Content Neutrality and Commercial Speech Doctrine after *Reed v Town of Gilbert*

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INTRODUCTION

At the end of the October 2014 term, the Supreme Court decided a seemingly mundane case involving municipal sign ordinances. That case, *Reed v Town of Gilbert, Arizona*,[1] was brought by Good News Community Church in Gilbert, Arizona.[2] The church and its pastor challenged the constitutionality of the town's sign code, arguing that it interfered with the church's ability to advertise its weekly meetings.[3] The code imposed different dimensional and durational requirements based on the subject matter of the signs.[4] While the code specified twenty-three categories, only three were at issue in *Reed*: "ideological signs," "political signs," and "temporary directional signs relating to a qualifying event."[5] The church's signs fell under the final category.[6] The Court unanimously struck down the law for violating the First Amendment, with a majority finding that the law was content based on its face and failed strict scrutiny.[7]

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1 135 S Ct 2218 (2015).

2 Id at 2224–25.

3 Id at 2224–26.

4 See id at 2224–25.

5 See *Reed*, 135 S Ct at 2224–25. A "qualifying event" was defined elsewhere in the statute as an "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." Id at 2225.

6 See id at 2225. The church's signs, while permitted as temporary directional signs, were posted longer than the thirteen hours permitted by the ordinance. Id.

7 The majority opinion applied strict scrutiny in striking down the law. Id at 2231–32. Justice Stephen Breyer disagreed with the application of strict scrutiny in his concurring opinion, as did Justice Elena Kagan in a concurring opinion joined by Breyer and Justice Ruth Bader Ginsburg. See id at 2234–36 (Breyer concurring in the judgment); id at 2236–39 (Kagan concurring in the judgment).

While the disposition was uncontroversial, the reasoning divided the Court, as the case generated four separate opinions.[8] The majority opinion, penned by Justice Clarence Thomas and joined by five other justices, laid out a new, seemingly simple test for content neutrality. A law is content based, and therefore triggers strict scrutiny, (1) if "on its face [the law] draws distinctions based on the message a speaker conveys" or on the topic of the speech, or (2) if the law "cannot be justified without reference to the content of the regulated speech."[9] The opinion also clarified that either viewpoint or subject-matter discrimination will qualify a law as content based.[10] By crafting a singular test, the Supreme Court likely sought to simplify the wider doctrine, although most of the back-and-forth between opinions interestingly focused on issues with sign ordinances.[11] However, if read broadly, the majority opinion has vast implications for First Amendment jurisprudence generally. Even before *Reed* was decided, some commentators were already concerned about the grounds on which the Court would decide the case.[12] After the decision, commentators argued that *Reed* signaled a potentially vast shift in the Court's content-neutrality doctrine, and noted that Thomas's formulation of the standard could have wide-ranging effects, superseding whole swaths of doctrine.[13] The first substantial scholarship written about *Reed* called for the case to be "distinguished up, down, and sideways."[14] Commentators

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8 See generally id. Justice Clarence Thomas wrote the majority opinion, Justice Samuel Alito concurred, and Breyer and Kagan each wrote separately to concur in the judgment.

9 *Reed*, 135 S Ct at 2227 (quotation marks omitted).

10 Id at 2230.

11 See id at 2233 (Alito concurring) (suggesting a number of sign ordinances that would survive the new test); id at 2236–37 (Kagan concurring in the judgment) (noting that communities will be left "in an unenviable bind" when they attempt to revise sign ordinances).

12 See, for example, Garrett Epps, *Billboards and the Bill of Rights* (The Atlantic, Jan 9, 2015), archived at http://perma.cc/6UAX-ZLDA (expressing concern at "[t]he slow degradation of [the] 'viewpoint-subject matter' rule").

13 See, for example, Adam Liptak, *Court's Free-Speech Expansion Has Far-Reaching Consequences* (NY Times, Aug 17, 2015), online at http://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html (visited Oct 14, 2016) (Perma archive unavailable) (noting an argument by a legal commentator that "[t]he decision's logic . . . endangered all sorts of laws, including ones that regulate misleading advertising and professional malpractice").

14 Note, *Free Speech Doctrine after* Reed v. Town of Gilbert, 129 Harv L Rev 1981, 1981 (2016). This note argued that *Reed* can be distinguished in three respects: "down" by relying on the conduct–speech distinction, "sideways" by not applying it to commercial speech, and "up" by diluting the definition of either content neutrality or strict scrutiny.

have also noted *Reed*'s effect on specific types of ordinances, such as panhandling ordinances and sign codes.[15]

This Comment considers an important implication of the *Reed* Court's reasoning: the potential evisceration of commercial speech doctrine. Commercial speech, once thought to lie outside the First Amendment's protection, was first recognized as a lower-value class of protected speech in the mid-1970s.[16] The Supreme Court now subjects commercial speech to a form of intermediate scrutiny. While the stringency of this scrutiny (and the definition of commercial speech) has fluctuated over time, the general outlines of the doctrine are well established.[17]

The content-neutrality principle, with its beginnings in the 1970s, developed alongside commercial speech doctrine. Since the principle's inception, content-based regulations have always been "presumptively invalid."[18] Until *Reed*, however, the Supreme Court generally favored a more flexible standard of content neutrality. While the Court sometimes articulated the test as requiring purely neutral application,[19] it more often looked to whether the government could provide a content-neutral justification for the challenged law.[20] *Reed*'s seemingly unyielding demand for facial content neutrality marks a significant departure from prior doctrine, and poses particular problems for regulations of commercial speech, which often rely on facial content-based distinctions.

Complicating matters further, the Supreme Court has increasingly relied on content-neutrality principles in commercial

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Id at 1987. While the note dedicated some time to commercial speech, it failed to grapple with the complexity of the doctrine as it stands now: content-neutrality principles have pervaded commercial speech in recent years, which makes distinguishing *Reed* more difficult than the note acknowledges. See id at 1990–92 (discussing commercial speech). As such, this Comment fills a gap in the literature by fully considering the implications of *Reed* for a commercial speech doctrine that is already deeply infused with content-neutrality principles.

15 See generally Anthony D. Lauriello, Note, *Panhandling Regulation after* Reed v. Town of Gilbert, 116 Colum L Rev 1105 (2016); Leah K. Brady, Note, *Lawn Sign Litigation: What Makes a Statute Content-Based for First Amendment Purposes?*, 21 Suffolk J Trial & App Advoc 320 (2016).

16 See text accompanying notes 103–04.

17 See notes 112–25 and accompanying text.

18 *R.A.V. v City of St. Paul, Minnesota*, 505 US 377, 382 (1992).

19 See *Consolidated Edison Co of New York v Public Service Commission of New York*, 447 US 530, 535–36 (1980), quoting *Erznoznik v City of Jacksonville*, 422 US 205, 209 (1975) (noting that regulations must be "applicable to all speech irrespective of content").

20 See *Ward v Rock against Racism*, 491 US 781, 791 (1989) (noting that the crucial question is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys").

speech cases.[21] The Court's recent decision in *Sorrell v IMS Health Inc*[22] has particularly unsettled content neutrality's role by indicating that "heightened scrutiny" applies to content-based regulations of commercial speech.[23] However, the Court left the particulars of this heightened scrutiny unresolved, leaving lower courts to grapple with content neutrality's role with respect to commercial speech.[24] In other words, the two doctrines are now unsettled and fundamentally incompatible *but* must nonetheless be considered together according to recent Supreme Court precedent.

Likely because of this inherent tension, courts have already shown considerable hesitance in applying *Reed* to commercial speech, but have yet to articulate a satisfying doctrinal defense.[25] This uncertainty has led to an explosion of complaints invoking *Reed* to challenge regulations of commercial speech.[26] This Comment examines the tricky intersection between *Reed*'s content-neutrality standard and modern content-neutrality-inflected commercial speech doctrine. Part I traces the concurrent development of content neutrality and commercial speech doctrine. Part II then examines how courts have dealt with the intersection of these two doctrines, both before and after the *Reed* decision. Finally, Part III evaluates the various approaches courts have taken and could pursue in reconciling *Reed*, before concluding that *Reed* does not apply to commercial speech cases.

I. CONCURRENT DEVELOPMENTS IN FREE SPEECH DOCTRINE

On its face, the Constitution protects free speech rather plainly: "Congress shall make no law . . . abridging the freedom of speech."[27] Despite this apparent simplicity, the Supreme Court has created a complex framework[28] to ensure that state actors respect this principle.[29] While this Comment occasionally

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21 See notes 134–52 and accompanying text.

22 564 US 552 (2011).

23 Id at 564–66.

24 See id. For a full discussion, see Part II.A.

25 See notes 154–56 and accompanying text.

26 See Part II.B.

27 US Const Amend I.

28 For an overview of the substantial number of categories and tests that comprise the doctrine, see Geoffrey R. Stone, et al, *Constitutional Law* 1027–1452 (Wolters Kluwer 7th ed 2013).

29 Like most of the Bill of Rights protections, freedom of speech has been incorporated to apply to the states and other federal government actors, despite the clause's specification of "Congress." See *Gitlow v New York*, 268 US 652, 666 (1925) ("[F]reedom

touches on other doctrinal areas, the bulk of the analysis focuses on the two doctrines that *Reed* and *Sorrell* have put directly at odds: content neutrality and commercial speech. This Part tracks the concurrent development of each doctrine, beginning with the development of the content-neutrality principle and concluding with the development of commercial speech doctrine.

A. The Development of Content-Neutrality Doctrine

The distinction between content-neutral and content-based speech first emerged in *Police Department of the City of Chicago v Mosley*.[30] Earl Mosley challenged a Chicago law exempting "peaceful labor picketing" from a prohibition against picketing near schools after he was threatened with arrest for continuing to picket a high school for its discriminatory practices.[31] Drawing on the Equal Protection Clause, the Court ruled that, once a public forum is created, the government may not circumscribe usage of the forum based on viewpoint or subject matter.[32] In *Carey v Brown*,[33] the Court struck down a similar nonlabor picketing prohibition, finding it indistinguishable from the law at issue in *Mosley*.[34] While again noting that "content-based distinctions" are generally prohibited by the Equal Protection Clause, the Court suggested that "certain state interests may be so compelling" that a "narrowly drawn" content-based distinction may survive if "no adequate alternatives exist," subjecting content-based regulations to Fourteenth Amendment–style strict scrutiny rather than the absolute ban suggested by *Mosley*.[35] While these initial cases were grounded in a blend of equal protection and First Amendment analysis, later cases articulated the content-neutrality principle on purely First Amendment grounds.[36]

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of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

30 408 US 92 (1972).

31 Id at 92–94.

32 Id at 96. In the words of the Court, the government cannot "deny use to those wishing to express less favored or more controversial views" (viewpoint discrimination) and similarly "may not select which issues are worth discussing or debating" (subject-matter discrimination). Id.

33 447 US 455 (1980).

34 See id at 460–61.

35 Id at 464–65.

36 See, for example, *R.A.V. v City of St. Paul, Minnesota*, 505 US 377, 382 (1992) ("The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed.") (citations omitted).

Since *Mosley*, the Supreme Court has almost universally invalidated content-based laws. One line of cases found that "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."[37] This principle was, shortly thereafter, extended to all regulations. In *R.A.V. v City of St. Paul, Minnesota*,[38] the Supreme Court summarized the doctrine as such: "Content-based regulations are presumptively invalid."[39] The Court noted, however, that certain "traditional limitations" of content, such as regulation of obscenity, defamation, and "fighting words," are exempt from triggering this presumption.[40] That said, the government cannot discriminate at will within low-value categories. Instead, content-based distinctions within a low-value speech category must be made based on "the very reason the entire class of speech at issue is proscribable."[41] Consider one of the Court's examples of this principle: "A State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience*. . . . But it may not prohibit, for example, only that obscenity which includes offensive *political* messages."[42] Additionally, despite *Mosley*'s insistence that the principle is neutral, the Court has not always consistently invoked it, particularly with respect to subject-matter discrimination.[43] While viewpoint discrimination has always been treated as content based, the Court has not always addressed subject-matter discrimination through this framework.[44] Since this initial development, the test for content

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See also Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S Cal L Rev 49, 53 (2000) (noting that equal protection analysis disappeared from free speech cases despite content neutrality's increased importance).

37 *Simon & Schuster, Inc v Members of the New York State Crime Victims Board*, 502 US 105, 115 (1991), citing *Leathers v Medlock*, 499 US 439, 447 (1991). See also *Arkansas Writers' Project, Inc v Ragland*, 481 US 221, 234 (1987) (striking down a content-based magazine tax).

38 505 US 377 (1992).

39 Id at 382.

40 Id at 382–83.

41 Id at 388. For more on the implications of this carve-out from content-neutrality rules, see Part II.A.

42 *R.A.V.*, 505 US at 388.

43 See Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U Chi L Rev 81, 83–84, 99 (1978) (discussing the Court's inconsistent treatment of subject-matter discrimination within the content-based/content-neutral framework).

44 See id at 88–100 (cataloging variation in the treatment of subject-matter discrimination by the Court in the five years following *Mosley*).

neutrality has become extraordinarily important to First Amendment jurisprudence, both theoretically and practically.

As a theoretical matter, the Supreme Court has long viewed the content-neutrality principle as central to the First Amendment goal of preventing government censorship.[45] As first articulated in *Mosley*, "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[46] Professor Geoffrey R. Stone has argued that this primacy is due to the "uniquely powerful distorting effect of [ ] content-based restrictions" on public discourse.[47] Stone noted, however, that this distortion principle cannot account for the harsh treatment of "modest" content-based regulations (or those "limited in scope" to "narrowly defined circumstances"), but that considerations of "equality, communicative impact, distortion, and [government] motivation" can collectively explain the Court's extreme skepticism.[48] Advancing a different primary consideration, then-Professor Elena Kagan argued that content neutrality first serves "to identify a set of improper [government] motives," rather than to combat skewing effects.[49] Whichever consideration is primary, a well-functioning content-neutrality rule should ideally serve both underlying values.

As a practical matter, once a regulation is found to be content based, its survival is unlikely. Content-based laws "are presumptively unconstitutional" and trigger strict scrutiny.[50] Strict scrutiny is notably difficult to satisfy, as a law "must be the least restrictive means of achieving a compelling state interest."[51] By comparison, content-neutral laws are analyzed under intermediate scrutiny,[52] which requires that a law be "narrowly tailored

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45 See *Mosley*, 408 US at 95–96.

46 Id at 95.

47 Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm & Mary L Rev 189, 200 (1983).

48 Id at 200, 233. At the time Stone wrote this article, the Court did not consistently treat subject-matter-based regulations as content based, see id at 239–42, a point that *Reed* definitively settled. As such, Stone's analysis is largely of *viewpoint-based* regulations, although he noted that it would hold for at least large subject-matter restrictions. See id at 242 n 179.

49 Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U Chi L Rev 413, 450–52 (1996).

50 *Reed*, 135 S Ct at 2226–27.

51 *McCullen v Coakley*, 134 S Ct 2518, 2530 (2014).

52 See *Turner Broadcasting System, Inc v Federal Communications Commission*, 512 US 622, 642 (1994).

to serve a significant governmental interest."[53] Because of the wide difference between tests, "[t]oday, virtually every free speech case turns on the application of the distinction between content-based and content-neutral laws."[54]

1. Differing articulations of the content-neutrality test.

Despite the Supreme Court's consistency in striking down content-based regulations, the Court has been markedly less consistent in articulating the test for determining content neutrality. One oft-quoted early case took a literal approach by providing that a regulation is content based when it is "based on the content of speech."[55] From this broad conception, the Court determined that "regulations must be applicable to all speech irrespective of content" to survive judicial review.[56] In more difficult factual contexts, however, the Supreme Court has crafted a number of narrower standards with subtle differences to determine content neutrality.

An influential, narrow articulation of the content-neutrality test emerged through cases challenging regulations of the time, place, or manner of speech.[57] *Grayned v City of Rockford*,[58] decided the same day as *Mosley*, contrasted clearly impermissible regulations that "restrict [ ] activity *because of* its message" with permissible regulations establishing "reasonable time, place and manner" restrictions for speech.[59] Crucially, this articulation focused on the

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53 *McCullen*, 134 S Ct at 2534, quoting *Ward v Rock against Racism*, 491 US 781, 796 (1989).

54 Chemerinsky, 74 S Cal L Rev at 53 (cited in note 36). Interestingly, rational basis review is absent from this framework, despite its typical place alongside strict and intermediate scrutiny. Commentators have noted that "rational basis review plays an extremely limited role in free speech cases" and that strict scrutiny itself was imported "almost inadvertently" from equal protection law. Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U Ill L Rev 783, 787.

55 *Consolidated Edison Co of New York v Public Service Commission of New York*, 447 US 530, 536 (1980). It is worth noting that the Public Service Commission effectively conceded that its regulation was content based, so the Court may not have paid the definition much attention. See id at 537.

56 Id at 536 (quotation marks omitted). Although decided the same day as *Carey*, the *Consolidated Edison* opinion did not use a strict scrutiny framework, but did note that "governmental regulation based on subject matter has been approved in narrow circumstances." Id at 538.

57 The Supreme Court initially upheld the authority of municipalities "to give consideration, without unfair discrimination, to time, place and manner" of protected speech in *Cox v New Hampshire*, 312 US 569, 576 (1941).

58 408 US 104 (1972).

59 Id at 115 (quotation marks omitted).

government's justification for passing an ordinance, noting that "expressive activity may be restricted only for weighty reasons."[60] In the leading justification-based case, *Ward v Rock against Racism*,[61] the Supreme Court added more substance to this principle, asserting that "[t]he principal inquiry in determining content neutrality, in speech cases generally . . . , is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[62] This version of the test makes "[t]he government's purpose [ ] the controlling consideration."[63] Leading up to *Reed*, the *Ward* test had become very influential. Its roots dated back to the inception of the content-neutrality principle,[64] and it was the test advanced by the United States as an amicus curiae in *Reed*.[65]

Complicating matters, the Supreme Court has based a number of decisions on more specific rules derived from *Ward*'s version of content neutrality. These tests generally attempt to capture whether the government is motivated by the content of the speech or some other factor closely related to its content. In a move stemming from an implication of the *Ward* test, the Supreme Court has held that statutes "designed to combat the undesirable secondary effects" of speech are content neutral even if plainly facially content based.[66] In *City of Renton v Playtime Theatres, Inc*,[67] the Court relied on the trial court's finding "that the City Council's '*predominate* concerns' were with the secondary effects of adult theaters, and not with the content of adult films themselves."[68] In other words, because these statutes are justified by reference to the "secondary effects" of speech and not by reference to the content of speech, they are content neutral, even though they facially regulate speech based on its content. These "secondary effects" cases have primarily arisen in challenges to zoning regulations of pornography like those

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60 Id.

61 491 US 781 (1989).

62 Id at 791, citing *Clark v Community for Creative Non-violence*, 468 US 288, 295 (1984).

63 *Ward*, 491 US at 791.

64 See *Grayned*, 408 US at 115 ("The right to use a public place for expressive activity may be restricted only for weighty reasons. Clearly, government has no power to restrict such activity because of its message.") (paragraph break omitted).

65 See *Reed*, 135 S Ct at 2228.

66 *City of Renton v Playtime Theatres, Inc*, 475 US 41, 49 (1986).

67 475 US 41 (1986).

68 Id at 47.

in *Renton*.[69] In other contexts, the Court has frequently refused to apply the secondary effects test.[70] In cases in which restrictions on political speech have been justified through the impact on observers—which, on first glance, would seem to implicate the secondary effects test[71]—the Court has articulated a slightly different test. In striking down a restriction on speech near foreign embassies, the Court singled out "[r]egulations that focus on the direct impact of speech on its audience" as content based.[72] Similarly, a Texas flag-burning statute was struck down for its content-based focus "on the likely communicative impact of [ ] expressive conduct."[73] These tests effectively narrowed the range of non-content-based justifications on which regulators could rely. While these slight wrinkles in doctrine may not affect the average case, a *Ward*-type test allowed the Court to craft varying explanations of when justifications are content based.

Surveying the landscape prior to *Reed*, the Court had articulated two primary tests: a facial content-neutrality test and the narrower *Ward* purpose-based test, with the latter more frequently relied on. Additionally, a number of targeted tests emerged to determine whether a government's justification is content based. A restriction is content based if government actors focused on the "direct impact" or "communicative impact" of speech, but content neutral if government actors focused on the "secondary effects" of such speech. These distinctions gave courts some flexibility in deciding cases, but relied on a purpose-based version of content neutrality. As these variations should show, the *Ward*-type tests are broader along some dimensions (capturing facially neutral regulations motivated only by animus toward speech) but narrower along others (facially content-based laws justified by secondary effects or other alternative considerations).

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69 See, for example, id at 54–55 (upholding a zoning ordinance targeted against adult theaters); *Young v American Mini Theatres, Inc*, 427 US 50, 71–73 (1976) (Stevens) (plurality) (upholding a similar ordinance).

70 See, for example, *Boos v Barry*, 485 US 312, 320 (1988) (O'Connor) (plurality) (stating that "secondary effects" analysis is appropriate only when "regulatory targets happen to be associated with that type of speech" but "justifications for regulation have nothing to do with content").

71 The respondent in *Boos* argued as much. Id (O'Connor) (plurality).

72 Id at 321 (O'Connor) (plurality).

73 *Texas v Johnson*, 491 US 397, 411, 420 (1989).

2. *Reed* and a unified content-neutrality principle.

In the term before the *Reed* decision, the Supreme Court referenced both standards described in the previous Section in determining whether restrictions on gathering in front of abortion clinics were content based.[74] *McCullen v Coakley*,[75] drawing on earlier language, noted that a law is "content based if it require[s] enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred."[76] Later, the Court noted that a "facially neutral law" cannot become content based by "disproportionately affect[ing] speech on certain topics," but rather must fail the justification-based test.[77] Perhaps prefiguring *Reed*, the Court incorporated both lines of precedent discussed in the previous Section into a single discussion.[78] In such combination, *McCullen* marks a stark departure from the Court's statement when applying the *Ward* test only fourteen years before that it "ha[d] never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct."[79]

In *Reed*, of course, the Court cemented this shift, laying out a precise test to determine whether speech regulations are content based and, accordingly, whether strict scrutiny applies. That standard united the two lines of precedent into a unified test, triggering strict scrutiny (1) if "on its face [the law] draws distinctions based on the message a speaker conveys" or on the topic of the speech, *or* (2) if the law "cannot be justified without reference to the content of the regulated speech."[80] The town's sign code failed the first prong by facially distinguishing between categories of signs, but would likely have passed the second prong.[81] Thus, under a *Ward*-type test, the code would have avoided strict scrutiny. Nevertheless, as evidenced by Justice Elena Kagan's and Justice Stephen Breyer's concurrences, the

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74 *McCullen*, 134 S Ct at 2529.

75 134 S Ct 2518 (2014).

76 Id at 2531 (quotation marks omitted), quoting *Federal Communications Commission v League of Women Voters of California*, 468 US 364, 383 (1984).

77 *McCullen*, 134 S Ct at 2531.

78 However, because the Court ultimately found that neither standard was met and that the law was not content based, it stopped short of announcing a new test. See id.

79 *Hill v Colorado*, 530 US 703, 721 (2000). Notably, *Hill* also concerned regulations on gathering at abortion clinics. Id at 708.

80 *Reed*, 135 S Ct at 2227 (quotation marks omitted).

81 See id at 2227–28.

sign code would have failed any level of scrutiny.[82] While the code was not justified by reference to the signs' content, it simply was not justified at all. The town argued that the code's smaller dimensional requirements for temporary directional signs were justified because those signs "need to be smaller because they need to guide travelers along a route."[83] The town's lackluster justifications under any standard make *Reed* an odd case in which to insist on bright-line facial rules.[84]

Not stopping there, the Court also held that either viewpoint or subject-matter discrimination will trigger this strict scrutiny test.[85] A regulation discriminates based on viewpoint when its force depends on the views or ideas expressed by the speaker.[86] Meanwhile, a regulation discriminates based on subject matter when it proscribes or regulates a whole topic, even if all viewpoints within that subject-matter area are treated the same.[87] Historically, courts have been much more skeptical of viewpoint discrimination than subject-matter discrimination, sometimes even failing to recognize subject-matter discrimination as a form of content-based regulation.[88] But, under *Reed*'s test, both types of content-based laws trigger strict scrutiny.

While the plain language of the opinion suggests that the test is meant to be all-encompassing, aspects of the concurrences suggest otherwise. Justice Samuel Alito's concurrence, which included three votes necessary for the majority, proposed a number of possible sign ordinances that he claimed would survive the majority rule, including a pair of suggestions that actually seem to *fail* the majority's standard.[89] For instance, Alito pointed to distinctions between on-premises and off-premises signs as

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82 See id at 2234–36 (Breyer concurring in the judgment); id at 2236–39 (Kagan concurring in the judgment).

83 Id at 2239 (Kagan concurring in the judgment).

84 Contrast the Court's assertive pronouncement of a new test here with its more cautious approach in *Sorrell* only a few years before, when the majority left the details of a "heightened" standard undefined because the regulation would have failed even intermediate scrutiny. See *Sorrell*, 564 US at 571.

85 *Reed*, 135 S Ct at 2230.

86 See id at 2229–30.

87 See id.

88 See Stone, 46 U Chi L Rev at 84–88 (cited in note 43). See also, for example, *R.A.V.*, 505 US at 391 ("[T]he ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination."); *Perry Education Association v Perry Local Educators' Association*, 460 US 37, 59–62 (1983) (Brennan dissenting) ("Once the government permits discussion of certain subject matter, it may not impose restrictions that discriminate among viewpoints.").

89 See *Reed*, 135 S Ct at 2233 (Alito concurring).

permissible under the majority test.[90] However, it is hard to see—and Alito did not explain—how this distinction does not require enforcement authorities to examine the content of the signs. Put differently, at least three of the six justices for the majority seem to have understood the opinion somewhat differently than the plain language suggests.[91]

The concurrences in the judgment also seem to differ as to their understandings of the extent of the opinion's reach. Kagan's concurrence in the judgment laments only that "many sign ordinances . . . are now in jeopardy."[92] Only Breyer's concurrence in the judgment discusses the application of the majority's standard to other areas of law, concluding that content neutrality should be a "rule of thumb" rather than an automatic trigger for strict scrutiny.[93] The contrast between the plain language of the majority opinion and the Court's back-and-forth suggests that a question remains as to the proper interpretation of *Reed*'s seemingly broad language.

B. The Development of Commercial Speech Doctrine

Commercial speech doctrine emerged roughly concurrently with content-neutrality doctrine, beginning with the Court's first protection of commercial speech in *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council, Inc*,[94] decided four years after *Mosley*. This Section first discusses this historical emergence of commercial speech as a protected category, noting the boundaries of the doctrine and the theory behind it. Next, it considers the current state of commercial speech doctrine.

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90 Id (Alito concurring).

91 One court has already found that an on-premises/off-premises sign rule was content based. See *Thomas v Schroer*, 116 F Supp 3d 869, 876 (WD Tenn 2015) ("[U]nder the *Reed* test, the on-premise exemption is facially content-based."). Commentators were similarly perplexed at the time of the decision. See Eugene Volokh, *Supreme Court Reaffirms Broad Prohibition on Content-Based Speech Restrictions, in Today's* Reed v. Town of Gilbert *Decision* (Wash Post, June 18, 2015), archived at http://perma.cc/6S4V-A4XF (pointing to Alito's on-premises and one-time-event examples).

92 See *Reed*, 135 S Ct at 2236 (Kagan concurring in the judgment).

93 See id at 2234–35 (Breyer concurring in the judgment). Breyer continued: "Consider a few examples of speech regulated by government that inevitably involve content discrimination, but where a strong presumption against constitutionality has no place." Id (Breyer concurring in the judgment). He listed a number of these examples, ranging from securities regulation and income tax requirements to petting zoo signs. Id at 2235 (Breyer concurring in the judgment).

94 425 US 748 (1976).

1. Historical and theoretical foundations of commercial speech.

Commercial speech—aside from the paradigmatic case of commercial advertising—is difficult to define, and the boundaries are often litigated.[95] In one common articulation by the Supreme Court that largely tracks the paradigmatic case, commercial speech, quite simply, is speech which does "no more than propose a commercial transaction."[96] The Supreme Court has sometimes suggested a potentially broader definition: "[E]xpression related solely to the economic interests of the speaker and its audience."[97] What is clear, however, is that "important commercial attributes of various forms of communication" do not transform otherwise high-value speech into commercial speech.[98] For example, newspapers, films, and books are all sold for profit, but this does not make their content commercial speech.[99] These boundaries were particularly important when, prior to the 1970s, the Supreme Court had held that commercial speech was unprotected by the First Amendment.[100] Now that commercial speech enjoys some protection, precisely defining the boundaries of commercial speech—while still important and contentious—can often be avoided if the challenged regulation would fail judicial scrutiny whether it is classified as commercial or noncommercial.[101] Even so, the slipperiness of the boundaries "has haunted [commercial speech] jurisprudence and scholarship" and complicates any discussion of commercial speech doctrine.[102]

Definitional issues aside, modern commercial speech doctrine begins with *Virginia Pharmacy*, in which the Court first

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95 See, for example, *City of Cincinnati v Discovery Network, Inc*, 507 US 410, 419 (1993) ("This very case illustrates the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category.").

96 *Virginia Pharmacy*, 425 US at 771 n 24. See also *Board of Trustees of the State University of New York v Fox*, 492 US 469, 473–74 (1989).

97 *Central Hudson Gas & Electric Corp v Public Service Commission of New York*, 447 US 557, 561 (1980).

98 *Discovery Network*, 507 US at 420.

99 See id at 420–23 (cataloging types of speech with commercial components that do not fall within the "commercial speech" category).

100 See *Valentine v Chrestensen*, 316 US 52, 54–55 (1942) ("We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.").

101 See, for example, *Sorrell*, 564 US at 571.

102 Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L Rev 1, 7 (2000).

explicitly subjected regulation of commercial speech to First Amendment scrutiny.[103] Specifically, the Court held that a state could not "completely suppress the dissemination of concededly truthful information about entirely lawful activity," but reserved additional questions regarding the regulation of commercial speech for later decisions.[104] By limiting this protection to "concededly truthful" commercial advertising, the Court excluded false or misleading commercial speech from constitutional protection, maintaining a sharp difference from higher-value speech.[105] The Supreme Court later clarified that *Virginia Pharmacy* preserved the "common-sense distinction between speech proposing a commercial transaction . . . and other varieties of speech," because "parity of constitutional protection for commercial and noncommercial speech alike could invite dilution."[106] Thus, the Court, while extending protection to commercial speech, established a separate framework for assessing its constitutionality based largely on the fear of dilution.

Before discussing the specifics of current commercial speech doctrine, it is worth considering why commercial speech merits different treatment. Coupled with the initial dilution concerns, the Supreme Court has justified the separation by describing commercial speech as a "hardy breed of expression."[107] Commercial speech is seen as "hardy" because it is (1) less susceptible to chilling effects and (2) usually advanced by legally sophisticated repeat players.[108] However, scholars have long criticized this account, arguing that, "despite its superficial plausibility," it "do[es] not survive close examination" and "fails to identify any essential distinction" between commercial speech and other types of speech.[109] Scholars have, however, suggested alternate justifications for the category. Professor Daniel Farber, while

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[103] See *Virginia Pharmacy*, 425 US at 758–62.

[104] Id at 773.

[105] See id at 771–73.

[106] *Ohralik v Ohio State Bar Assn*, 436 US 447, 455–56 (1978) (quotation marks omitted).

[107] See, for example, *Central Hudson*, 447 US at 564 n 6.

[108] See id.

[109] Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 Nw U L Rev 372, 385–86 (1979). Professor Daniel A. Farber has argued that a categorically smaller chilling effect is implausible because (1) advertising "is not necessarily more verifiable than other speech," (2) the unpredictability of government findings could still deter advertisers, (3) the degree of punishment is more important than the type of speech in creating a chilling effect, and (4) "greed [may not be] more effective than idealism in motivating people." Id.

advocating doctrinal reform, has argued that commercial speech is distinct because of the dual "informative aspect of advertising" and "non-first amendment, contractual aspect" of advertising.[110] More recently, Professor Robert Post has described a "commonsense" justification: unlike higher-value speech, commercial speech is not valued for its participatory value, but instead only to "safeguard the circulation of information."[111] These crucial differences suggest a theoretical grounding for a specialized constitutional regime.

2. The current state of commercial speech doctrine.

The modern doctrinal framework began with the leading case *Central Hudson Gas & Electric Corp v Public Service Commission of New York*,[112] which established a now well-settled four-part test to analyze commercial speech regulations: (1) "[i]f the communication is neither misleading nor related to unlawful activity," (2) the government must show a "substantial interest," (3) the limitation must "directly advance the state interest involved," and (4) if a "more limited restriction on commercial speech" could serve the interest, the law cannot survive.[113] The first prong of the test excludes false or misleading commercial speech from First Amendment scrutiny, while the latter three parts impose a test on truthful commercial speech, in line with *Virginia Pharmacy*. The *Central Hudson* test, or more precisely the latter three prongs of it, is a form of intermediate scrutiny.[114]

Concurring in *Central Hudson*, Justice Harry Blackmun worried that the test did not afford commercial speech adequate protection.[115] The Court later may have validated these concerns. In *Board of Trustees of the State University of New York v Fox*,[116] the Court held that *Central Hudson*'s fourth prong does not impose a "least-restrictive-means requirement," as the language

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110 Id at 387–88.

111 Post, 48 UCLA L Rev at 14, 18 (cited in note 102). As a point of comparison, under First Amendment analysis generally, both the participatory function and informative function of speech are highly valued. See id. For political speech particularly, "[t]he possibility of participating in the formation of public opinion authorizes citizens to imagine themselves as included within the process of collective self-determination." Id at 7.

112 447 US 557 (1980).

113 Id at 564.

114 See id at 573 (Blackmun concurring in the judgment).

115 See id (Blackmun concurring in the judgment).

116 492 US 469 (1989).

might suggest, but rather requires "a fit between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable."[117] That said, subsequent Supreme Court decisions have suggested that *Central Hudson* requires something more than a reasonable fit in practice. Despite *Fox*'s disavowal of the least-restrictive-means requirement, later cases have found "that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so."[118] The Court is particularly suspicious in cases in which existing alternatives "would not involve any restriction on speech."[119] In short, the fourth prong of the *Central Hudson* test, despite *Fox*'s mitigating language, has been a difficult hurdle for regulations to surpass.

Although the exact nature of *Central Hudson*'s scrutiny may have shifted somewhat since the test's first articulation, it is now well established that the test governs all commercial speech cases.[120] Unsurprisingly, given the history described above, commentators have criticized the *Central Hudson* test for being "susceptible to [ ] wide swings of application."[121] As noted by Post, the Rehnquist Court was initially quite deferential to government regulation of commercial speech, while the Supreme Court had by 2000 swung back to "a severity that borders on strict scrutiny,"[122] a trend commentators continue to observe.[123] Lower courts, too, can vary significantly in application, sometimes invoking *Fox*, sometimes not.[124] Even so, commercial speech cases have not departed from applying its basic framework, although

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117 Id at 477–80 (quotation marks and citation omitted).

118 *Thompson v Western States Medical Center*, 535 US 357, 371 (2002).

119 *44 Liquormart, Inc v Rhode Island*, 517 US 484, 507 (1996) (Stevens) (plurality).

120 See, for example, *Metromedia, Inc v City of San Diego*, 453 US 490, 507 (1981) (White) (plurality) (noting that *Central Hudson* is "the proper approach to be taken in determining the validity of [ ] restrictions on commercial speech"); *California Outdoor Equity Partners v City of Corona*, 2015 WL 4163346, *9 (CD Cal) (describing a "well settled" application of the *Central Hudson* "test for government regulation of commercial speech").

121 Post, 48 UCLA L Rev at 42 (cited in note 102).

122 Id.

123 This is particularly true after *Sorrell*, which seems to have collapsed the distinction even further. See Hunter B. Thomson, Note, *Whither* Central Hudson*? Commercial Speech in the Wake of* Sorrell v. IMS Health, 47 Colum J L & Soc Probs 171, 206 (2013).

124 Contrast *Contest Promotions, LLC v City and County of San Francisco*, 2015 WL 4571564, *3 (ND Cal) (invoking an unmodified *Central Hudson*), with *Peterson v Village of Downers Grove*, 150 F Supp 3d 910, 929–31 (ND Ill 2015) (invoking *Fox*'s language modifying *Central Hudson*).

they sometimes appear driven by considerations outside the ambit of the *Central Hudson* test.[125]

In addition to application of the distinctive *Central Hudson* test, commercial speech cases are also notable in a number of other respects. Most importantly, a number of doctrines that protect higher-value speech are not applicable to commercial speech. The absence of these doctrines from commercial speech cases—overbreadth, prior restraint, compelled speech, and at one point, content neutrality—suggests that a change in these doctrines need not be imported into the commercial speech arena.[126]

For example, the Supreme Court has consistently declined to apply overbreadth doctrine to grant standing to challenge commercial speech regulations.[127] However, the Court has been somewhat unclear on whether this is an outright prohibition or whether such an application would only be highly unusual.[128] In the latter case, the Court suggested in dicta that overbreadth might be properly applied to a commercial speaker if there were "basis in the record to believe that [a statute] will be interpreted or applied to infringe significantly on noncommercial speech rights."[129] While the outlines are not well defined, it is at least clear that a speaker of an unprotected form of commercial

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[125] For example, content neutrality is now often considered in commercial speech cases despite *Central Hudson*'s and *Fox*'s silence on the principle. For a discussion of how outside considerations have often driven cases that ostensibly worked within the *Central Hudson* framework, see Part III.

[126] Post cataloged these differences (with the exception of content neutrality) in support of his proposition that commercial speech is distinguished by its purely informative, rather than participatory, function. See Post, 48 UCLA L Rev at 26–33 (cited in note 102). The remainder of this Section draws from Post's account, but stresses a different significance of these discrepancies—that evolution of a doctrine toward higher-value speech need not signal a similar evolution within commercial and other lower-value categories.

[127] See, for example, *Bates v State Bar of Arizona*, 433 US 350, 380–81 (1977) (establishing that overbreadth doctrine should not be applied "to professional advertising, a context where it is not necessary to further its intended objective"). See also Post, 48 UCLA L Rev at 29–32 (cited in note 102). Generally speaking, overbreadth doctrine allows challenges to overinclusive statutes even when typical standing rules may not allow such challenges. See Post, 48 UCLA L Rev at 29–32 (cited in note 102).

[128] The Court has at times said application of overbreadth would be "highly questionable" while at other times has simply said it "does not apply to commercial speech." Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 Harv CR–CL L Rev 31, 41 n 53 (2003), quoting *San Francisco Arts & Athletics, Inc v United States Olympic Committee*, 483 US 522, 536 n 15 (1987), and *Village of Hoffman Estates v The Flipside, Hoffman Estates, Inc*, 455 US 489, 497 (1982).

[129] *San Francisco Arts & Athletics*, 483 US at 536 n 15.

speech could not facially challenge a law that implicates protected commercial speech. Instead, higher-value speech must be implicated.

Similarly, two types of ex ante government speech restrictions—prior restraints and compelled speech—operate quite differently in commercial speech doctrine. Prior restraints, while strongly discouraged with respect to public discourse, are seen as acceptable, and even preferable, as limits on commercial speech.[130] Likewise, speech compelled by the government is seen as a unique evil when imposed on higher-value speech, and is commonplace with respect to commercial speech regulation.[131] Yet these mandated disclosure regimes are thought not to trigger usual protections against compelled speech.[132] Both of these ex ante government restrictions typically fail with higher-value speech but are broadly accepted in the commercial speech context.

Content neutrality was once in this category of doctrines with limited applicability to commercial speech, but as discussed in the following Part, recent cases have cast doubt on this conclusion.[133] The existence of these exceptions, however, makes clear that the categorization of speech as commercial or noncommercial implicates more than the choice of whether *Central Hudson*'s intermediate scrutiny or some other higher tier of scrutiny applies.

II. THE INTERSECTION OF CONTENT NEUTRALITY AND COMMERCIAL SPEECH DOCTRINE

Given the broad applicability of content-neutrality principles to First Amendment cases generally, it is unsurprising that the issue has frequently arisen in commercial speech cases. This Part discusses the developing intersection of content neutrality and commercial speech. Section A tracks the Court's gradual incorporation of content-neutrality principles into commercial speech doctrine. Section B then addresses how lower courts have

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130 See Post, 48 UCLA L Rev at 32–33 (cited in note 102). Prior restraints are, quite simply, laws that prevent speech from happening in advance.

131 See id at 26–28.

132 See id. But see Jonathan H. Adler, *Compelled Commercial Speech and the Consumer "Right to Know"*, 58 Ariz L Rev 421, 434 (2016) ("This suggests to some that mandated disclosures may not raise the same degree of First Amendment concerns as other regulation of commercial speech. This view is mistaken.") (citation omitted).

133 For a full discussion of these developments, see Part II.A.

attempted to reconcile this trend with *Reed*'s new standard for content neutrality.

A. Content Neutrality and Commercial Speech before *Reed*

In its initial forays into commercial speech, the Supreme Court declined to extend content-neutrality protection to commercial speech. In *Virginia Pharmacy*, for example, the Court discussed the justification-based articulation of content neutrality with respect to time, place, and manner restrictions, noting that they were not relevant to the case at hand.[134] The Court declined to determine the "proper bounds" of this inquiry with respect to commercial speech, but held that content-neutrality principles did not apply.[135] In *Central Hudson*, the Court noted that "[i]n most other contexts" content-based regulations of speech are prohibited.[136] However, in a footnote, the Court advanced two reasons why government actors could nevertheless regulate commercial speech based on its content:

> First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not particularly susceptible to being crushed by overbroad regulation.[137]

Without further discussion, content neutrality was brushed aside. Similarly, early content-neutrality cases sometimes cited commercial speech as a context in which content-based distinctions were perfectly permissible.[138] Following these cases, early commentators assumed that content neutrality applied only to high-value speech.[139]

However, a decade later, a line of cases called this assumption into question and applied content-neutrality principles to regulations of commercial speech. In *R.A.V.*, the Supreme Court

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134 See *Virginia Pharmacy*, 425 US at 771.

135 Id.

136 *Central Hudson*, 447 US at 564 n 6.

137 Id (quotation marks and citation omitted).

138 See *Consolidated Edison Co of New York v Public Service Commission of New York*, 447 US 530, 538 & n 5 (1980) (listing commercial speech among libel, obscenity, and fighting words as instances in which "governmental regulation based on subject matter has been approved in narrow circumstances").

139 See Stone, 25 Wm & Mary L Rev at 195–96 (cited in note 47).

proposed a framework by which content neutrality could apply to categories of low-value speech like commercial speech for the first time.[140] While the case addressed fighting words, it proposed a principle generalizable to all low-value categories: regulations may not discriminate on content unless "the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable."[141] In dicta, the Court suggested that, consistent with this principle, "a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud . . . is in its view greater there."[142]

The following term, the Supreme Court applied these principles in a commercial speech case. In *City of Cincinnati v Discovery Network, Inc*,[143] the Supreme Court struck down a Cincinnati law that prohibited commercial handbill newsracks from public streets but allowed newspaper racks.[144] The city argued, among other things, that this restriction was a permissible time, place, or manner restriction.[145] However, the Court rejected this argument, citing the justification-based *Ward* test, "because the very basis for the regulation is the difference in content between ordinary newspapers and commercial speech."[146] Because the only distinction between commercial and noncommercial newsracks made by the city was that "commercial speech has 'low value,'" the Court rejected the city's contention that its justifications were content neutral.[147] *Discovery Network* suggests that the content-neutrality inquiry should be applied not only *within* the commercial speech category (as established by *R.A.V.*) but also to commercial speech as a category. Commercial speech must be targeted for the *reasons* it is entitled to less constitutional protection, not simply *because* it is less well protected.

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140 See generally *R.A.V.*, 505 US 377.

141 Id at 388. Although the Court spoke in absolute terms when discussing these forms of content discrimination, "[t]he dispositive question . . . is whether content discrimination is reasonably necessary to achieve [the state's] compelling interests." Id at 395–96. In other words, some of these types of content distinctions could conceivably survive if another compelling interest could be identified aside from the one that allows the category of low-value speech to be proscribed.

142 Id at 388–89.

143 507 US 410 (1993).

144 Id at 413–15.

145 Id at 428.

146 Id at 428–29.

147 *Discovery Network*, 507 US at 429–30.

More recently, in *Sorrell*, the Supreme Court returned to content neutrality in the commercial speech context. The case concerned a Vermont law that "restrict[ed] the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors."[148] Striking down the statute, the Court imposed "heightened judicial scrutiny" because the statute was "designed to impose a specific, content-based burden on protected expression."[149] Here, too, the Court cited *Ward*'s justification-based articulation of the content-neutrality standard and stated that "[c]ommercial speech is no exception."[150] However, the Court never specified what this form of "heightened scrutiny" entails. Instead, because "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied," the Court declined to decide whether "heightened scrutiny" is "all but dispositive" as with high-value speech or if some lower—but still higher than *Central Hudson*'s intermediate scrutiny—standard applies.[151] Thus, it is somewhat difficult to parse what work the Court's determination that the statute is content based does for its analysis. As one hint, confronting the dissent's objection that heightened scrutiny is unnecessary, the Court at least suggested that the case would be different if false or misleading speech were at issue.[152] This would not be the case with high-value speech, so heightened scrutiny must mean something less than traditional strict scrutiny, perhaps by importing (or preserving) *Central Hudson*'s first prong. Because the Court mandated that content-neutrality analysis have a place in the commercial speech test without resolving the extent to which the analysis changes established practice, lower courts were left to confront the implications of *Sorrell* without much guidance. Even before *Reed*, this left commercial speech doctrine in a state of some uncertainty.

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148 *Sorrell*, 564 US at 557.

149 Id at 565, citing *Discovery Network*, 507 US at 418.

150 *Sorrell*, 564 US at 565–66.

151 Id at 570–71 (noting that failing both tests was characteristic of many such cases).

152 See id at 579 ("The State nowhere contends that detailing is false or misleading within the meaning of this Court's First Amendment precedents."); id at 581 (Breyer dissenting) ("The First Amendment does not require courts to apply a special 'heightened' standard of review when reviewing [commercial regulation].").

B. Litigation since *Reed* Involving Commercial Speech

The Court's new content-neutrality test announced in *Reed* has only added to the confusion that followed *Sorrell*. Since the decision, a number of district courts and two appellate courts have already considered *Reed*'s effect on commercial speech restrictions. These courts have fallen into two basic camps. The first group has found that *Reed* should not apply at all to commercial speech. The second group has followed the lead of *Sorrell* to integrate *Reed*'s content-neutrality standard into *Central Hudson*, but has stopped short of applying strict scrutiny. Notably, no court has ruled that *Reed* fully applies to commercial speech, which would trigger strict scrutiny. Perhaps more interestingly, a third group of courts has avoided answering the question entirely (or has alternately hedged the determination) by ruling that the challenged regulation would either fail or survive any degree of scrutiny, as the Supreme Court did in *Sorrell*. Because of courts' hesitance to fully address *Reed*'s implications for commercial speech, litigants continue to seize on the uncertainty by challenging commercial speech regulations. Section 1 addresses the two approaches courts have taken to reconcile *Reed* and commercial speech, while Section 2 examines pending litigation and courts that have declined to propose a resolution.

1. The two leading approaches to *Reed* and commercial speech.

The majority of courts fall into the first group and have summarily rejected plaintiffs' contentions that *Reed* applies to commercial speech. In the first post-*Reed* decision, the Central District of California, upholding a prohibition on off-site commercial billboards, found that "*Reed* does not concern commercial speech."[153] Because *Reed* does not cite *Central Hudson*, the court argued that "*Reed* is most notable for what it is not about, and what it does not say."[154] At least five other courts have followed this approach without any real discussion.[155] And although

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[153] *California Outdoor Equity Partners v City of Corona*, 2015 WL 4163346, *10 (CD Cal).

[154] Id.

[155] See *Contest Promotions, LLC v City and County of San Francisco*, 2015 WL 4571564, *3–4 (ND Cal); *CTIA—the Wireless Association® v City of Berkeley, California*, 139 F Supp 3d 1048, 1061 & n 9 (ND Cal 2015); *Timilsina v West Valley City*, 121 F Supp 3d 1205, 1215, 1218 (D Utah 2015); *Chiropractors United for Research and Education,*

Discovery Network may suggest otherwise, one court went so far as to note that "the classification of speech between commercial and noncommercial is itself a content-based distinction[ ] [but] it cannot seriously be contended that such classification itself runs afoul of the First Amendment."[156] Coming to the same conclusion, a judge in the Northern District of Illinois avoided engaging with the question by noting that "absent an express overruling of *Central Hudson*," lower courts are bound to its standard in commercial speech cases.[157] Uniting these cases is a strong disinclination that *Reed* should apply, but an underdeveloped analysis as to why.

While most courts have rejected *Reed*'s application to commercial speech, two courts have argued that *Reed* should apply to at least a limited extent, but, again, without much discussion. In *Centro de la Comunidad Hispana de Locust Valley v Town of Oyster Bay*,[158] a judge in the Eastern District of New York found that *Reed* weighs on the commercial speech inquiry.[159] Specifically, the court found that *Sorrell* modified the fourth prong of the *Central Hudson* test, which looks to whether a statute is narrowly drawn, to "require[ ] the Court to determine if the Ordinance is content based."[160] The court then applied *Reed*'s facial test to determine that the regulation was content based, and struck down the ordinance for failure to meet *Central Hudson*'s fourth prong because less burdensome alternatives were available.[161] While the court did not address this, one could imagine how content neutrality would aid this inquiry: a content-based law seems undesirable if a content-neutral alternative would satisfy the same government objective. However, despite emphasizing

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LLC v Conway, 2015 WL 5822721, *4–5 (WD Ky); *Auspro Enterprises, LP v Texas Department of Transportation*, 506 SW3d 688, 703 & n 109 (Tex App 2016).

156 *CTIA—the Wireless Association®*, 139 F Supp 3d at 1061 n 9. The court seems to have missed that, under *Discovery Network*, the classification of commercial speech clearly *can* run afoul of the First Amendment. Or it could simply have been noting that, if the *Reed* standard were applied to *Discovery Network*'s analysis, *all* commercial speech classifications would do so because looking to justifications is impermissible if there is facial content discrimination.

157 *Peterson v Village of Downers Grove*, 150 F Supp 3d 910, 927–28 (ND Ill 2015). Another judge on the Northern District of Illinois recently returned to the question, citing *Peterson* and Seventh Circuit precedent on *Reed*, and similarly concluded that *Reed* did not bear on commercial speech. *RCP Publications Inc v City of Chicago*, 2016 WL 4593830, *4 (ND Ill).

158 128 F Supp 3d 597 (EDNY 2015).

159 Id at 612–13.

160 Id.

161 See id at 613, 617.

the necessity of determining whether the law was content based before embarking on *Central Hudson*'s fourth prong, the court did not even mention the word "content" in its nearly four-page discussion of that prong.[162] As in *Sorrell*, content neutrality seems to play little actual role in the analysis. More notably, the court did not fully apply *Reed* (by triggering strict scrutiny), but merely incorporated *Reed*'s facial test into the court's interpretation of the *Sorrell*-modified *Central Hudson* inquiry.[163] This case marks a sort of hybridized approach, taking *Reed*'s reasoning into account without applying its full holding.

The Eleventh Circuit adopted a similar approach, using *Reed*'s test to determine whether speech is content based within its *Sorrell*-modified *Central Hudson* framework.[164] However, the court also found that content-based restrictions on commercial speech do not trigger strict scrutiny, distinguishing *Reed* in that respect.[165] In both of these cases, as in *Sorrell*, it is somewhat difficult to determine what work the content-neutrality determination actually does in resolving the case. But the Eleventh Circuit did suggest that *Central Hudson* is triggered *only* for content-based regulations of commercial speech,[166] which would seem paradoxically less protective than traditional *Central Hudson* scrutiny, which applies to any regulation of commercial speech. Because the challenged laws would fail "any level of heightened scrutiny,"[167] it may take a closer case to bring to the forefront the potential implications of this hybridized approach.

2. Courts avoiding reconciliation and pending litigation.

While courts that have attempted to reconcile *Reed* with commercial speech doctrine have largely split into the two approaches outlined above, a number of courts have taken interesting steps to avoid addressing the issue at all. Two recent court of appeals decisions are particularly worth noting, even though

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162 See *Centro de la Comunidad Hispana*, 128 F Supp 3d at 617–20.

163 See id at 613.

164 See *Dana's Railroad Supply v Attorney General, Florida*, 807 F3d 1235, 1248 (11th Cir 2015).

165 See id at 1246 ("As is so often true, the general rule that content-based restrictions trigger strict scrutiny is not absolute.").

166 See id ("Content-based restrictions on certain categories of speech such as commercial and professional speech, though still protected under the First Amendment, are given more leeway because of the robustness of the speech and the greater need for regulatory flexibility in those areas.").

167 Id at 1241.

they do not directly hold whether *Reed* bears on commercial speech. First, although subsequently reversed en banc, a panel on the Eleventh Circuit recently declined to decide whether *Reed* has an effect on professional speech doctrine (a closely related cousin of commercial speech also subject to a form of intermediate scrutiny).[168] Interestingly, however, the panel did not reach the question, because it found that the content-based restriction on professional speech survived both intermediate and strict scrutiny.[169] Given the rarity of content-based distinctions that survive strict scrutiny,[170] this could suggest, despite the panel's subsequent reversal, that courts may be inclined to apply a diluted form of strict scrutiny to commercial and professional speech if *Reed* is so extended.

En banc, the Eleventh Circuit reversed, but also avoided deciding the effect of *Reed* on professional speech doctrine. The en banc court found that portions of the challenged regulation *failed* both heightened scrutiny under *Sorrell* and strict scrutiny.[171] By coming out the other way on both tests, the court explicitly declined to decide whether strict or heightened scrutiny was proper.[172] Despite reversing on the issue, the en banc majority decision followed the earlier panel's approach to avoid reconciling *Reed*'s implications for broader First Amendment doctrine.

However, two separate opinions engaged in a spirited discussion of *Reed*'s effect. Judge Charles Wilson wrote a concurrence arguing that "after the Supreme Court's decision in *Reed* last year reiterated that content-based restrictions must be subjected to strict scrutiny, I am convinced that it is the only standard with which to review this law."[173] Wilson argued that the regulation at issue was paradigmatically content-based, and that although the regulation concerned a class of professionals, it did not fall properly within the Court's line of professional

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[168] See *Wollschlaeger v Governor of Florida*, 814 F3d 1159, 1182–1202 (11th Cir 2015), revd, 848 F3d 1293 (11th Cir 2017) (en banc).

[169] See *Wollschlaeger*, 814 F3d at 1186. This is in contrast to cases like *Sorrell* and *Dana's Railroad Supply*, which at least decided that content neutrality bore on the cases, even if they did not articulate a clear explanation as to why.

[170] See *Burson v Freeman*, 504 US 191, 211 (1992) (Blackmun) (plurality) ("In conclusion, we reaffirm that it is the rare case in which we have held that a law survives strict scrutiny. This, however, is such a rare case.").

[171] *Wollschlaeger v Governor of Florida*, 848 F3d 1293, 1311 (11th Cir 2017) (en banc).

[172] Id at 1308 ("But we need not decide whether strict scrutiny applies here, because . . . [the challenged provisions] fail even under heightened scrutiny as articulated in *Sorrell*.").

[173] Id at 1324 (Wilson concurring).

speech cases.[174] Judge Gerald Bard Tjoflat's dissent, meanwhile, argued that *Reed* should be read as inapplicable to professional speech so as to cabin its disruptive effect.[175] These opinions are likely the most robust judicial discussion to date of *Reed*'s effect on low-value-speech doctrine. Even so, only two of the eleven judges on the en banc panel joined this discussion, with the majority expressly leaving consideration of *Reed*'s effect for a later date.

Second, the Federal Circuit recently struck down a federal trademark regulation because it triggered *Reed*'s content-neutrality test and failed strict scrutiny.[176] The court accomplished this, however, not by extending *Reed* to commercial speech, but by finding that the expressive elements of trademarks do not qualify as commercial speech.[177] In the alternative, the court found that the regulation would also fail the *Central Hudson* test if classified as a regulation of commercial speech.[178] By applying a relatively narrow understanding of commercial speech, the Federal Circuit suggested an alternative way to apply *Reed* without overturning existing commercial speech doctrine. However, the case is currently under review by the Supreme Court.[179]

Although only a few courts have considered *Reed* in a commercial context so far, a number of pending cases raise the same question. In a complaint filed in the Southern District of New York, a plaintiff has challenged a New York law prohibiting advertising on rideshare vehicles as a violation of *Reed*'s content-based standard.[180] Facebook has challenged portions of

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174 Id at 1324–25 (Wilson concurring).

175 *Wollschlaeger*, 848 F3d at 1337 (Tjoflat dissenting).

176 *In re Tam*, 808 F3d 1321, 1334–36 (Fed Cir 2015) (en banc), cert granted, *Lee v Tam*, 137 S Ct 30 (2016).

177 *Tam*, 808 F3d at 1337–39.

178 Id at 1355–57.

179 Certiorari was granted on September 29, 2016. See *Tam*, 137 S Ct at 30. Although the merits briefs feature robust discussions of commercial speech doctrine and viewpoint-discrimination doctrine, *Reed* does not figure prominently in either party's arguments. See generally Brief for the Petitioner, *Lee v Tam*, Docket No 15-1293 (US filed Nov 9, 2016) (available on Westlaw at 2016 WL 6678795); Brief for Respondent, *Lee v Tam*, Docket No 15-1293 (US filed Dec 9, 2016) (available on Westlaw at 2016 WL 7229149).

180 See Complaint for Declaratory and Injunctive Relief, *Vugo, Inc v City of New York*, Civil Action No 15-08253, *7–8 (SDNY filed Oct 20, 2015) (available on Westlaw at 2015 WL 6164852). The complaint makes an argument in the vein of *Discovery Network*—that singling out commercial advertisements runs afoul of *Reed*'s standard. The plaintiff's briefing for summary judgment similarly heavily leans on *Reed*. See Vugo's Memorandum in Support of Motion for Summary Judgment, *Vugo, Inc v City of New*

the Telephone Consumer Protection Act of 1991[181] that regulate both commercial and noncommercial speech, arguing that *Reed* has changed the calculus.[182] San Francisco's ban on advertising for sugar-sweetened beverages similarly was recently challenged, with the complaint invoking *Reed*'s test as applicable to commercial speech.[183] Interestingly, the city of San Francisco responded to the complaint by repealing the provision of its ordinance banning soda advertisements from city property.[184] While a number of considerations (such as litigation costs) could have led the city to revise the code, city officials have publicly indicated that they assumed *Reed* applied to commercial speech.[185] One city official commented that "the law has changed, so we're taking today's action."[186] San Francisco's experience demonstrates how litigants have seized on this unsettled issue. Plaintiffs will invariably continue to bring cases, especially if this uncertainty will lead parties—particularly more-risk-averse municipal parties—to settle.

III. RECONCILING COMMERCIAL SPEECH AND CONTENT NEUTRALITY POST-*REED*

Despite the recent convergence of content neutrality and commercial speech doctrine, district courts have been hesitant to broadly consider *Reed*'s implications. Perhaps much of this hesitance stems from the fact that neither full applicability of *Reed* nor complete inapplicability of it is fully satisfying given existing doctrine and *Reed*'s plain language. More troublingly, *Reed*'s

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York, Civil Action No 15-08253, *11–13 (SDNY filed July 15, 2016) (available on Westlaw at 2016 WL 4728051).

181 Pub L No 102-243, 105 Stat 2394, codified as amended in various sections of Title 47.

182 See Facebook, Inc.'s Notice of Motion and Motion to Dismiss Plaintiff's First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and Memorandum in Support, *Brickman v Facebook, Inc*, Civil Action No 16-00751, *17–23 (ND Cal filed Aug 9, 2016) (available on Westlaw at 2016 WL 6196205).

183 See Complaint for Declaratory and Injunctive Relief, *American Beverage Association v City and County of San Francisco*, Civil Action No 15-03415, *25 (ND Cal filed July 24, 2015).

184 See Katherine Proctor, *San Francisco Dumps Part of Its Soda Ad Ban* (Courthouse News Service, Dec 1, 2015), archived at http://perma.cc/W4VJ-64N6. The litigation continues over other aspects of San Francisco's sugary-drink rules. For the most recent opinion in the case, denying a preliminary injunction of a warning requirement, see generally *American Beverage Association v City and County of San Francisco*, 187 F Supp 3d 1123 (ND Cal 2016).

185 See Proctor, *San Francisco Dumps Part of Its Soda Ad Ban* (cited in note 184).

186 Id.

version of content neutrality forecloses some of content neutrality's natural applications to commercial speech. This Part first addresses why full application of *Reed*'s standard would render commercial speech doctrine a dead letter. Next, it explores how even a soft incorporation of *Reed*—use of its content-neutrality principles without the strict scrutiny trigger—weakens the usefulness of content neutrality in the commercial speech context. A final Section argues that, as a result of these troubling implications, courts can and should avoid applying *Reed* in commercial speech cases.

A. Full Application of *Reed* Would Eviscerate Commercial Speech Doctrine

That *Reed*'s test might apply to all regulations of speech, whether commercial or noncommercial, is a compelling reading of the plain language of the opinion. The majority's rule is appealingly simple with respect to "facial distinctions" and "more subtle" distinctions based on "function or purpose": "Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny."[187] The Court even cited *Sorrell* in this paragraph, suggesting that the opinion's definition of content-based regulations applies broadly to commercial speech cases.[188] Based on this straightforward reading, then, one could argue that content-based regulations, whether facial or justification based, will trigger strict scrutiny, even with respect to commercial speech.

Although this solution seems straightforward, complete application of *Reed* to commercial speech would essentially overrule all existing commercial speech doctrine. The standard for determining facial content discrimination is quite broad: a regulation is content based if "enforcement authorities [must] examine the content of the message."[189] Almost by definition, a law regulating commercial speech will distinguish speech facially based on its content. Consider just a few regulations of commercial speech challenged since *Reed*'s decision: a city ordinance requiring disclosure during cell phone sales,[190] distinctions between

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

[188] See id.

[189] *McCullen*, 134 S Ct at 2531 (quotation marks omitted).

[190] *CTIA—the Wireless Association® v City of Berkeley, California*, 139 F Supp 3d 1048, 1050–52 (ND Cal 2015).

"primary and non-primary business uses,"[191] and on- and off-site commercial signs.[192] All require examination of the content, and all would be content based under *Reed*, but none seem to implicate *Ward*'s framework, which requires disagreement with the message conveyed. In short, it is difficult to imagine a regulation of commercial speech that would not trigger *Reed*'s strict scrutiny analysis. Even further, one court has skeptically noted that the Court's practice of distinguishing commercial and noncommercial speech could itself be seen as an impermissible content-based distinction under a broad reading of *Reed*.[193]

Of course, some sorting out of the strict scrutiny bucket could be accomplished through *Discovery Network* or *R.A.V.*, but this would leave the content-neutrality sorting largely ineffectual. Instead, these two (ironically justification-centered) tests would accomplish all of the scrutiny-sorting work. This would allay some of the concerns—particularly those expressed by lower courts that the very act of distinguishing commercial speech would be improper—but could raise significantly more problems as the tests would be expanded beyond their original ambit.

That *Reed*'s broad applicability would swallow existing commercial speech doctrine is also borne out by the way the Supreme Court has discussed commercial speech regulation in the past. In *Central Hudson*, the Supreme Court expressly acknowledged that its new test would allow for content-based distinctions in the commercial speech context.[194] Even in *Discovery Network*, which applied content-neutrality principles, the Court spent considerable time discussing the bounds of commercial speech, noting that commercial speech "must be distinguished by its content."[195] In short, it is difficult to see how a principled, independent commercial speech test could be maintained while subjecting *every* content-based distinction to strict scrutiny. Some commentators would certainly invite that destruction, but there is little reason to think that *Reed* is the proper instrument for it,

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191 *Contest Promotions, LLC v City and County of San Francisco*, 2015 WL 4571564, *4 (ND Cal).

192 *California Outdoor Equity Partners v City of Corona*, 2015 WL 4163346, *1 (CD Cal).

193 See *CTIA—the Wireless Association®*, 139 F Supp 3d at 1061 n 9.

194 *Central Hudson*, 447 US at 564 n 6.

195 *Discovery Network*, 507 US at 418–24, quoting *Virginia Pharmacy*, 425 US at 761–62.

and post-*Reed* decisions have already suggested that dilution concerns are real.[196]

It is important to note that death to commercial speech *doctrine* would not necessarily mean death to commercial speech *regulation*. Although full application of *Reed* would subject nearly every commercial speech regulation to strict scrutiny, it does not necessarily follow that all commercial speech regulations would be invalidated.[197] While some on the Court would invite this evisceration of advertising regulation,[198] many lower courts would likely preserve a considerable share of commercial speech regulation by finding that many challenged provisions survive strict scrutiny.[199] For example, although later reversed en banc, a panel on the Eleventh Circuit recently found a compelling interest in "the right to privacy in one's status as a firearm owner" to uphold a regulation of professional speech prohibiting doctors from discussing firearms with patients.[200] One could imagine a litany of compelling state interests in policing advertising to emerge from lower court case law. Recall that this was the primary concern that compelled the creation of commercial speech

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[196] A number of detractors have attacked the *Central Hudson* test and commercial speech doctrine generally for decades. As discussed above, the *Central Hudson* test itself is rather malleable and often fails to take into account critical considerations. See Post, 48 UCLA L Rev at 42 (cited in note 102). Some have even argued more forcefully that commercial speech doctrine is a potential license for government censorship. See Alex Kozinski and Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va L Rev 627, 653 (1990). Justice Thomas would similarly invite its total elimination. See *44 Liquormart, Inc v Rhode Island*, 517 US 484, 522 (1996) (Thomas concurring in part and concurring in the judgment). Whatever the merits of these criticisms of commercial speech (and a full analysis is beyond the scope of this Comment), application of *Reed*, even to abolish the distinction between commercial speech and regular speech, would exacerbate the problems noted in these criticisms. As this Comment later explores in Part III.B, *Reed*'s holdings apply to commercial speech awkwardly at best. Further, there is already evidence that courts might dilute strict scrutiny considerably in applying it to commercial speech, see *Wollschlaeger v Governor of Florida*, 814 F3d 1159, 1186 (11th Cir 2015), revd, 848 F3d 1293 (11th Cir 2017) (en banc), which was a central concern underlying the Supreme Court's establishment of commercial speech as an independent category. In other words, whatever is lacking about the Supreme Court's current commercial speech jurisprudence, *Reed*'s test is not the vehicle to solve it.

[197] Some regulations would likely fall simply based on the higher probability of successful litigation, however, as has already happened at least in San Francisco. See Proctor, *San Francisco Dumps Part of Its Soda Ad Ban* (cited in note 184).

[198] See *44 Liquormart*, 517 US at 522 (Thomas concurring in part and concurring in the judgment) ("I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech.").

[199] Courts might also react by filtering cases through a much more robust application of *R.A.V.* This approach has its own problems, which are discussed further in Part III.B.

[200] *Wollschlaeger*, 814 F3d at 1194.

doctrine in the first instance: "To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution."[201] If the state has a compelling interest in regulating relatively innocuous forms of advertising, it could all too easily establish by analogy a compelling interest in restricting more important—and potentially more harmful—forms of speech. In other words, under an interpretation of *Reed* that applies strict scrutiny to all commercial regulations, courts would be stuck between two unenviable alternatives: (1) invalidate almost all regulations of commercial speech or (2) create new categories of compelling interests, diluting the force of strict scrutiny. That strict scrutiny would force courts into these choices further undercuts the notion that *Reed* was meant to extend this far.

Of course, there is an argument to be made that the Supreme Court intended to implicitly overrule much of its old doctrine distinguishing commercial speech by making *Reed*'s test broadly applicable. After all, recent cases have taken increasingly tough looks at restrictions on commercial speech despite nominally sticking to the *Central Hudson* framework.[202] Some commentators have even suggested that, by the time *Sorrell* was decided, the distinction between protection for commercial and noncommercial speech had all but disappeared.[203] However, a close reading of *Reed* does not suggest that the Supreme Court intended such significant upheaval. Justice Thomas's majority opinion assures readers, "Our decision today will not prevent governments from enacting effective sign laws."[204] Justice Alito's and Justice Kagan's concurrences similarly spar over the fate of sign ordinances.[205] Only Justice Breyer's solo concurrence discusses the potentially disruptive implications of a blanket application of

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[201] *Ohralik v Ohio State Bar Assn*, 436 US 447, 455–56 (1978).

[202] See text accompanying notes 116–20.

[203] See Thomson, Note, 47 Colum J L & Soc Probs at 206 (cited in note 123). But see Oleg Shik, Note, *The* Central Hudson *Zombie: For Better or Worse, Intermediate Tier Review Survives* Sorrell v. IMS Health, 25 Fordham Intel Prop Media & Enter L J 561, 587–88 (2015) (arguing that, because *Sorrell* was unclear on its standard, *Central Hudson* should remain the governing test).

[204] *Reed*, 135 S Ct at 2232 (noting that content-neutral restrictions applicable to all signs, such as those restricting size, material, and lighting, are still available).

[205] Compare id at 2233 (Alito concurring) (suggesting numerous "reasonable sign regulations" that survive), with id at 2236 (Kagan concurring in the judgment) ("[M]any sign ordinances . . . are now in jeopardy.").

strict scrutiny to far-reaching areas of law.[206] Given this generally narrow focus, it seems unlikely that the Court intended to implicitly overrule three decades of precedent far afield from the topic of litigation.[207]

B. *Reed*'s Version of Content Neutrality Is an Awkward Fit for *Central Hudson*

Because full application of *Reed* to commercial speech cases would effectively render decades of doctrine a dead letter, courts and litigants have sensibly tried to find a middle ground by which to reconcile these two lines of precedent. While these middle paths to incorporation are, at first glance, the most promising ways to reconcile existing doctrine, *Reed*'s central holdings make such a reconciliation troubling for underlying First Amendment theory. The following two Sections show that two of *Reed*'s central holdings—facial content neutrality and the equivalence of viewpoint and subject-matter discrimination—make *Reed* an ill fit for commercial speech jurisprudence.

1. Incorporating facial content neutrality into the *Central Hudson* test dilutes the importance of content neutrality.

Courts that have held that *Reed* applies to commercial speech have incorporated only a small portion of its holding into the *Central Hudson* analysis.[208] These courts have used *Reed*'s two-prong test to determine content neutrality but, rather than applying strict scrutiny, have incorporated the results into the *Central Hudson* test. One court incorporated content neutrality into *Central Hudson*'s fourth prong (tailoring), while the other treated it as a threshold question.[209] Both cases relied on *Sorrell* for the notion that "the general rule that content-based restrictions trigger

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[206] Id at 2234–35 (Breyer concurring in the judgment) ("Consider a few examples of speech regulated by government that inevitably involve content discrimination, but where a strong presumption against constitutionality has no place.").

[207] Although the Supreme Court has long said it is more likely to depart from stare decisis in constitutional cases than in the typical case, recent empirical research has cast this assertion into doubt. See Lee Epstein, William M. Landes, and Adam Liptak, *The Decision to Depart (or Not) from Constitutional Precedent: An Empirical Study of the Roberts Court*, 90 NYU L Rev 1115, 1141–42 (2015).

[208] See notes 158–67 and accompanying text.

[209] Contrast *Centro de la Comunidad Hispana*, 128 F Supp 3d at 612–13, with *Dana's Railroad Supply v Attorney General, Florida*, 807 F3d 1235, 1246, 1248 (11th Cir 2015).

strict scrutiny is not absolute."[210] This view also has considerable support from case law developed before *Reed*'s per se strict scrutiny rule. While content-based regulations were "presumptively invalid" in most contexts, this presumption was never previously extended to commercial speech.[211] As noted above, *Sorrell* explicitly reserved the question whether this presumption carries over to commercial speech.[212] Absent specific language in *Reed*, it is easy to argue that *Reed*, while importing the two-prong facial content-neutrality test into all tests, did not upset the (however tenuous) balance of how far strict scrutiny reaches within commercial speech, last revisited in *Sorrell*.

Despite the relative doctrinal ease of this path and its avoidance of dilution, it is worth considering what effect incorporating the *Reed* test for content neutrality into *Central Hudson* would have. As noted above, it is hard to imagine any commercial speech regulation that will not qualify as content based under *Reed*'s broad standard. There is reason to be concerned, then, that courts applying *Reed* would determine that commercial speech regulations are content based as a matter of course before proceeding into the *Central Hudson* analysis. There is a flavor of this cursory content-neutrality analysis in *Centro de la Comunidad Hispana*. While the court argued that *Sorrell* required it to determine whether the speech was content based, once the court made that distinction, it seemed to play no role in the analysis.[213] Indeed, after making the determination, the court did not mention the law's content-based status once in its *Central Hudson* analysis, despite the court's insistence that content neutrality should weigh on the fourth prong.[214]

This seems to create a fundamental problem: If virtually all commercial speech regulations are content based under the *Reed* test, what effect could its incorporation possibly have on the *Central Hudson* calculus? Consider what work the content-neutrality analysis accomplished in commercial speech cases driven by content-neutrality concerns. Under *Sorrell*, "[t]o sustain the targeted, content-based burden [the statute] imposes on protected expression, the State must show at least that the statute

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[210] *Dana's Railroad Supply*, 807 F3d at 1246. See also *Centro de la Comunidad Hispana*, 128 F Supp 3d at 613 ("As adjusted by *Sorrell*, the *Central Hudson* test requires the Court to determine if the Ordinance is content based.").

[211] *R.A.V.*, 505 US at 382. See also *Central Hudson*, 447 US at 564 n 6.

[212] See *Sorrell*, 564 US at 571.

[213] See *Centro de la Comunidad Hispana*, 128 F Supp 3d at 612–20.

[214] See id at 613–20.

directly advances a substantial governmental interest and that the measure is drawn to achieve that interest."[215] In other words, content-based restrictions must *at least* satisfy the standard *Central Hudson* test. What more they must satisfy is unclear. The Court seemed most troubled by the state's failure to provide a "neutral justification," suggesting that "[t]he State's interest in burdening the speech of detailers instead turns on nothing more than a difference of opinion."[216]

The Court in *Discovery Network* was driven by similar concerns, troubled that the city regulated commercial handbills solely because they were "low value," rather than because of any particular harm they caused relative to noncommercial handbills.[217] Similarly, the *R.A.V.* test essentially asks whether the government's motive aligns with the reasons the area is afforded reduced First Amendment protection.[218] In short, the content-neutrality analysis added value to commercial speech doctrine when the Court focused on neutral justifications in accordance with *Ward*. *Reed*'s broader version of content neutrality, divorced from an inquiry into government motive, does not correlate as well with the concerns of the *Central Hudson* test, and is thus unlikely to add the same value to the inquiry if incorporated by courts taking this middle path.

Federal advertising regulations are replete with provisions that would likely pass the *Ward* version of content neutrality but almost certainly fail *Reed*'s facial test. Specific provisions apply to only advertising of television screen size[219] or home amplifier power,[220] "Retail Food Store Advertising and Marketing,"[221] and the advertising of home insulation.[222] Alcohol advertising rules vary depending on whether the ad sells wine,[223] distilled spirits,[224] or malt beverages.[225] Finally, Food and Drug Administration regulations rely on numerous granular distinctions between types of foods and drinks in advertising and labeling rules.[226]

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215 *Sorrell*, 564 US at 572.
216 Id at 579.
217 *Discovery Network*, 507 US at 428.
218 See *R.A.V.*, 505 US at 388.
219 16 CFR § 410.1.
220 16 CFR §§ 432.1–432.6.
221 16 CFR §§ 424.1–424.2.
222 16 CFR §§ 460.1–460.24.
223 27 CFR §§ 4.60–4.65.
224 27 CFR §§ 5.61–5.66.
225 27 CFR §§ 7.50–7.55.
226 See 21 CFR ch 1.

These types of regulatory regimes, which apply different restrictions to different messages, are almost perfectly analogous to the fact pattern in *Reed* and would almost certainly be content based under *Reed*'s test.[227] However, most of these regulations do not even begin to suggest the government "disagreement with the message [ ] convey[ed]" needed to trigger the *Ward* test,[228] but instead seem to serve as commonsensical ground rules for competition between advertisers.[229] While some regulations may be more constitutionally troubling, many of these regulations may further the antidistortion and information-disseminating purposes of commercial speech protection by simply facilitating, rather than blocking, commercial speech. Further, by capturing *all* such rules, the *Reed* test does nothing to distinguish a subset of potentially more troubling rules and prevents the standard from serving as any meaningful proxy for government motive.[230] Such a broad conception of content neutrality, when applied to commercial speech, does nothing to further its underlying purposes. Rather, it renders nearly every regulation content based, leaving courts with no guidance on how to weigh the impact of each regulation's content-based status.

Thus, while incorporating *Reed* into the *Central Hudson* test may sensibly reconcile the two lines of precedent and avoid the dilution of strict scrutiny tests, it risks watering down the importance of content neutrality in commercial speech cases. Because nearly every form of commercial speech regulation would be content based, this incorporation of *Reed* would counterintuitively lower the importance of the distinction in the evaluation of commercial speech and divorce the content-neutrality test itself from its purposes. Instead, each regulation would be cast into *Sorrell*'s form of heightened scrutiny, risking a different sort of dilution.[231] *Central Hudson*'s "false and misleading" prong could protect many of these regulations (as suggested by

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[227] *Reed*, of course, concerned different requirements for different categories of signs, see *Reed*, 135 S Ct at 2224–25, which, if extended to commercial speech, seems impossible to distinguish from different advertising rules for different types of advertising.

[228] *Ward*, 491 US at 791, citing *Clark v Community for Creative Non-violence*, 468 US 288, 295 (1984).

[229] Many of these provisions simply define how certain terms must be used when advertising specific products, in effect curtailing the full range of expression available without fully suppressing commercial speech. See, for example, 27 CFR § 5.65.

[230] This argument tracks then-Professor Kagan's interpretation of the utility of the doctrine. See Kagan, 63 U Chi L Rev at 450–52 (cited in note 49).

[231] See note 196 and accompanying text (discussing dilution concerns from overreliance on strict scrutiny).

Sorrell[232]), but this still leaves the content-neutrality barrier ineffectual. That said, for courts inclined to cabin *Reed*'s encroachment on commercial speech doctrine, this approach may paradoxically more effectively limit *Reed*'s influence than outright rejection of its applicability would. Beyond this pragmatic justification and doctrinal expediency, there is little to say in favor of the incorporative approach.

2. *Reed*'s equivalent treatment of subject-matter discrimination and viewpoint discrimination poses particular difficulties for commercial speech doctrine.

Working from first principles, imposing strict scrutiny for some subset of content-based regulations of commercial speech might have been one way to clarify the doctrine, solving some of the wide swings in *Central Hudson*'s application. *Sorrell*'s undefined "heightened" scrutiny for content-based restrictions on commercial speech would seem to have allowed for such an altered test.[233] However, as discussed above, wholesale importation of *Reed*'s rule would effectively subject all commercial speech regulations to strict scrutiny. Because of the problems with this,[234] some limiting principle must be applied to *Reed*'s broad conception of content discrimination in order to make strict scrutiny *within* the commercial speech context work.

One possible reconciliation might have applied strict scrutiny only to viewpoint discrimination (historically the greater evil) while leaving subject-matter discrimination within the ambit of *Central Hudson*. Unfortunately, *Reed* held that the two types of content discrimination are equivalent evils, foreclosing one of the most promising available limiting principles.[235] Strict scrutiny for viewpoint discrimination would likely not create any new problems for commercial speech regulation, as these types of regulations are almost certain to be struck down under existing precedent. Applying viewpoint-neutrality principles alone, government actors could still regulate industries, so long as no specific players or advocacy groups were singled out. However, subject-matter discrimination is a much more challenging

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[232] *Sorrell*, 564 US at 579 (noting that the state did not argue that the regulation at issue targeted misleading speech); id at 583–84 (Breyer dissenting) (cataloging defensible regulations).

[233] Id at 571.

[234] See notes 197–202 and accompanying text.

[235] See *Reed*, 135 S Ct at 2230.

problem, because all regulations of commercial speech, if targeted at a specific industry, must by definition make distinctions based on subject matter. Prohibiting these types of distinctions would make regulating any advertising exceptionally difficult.

The *R.A.V.* test, which would exclude subject-matter distinctions designed to further the purposes underlying commercial speech doctrine from triggering strict scrutiny,[236] could provide something of a solution. This test would avoid subjecting all of commercial speech to strict scrutiny, but would allow the expansion contemplated by *Sorrell*. However, extending *R.A.V.*, which was decided based on *Ward*'s version of content neutrality, could create troubling consequences. Tiers of scrutiny would be determined by how susceptible certain industries are to fraud,[237] and would invite complex, industry-wide factual determinations early in the trial process. Deference to legislative determinations of fraud risk could mitigate this problem, but would also undermine the purpose of *Reed*'s clean test. Using the *R.A.V.* test to police regulatory subject-matter distinctions would hardly clarify commercial speech doctrine, instead reallocating *Central Hudson*'s ambiguity to a different, less-well-tested doctrinal framework.

Even still, some may argue that applying strict scrutiny based on both viewpoint and subject-matter discrimination would not be such a dangerous departure. As recently applied by the Court, the *Central Hudson* test has already treated these kinds of content-based restrictions harshly. Subject-matter bans of speech have failed the *Central Hudson* test quite consistently: the Court has struck down laws banning beer strength labeling,[238] advertising alcohol prices,[239] and advertisements for legal gambling,[240] as just a few prominent examples. Because the Court is already treating these types of restrictions harshly, there is at least an argument that applying *Reed*'s strict scrutiny could add some clarity to the uncertainty surrounding the stringency of *Central Hudson*. However, there is a considerable difference between hostility toward subject-matter *bans* and applying strict scrutiny to all subject-matter *distinctions*. In fact,

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236 *R.A.V.*, 505 US at 388–89.

237 Id.

238 See *Rubin v Coors Brewing Co*, 514 US 476, 478 (1995).

239 See *44 Liquormart*, 517 US at 489.

240 See *Greater New Orleans Broadcasting Association, Inc v United States*, 527 US 173, 176 (1999).

as discussed in the previous Section, nearly all regulations of advertising make at least product-level subject-matter distinctions.[241] Further, subject-matter distinctions in rulemaking do not pose the same class of danger to the informational function of commercial speech as do subject-matter bans. Under *Ward*, subject-matter bans are easily distinguished from subject-matter distinctions, because bans suggest government disagreement much more readily than simple distinctions do. *Reed* forecloses that move—both bans and distinctions involve facial content discrimination—which makes squaring it with past commercial speech cases considerably more difficult.

While the *Reed* test provides one possibility for the use of strict scrutiny for commercial speech, other aspects of its holding foreclosed two more promising possibilities. As noted above, commercial speech cases invoking content-neutrality doctrine seemed particularly troubled by government intent, and all relied on the *Ward* test.[242] By foreclosing the use of intent-based tests in the face of facial content-based regulations,[243] *Reed* appears to prevent commercial speech strict scrutiny from being built around a purpose-based version of content neutrality. Similarly, *Reed*'s treatment of subject-matter and viewpoint discrimination prevents courts from taking a targeted look at viewpoint discrimination in commercial speech, without doing the same with subject-matter distinctions. Because regulations using subject-matter distinctions are the norm in advertising law, such equivalence poses a problem for any version of commercial speech strict scrutiny.

C. Keeping *Reed* Out of Commercial Speech

Full application of *Reed* leaves no room for a distinct commercial speech test, and *Reed*'s holdings present intractable difficulties for preserving any meaningful place for content neutrality within existing commercial speech analysis. In light of these problems, interpreting *Reed* to have no effect on commercial speech doctrine is the most workable solution. Most courts and observers have come to this conclusion—total inapplicability—but have yet to articulate a satisfying justification.[244] This Section argues that

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[241] See text accompanying notes 215–26.

[242] See text accompanying notes 215–17.

[243] *Reed*, 135 S Ct at 2228 ("[T]his analysis skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face.").

[244] See notes 14, 154–57, and accompanying text.

Reed can and should be found inapplicable in order to preserve a meaningful commercial speech standard.

While the complete inapplicability of *Reed* is difficult to reconcile with the Supreme Court's increasing tendency to draw on content-neutrality principles in commercial speech cases,[245] these cases all speak in the language of *Ward*'s justification-based test. *Sorrell* first opened the door for a *Reed*-like strict scrutiny trigger in commercial speech cases by raising the issue of whether "heightened" scrutiny should apply to content-based regulations of commercial speech.[246] It is notable, however, that it and other recent commercial speech cases have cited *Ward*'s articulation of a justification-focused content-neutrality standard.[247] *Reed* explicitly disavowed this application of the *Ward* test in the face of facial content distinctions, arguing that such an "analysis skips the crucial first step."[248] Indeed, a judge on the Seventh Circuit has recognized *Reed*'s primary innovation as "eliminat[ing] the confusion that followed from *Ward*" by establishing a new "rigorous standard."[249] Because past cases at the intersection of commercial speech and content neutrality relied on the *Ward* formulation, *Reed* suggests two possibilities: *Sorrell* and its ilk were wrongly decided, or *Reed* was not meant to apply to commercial speech.

Despite *Reed*'s broad language, it does not apply to all content-based categories. As a starting point, it is unlikely that *Reed* applies strict scrutiny within all traditionally unprotected low-value content-based categories of speech, such as obscenity and defamation.[250] If *Reed*'s scope does not reach unprotected low-value speech, at least one category of commercial speech, factually false or misleading speech (excluded from constitutional protection by the first part of *Central Hudson*), would unambiguously

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245 For a full discussion of this trend, see Part II.A.

246 *Sorrell*, 564 US at 571.

247 See id at 566, citing *Ward*, 491 US at 791; *Discovery Network*, 507 US at 428, quoting *Ward*, 491 US at 791 (quoting the same passage from *Ward* as *Sorrell* does).

248 *Reed*, 135 S Ct at 2227–28.

249 *Norton v City of Springfield, Illinois*, 806 F3d 411, 413 (7th Cir 2015) (Manion concurring).

250 For a cataloging of these categories, see *R.A.V.*, 505 US at 382–83. Of course, these categories of speech are only unprotected if strictly defined. See generally, for example, *New York Times Co v Sullivan*, 376 US 254 (1964). Even still, applying strict scrutiny to all state defamation statutes would mark a significant departure from current practice.

fall outside *Reed*'s ambit.[251] Similarly, *R.A.V.*'s test could exempt regulations that make content-based distinctions targeting the types of speech most prone to fraud by misleading consumers.[252] *Discovery Network*'s principle could potentially justify certain regulations addressing commercial speech as a whole, if similarly targeted for the reasons commercial speech is sometimes proscribable.[253] However, pushing these tests to the forefront of commercial speech jurisprudence risks hopelessly confusing the boundaries of the doctrine. The reasons commercial speech can be treated as low-value speech are deeply contested. Some reasons for commercial speech's differential treatment—its hardiness and dilution concerns, for example—do not translate into this inquiry at all.[254] While these elements of commercial speech and unprotected speech doctrines suggest natural boundaries for the *Reed* test in the commercial speech context, the difficulty of defining these boundaries creates questions as to whether *Reed* was meant to apply here at all.

In fact, content-neutrality rules have not been applied as broadly as worded since the Court's initial forays into the area. *Mosley* is itself written in language nearly as broad as *Reed*'s, but was not interpreted to reach low-value speech.[255] In 1982, while content neutrality was still a relatively fresh doctrine, Professor Paul Stephan wrote that "[d]espite its repeated invocations of a near-absolute content neutrality rule, the Court has not followed its own precept."[256] Another contemporaneous commentator noted that the Court's advances in content neutrality seemed plainly inconsistent with the developing law of defamation.[257] Similarly, the Court often does not invoke the doctrine in cases in which its applicability would seem near certain.[258] The

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[251] See *Central Hudson*, 447 US at 563 (noting that "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity"). See also *R.A.V.*, 505 US at 389.

[252] See *R.A.V.*, 505 US at 389.

[253] See *Discovery Network*, 507 US at 418.

[254] For a discussion of these factors, see Part I.B.1.

[255] See *Mosley*, 408 US at 95 ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

[256] Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 Va L Rev 203, 205 (1982).

[257] See George C. Christie, *Underlying Contradictions in the Supreme Court's Classification of Defamation*, 1981 Duke L J 811, 819 ("Probably no one could reconcile all the Court's recent activity concerning the regulation of speech according to its content.").

[258] See Stone, 46 U Chi L Rev at 88–100 (cited in note 43).

Court's pronouncements in this area have always been understood to exclude certain categories,[259] and it is reasonable to think the same is true here.

If *Reed* is left inapplicable to commercial speech cases, a question remains as to how to handle *Sorrell*. An answer could come from similar doctrines that are applied, but treated differently, in commercial speech cases. Specifically, *Sorrell* grounds its analysis in *Central Hudson* as modified by *Fox*, but suggests that, had the statute not failed that test, a "heightened" form of scrutiny need apply.[260] On these grounds, *Sorrell* could be understood as incorporating content-neutrality principles without incorporating the doctrine wholesale. Like prior restraint, compelled speech, and overbreadth,[261] content-neutrality principles could simply function differently in commercial speech cases. Until *Sorrell*, this was explicitly the case with commercial speech, and even *Sorrell* stopped short of imposing the "all but dispositive" presumption that typically applies to content-based restrictions.[262] Put differently, because facial content distinctions have long been thought endemic to commercial speech doctrine, importation of the *Reed* test seems unnecessary.

Absent further Supreme Court comment, then, lower courts should continue to apply the *Ward* test in commercial speech cases. Of course, *Sorrell* left open the question of how the content-neutrality standard should figure in. It seems that the most value could be added by incorporating the inquiry into the fourth prong (tailoring) of *Central Hudson*.[263] Since *Fox* adjusted this prong, it has been the source of much of the volatility of commercial speech inquiry.[264] Incorporating *Sorrell*-*Ward* here would allow for real differentiation in a portion of the test that has created considerable confusion. Moreover, the *Ward* standard avoids the problems noted in the previous Section, while still allowing for meaningful application of content-neutrality principles in commercial speech cases.

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[259] See Stone, 25 Wm & Mary L Rev at 195–96 (cited in note 47) (noting that the rule announced in *Mosley* had been applied only to high-value speech).

[260] *Sorrell*, 564 US at 565.

[261] See notes 127–32 and accompanying text.

[262] *Sorrell*, 564 US at 571–72.

[263] This was the approach taken in *Centro de la Comunidad Hispana*, 128 F Supp 3d at 612–13.

[264] See Part I.B.2.

CONCLUSION

Courts are left with an unenviable task in the face of *Reed*'s broad test for content neutrality and *Sorrell*'s unsettling of commercial speech doctrine. Much of this confusion arises from *Reed*'s central holding that courts must always consider whether a law is facially content based as part of the content-neutrality inquiry. This formulation comes into fundamental conflict with the category of commercial speech itself, one that courts had always contemplated would involve content-based distinctions. Courts have even explicitly justified the presence of these distinctions in the commercial speech context, contrary to their prohibitions elsewhere.[265] Given this inevitability of facial content distinction, commercial speech cases had largely focused on what *Reed* called the "more subtle" justification-based forms of content discrimination when decrying laws as content based.[266] *Reed*, however, mandated that both forms of content neutrality be considered in tandem, which considerably unsettles these past approaches. The confusion this has created is evident from the recent surge of litigants citing *Reed* to attack regulations of commercial speech.

Any application of *Reed* to commercial speech doctrine creates considerable problems. Of the ways to salvage a (limited) application of *Reed* to commercial speech cases, incorporating *Reed*'s test for content neutrality into the *Central Hudson* test provides the most promise at first glance.[267] It allows commercial speech doctrine to be maintained, but paradoxically would decrease the importance of content neutrality in the commercial speech inquiry. The wholesale application of *Reed*'s standard[268] creates problems in the other direction, by effectively overruling all other commercial speech doctrine. Ironically, the most promising opportunities to reconcile the two doctrines after the *Sorrell* decision—either by focusing on justifications or by singling out viewpoint discrimination for strict scrutiny—were entirely foreclosed by *Reed*'s holdings.

Because of this effect of *Reed*'s holdings, the most workable conclusion is that *Reed* does not apply at all in the commercial speech context. Instead—and particularly because *Sorrell* and

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[265] See *Central Hudson*, 447 US at 564 n 6; *Consolidated Edison Co of New York v Public Service Commission of New York*, 447 US 530, 538 & n 5 (1980).

[266] See text accompanying notes 215–17.

[267] See Part III.B.1.

[268] See Part III.A.

Discovery Network rely on it—the *Ward* justification-based test should figure into commercial speech cases. This solution is not without its problems, especially given the Court's movement toward using the doctrines together in *Sorrell*. Further, recent decisions' summary treatments of the issue have done little to resolve the confusion created by *Sorrell*. Still, courts and litigants can carve out a principled justification for *Reed*'s inapplicability. Other foundational doctrines like prior restraint are treated differently in commercial speech cases, and *Sorrell*'s focus on government motive is totally inconsistent with *Reed*. By preserving a space for content-neutrality principles, albeit not *Reed*'s broad version of those principles, continued application of *Ward* via *Sorrell* to commercial speech cases best serves the first principles underlying First Amendment doctrine.