation, drug labeling requirements, consumer protection statutes, and other laws and regulations.[35] The most curious aspect of the opinion, however, is that, if taken at face value, it would reverse the Court's extensive case law determining that certain categories of speech are more valuable than others, and thus, that different categories may be regulated in different ways.[36]

The classic example of speech that is considered less worthy of First Amendment protection is commercial speech.[37] In fact, for the longest time, commercial speech was thought to be outside the protections of the First Amendment entirely.[38] The Court created such a distinction "based . . . on the belief that noncommercial or political speech made up the heart of the First Amendment's guarantee of a 'free marketplace of ideas.'"[39] This is because commercial speech involved nothing more than "a seller hawking his wares, and a buyer seeking to strike a bargain."[40] When the Court brought commercial

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[33] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015).

[34] Adam Liptak, *Court's Free Speech Expansion Has Far-Reaching Consequences*, N.Y. TIMES (Aug. 17, 2015), http://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html?_r=0. *See also infra* notes 146-50 and accompanying text.

[35] *Id.*

[36] *See* Jason R. Burt, *Speech Interests Inherent in the Location of Billboards and Signs: A Method for Unweaving the Tangled Web of* Metromedia, Inc. v. City of San Diego, 2006 BYU L. REV. 473, 485-86 (2006).

[37] *See id.*

[38] *Id.* at 486.

[39] *Id.* at 487 (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 781 (1976) (Rehnquist, J., dissenting)).

[40] *Id.* at 487 (quoting *Va. Pharmacy*, 425 U.S. at 781 (Rehnquist, J., dissenting)).

speech under the protection of the First Amendment, it did so under a lesser standard than strict scrutiny.[41]

If *Reed* is to be taken on its face, then any separate distinctions for commercial speech must be implicitly overturned. The Court held that a regulation is content-based if it makes the distinction based on the message expressed.[42] Because any regulation of commercial speech must make distinctions based on the message expressed, all commercial speech is content-based and subject to strict scrutiny. This decision unintentionally overturns thousands of federal, state, and local regulations, implicitly revokes clearly established Supreme Court case law, and ignores other governmental and public interests that were not present in this case.

To remedy the Court's oversight and to limit its unintended consequences, this Note argues the Court should create another test that requires some balancing of the interests. Part I describes the background issues and case law leading up to this decision. Part II analyzes the arguments and opinions provided by the justices, and Part III looks at the application of a different rule and how that would affect the outcome of this case and a previous sign case, *Metromedia, Inc. v. City of San Diego*. Finally, the Note reviews the problems created by this opinion and suggests potential solutions.

I. BACKGROUND

The First Amendment's freedom of speech had its beginnings in the writings of William Blackstone. He explained "the liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publication and not in freedom from censure for criminal matter when published."[43] He further stated, "Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press."[44] Blackstone's points are demonstrated through the infamous prosecutions of seditious libel and treason in

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41 *Id.* at 487-88 (explaining that this lesser standard was intermediate scrutiny).

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

43 Michael Kahn, *The Origination and Early Development of Free Speech in the United States: A Brief Overview*, 76 FLA. B.J. 71, 71 (Oct. 2002) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *151).

44 *Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *151-52).

England.[45] Consider the case of John Twyn. In a book he was prepping for publication, "Twyn had the temerity to suggest that the king was accountable to the people who were entitled to self-government. For this radical notion, he was convicted of constructive treason, hanged, drawn, and quartered."[46] No restraint could be placed on Twyn publishing his beliefs, but he could be prosecuted if his statements were criminal.

It is with this mindset and history that the Framers added the freedom of speech into the First Amendment. They wanted to ensure certain speech would not be criminalized. It would do no good to prohibit previous restraints if speech could just be punished later. To carry this intent out, the courts have generally realized that "core speech" deserves high protection and value.[47] Core speech has traditionally been defined as "political, religious, artistic, or scientific speech."[48] The courts have given all other types of speech, such as commercial speech, lesser protection over time.[49]

Subsection A will review the development of core speech protections in terms of sign regulations, and Subsection B will analyze the development of the commercial speech doctrine.

A. *Core Speech and Sign Regulations*

1. *Linmark Associates v. Township of Willingboro*: The Prohibition of an Outright Ban

During the late 1960s and early 1970s, the minority population in Willingboro Township, New Jersey, began to rise sharply.[50] Many white people started to sell their homes and leave the township, and the town officials discovered that they were leaving as a result of panic selling.[51] Those departing thought an increase of the minority population would lower property values.[52] In response to the "white flight,"

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[45] *Id.* at 72.

[46] *Id.*

[47] *See* Edward J. Eberle, *The Architecture of the First Amendment*, 2011 MICH. ST. L. REV. 1191, 1199-1200.

[48] *Id.* at 1193.

[49] Jennifer L. Pomeranz, *No Need to Break New Ground: A Response to the Supreme Court's Threat to Overhaul the Commercial Speech Doctrine*, 45 LOY. L.A. L. REV. 389, 399 (2012).

[50] Linmark Assocs., Inc. v. Twp. of Willingboro, 431 U.S. 85, 87 (1977).

[51] *Id.* at 87-88.

[52] *Id.* at 88.

town officials decided to promote integrated housing and limit the ability of owners to sell their homes by banning "for sale" signs on private, residential property.[53] The United States Supreme Court, however, struck down the ordinance saying, "[t]he Township Council here, like the Virginia Assembly in *Virginia Pharmacy Bd.* acted to prevent its residents from obtaining certain information."[54] It held, "we reaffirm . . . that the 'commonsense differences between speech that does "no more than propose a commercial transaction," and other varieties . . . suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.'"[55]

Although the Court did not rely on a core speech distinction, the Court made clear localities could not interfere with the exchange of ideas. This principle serves as the bulwark of all freedom of speech cases. Government can regulate how messages and advertisements are displayed, but it cannot ban whole subject matters. This comports with the main tenets of the First Amendment: the government may not ban speech outright.

2. *Members of City Council v. Taxpayers for Vincent*: The Viable Alternative Mandate

In 1979, Roland Vincent decided to run for the City Council of Los Angeles.[56] To help him campaign, a group called "Taxpayers for Vincent" purchased many political signs advertising Vincent's candidacy, and they placed these signs on utility poles, lampposts, and other public fixtures.[57] However, the city had an ordinance that forbade the posting of any signs on public fixtures, so city employees removed all of Vincent's signs once a week for violating the ordinance.[58] Taxpayers brought suit, saying the regulation was overbroad and infringed on free speech rights, but the United States Supreme Court held the ordinance was constitutional.[59] Although it seemed overbroad, the city had a right to make reasonable judgment calls and to balance the pub-

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53 *Id.* at 86-87.

54 *Id.* at 97-98.

55 *Id.* (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 728, 798 (1976)).

56 Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 792 (1984).

57 *Id.* at 792-93.

58 *Id.* at 793.

59 *Id.* at 793, 817.

lic interest with the private speech interest.[60] Also, the Court stated, "a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate."[61] Thus, because there were other ways for Vincent to campaign and other places to post the signs, the ordinance was constitutional.[62]

The Court stated speech interests could be balanced against governmental interests.[63] Although the results could seem unfair at times, the government has a right to enforce its interests. The government's new right to regulate speech in some instances was not absolute however. The Court provided a clear check on the government's police power—another viable alternative for the same speech must exist. This was the major problem in *Linmark*. "For sale" signs were the best way to communicate that the house was for sale, and there was no viable alternative.

Combined with *Linmark*, *Taxpayers for Vincent* started to form a workable framework for core speech in sign regulation. Although no subject matter could be banned outright, the government could reasonably balance its interests with speech interests, provided every method of speech had a viable alternative.

3. *City of Ladue v. Gilleo*: The Goldilocks Approach

In an effort to protest the Persian Gulf War, Margaret Gilleo placed a sign in her front yard saying, "Say No to War in the Persian Gulf, Call Congress Now."[64] After the sign was ruined twice in her yard, she reported the matter to the police, but she was told it was illegal to have signs in Ladue, Missouri.[65] Ladue had an ordinance banning all signs except for several that had express exemptions in the ordinance.[66] When ruling on Gilleo's suit, the United States Supreme Court stated, "[t]hese decisions identify two analytically distinct grounds for challenging the constitutionality of a municipal ordinance regulating the display of signs."[67] The Court continued, "One [was] that the measure in effect restricts too little speech because its exemp-

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60 *See id.* at 811.
61 *Id.* at 812.
62 Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 817 (1984).
63 *Id.* at 808, 811.
64 City of Ladue v. Gilleo, 512 U.S. 43, 45 (1994).
65 *Id.*
66 *Id.* at 46.
67 *Id.* at 50.

tions discriminate on the basis of the signs' messages. Alternatively, such provisions are subject to attack on the ground that they simply prohibit too much protected speech."[68] On the basis of both challenges, the Court struck down the ordinance.

Regulations must not be under or overinclusive. A regulation is underinclusive when it has exceptions that seem to indicate the government is giving an advantage to one particular viewpoint in a public debate.[69] On the other hand, a regulation is overinclusive when it appears that the government is trying to select the subject matters for public debate by banning the rest.[70] The Court demands the 'Goldilocks approach' to speech regulation because the government must only prohibit just the right amount of speech. The government cannot ban more speech than is necessary to achieve its purpose, but it must restrict enough to ensure its stated purpose for the ban is actually achieved. Although this offers little useful guidance, it does put the government on notice that it must take steps to ensure that no subject matter or viewpoint is benefited or harmed by its regulations.

4. Summary

These cases provide the regulatory framework for core speech. No subject matter may be banned outright or benefitted or harmed by a regulation. The government may balance its interests with speech interests and issue restrictions when its interests are greater, but there must be some viable alternative for the communication.

B. *Commercial Speech*

1. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*: The Introduction of a Lesser Standard for Commercial Speech

In an attempt to regulate professional conduct and keep bad pharmacists from taking over the industry, the Virginia state pharmacy board prohibited the advertising of drug prices.[71] When people on medications tried to find cheaper options but were denied access to

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[68] *Id.* at 50-51 (citation omitted).

[69] *Id.* at 51.

[70] City of Ladue v. Gilleo, 512 U.S. 43, 51 (1994).

[71] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 751-52 (1976).

the information, they sued, arguing the First Amendment allowed them to obtain the information from pharmacists.[72] The United States Supreme Court ruled, "even if the First Amendment were thought to be primarily an instrument to enlighten public decision making in a democracy, we could not say that the free flow of information does not serve that goal."[73] This placed commercial speech within the boundaries of the First Amendment. However, the Court held, "[s]ome forms of commercial speech regulation are surely permissible."[74] Time, place, and manner restrictions, as well as restrictions on falsehoods, for example, are permissible.[75]

2. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*: The Established Test

Due to concerns of a fuel shortage in the mid-1970s, the Public Service Commission of New York placed a ban on commercial advertising by utility companies; however, when the shortage was over, the Commission maintained the ban.[76] When Central Hudson sued, the United States Supreme Court created a four-part test:[77] "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least [1] must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial."[78] If the answer to factors one and two are 'yes,' then a court "must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest."[79] Because an outright ban on commercial advertising was broader than necessary to achieve the goal of conservation, the Court struck down the ban as unconstitutional.[80]

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[72] *Id.* at 753-54.

[73] *Id.* at 765.

[74] *Id.* at 770.

[75] *Id.* at 771.

[76] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 558-60 (1980).

[77] *Id.* at 566.

[78] *Id.*

[79] *Id.*

[80] *Id.* at 570-71.

This test has become the standard for commercial speech regulation.[81] Because commercial speech has traditionally been less favored than core speech, a government regulation need only be tied to the stated purpose and "[be] not more extensive than is necessary to serve the government's interests."[82] Balancing has generally been permitted.[83]

3. *Metromedia, Inc. v. City of San Diego*: Signs Face Scrutiny

Of the cases discussed so far, the following case–*Metromedia, Inc. v. City of San Diego*–has been the most confusing and controversial for the lower courts. It combines sign regulation, generally under the police power, with commercial speech, a form of speech with lesser protections.

The City of San Diego passed an ordinance that restricted billboards to only commercial, onsite use.[84] A plurality of the United States Supreme Court summarized the ordinance, saying: "(1) a sign advertising goods or services available on the property where the sign is located is allowed; (2) a sign on a building or other property advertising goods or services produced or offered elsewhere is barred; (3) noncommercial advertising, unless within one of the specific exceptions, is everywhere prohibited."[85] The plurality bifurcated the commercial and noncommercial speech issues.[86]

For the plurality, the commercial speech issue was easily resolved by the *Central Hudson* test.[87] The only real concern for the plurality was whether the ordinance directly advanced the stated governmental interest in traffic safety, and because the plurality deferred to legislative judgment that billboards distract drivers, they decided the restriction directly advanced the government's interest.[88] This meant an offsite-onsite distinction was constitutional. The plurality came out differently on the noncommercial speech issue, however. The plurality ruled San Diego inverted the proper judgment of commercial ver-

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81 *See* Allen Rostron, *Pragmatism, Paternalism, and the Constitutional Protection of Commercial Speech*, 37 VT. L. REV. 527, 537-38 (2013).

82 *Id.*

83 *See id.*

84 Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 495-96 (1981) (plurality opinion).

85 *Id.* at 503.

86 *See id.*

87 *Id.* at 507.

88 *Id.* at 508-09.

sus noncommercial speech.[89] Commercial speech may not be more valued than noncommercial speech because noncommercial speech receives more protection under the First Amendment.[90] Because of this, the plurality struck down the entire ordinance.[91]

However, the concurrence by Justice Brennan provided a completely different rationale for striking down the ordinance.[92] Justice Brennan rejected the bifurcated approach used by the plurality and instead interpreted the ordinance as a complete ban on billboards.[93] Justice Brennan treated the ordinance as a time, place, and manner restriction, which must allow another viable alternative if it bans a form of communication.[94] Because billboards were an important source of speech that did not have a viable alternative, Justice Brennan struck down the ordinance.[95]

With the Court providing two competing, non-binding rationales, the lower courts are confused on how to rule on signs.[96] However, all lower courts can be sure that *Central Hudson* still looms large.

II. ANALYSIS OF *REED V. TOWN OF GILBERT*

In *Reed*, the Court ruled, "[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."[97] However, this is a broad ruling with many unintended, or worse, ill-thought-out consequences. Even one justice in the majority recognized the weaknesses of the majority's opinion and tried to exert damage control. This Part will analyze each of the opinions given in *Reed*: the majority by Justice Thomas, the concurring opinion by Justice Alito, and the two opinions concurring in judgment by Justices Breyer and Kagan.

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89 *Id.* at 513.

90 Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 513-14 (1981) (plurality opinion).

91 *Id.* at 521.

92 *Id.* at 522 (Brennan, J., concurring in judgment).

93 *Id.*

94 *See id.* at 526-27.

95 *Id.* at 540.

96 Burt, *supra* note 37, at 475.

97 Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015).

A. *Majority Opinion by Justice Thomas*

Justice Thomas sought to create an easily applied rule for courts to use to decide if a regulation is content neutral.[98] The rule simply states that any regulations drawing distinctions based on content are subject to strict scrutiny, which means most are likely unconstitutional.[99] When announcing his rule, Justice Thomas relied on four cases, notably all core speech cases.[100] The language of the opinion is not constrained to core speech, however; any references are conspicuously absent. Justice Thomas has "long-held [the] view that restrictions on commercial speech 'should not be analyzed under the *Central Hudson* test.' He has and continues to be the biggest proponent of applying strict scrutiny to all regulations of speech."[101] It appears he finally found his vehicle for doing so.

Although he may not explain it, Justice Thomas relies on some of the Court's important historical values in giving his *Reed* rule. A content neutrality mandate that is strictly enforced can better protect smaller, despised groups. "Polls find that when asked about applying free speech principles in particular cases, large proportions of opinion leaders and majorities of the rank and file are disinclined to allow the specific groups whose messages they find repellant to speak, print, broadcast, or demonstrate."[102] The classic example is the Red Scare and the hunt of Senator Joseph McCarthy when the government suppressed Communist speech during the 1950s.[103] Under the rule announced by Justice Thomas, such targeted suppression cannot occur again under the guise of government regulation.

Another argument Justice Thomas relies on is the difficulty of judging a regulation based on its motives. "[O]fficials will not admit (often, will not themselves know) that a regulation of speech stems

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98 *See id.* at 2228.

99 *Id.* at 2227.

100 *See id.* (citing Sorrell v. IMS Health, Inc., 564 U.S. 552 (2011); Ward v. Rock Against Racism, 491 U.S. 781 (1989); Carey v. Brown, 447 U.S. 455 (1980); Police Dep't. of Chi. v. Mosley, 408 U.S. 92 (1972)).

101 Pomeranz, *supra* note 50, at 392 (quoting Thompson v. Western States Medical Center, 535 U.S. 357, 337 (2002) (Thomas, J., dissenting).

102 Seth F. Kreimer, *Good Enough for Government Work: Two Cheers for Content Neutrality*, 16 U. PA. J. CONST. L. 1261, 1306 (2014).

103 *Id.*

from hostility or self-interest."[104] When officials will not reveal their intentions, or if they do not know of their own intentions, it is hard to determine if their actions are biased. Justice Thomas can claim, like Queen Elizabeth I, "I have no desire to make windows into men's souls;"[105] although he may not have any desire, he may not have the ability to either. A finding of discrimination should not turn on whether the Court can easily ascertain an ill motive. Justice Thomas's rule simplifies the inquiry by looking straight to the text of the regulation, which can be easily judged objectively.

Although these values are important, Justice Thomas ignores two key facts: the Court historically defers to legislative judgment on certain types of regulations, and not all core speech is treated the same.

First, the Court deferred to legislative judgment in *Metromedia* regarding the direct advancement requirement.[106] The Court explained, "[w]e likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety."[107] In tough situations, especially when trying to balance government interests and speech interests, courts have deferred to the judgment of the legislatures. The strict scrutiny rule announced in *Reed* removes this deference and holds that most government interests in sign regulation are not compelling enough.[108]

Also, although motives may be hard to measure, the Court still needs to address them in its opinions. For example, in *Sorrell v. IMS Health, Inc.*, cited by Justice Thomas himself, the United States Supreme Court took the motives of the legislature into account when it deemed a regulation content-based on its face.[109] Justice Kennedy stated, "[a]ny doubt that [a regulation] imposes an aimed, content-based burden on detailers is dispelled by the record and by formal legislative findings. . . . Just as the 'inevitable effect of a statute on its face may render it unconstitutional,' a statute's stated purposes may also be considered."[110] The main difference between the result in

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104 *Id.* at 1315 (quoting Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 437, 441 (1996)).

105 Terrence W. Klein, *Windows into Men's Souls*, AMERICAN: THE NATIONAL CATHOLIC REVIEW (Nov. 29, 2013), http://americamagazine.org/content/good-word/windows-mens-souls.

106 Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 508 (1981) (plurality opinion).

107 *Id.* at 509.

108 Reed v. Town of Gilbert, 135 S. Ct. 2218, 2231-32 (2015).

109 Sorrell v. IMS Health, Inc., 564 U.S. 552, 555 (2011).

110 *Id.* (quoting United States v. O'Brien, 391 U.S. 367, 348 (1968)).

Metromedia and *Sorrell* seems to be the existence of a formal record detailing legislative motives. Although the ordinance in *Metromedia* was also struck down, it was struck down because it favored commercial over core speech.[111] Even though Justice Thomas may want to ignore a legislative inquiry, the Court usually attempts to inquire into legislative motives to some degree.[112]

Second, Justice Thomas ignored the Court's creation of tiered degrees even within core speech.[113] For example, the Court applied lesser degrees of scrutiny when the Federal Communications Commission sought to regulate offensive words on broadcast radio[114] or when a town wanted to regulate the location of adult theaters.[115] If the Court created a tiered system of core speech, why then would the Court adopt a rule that would abolish that system? The Court created the system to recognize some speech had negative, secondary effects, so it allowed legislation to curb those secondary effects.[116]

Justice Thomas then proceeded to explain how the opinion would still permit sign regulations, provided they do not make distinctions based on content.[117] He remarked a locality could regulate "size, building materials, lighting, moving parts, and portability."[118] However, this ignores the concept that signs are used for many purposes. Traditionally, signs are regulated based on what function they serve and what type of sign they are. This allows for more effiecent and useful regulations. However, is the city supposed to regulate billboards, storefront signs, and lawn signs with the same regulations? Such a scheme would be unworkable, but it seems to be required by Justice Thomas's test. The other problem arising from Justice Thomas's limitations is many categories in the list are not what concern local governments from a beauty or safety standpoint. It does no good to regulate if the regulations do not address the problems you wish to address.

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111 *Metromedia*, 453 U.S. at 521 (plurality opinion).

112 *See Sorrell,* 564 U.S. at 555.

113 Pomeranz, *supra* note 50, at 396.

114 *See* FCC v. Pacifica Found., 438 U.S. 726 (1978).

115 *See* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 45 (1986).

116 *Id.* at 49.

117 *Reed*, 135 S. Ct. at 2232.

118 *Id.*

B. *Concurring Opinion by Justice Alito*

Justice Alito recognized the weaknesses in Justice Thomas's opinion when he sought to "add a few words of further explanation."[119] Justice Alito knew that Justice Thomas's categories of possible regulation did not provide enough guidance on what may be reasonably regulated, so he added a few more categories of his own.[120] The main problem with some of Justice Alito's categories are that they would also be ruled facially unconstitutional. Two categories stand out in particular. First he mentioned, "[r]ules distinguishing between on-premises and off-premises signs."[121] Second, he named, "[r]ules imposing time restrictions on signs advertising a one-time event."[122]

To determine if a sign is offsite or onsite, the regulator must first look to the content of the sign and then the location. This clearly falls within the content-based distinction struck down by the majority opinion. Unless a government could come up with a compelling government interest that justifies the distinction, it would be struck down.[123] Justice Alito seemed to pull this distinction from the plurality opinion of *Metromedia*,[124] but the failure to recognize this facial unconstitutionality in Justice Alito's analysis demonstrates how the *Reed* majority opinion overturns a long line of case law on this subject.

This same analysis applies to signs advertising a one-time event. Justice Alito tries to solve the problem when he says, "[r]ules of this nature do not discriminate based on topic or subject and are akin to rules restricting the times within which oral speech or music is allowed."[125] This statement misses the point of the majority opinion, however. To determine if the sign regulates a one-time event, the regulator must first turn to the content of the sign to see if it describes such an event, and this is the behavior the majority opinion forbids. Surprisingly, if Justice Alito's opinion is correct, then the Court erred in striking down the regulation in this case. Arguably, the church meetings were one-time events. Even if the Court rejected such an argument, it would have great difficulty distinguishing one-time event

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

120 *Id.*

121 *Id.*

122 *Id.*

123 Reed v. Town of Gilbert, 135 S. Ct. 2218, 2231-32 (2015) (majority opinion).

124 *Metromedia*, 453 U.S. at 508-09 (1981) (plurality opinion).

125 *Reed*, 135 S. Ct. at 2233 (Alito, J., concurring).

signs and recurring event signs. Justice Alito's strenuous, but insufficient, efforts to strengthen the majority opinion merely show its weaknesses and fallacies.

C. *Opinion Concurring in Judgment by Justice Kagan*

Justice Kagan first noted that the majority bases its opinion on the exceptions listed in Gilbert's sign ordinance.[126] She agreed that the exceptions listed in the Code were uncalled for and lacked any justification,[127] but argued most exceptions to sign codes do not implicate the need for strict scrutiny.[128] The Court instead made a ruling that all exceptions are based on content and so should be subject to strict scrutiny.[129] Justice Kagan noted that the reasons provided by the majority to invoke strict scrutiny do not match the typical reasons.[130] She argued that strict scrutiny is applied when the Court believes, "there is any 'realistic possibility that official suppression of ideas is afoot.'"[131] The Court has also applied strict scrutiny when there is any chance that the restriction "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace."[132]

However, as Justice Kagan commented, if it is impossible for the regulation to bar or favor certain speech or viewpoints over others, then applying strict scrutiny serves no purpose.[133] Although strict scrutiny must be applied more broadly than needed to ensure First Amendment protection, it does not have to extend to every content-based distinction, which the majority does here.[134] In fact, the case law holds that not every content-based distinction requires strict scrutiny, and in some cases, a law is just too overbroad, so it is unconstitutional and is not subject to a level of scrutiny analysis.[135] The Court

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126 *Id.* at 2237 (Kagan, J., concurring).

127 *Id.* at 2239.

128 *Id.* at 2237.

129 *See id.*

130 *Id.*

131 Reed v. Town of Gilbert, 135 S. Ct. 2218, 2237 (2015) (Kagan, J., concurring) (quoting Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 189 (2007)).

132 *Id.* at 2238 (quoting R.A.V. v. St. Paul, 505 U.S. 377, 378 (1992)) (internal quotations omitted).

133 *Id.*

134 *Id.*

135 *Id.* at 2238-39.

could have taken this same approach here, but instead, it adopted too broad of a view.[136]

Justice Kagan's argument follows the traditional view. "Under the two-level theory articulated prominently in *Chaplinsky v. New Hampshire*, speech was protected unless it fell within one of those 'certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.'"[137] "These exceptions included 'the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words.'"[138] Some speech has always been considered less important, and different protection has been afforded to speech based on its perceived worthiness. In fact, the First Amendment has always contemplated that some content distinctions can be made:

> What [the Court] means is that these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.[139]

If the First Amendment allows some content distinctions and value judgments in speech, why then should the Court apply a more exacting standard? The majority's content-based distinctions, with subsequent strict scrutiny requirements, completely ignore this history. By requiring strict scrutiny for all content-based distinctions, the Court makes all speech equal and impossible to differentiate.

It may seem like a good idea to require all speech to be treated the same way, such that all speech is completely equal and free. However, this is not the goal of the First Amendment. The First Amendment was intended "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[140] All speech is not necessarily intended to allow truth to prevail, and if the speech does not facilitate the goal of the First Amendment, should it really get the Amend-

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136 *Id.*

137 Eberle, *supra* note 48, at 1191-92.

138 *Id.* (quoting Chaplinksy v. New Hampshire, 315 U.S. 568, 571-72 (1942)).

139 R.A.V. v. City of St. Paul, 505 U.S. 377, 383-84 (1992).

140 *Reed*, 135 S. Ct. at 2237 (Kagan, J., concurring) (quoting McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014)) (internal quotations omitted).

ment's protections? If speech is intended to harm, deceive, or defame, the speech does not help to facilitate truth—it may even hide it. This is why the First Amendment does not protect these forms of speech. However, one may only decide if speech hides or harms the truth by looking at its content, which the majority specifically bans. The method the majority selects actually undercuts the very principles of the First Amendment that it claims to protect.

The majority's approach also ignores that certain types of speech need less protection than others.[141] Two things make commercial speech different than core speech. "First, the relative objectivity of commercial speech and advertisers' familiarity with their product or service support an expectation that commercial speakers can verify the truth of their message."[142] Also, "the hardiness of commercial speech, based on the dependence of commercial profits on advertising, reduces the possibility that it will be discouraged by regulation reasonably designed to [e]nsure that the flow of truthful and legitimate commercial information is unimpaired."[143] So, if the risk of stifling commercial speech through regulation is low, why does it need more protection from regulation?

Justice Kagan is correct when she states the purpose and context of speech matter. The Court has always looked at what kind of speech is implicated before it decides which level of protection it deserves.[144] The Framers did not design the First Amendment to be wielded as a dull sword to hack at everything with which it comes into contact; they designed it to serve as a scalpel for fine-edged cuts to curb back government intrusion into private spaces. The majority's dull sword leaves a trail of bloodied statutes and regulations, ignorant of the reason it strikes them down. Justice Kagan's scalpel can be effectively used when purposefully needed to ensure maximum effect without creating collateral damage.

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141 Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 61 (1999).

142 *Id.* (citation omitted) (internal quotation marks omitted).

143 *Id.* (citation omitted) (internal quotation marks omitted).

144 *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 751-52 (1976).

D. *Opinion Concurring in Judgment by Justice Breyer*

Although Justice Breyer agrees with Justice Kagan, his opinion is worth brief discussion because it does provide a somewhat alternative test compared to the majority's version.[145] Justice Kagan provides a rationale that Justice Breyer matches with his own test.

Justice Breyer first critiques the Court's use of the automatic strict scrutiny standard.[146] Although the majority's ban on content-based distinction may effectively prevent undue government influence in public debate, there are many government regulations that benefit the public and require content-based distinctions.[147] Regulations for securities, prescription drugs, doctor-patient confidentiality, airline briefings, and more could be struck down under strict scrutiny.[148] He notes strict scrutiny could be watered down to make up the difference, but that doing so would completely defeat the purpose of having strict scrutiny in the first place.[149]

Instead of wiping out most of the regulatory code or watering down strict scrutiny, Justice Breyer recommends using content-based distinctions in a balancing test:[150] "I would use content discrimination as a supplement to a more basic analysis, which, tracking most of our First Amendment cases, asks whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives."[151] Thus, in Justice Breyer's mind, the main question is whether the First Amendment values implicated are stronger than the purpose of the regulations in question. If a regulation is content-based, it weighs closer to unconstitutionality, but it is not killed automatically, as it would be under the majority's framework.

Justice Breyer demonstrates this point when he says, "[a]nswering this question requires examining the seriousness of the harm to speech, the importance of the countervailing objectives, the extent to which the law will achieve those objectives, and whether there are

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145 *Reed*, 135 S. Ct. at 2234 (Breyer, J., concurring).

146 *Id.*

147 *Id.*

148 *Id.* at 2235.

149 *Id.*

150 *Id.* at 2235-36.

151 Reed v. Town of Gilbert, 135 S. Ct. 2218, 2235-36 (2015) (Breyer, J., concurring).

other, less restrictive ways of doing so."[152] There are four factors that need balancing under this test: (1) the harm to speech, (2) the importance of the objectives of the regulation, (3) the extent of the law's coverage, and (4) other means of achieving the same objectives. This mimics the current limitations on regulating core speech. The government may not issue an outright ban on a subject matter,[153] and it must ensure that another viable alternative exists.[154] The government may also balance interests when necessary.[155]

The goal of the First Amendment is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[156] If a regulation is designed to facilitate this goal, why should it be subject to strict scrutiny in the name of the First Amendment?

III. APPLYING THE MAJORITY'S TEST AND A NEW TEST

The majority and the concurrences provide two different tests. The majority states, "[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."[157] The majority attempts to establish a test to determine whether or not a regulation is content-neutral. On the other hand, Justices Breyer and Kagan, in their concurrences, analyze four factors: (1) the harm to speech, (2) the importance of the objectives of the regulation, (3) the extent of which the law covers those objectives, and (4) other means of achieving the same objectives.[158] The concurrences attempt to establish a test determining the constitutionality of regulations not qualifying for automatic strict scrutiny. Applying both of these tests to *Metromedia* shows the impact each have.

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152 *Id.* at 2236.

153 Linmark Assocs. v. Twp. of Willingboro, 431 U.S. 85, 97-98 (1977).

154 Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984).

155 *Id.* at 811.

156 *Reed*, 135 S. Ct. at 2237 (Kagan, J., concurring) (quoting McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014)) (internal quotations omitted).

157 *Id.* at 2227 (majority opinion).

158 *Id.* at 2236 (Kagan, J., concurring).

A. *The Majority's Test as Applied to* Metromedia

The sign code in *Metromedia* only allowed highway billboards for onsite displays unless the speech fits into certain exceptions.[159] To determine if the sign displays onsite or offsite messaging, the regulator must first look at the content of the sign. To examine if an exception applies, once again, the regulator must turn to the content of the sign. Because the regulation turns on a content-based distinction, strict scrutiny applies. Because the justification for the ordinance is aesthetics,[160] the ordinance does not address a compelling government interest. This means it is unconstitutional, and the city has no guidance on how to best draft a sign code. Signs and billboards go unchecked, and a void is left that cannot be filled.

B. *The Balancing Test as Applied to* Metromedia

Because the majority's test requires a relatively short analysis, it lacks in rationale or guidance. However, the concurrence's balancing test provides clues on how to change the regulation and best weigh speech based on its value to the community. First, the regulator must measure the harm to the speech. Core speech is virtually banned under this ordinance. The ordinance only regulates signs if they are onsite, but what would be considered onsite for core speech? A nonprofit's office? A campaign headquarters? The ordinance is unclear, and without a clear definition, the ordinance prohibits core speech signs. The only way core speech would be allowed is if an exception applied, but the exceptions are too limited. As for commercial speech, so long as the billboard or sign is onsite, it is fine. Although this limits speech, it is a relatively minor restriction. From this first step, the regulator can see there is an issue because of the great harm to core speech; the ordinance may have to be revised.

Second, the regulator must look at the objectives of the regulation. Here, the goals are safety and aesthetics. Safety is a high priority because drivers should not be distracted by many billboards. Aesthetics is also considered a potential priority because too many signs can clutter a neighborhood and lower property values. Some

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[159] Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 503 (1981) (plurality opinion).

[160] *Id.* at 530 (Brennan, J., concurring).

regulation is needed to keep order, so the regulation serves a substantial government interest.

Third, the regulator must consider the extent to which the regulation meets its objectives. Here, the regulation keeps billboard signs under control. Safety and aesthetics are addressed because billboards and signs are only permitted onsite without any exceptions. Drivers are not distracted by an overabundance of signs, and neighborhoods cannot be papered with signs that make them unappealing to potential buyers. However, although the regulation meets its objectives, it exceeds those objectives as well. What harm is posed by allowing core speech billboard signs to be posted? The regulation prohibits more speech than is necessary because it places a complete ban on signs unless the signs advertise onsite. A few signs in a residential neighborhood will not harm property values, and onsite commercial signs are no less distracting than offsite commercial signs. Also, no real alternative exists for banned core speech. Political campaigns as well as church and community events depend on signs to be a cheap and convenient, way to communicate with the public. No other form of communication is as cheap or convenient, so an outright ban under the ordinance leaves no real alternative for core speech to be expressed. Thus, the ordinance fails a key test.

Fourth, the regulator must determine if any other means of regulating the speech exist. Here, zoning restrictions could be used instead of an absolute ban, or other possible methods could be used to allow some core speech. Because the ordinance imposes huge harm on commercial speech, extends past its objectives, and there are less restrictive alternatives, the ordinance is unconstitutional.

C. *Comparing the Two Tests*

When compared side by side, Justice Breyer's and Kagan's test provides more insight and guidance than the majority's test. The balancing test has two distinct advantages over the majority's test; the balancing test naturally requires regulators to pay attention to core speech concerns, and it highlights the exact problems a regulation has that can be corrected.

When measuring the harm of speech, the regulator must note how different kinds of speech are specifically being impacted by the regulation. Noticing the specific effects on core speech will force the regulator to address these concerns and determine if core speech suf-

fers great harm. If the harm is relatively small, the regulation should probably be upheld, but if it is great, this leads to a presumption of unconstitutionality. These evaluations can only be determined by balancing, however. By comparing the good of the regulation with its harm to speech, parties can exert legitimate concerns that may be missed under the majority's analysis.

Because a balancing test reveals defects that can be corrected to reduce harm to speech, it allows a regulator to correct those harms. However, the majority's test does not allow for corrections because most non-content neutral regulations are automatically struck down. The Court recently ruled that, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."[161] Thus, if the Court's goal is to save a statute from unconstitutionality, then a balancing test is the preferred method of analysis. It highlights errors and allows the regulator to fix them. If the errors are too severe to fix, then the regulation must be found unconstitutional.

CONCLUSION

The Framers and traditional First Amendment case law recognize not all speech is valued equally, so it must be protected in different ways.[162] The majority's approach in *Reed* abolishes all useful guidance the traditional system provides. Instead of using a blunt test for all circumstances, as the majority suggests, courts should use a balancing test for core speech, as it provides greater protection and guidance, especially when separate tests exist for commercial speech and other types of speech. A balancing test ensures every regulation of speech is held to the appropriate level of scrutiny, depending on how much society values that kind of speech.

By examining the four factors—(1) the harm to speech, (2) the importance of the objectives of the regulation, (3) the extent of which the law covers those objectives, and (4) other means of achieving the same objectives—a court can better measure the impact of the regulation and ensure that the marketplace of ideas stays open for the right reasons. The marketplace of ideas does not exist for the sake of

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[161] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2594 (2012) (quoting Hooper v. Cal., 155 U.S. 648, 657 (1895)).

[162] Eberle, *supra* note 48, at 1202.

existing—it ensures "truth will ultimately prevail."[163] The majority's test does not permit this because of its over-inclusivity.

If the goal of speech is truth, then throwing out all content-based regulations designed to obtain the truth destroys that goal. Many content-based regulations are designed to ensure that the public knows the truth. Even though we should be skeptical of governmental regulation of speech, the best way to test government sincerity is by using the balancing test. This allows courts not only to measure the exact harm to speech but also to compare it with the motivations of the government. If the harm is worse than claimed or expected, then the regulation should be struck down. But, the balancing test also allows the government to defend its asserted purpose. The majority's test prevents this inquiry by cutting it off prematurely, without any evidence of the government's purposes for its regulation.

Speech is only useful if it is reasonably protected. The majority's approach in *Reed* leaves a cacophony of chaos that the average citizen will simply ignore. Courts should adopt the balancing test because it requires them to scrutinize regulations and draws attention to the harmed speech. If the Framers intended for courts to scrutinize all speech, then it seems the balancing test is the best way to achieve that end.

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[163] *Reed*, 135 S. Ct. 2237 (Kagan, J., concurring).