

## COMMENTS

### FINDING VIEWPOINT NEUTRALITY IN OUR CONSTITUTIONAL CONSTELLATION

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#### INTRODUCTION

Viewpoint-based regulations have long been regarded as the most contemptuous, democracy-threatening restrictions on speech: “censorship in its purest form”<sup>1</sup> that attempts to suppress disfavored or supposedly dangerous ideas.<sup>2</sup> Indeed, the promotion of diverse thought and the constitutionally protected right to speak freely separates the United States from totalitarian regimes.<sup>3</sup> Justice Jackson stated in an oft-quoted passage in *West Virginia State Board of Education v. Barnette*<sup>4</sup>: “If there is any fixed star in our constitutional constellation, it is that no official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”<sup>5</sup> Yet as the Court has retracted<sup>6</sup> and expanded its recognition of maintaining so-called

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<sup>1</sup> *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting).

<sup>2</sup> See Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 102–04 (1996) (“[G]overnment discrimination against broad categories of expression such as ‘political,’ ‘controversial,’ or ‘offensive’ speech, is often a guise for disagreement with the ideas expressed, or is so close in spirit to viewpoint discrimination . . .”).

<sup>3</sup> See *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (“The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.”).

<sup>4</sup> 319 U.S. 624 (1943); see also *id.* at 644 (Black & Douglas, JJ., concurring) (“These laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men.”).

<sup>5</sup> *Id.* at 642.

<sup>6</sup> The viewpoint neutrality principle was curtailed temporarily during McCarthyism. See Nicole B. Cásarez, *Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination*, 64 ALB. L. REV. 501, 508 (2000) (discussing how the Court in the 1950s merely paid “lip service” to the idea that contrarian views had a right to be expressed).

viewpoint neutrality at all costs, it has simultaneously left open opportunities for viewpoint discrimination to be permissible, without necessarily providing for a logical roadmap to analyze it in every context.

The Court has not provided consistency in its determinations of viewpoint neutrality (or conversely, viewpoint discrimination) in state action. Given that viewpoint-based regulations are an “egregious form” of content discrimination, the Court applies some version of strict scrutiny. But, even that determination seems to stand on shaky ground because such scrutiny is rarely applied to viewpoint-based regulations. Instead, the Court may determine that viewpoint discrimination exists, state that strict scrutiny applies, and—without conducting further analysis—find the state action unconstitutional. It has become a sort of prophetic realization before the prophecy is actually realized.<sup>7</sup> Then-professor Elena Kagan noted in 1996 that the Court “almost always rigorously reviews [to find if viewpoint discrimination exists] and then invalidates regulations based on viewpoint” rather than explicitly apply strict scrutiny as it would to other content-based restrictions.<sup>8</sup> Other legal scholars have even argued that “[t]here can be *no* exceptions to the constitutional bar of viewpoint-based regulations.”<sup>9</sup> The Court itself has stated that determining a law is content-based and viewpoint-discriminatory is “all but dispositive.”<sup>10</sup> However, most federal courts still recognize that there is “impermissible viewpoint discrimination,” which implies there are certain viewpoint-based regulations on speech that are permissible.<sup>11</sup> And emphatic statements such as “the absolute First Amendment heavy presumption against viewpoint discrimination”<sup>12</sup> are oxymoronic in their resoluteness: how can a presumption be absolute?

If viewpoint discrimination is fundamentally unconstitutional, then there need be no further scrutiny of a viewpoint-based regulation, because it would *per se* be impermissible. If, on the other hand, viewpoint-based restrictions are not *per se* unconstitutional, and are subject to strict scrutiny, then there would be no need for the Court to functionally distinguish between content-based and viewpoint-based regulations. Now, this is an oversimplification of

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<sup>7</sup> See WILLIAM SHAKESPEARE, *MACBETH* act 4, sc. 1 (prophesying how Macbeth would die when “Great Birnam wood to high Dunsinane Hill Shall come against him;” he resigned himself to such fate when he realized it was happening).

<sup>8</sup> Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 444 (1996).

<sup>9</sup> Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 109 (2007) (emphasis added); see also RODNEY A. SMOLLA, 1 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 4:8 (2017) (citing late twentieth-century federal court case law to find that “[m]odern First Amendment cases establish a *per se* rule making the punishment of speech flatly unconstitutional if the penalty is based on the offensiveness or the undesirability of the viewpoint expressed.”).

<sup>10</sup> *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011) (citation omitted).

<sup>11</sup> See *infra* Subpart II.B.

<sup>12</sup> SMOLLA, *supra* note 9, § 11:26.

the tension, and is flawed when a First Amendment analysis is complicated by such considerations as the type of forum and speech to which the regulation applies.<sup>13</sup> And this is murky terrain even for just content discrimination, since some members of the Court feel strict scrutiny should not automatically apply to all content-based regulations.<sup>14</sup> It is likely, then, that the implicit legal analysis of viewpoint-discrimination claims falls somewhere in the middle: the strict scrutiny applied to viewpoint-based regulations is more strict (practically fatal) than other types of content discrimination, but no absolute bar exists, perhaps in part to provide breathing room for future decisions.

This Comment considers this puzzle in more detail by examining both recent decisions of the Supreme Court as well as those of the federal courts of appeals that wrestle with these questions: whether a statute is viewpoint-neutral, and when, if ever, a federal court will uphold a restriction whilst simultaneously determining it is viewpoint-based. Part I provides a broad legal definition of viewpoint neutrality, as distinguished from content neutrality. Part II begins an account of when the Court has invalidated viewpoint-based regulations, as well as the circumstances in which it has upheld them.<sup>15</sup> Part III reviews decisions made by the federal courts of appeals from 2014 to 2017 involving viewpoint-discrimination challenges to state action. Specifically, Subpart III.A addresses the impact of shifting outside of the forum analysis, focusing in greater detail on the impact of *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*<sup>16</sup> Subpart III.B looks at how heightened discretion in limited public forums and nonpublic forums may lead to premature findings of viewpoint neutrality, and how this could lead to increased viewpoint discrimination. Finally, Part IV addresses the most recent Supreme Court determination of viewpoint discrimination in *Matal v. Tam*,<sup>17</sup> and its implications for how federal courts may analyze impermissible viewpoint discrimination claims in the future.

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<sup>13</sup> See *infra* Part II. Laws can be constitutionally content-based but viewpoint-neutral in a limited public forum or nonpublic forum under intermediate scrutiny, or in a public forum under strict scrutiny.

<sup>14</sup> See, e.g., *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2234 (2015) (Breyer, J., concurring) (“In my view, the category ‘content discrimination’ is better considered in many contexts, including here, as a rule of thumb, rather than as an automatic ‘strict scrutiny’ trigger, leading to almost certain legal condemnation.”); *id.* at 2238 (Kagan, J., concurring) (noting that if a statute does not realistically suppress certain ideas, then “we may do well to relax our guard so that ‘entirely reasonable’ laws imperiled by strict scrutiny can survive.”).

<sup>15</sup> This is meant to provide a general overview and identify broad trends in these categories involving the pursuit of identifying and analyzing viewpoint neutrality. This is by no means an all-encompassing survey of the case law and secondary research already completed on this topic. It is intended to set the backdrop for recent circuit decisions.

<sup>16</sup> 135 S. Ct. 2239 (2015).

<sup>17</sup> 137 S. Ct. 1744 (2017).

## I. BASIC CONTOURS OF VIEWPOINT NEUTRALITY

According to well-settled First Amendment principle, the Constitution does not authorize the “official suppression of ideas.”<sup>18</sup> A viewpoint-based restriction does just that; namely, it aims to suppress a particular view that may be considered dangerous (to the government).<sup>19</sup> More specifically, the Court defines viewpoint discrimination as a regulation of speech, the rationale for which is the “specific motivating ideology or the opinion or perspective of the speaker.”<sup>20</sup> Justice Brennan referred to viewpoint discrimination as pure censorship and a fierce threat to the “continued vitality” of freedom of expression.<sup>21</sup> Because of its association with muzzling speech due to the particular idea expressed, inapposite to the First Amendment, viewpoint discrimination is presumed impermissible in almost every context.

Given its key role in free speech doctrine as a means to effectively facilitate the free marketplace of ideas, viewpoint neutrality can “preserve the reality of free expression” in a society diverse with beliefs, thoughts, and experiences.<sup>22</sup> Of course, this core principle of American legal jurisprudence cuts against the concurrent reality that free expression leaves the public space open for “thought that we hate.”<sup>23</sup> In *Cohen v. California*, Justice Harlan struck down a law criminalizing offensive conduct that was “maliciously and willfully disturb[ing] the peace” as applied to wearing a jacket that said “Fuck the Draft.”<sup>24</sup> Harlan emphasized that speech did not need to meet social standards of acceptability, so long as communicated peacefully, and that “[t]he constitutional right of free expression is powerful medicine in a society

<sup>18</sup> *Reed*, 135 S. Ct. at 2237 (citation omitted); *see also* *N.Y. Times v. United States*, 403 U.S. 713, 725 (1971) (Brennan, J., concurring) (“[T]he First Amendment stands as an absolute bar to the imposition of judicial restraints [to block the publication of material sought to be suppressed by the Government] . . .”). *See generally* *United States v. Eichman*, 496 U.S. 310 (1990); *Cohen v. California*, 403 U.S. 15 (1971); *Burstyn v. Wilson*, 343 U.S. 495 (1952).

<sup>19</sup> *See* *Am. Commc’ns Ass’n v. Douds*, 339 U.S. 382, 402 (1950) (“Under some circumstances, indirect ‘discouragements’ undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes.”); *see also* Heins, *supra* note 2, at 106–10.

<sup>20</sup> *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 829 (1995) (citation omitted).

<sup>21</sup> *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting).

<sup>22</sup> Seth F. Kreimer, *Good Enough for Government Work: Two Cheers for Content Neutrality*, 16 U. PA. J. CONST. L. 1261, 1276 (2014) (“The core question for first amendment doctrine should be neither whether every application preserves the essence of democratic discourse . . . nor whether all ‘common sense’ or ‘proportionate’ regulations survive its strictures. Rather, attention should focus on the extent to which the doctrine contributes to a system of norms which preserve the reality of free expression in American society.”). Professor Redish argues viewpoint discrimination is “the most universally condemned threat to the foundations of free expression.” Redish, *supra* note 9, at 69.

<sup>23</sup> Kreimer, *supra* note 22, at 1330 n.173 (citations and internal quotation marks omitted).

<sup>24</sup> *Cohen v. California*, 403 U.S. 15, 16 (1971). The Court specifically distinguished the expression used by Cohen from other cases involving fighting words because the speech was not directed at anyone. *Accord* *Beauharnais v. Illinois*, 343 U.S. 250, 258–59 (1951) (upholding a state statute that criminalized the exhibit of any play or sketch portraying a class of citizens in a significantly negative light, reasoning that the state should have power to punish libel “directed at a defined group”).

as diverse and populous as [this].”<sup>25</sup> While the Court never used the phrase “viewpoint neutrality,” the thrust of its importance is evident in *Cohen* and in earlier precedent.<sup>26</sup> It “is the function of speech to free men from the bondage of irrational fears,”<sup>27</sup> and state-sanctioned suppression of differences in viewpoints can lead to suspicion, willful ignorance, and even hatred.

#### A. Distinguishing Content-Based and Viewpoint-Based Regulations

Viewpoint discrimination is a form of content discrimination, and the Court in recent years frequently has used “content” and “viewpoint” interchangeably.<sup>28</sup> But despite this conflation, the terms encompass distinct meanings. Content discrimination exists if the government restricts discussion of an entire topic; content *and* viewpoint discrimination exist if the government restricts specific points of view on that topic. Further, an otherwise viewpoint-neutral, content-based regulation may still be viewpoint-discriminatory if applied in a manner that discriminates against a particular view. Elena Kagan illustrated this “hazier” distinction within content-based regulations with the following example:

[T]he Court would treat differently a law prohibiting the use of billboards for all political advertisements and a law prohibiting the use of billboards for political advertisements supporting Democrats. The former might meet constitutional standards; the latter would never succeed in doing so. It is not so much that the Court formally uses two different standards for subject matter and viewpoint regulation; in most contexts, a strict scrutiny standard applies to content-based action of all kinds. But the Court, when reviewing subject-matter restrictions, either may apply a purportedly strict standard less than strictly or may disdain to recognize the law as content based at all.<sup>29</sup>

Kagan’s example identifies the distinction between “viewpoint” and “content”—albeit with a stark example not before the Court—and underscores interpretive challenges of applying this doctrine, triggering the same level of scrutiny for different types of regulations (or different standards of scrutiny to the same type of regulation).<sup>30</sup> Ultimately, all content-based

<sup>25</sup> *Cohen*, 403 U.S. at 24.

<sup>26</sup> See *supra* note 18 and accompanying text.

<sup>27</sup> *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis & Holmes, JJ., concurring).

<sup>28</sup> Justice Thomas pointed out this confusion in *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2229–30 (2015), faulting the Ninth Circuit with assuming the town code at issue was content-neutral because it did not discriminate based on viewpoint. Justice Brennan also reasoned that the “content neutrality principle” grew out of the core prohibition *against* viewpoint discrimination. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 59 (1983).

<sup>29</sup> Kagan, *supra* note 8, at 444. Kagan’s use of “subject matter” rather than content may not survive following Thomas’ example in *Reed*. While the Court in *Reed* invalidated a content-based, viewpoint-neutral regulation, there was not unanimous agreement that the regulation was not viewpoint-discriminatory. *Reed*, 135 S. Ct. at 2239 (Kagan, J., concurring).

<sup>30</sup> For an example of how a lower court may struggle to either interpret the Supreme Court’s analysis or ignore it altogether, see *infra* Part III.

and viewpoint-based restrictions on speech are currently subject to strict scrutiny in public fora and presumptively invalid, except in a narrow set of cases discussed later in this Comment.<sup>31</sup>

*Reed v. Town of Gilbert* provides a recent illustration of deciphering whether a content-based regulation is also viewpoint-based.<sup>32</sup> In *Reed*, the Court unanimously found a town ordinance that differentiated between temporary messages and political or ideological messages on public signs facially unconstitutional, and an impermissible content-based regulation on speech.<sup>33</sup> Justice Thomas, writing for the majority, noted that the sign code was content-based even though it did not discriminate against certain viewpoints.<sup>34</sup> He used the following analogy, similar to that of Kagan, to distinguish the two kinds of regulations:

[A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints . . . . For example, a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed. The Town’s Sign Code likewise singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter. Ideological messages are given more favorable treatment than [political] messages[,] . . . which are themselves given more favorable treatment than messages announcing an assembly of like-minded individuals.<sup>35</sup>

Even though the statute was viewpoint-neutral, it was content-based, as Thomas points out, and could not survive strict scrutiny.<sup>36</sup> A restriction on free speech can therefore be bucketed into three categories relevant to a viewpoint-neutrality inquiry: content-neutral, and thus viewpoint-neutral; content-based but viewpoint-neutral; and content-based and viewpoint-based.<sup>37</sup> However, Justices frequently disagree both about whether viewpoint discrimination exists, and also the extent to which it is permissible, which has provoked confusion and discord across the federal bench.

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<sup>31</sup> See *infra* Subpart II.B; see also *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (listing the categories of speech where content-based restrictions have traditionally been permitted: advocacy intended to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, fraud, fighting words, child pornography, true threats, and speech “presenting some grave and imminent threat the government has the power to prevent”).

<sup>32</sup> *Reed*, 135 S. Ct. at 2229–30.

<sup>33</sup> *Id.* at 2232.

<sup>34</sup> *Id.* at 2230–31.

<sup>35</sup> *Id.* at 2230.

<sup>36</sup> *Id.* at 2228–30.

<sup>37</sup> EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES* 361 (5th ed. 2014).

### B. Content-Based, Viewpoint-Neutral Regulations

Considering the Court's analysis of content-based regulations illustrates in part why federal courts have struggled to apply First Amendment law uniformly when it comes to content-based regulations that implicate questions of viewpoint discrimination.<sup>38</sup> This Subpart is intended to provide a broad sense of where the Court has situated itself in the past two decades on when a statute is viewpoint-neutral, but content-based, when it is not, and when such regulations can be constitutional.<sup>39</sup> It may appear straightforward on its face to determine what is a "viewpoint" or "discrimination," but the Court has been far from clear on that front, which raises concerns for lower courts as well as litigants and policymakers.

Even if a content-based regulation on protected speech in a public or designated public forum is considered viewpoint-neutral, it is still subject to strict scrutiny.<sup>40</sup> In a public forum, for example, the government cannot selectively restrict expression due to its ideas, message or content, but can enforce reasonable time, place or manner restrictions that are narrowly tailored to the stated interest, justified without reference to content.<sup>41</sup> While individual expression cannot be restricted solely due to the views expressed, that right must be met by the reality that people cannot "publicize their views 'whenever and however and wherever they please.'"<sup>42</sup>

Frequently, any analysis of viewpoint neutrality will be foregone if a challenged regulation would fail under a less demanding test, regardless of whether it is viewpoint-based or not.<sup>43</sup> Thus, if the Court can argue that a regulation is unconstitutional because it is content-based, without determining

<sup>38</sup> See, e.g., *Morgan v. Swanson*, 755 F.3d 757, 761 (5th Cir. 2014) (contending the assertion that "viewpoint discrimination regarding private speech is unconstitutional" is generally true, but that the "nearly universal prohibition against viewpoint discrimination does not inform an official as to what, precisely, constitutes viewpoint discrimination").

<sup>39</sup> See *Cásarez*, *supra* note 6, at 505 ("To understand and apply the prohibition against viewpoint discrimination, the Supreme Court has had to address two linked and overlapping questions. . . . [W]hat qualifies as a 'viewpoint,' and . . . what constitutes 'discrimination.' Although these questions appear simplistic, the Court has provided differing answers in various contexts, resulting in uncertainty about the meaning of viewpoint discrimination across the board.")

<sup>40</sup> See *supra* notes 32–36 and accompanying text.

<sup>41</sup> *McCullen v. Coakley*, 134 S. Ct. 2518, 2529, 2548–49 (2014) (striking down a statute criminalizing standing on public sidewalks within thirty-five feet of abortion clinics in a First Amendment challenge because it was not narrowly tailored to serve a significant governmental interest).

<sup>42</sup> *Wood v. Moss*, 134 S. Ct. 2056, 2066, 2070 (2014) (citation and internal quotation marks omitted) (reversing a Ninth Circuit determination of clearly established viewpoint discrimination by Secret Service agents controlling protests where the President was dining).

<sup>43</sup> See, e.g., *McCullen*, 134 S. Ct. at 2542 (Scalia, J., concurring) ("[T]he Court found it unnecessary to 'parse the differences between . . . two [available] standards' where a statute challenged on First Amendment grounds 'fail[s] even under the [less demanding] test.'" (alterations in original) (quoting *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1446 (2014) (plurality opinion))); *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1307 (11th Cir. 2017) ("Even if the restrictions on speech can be seen as viewpoint neutral—a point we need not address—that does not mean that they are content-neutral.").

whether it discriminates by viewpoint, the Court will almost always avoid any discussion of viewpoint discrimination. This creates challenges for lower courts who struggle to decipher whether a regulation is viewpoint-discriminatory, or just impermissibly content-based, under current doctrine.

An illustration of this unconstitutional, content-based, but viewpoint-neutral trichotomy, and the tension within each layer, may be found in *McCullen v. Coakley*.<sup>44</sup> In *McCullen*, every member of the Court believed a state statute that established a buffer zone on public sidewalks at abortion clinics was unconstitutional, but for different reasons.<sup>45</sup> Justice Roberts, writing the majority opinion joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, argued that the statute was content-neutral because it did not make facially content-based distinctions, but that it did not survive a lesser, albeit heightened scrutiny.<sup>46</sup> In contrast, Justice Scalia concurred, writing for Justices Kennedy and Thomas, and argued the statute was both content- and viewpoint-based, such that strict scrutiny was triggered (which the regulation could not survive).<sup>47</sup> While Justice Scalia did not end the analysis at his determination there was viewpoint discrimination—going on to say strict scrutiny applied—the Court has never upheld a viewpoint-based regulation of protected speech in a traditional public forum.

The Justices on the Court do not always agree that strict scrutiny should apply to content-based regulations in public forums, however. In *Reed*, while the Court unanimously invalidated a content-based, viewpoint-neutral town ordinance, the Justices diverged on the uniform application of strict scrutiny for content-based regulations. In her concurrence, joined by Justices Breyer and Ginsburg, Justice Kagan argued that strict scrutiny should not apply to all content-based regulations like the one at issue.<sup>48</sup> In her view, strict scrutiny should apply only where there is a real danger that “official suppression of ideas is afoot.”<sup>49</sup> Justice Breyer, writing a separate concurrence, similarly argued that content discrimination should not always trigger strict scrutiny; otherwise, the judiciary will be interfering with and managing ordinary government activity because nearly all government activity involves speech.<sup>50</sup> Effectively, Breyer pushed for strict scrutiny to apply to content-based regulations in traditional public forums or that discriminate by viewpoint, but not for all cases of content discrimination. He argued that content discrimination should not always be a “determinative

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<sup>44</sup> 134 S. Ct. at 2534, 2547, 2549.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 2532.

<sup>47</sup> *Id.* at 2547 (Scalia, J., concurring) (“[S]o long as the statute permits speech favorable to abortion rights while excluding antiabortion speech, it discriminates on the basis of viewpoint.”).

<sup>48</sup> *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2238 (2015) (Kagan, J., concurring).

<sup>49</sup> *Id.* at 2237 (Kagan, J., concurring).

<sup>50</sup> *Id.* at 2234–35 (Breyer, J., concurring).



legal tool[] in an appropriate case,” instead acting as a “supplement to a more basic analysis” of a regulation.<sup>51</sup> Thus, even though it may seem settled that content-based regulations in traditional or designated public forums are subject to strict scrutiny, an undercurrent of alternative reasoning at work could perhaps alter this normative principle.

Two forums where strict scrutiny does not apply per se to content-based regulations are limited public forums and nonpublic forums.<sup>52</sup> A traditional public forum is designated as such primarily because its principal purpose is the exchange of ideas.<sup>53</sup> Conversely, speech restrictions in a limited public or nonpublic forum are subject to fewer First Amendment constraints.<sup>54</sup> In either forum, a content-based regulation must still be both reasonable and viewpoint-neutral.<sup>55</sup> But that viewpoint neutrality is required for restricting speech in a forum subject to lesser scrutiny, calls into question whether viewpoint-based regulations on protected speech could *ever* survive a forum analysis.<sup>56</sup> The Court has provided little direction as to whether a viewpoint-based, but reasonable regulation in a nonpublic forum would be invalidated because it is not viewpoint-neutral, or because it does not then survive strict scrutiny.

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<sup>51</sup> *Id.*

<sup>52</sup> While the Court refers to these differently, they seem to be interchangeable and require the same analysis.

<sup>53</sup> See *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (finding traditional public forums are “venues for the exchange of ideas”).

<sup>54</sup> See *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 683 (1998) (upholding a public broadcaster’s right to exclude a politically nonviable candidate from a televised debate); see also Frederick Schauer, Comment, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 88–89 (1998) (stating that even though the Court in *Forbes* found the debate to be a nonpublic forum, the majority made the argument that public broadcasting was normally authorized to make viewpoint-based decisions because it was not a forum, subject to certain exceptions like debates).

<sup>55</sup> *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

<sup>56</sup> The Supreme Court has not made clear whether failing on the viewpoint-neutral prong of a limited public forum analysis would trigger strict scrutiny or invalidate the regulation. See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001) (noting that a speech restriction in a limited public forum “*must not* discriminate against speech on the basis of viewpoint” (emphasis added)). The majority of the circuit opinions read as if viewpoint neutrality is a necessary element to any restriction in a limited public forum, not just a potential trigger for more heightened scrutiny. See, e.g., *Heaney v. Roberts*, 846 F.3d 795, 801 (5th Cir. 2017) (“It is beyond debate that the law prohibits viewpoint discrimination in a limited public forum.”); *NAACP v. City of Philadelphia*, 834 F.3d 435, 449 n.7 (3d Cir. 2016) (“Apart from reasonableness, a second requirement that exists no matter how we label the forum is viewpoint neutrality.”); *Hodge v. Talkin*, 799 F.3d 1145, 1170 (D.C. Cir. 2015) (“A law that discriminated on the basis of viewpoint [to shield criticism] would plainly infringe the First Amendment even in a nonpublic forum.”); *Seattle Mideast Awareness Campaign v. King Cty.*, 781 F.3d 489, 502 (9th Cir. 2015) (“In a limited public forum, . . . what’s forbidden is viewpoint discrimination, not content discrimination.”).

Further, finding a regulation within a limited public forum is unreasonable (the other requirement) would deem the statute unconstitutional, rather than trigger any other form of scrutiny. See *NAACP*, 834 F.3d at 442 (“[O]ur conclusion that the ban . . . is unreasonable means that it is unconstitutional no matter what we label the forum. In other words, reasonableness is a bare minimum in forum cases. Some types of forums require more than reasonableness, but none allow less.”).

## II. VIEWPOINT DISCRIMINATION AT THE SUPREME COURT

In *Perry Education Ass'n v. Perry Local Educators' Ass'n*, the Court permitted (in a 5-4 decision) an incumbent teachers' union to negotiate a collective bargaining agreement with the school board, and to receive access to teachers' mailboxes, while denying access to a rival union.<sup>57</sup> Vehemently, Justice Brennan and three others dissented, finding the exclusive access provision to constitute viewpoint discrimination in violation of the First Amendment.<sup>58</sup> In the decades since, the Court has developed a multifaceted stance on the permissibility of viewpoint-based regulations. Generally, the federal judiciary heavily presumes that viewpoint discrimination is unconstitutional when it restricts speech that would otherwise be permissible.<sup>59</sup> However, the level of scrutiny, or test applied by the Court, matters greatly to the broader determination of whether viewpoint neutrality is absolutely mandated by the Constitution or not (spoiler: it's not).

Based on judicial practice, it is “all but dispositive” to conclude that a law regulating speech is content-based and viewpoint-discriminatory because it implies that the state favors one viewpoint over another.<sup>60</sup> This presumption applies to all forums, since viewpoint neutrality is a requirement even in a nonpublic forum. Conservative Justices are apt to declare that any finding of viewpoint discrimination is per se invalid for private speech, but such a rule has not been accepted by a majority of the Court.

### A. Impermissible Viewpoint Discrimination

If a regulation restricts private speech in a public forum, viewpoint discrimination is presumptively invalid. In *Good News Club v. Milford Central School*, for example, the Court held that a school's denial of a religiously-affiliated club to hold afterschool meetings in their facilities constituted impermissible viewpoint discrimination.<sup>61</sup> Without technically undergoing a strict scrutiny analysis but following two precedential cases,<sup>62</sup> Justice Thomas found that the

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<sup>57</sup> *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 48–49 (1983).

<sup>58</sup> *Id.* at 56 (Brennan, J., dissenting).

<sup>59</sup> See *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 829–30 (1995) (“[W]e have observed a distinction between . . . content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, . . . viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.”).

<sup>60</sup> *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)); see also *Rosenberger*, 515 U.S. at 828 (declaring an “axiomatic” principle that government regulations may not show favoritism based on the speaker or the substantive content of the speech).

<sup>61</sup> *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 108–09 (2001).

<sup>62</sup> *Rosenberger*, 515 U.S. at 831; *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393–94 (1993).

viewpoint discrimination at issue was unconstitutional because the club was excluded from participation solely based on its religious association.<sup>63</sup>

Viewpoint-based regulations on speech that is not fully protected can also be scrutinized fatally. In *Sorrell*, the Court struck down a statute which barred the sale and use of pharmacy records revealing individual doctors' prescribing practices, to be used for pharmaceutical marketing, because it imposed a discriminatory burden on certain speakers based on the content of the speech.<sup>64</sup> Since persons other than pharmaceutical manufacturers could obtain the information, the restriction was viewpoint-based.<sup>65</sup> Although commercial speech was at issue, the Court recognized that even under a lesser heightened scrutiny, requiring the state to show the statute directly advanced a substantial interest and was drawn to achieve said interest, the statute was unconstitutional because of the differential treatment applied based on viewpoint.<sup>66</sup> Lower courts have followed suit here, recognizing that "merely wrapping a law in the cloak of 'commercial speech' does not immunize it from the highest form of scrutiny due government attempts to discriminate on the basis of viewpoint."<sup>67</sup>

Even viewpoint-based regulations that target expression deemed "worthless" to public debate under the First Amendment are constitutionally suspect.<sup>68</sup> The question presented in *R.A.V. v. City of St. Paul*, in terms of viewpoint discrimination, was whether an ordinance designed to criminalize bias-motivated hate speech could criminalize some unprotected speech in a category (fighting words based on race) and not all fighting words.<sup>69</sup> The plaintiffs had burned a cross on the yard of a black family, and were prosecuted under this statute.<sup>70</sup> The Court found the law facially

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<sup>63</sup> See *Good News Club*, 533 U.S. at 108, 110–12. Three Justices—Souter, Ginsburg, and Stevens—did not think there was viewpoint discrimination at issue. *Id.* at 131 (Stevens, J., dissenting); *id.* at 135–37 (Souter, J., dissenting).

<sup>64</sup> *Sorrell*, 564 U.S. at 563–64.

<sup>65</sup> *Id.* at 565.

<sup>66</sup> *Id.* at 571–72, 580.

<sup>67</sup> *Dana's R.R. Supply v. Attorney General, Fla.*, 807 F.3d 1235, 1248 (11th Cir. 2015). Some professional speech proves to be more contentious because of the issues raised in the profession, and courts differ as to how to regulate it. *Contra King v. Governor of N.J.*, 767 F.3d 216, 237 (3d Cir. 2014) (upholding a state statute that prohibited counselors from rendering their services of sexual orientation change efforts to minors because it prevented them from "expressing [their] viewpoint in a very specific way"). Compare *NIFLA v. Harris*, 839 F.3d 823, 844 (9th Cir. 2016) (holding that a state law requiring abortion clinics to disseminate notices stating the existence of publicly-funded family-planning services did not violate the First Amendment), with *Stuart v. Camnitz*, 774 F.3d 238, 252 (4th Cir. 2014) (holding that a state law requiring doctors to display sonograms and describe fetuses to women seeking abortions constituted unconstitutionally compelled speech).

<sup>68</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384–85 (1992).

<sup>69</sup> *Id.* at 380–88; see also *Kagan, supra* note 8, at 417–18 (arguing that the ordinance in *R.A.V.* was struck down because its ban on fighting words that only racists would use failed to protect the "interest of listeners in a balanced debate on public issues").

<sup>70</sup> *R.A.V.*, 505 U.S. at 379–80.

unconstitutional and both content- and viewpoint-based.<sup>71</sup> Specifically, Scalia noted that the government could not lawfully regulate fighting words “based on hostility—or favoritism—towards the underlying message expressed.”<sup>72</sup> Because the ordinance only prohibited fighting words based on “race, color, creed, religion or gender,” it unconstitutionally selected certain views expressed through fighting words to be restricted, according to the *R.A.V.* majority.<sup>73</sup>

This decision was met with significant opposition, both from scholars and other Justices, who felt that the ordinance was unconstitutionally overbroad but that the speech was not entitled to any sort of First Amendment protection.<sup>74</sup> Regulating wholly unprotected speech may still be permissible even if viewpoint-discriminatory, as discussed in Subpart II.B.2. This illustration is intended to reflect that it is a rare occurrence that the Justices will agree on viewpoint neutrality and the level of scrutiny applied to content-based restrictions.

### B. Permissible Viewpoint Discrimination

Despite the heavy presumption against viewpoint discrimination, the Supreme Court has never made a per se rule on its (un)constitutionality. Few circumstances warrant the Court to stray from the viewpoint neutrality mandate, but they do exist. One such category is when the government itself speaks, free to select the views it wants to express.<sup>75</sup> Such a categorization may virtually strip the speech of nearly all First Amendment protection. The settings where the Court has upheld viewpoint-based regulations are discussed presently.

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<sup>71</sup> *Id.* at 391–92.

<sup>72</sup> *Id.* at 386.

<sup>73</sup> *Id.* at 393–94.

<sup>74</sup> *See, e.g., id.* at 400 (White, J., concurring) (“This categorical approach [to proscribable expression on the basis of content] has provided a principled and narrowly focused means for distinguishing between expression that the government may regulate freely and that which it may regulate on the basis of content only upon a showing of compelling need.”). White concurred in the judgment to invalidate the ordinance, reasoning that it was unconstitutionally overbroad. *Id.* at 397; *see also* Kagan, *supra* note 8, at 418 n.14. In her legal scholarship, Kagan also conceded that she personally found the *R.A.V.* ordinance to be viewpoint-discriminatory, but that it ultimately would “not dangerously have distorted public debate,” which seems to be a separate, though not mutually exclusive, line of analysis. Kagan, *supra* note 8, at 419. Thus, Kagan has made clear that certain viewpoint-based restrictions would not run counter to the broader goal of free expression. *Id.*

<sup>75</sup> *See Pleasant Grove City v. Summum*, 555 U.S. 460, 467, 472 (2009) (holding that monuments represented government speech, even in public parks, and that the Free Speech Clause “does not regulate government speech”); *see also* Mark Strasser, *Government Speech and Circumvention of the First Amendment*, 44 HASTINGS CONST. L.Q. 37, 59 (2016) (arguing that the Supreme Court’s lack of limitations on government free speech “give[s] the government an easy way to avoid First Amendment speech limitations”).

### 1. *Schools*

Although the First Amendment applies to public schools, the Court has recognized that it is an arena in which viewpoint-based regulations may be permissible.<sup>76</sup> In *Tinker v. Des Moines Independent Community School District*, the Court recognized this principle, but also noted that schools may be justified in restricting speech, so long as such censorship is “caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”<sup>77</sup>

But the *Tinker* test, permitting speech restrictions if it would substantially and materially disrupt the school’s operation, implicitly recognized that viewpoint discrimination may be constitutional in schools while selectively censoring certain views should not be. Despite its analytical structure, this test did not create as bright a line as it may appear for exactly when viewpoint discrimination is afoot in schools.

A twenty-first century case may demonstrate how federal courts still struggle with analyzing questionably viewpoint-based regulations in schools. In *B.W.A. v. Farmington R-7 School District*, the Eighth Circuit found that a public school ban on clothing depicting the Confederate flag did not violate free speech and did not constitute viewpoint discrimination.<sup>78</sup> At the time, there were several racially charged incidents at the school, which led to the school district’s decision to ban all clothing depicting the Confederate flag.<sup>79</sup> The circuit court panel then went on to analyze the restriction through *Tinker*’s “substantial disruption” test in schools.<sup>80</sup> Given the history of racial tension at the school, the court felt there was evidence that images of the Confederate flag caused a substantial disruption, and such a clothing ban was constitutional.<sup>81</sup>

At first, the Eighth Circuit seemed to suggest that the ban on clothing containing the Confederate flag was permissible viewpoint discrimination so long as it comported with *Tinker*, but then concluded its First Amendment analysis as follows:

Contrary to [the students’] assertion, viewpoint discrimination by school officials is not violative of the First Amendment if the *Tinker* standard requiring a reasonable forecast of substantial disruption or material interference is met. . . . Based on the evidence in the record, the school’s ban

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<sup>76</sup> See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

<sup>77</sup> *Id.* at 509.

<sup>78</sup> 554 F.3d 734, 740–41 (8th Cir. 2009).

<sup>79</sup> *Id.* at 736–37.

<sup>80</sup> *Id.* at 741; see also *Tinker*, 393 U.S. at 505–06 (arguing that a school could not send students home for wearing black armbands to protest the Vietnam War because the armbands were pure speech and not disruptive conduct). The Eighth Circuit felt that *Tinker*’s framework should be applied rather than *Morse*. See *infra* notes 84–86 and accompanying text.

<sup>81</sup> *B.W.A.*, 554 F.3d at 739, 741.

on the flag was reasonably related to a substantial disruption, *did not amount to viewpoint discrimination*, and did not violate the First Amendment.<sup>82</sup>

Perhaps the Court meant to say that the ban was not *impermissible* viewpoint discrimination, but instead conflated a constitutional ban with necessarily being viewpoint-neutral. Several other circuits have followed suit, finding that a prohibition on the display—on clothing or otherwise—of the Confederate flag in schools does not violate the First Amendment.<sup>83</sup> Thus, it is more likely that the refusal to permit a display of the Confederate flag is viewpoint discrimination. However, this error—clerical or legal—reflects the strong hesitation from writing an opinion that specifically finds viewpoint discrimination to be permissible.

In *Morse v. Frederick*, the Court did not apply *Tinker* and upheld a sort of viewpoint discrimination in the school setting, finding that a suspension of a student for carrying a banner emblazoned with the phrase “BONG HiTS 4 JESUS” to school did not violate his First Amendment rights.<sup>84</sup> The conservative Justices were in the majority, maintaining that the principal was within her rights as a school administrator because she reasonably believed the student’s banner promoted illegal drug use.<sup>85</sup> Even the dissent, composed of Justices Stevens, Souter and Ginsburg, conceded that “it might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting”—though arguing it was impermissible in this case.<sup>86</sup>

This is not to say that viewpoint discrimination is always permissible in schools, nor that there is unanimity over finding a speech regulation is viewpoint-based. For example, in *Christian Legal Society v. Martinez*, a five-Justice majority held that a public law school’s refusal to recognize a religious-based student organization because it did not maintain open eligibility membership was reasonable and viewpoint-neutral.<sup>87</sup> In dissent, the conservative end of the Court argued that the policy—even though coined “non-discriminatory”—amounted to viewpoint discrimination, and that “we have never taken the view that a little viewpoint discrimination is acceptable.”<sup>88</sup>

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<sup>82</sup> *Id.* at 740–41 (emphasis added).

<sup>83</sup> *See, e.g.*, *Hardwick v. Heyward*, 711 F.3d 426, 440 (4th Cir. 2013) (banning clothing with a Confederate flag in school was constitutional); *Defoe v. Spiva*, 625 F.3d 324, 335–36 (6th Cir. 2010) (finding Confederate flag displays would be a substantial disruption pursuant to *Tinker*); *McAllum v. Cash*, 585 F.3d 214, 222–24 (5th Cir. 2009) (concluding that a school ban on any display of the Confederate flag did not violate free speech rights).

<sup>84</sup> 551 U.S. 393, 397, 408–10 (2007).

<sup>85</sup> *Id.* at 397, 409–10.

<sup>86</sup> *Id.* at 439–40 (Stevens, J., dissenting).

<sup>87</sup> 561 U.S. 661, 669 (2010).

<sup>88</sup> *Id.* at 717–18 (Alito, J., dissenting).

## 2. *Unprotected Speech*

Despite the holding in *R.A.V.*, several Justices recognize that states should be able to regulate speech, even if in a viewpoint-based manner, that is wholly unprotected by the First Amendment. In Justice White’s concurrence in *R.A.V.*, joined by Justices Blackmun, O’Connor, and Stevens, he did not refute the finding that the regulation was content-based (or even viewpoint-based), but that the government should be free to regulate this sort of expression deemed historically proscribable.<sup>89</sup> White reasoned that if the state could ban all fighting words, it should be able to ban a subset of them “without creating the danger of driving viewpoints from the marketplace.”<sup>90</sup>

Even Scalia’s majority opinion in *R.A.V.* recognized exceptions to the principle that viewpoint-based regulations are impermissible. First, if the “basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists.”<sup>91</sup> Second, if “the subclass happens to be associated with particular ‘secondary effects’ of the speech, so that the regulation is ‘justified without reference to the content of the . . . speech.’”<sup>92</sup> Third and finally, a statute does not need to be neutral “so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot.”<sup>93</sup>

## 3. *Non-Coercive Government Subsidies and Speech*

The Court has permitted a form of viewpoint discrimination if the government is the one doing the talking. This has been recognized in the subsidy context as well as when the state action constitutes “government speech” that does not coerce private speakers into espousing a certain view.<sup>94</sup>

<sup>89</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 399–400 (1992) (White, J., concurring).

<sup>90</sup> *Id.* at 401. White also argued that the content-based ordinance would survive strict scrutiny even if it was applied. *Id.* at 403–04.

<sup>91</sup> *Id.* at 388. The Third Circuit also upheld a statute that fit into this category of permissible content-based regulations identified in *R.A.V.* See *King v. Governor of N.J.*, 767 F.3d 216, 237 (3d Cir. 2014) (“[T]he reason professional speech receives diminished protection under the First Amendment—*i.e.*, because of the State’s longstanding authority to protect its citizens from ineffective or harmful professional practices—is precisely the reason New Jersey targeted [sexual orientation change efforts] counseling . . . .”); see also *Doe v. Governor of N.J.*, 783 F.3d 150, 151 (3d Cir. 2015) (following *King* that the same statute did not violate a minor’s right to receive information).

<sup>92</sup> *R.A.V.*, 505 U.S. at 389 (emphasis omitted) (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986)). The Fifth Circuit, quoting the categorical exceptions outlined by Scalia in *R.A.V.*, upheld a state statute prohibiting so-called “animal crush videos” because the statute “regulates a content-defined subclass based on its secondary effects and is justified without reference to the content of the speech.” *United States v. Richards*, 755 F.3d 269, 277 (5th Cir. 2014).

<sup>93</sup> *R.A.V.*, 505 U.S. at 390.

<sup>94</sup> See, e.g., *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245–46 (2015) (holding that the government’s decision to refuse to approve a license plate design featuring the Confederate flag was not unconditional because the license plates constituted government speech

For example, in *National Endowment for the Arts v. Finley*, the Court upheld the NEA's "decency and respect" standard for awarding public funding, reasoning that such criteria did not "silence speakers by expressly 'threaten[ing] censorship of ideas.'"<sup>95</sup> While never does the Court say that yes, this is viewpoint discrimination and yes, this is permissible, it finds constitutional the government's decision to "merely [choose] to fund one activity to the exclusion of the other."<sup>96</sup> Scalia, in a concurring opinion, states emphatically that the NEA standard by its terms establishes viewpoint-based criteria, which is "perfectly" constitutional: "None of this has anything to do with abridging anyone's speech. . . . [T]he difference between me and the Court is that I regard the distinction between 'abridging' speech and funding it as a fundamental divide, on this side of which the First Amendment is inapplicable."<sup>97</sup>

Like subsidies, government speech may permissibly prefer certain views to the exclusion of others. This may include government speech that contains elements of private speech. While discussed in greater detail in Subpart III.A, *Walker v. Sons of Confederate Veterans* demonstrates this notion, where the Court upheld a decision by the Texas Department of Motor Vehicles Board to reject a specialty license plate bearing the Confederate flag because it was government speech.<sup>98</sup> The Fifth Circuit had reversed the district court's ruling for the board and argued that the plate designs were private speech; thus the board's refusal to approve their design was "constitutionally forbidden viewpoint discrimination."<sup>99</sup> The majority of the Court found otherwise, determining that the plates did not constitute any sort of forum, and was rather government speech because the message conveyed suggested it was done so on behalf of the state.<sup>100</sup> And when the government speaks as a general matter, Justice Breyer wrote, "[I]t is not barred by the Free Speech Clause from determining the content of what it

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and the government is not constrained by the First Amendment in what it chooses to say unless it seeks to "compel private persons to convey the government's speech"; *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (holding that the government did not violate the plaintiffs' First Amendment rights in prohibiting Title X funding for family planning programs to be used in programs that promote abortion, stating that the government does not unconstitutionally discriminate "on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals").

<sup>95</sup> 524 U.S. 569, 582–83 (1998) (alteration in original) (quoting *R.A.V.*, 505 U.S. at 393).

<sup>96</sup> *Id.* at 588 (quoting *Rust*, 500 U.S. at 193) (internal quotation marks omitted).

<sup>97</sup> *Id.* at 590, 598–99 (Scalia, J., concurring).

<sup>98</sup> 135 S. Ct. 2239, 2253 (2015).

<sup>99</sup> *Id.* at 2245.

<sup>100</sup> *Id.* at 2246, 2248, 2250. The majority reached this conclusion by analyzing the factors laid out in *Sumnum* for determining whether the specialty license plates constitute government speech: history of how the speech is communicated, whether they are "closely identified in the public mind with the [State]," and the control exercised by the government. *Id.* at 2246–48, 2250 (alteration in original) (internal quotation marks omitted) (quoting *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 472 (2009)).



says” or to take a position, so long as it does not attempt to compel private individuals to express such speech.<sup>101</sup> Further, Breyer recognized:

Our determination that Texas’s specialty license plate designs are government speech does not mean that the designs do not also implicate the free speech rights of private persons. We have acknowledged that drivers who display a State’s selected license plate designs convey the messages communicated through those designs. And we have recognized that the First Amendment stringently limits a State’s authority to compel a private party to express a view with which the private party disagrees. But here, compelled private speech is not at issue. And just as Texas cannot require SCV to convey ‘the State’s ideological message,’ SCV cannot force Texas to include a Confederate battle flag on its specialty license plates.<sup>102</sup>

Breyer’s distinction here rests upon the right of Texas to refuse to be associated with a message containing the Confederate flag. While necessarily exercising discretion to refuse the design because of the view it expressed, this form of government speech, according to the majority’s interpretation, simply cannot be held to a viewpoint-neutral forum analysis.

#### 4. *Other Plausible Exceptions to the Viewpoint Neutrality Principle*

While the Court has not established another discrete area in which viewpoint discrimination may be permissible, there are certain possibilities where a viewpoint-based regulation could conceivably survive constitutional challenge. There may be interests compelling enough to survive such an analysis. First, a valid Establishment Clause claim could plausibly be one such example, but the Court has not addressed this possibility.<sup>103</sup> Second, a more amorphous balancing with national security concerns, where the state interests are so high as to outweigh First Amendment rights, is conceivably an area where the Court would permit viewpoint discrimination.<sup>104</sup> This has not been supported by the case law, but it is important to acknowledge the possibility of views being restricted in the name of national security. A third area is viewpoint-based regulations of commercial speech. The Court has yet to clearly articulate whether a viewpoint-based regulation on commercial

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<sup>101</sup> *Id.* at 2245–46.

<sup>102</sup> *Id.* at 2252–53 (citations omitted).

<sup>103</sup> See *Little Pencil, LLC v. Lubbock Indep. Sch. Dist.*, No. 5:14-CV-014-C, 2014 WL 11531267, at \*10 (N.D. Tex. May 29, 2014) (finding that restricting a for-profit entity from advancing its religious message on school property differs from facility-use and flyer-distribution cases in which the Supreme Court found restrictions on religious messages to be impermissible, though the question was left unsettled by the Supreme Court as to whether an alleged “Establishment Clause violation can justify viewpoint discrimination” (quoting *Child Evangelism Fellowship of N.J. Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 530 (3d Cir. 2004))).

<sup>104</sup> See, e.g., *Def. Distributed v. U.S. Dep’t of State*, 838 F.3d 451, 458 (5th Cir. 2016) (“Ordinarily, of course, the protection of constitutional rights *would* be the highest public interest at issue in a case. That is not necessarily true here, however, because the State Department has asserted a very strong public interest in national defense and national security.”).

speech may be subject to strict (or higher) scrutiny, or may fall within the “relaxed scrutiny” of *Central Hudson*.<sup>105</sup> *Sorrell* left open the possibility—to the detriment of First Amendment litigants in lower courts—that a viewpoint-based regulation of commercial speech may be constitutional so long as it survives *Central Hudson*,<sup>106</sup> even if it would not survive strict scrutiny.

It seems that direct recognition of viewpoint discrimination in any forum against protected speech—perhaps save commercial speech—will trigger an extreme form of strict scrutiny that is commonly fatal in fact. Arguably, there is no such thing as permissible viewpoint discrimination of protected speech in a forum.<sup>107</sup> In considering how lower courts are interpreting this ambiguity, and consequently shaping the doctrine for litigants, Subpart III focuses on two key areas of concern: 1) taking the regulation outside of the forum analysis; and 2) expanding (or deferring to) government discretion in limited public and nonpublic forums.

### III. VIEWPOINT DISCRIMINATION AT THE COURTS OF APPEALS

Because of the trepidation to employ the term “viewpoint discrimination” in any favorable opinion to the government, federal courts are hesitant to find any viewpoint-based regulation constitutional. But that is not to say it never happens. Further, a survey of federal appellate decisions since 2014 begs the question if determinations of viewpoint neutrality are properly conducted for seemingly constitutional, content-based speech regulations. Table 1 highlights the relevant cases decided by the federal courts of appeals since 2014 that addressed questions of viewpoint discrimination. This search recovered over 200 cases, which were then scrubbed to review only First Amendment claims—since many equal protection and other discrimination claims were included in the results. The “Other” column includes cases that were decided on the merits but where the regulation was not content-based at all, as well as cases without final judgments: this includes, but is not limited to, reversals of dismissals, remanding for reconsideration of the viewpoint discrimination

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<sup>105</sup> *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017). *Compare id.* at 1764 (noting that “[the Court] need not resolve this debate” whether a trademark constitutes commercial speech because the viewpoint-based provision at issue in the Lanham Act failed *Central Hudson* scrutiny regardless), *with id.* at 1769 (Thomas, J., concurring) (“I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as ‘commercial.’” (internal quotation marks omitted) (citation omitted)), *and id.* at 1767 (Kennedy, J., concurring) (“To the extent trademarks qualify as commercial speech, they are an example of why that term or category does not serve as a blanket exemption from the First Amendment’s requirement of viewpoint neutrality.”). More attention is given to the opinions in *Matal* later in this Comment. *See infra* Subpart IV.B.

<sup>106</sup> *See supra* notes 64–66.

<sup>107</sup> *See, e.g., Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1050 n.1 (6th Cir. 2015) (“Viewpoint-based restrictions on citizens engaging in such [political] speech on public or private land would be per se invalid.”).

claim, or upholding or denying a qualified immunity defense. Table 1 also does not account for any cases that were overturned by the Supreme Court.

TABLE 1  
DECISIONS BY FEDERAL COURTS OF APPEALS  
INVOLVING VIEWPOINT DISCRIMINATION, 2014–2017<sup>108</sup>

Circuit	Upheld State Action			Invalidated State Action		
	Viewpoint-based	Content-based but Viewpoint Neutral	Other	Viewpoint-based	Content-based but Viewpoint Neutral	Other
11th	1 <sup>109</sup>	3		1	2	1
10th					2	
9th		8	1			3
8th		4		1	1	
7th		1			1	1
6th		1	2	1	2	2
5th	2 <sup>110</sup>	2	3	1	1	1
4th	1 <sup>111</sup>			1		
3rd		2	2		1	
2nd		2				
1st		1				
D.C.		1	2			2
Federal		1		2		
Total	4	26	10	7	10	10

Based on the cases, it is exceedingly rare that a federal court will uphold a regulation that is deemed to be viewpoint-based—which is in line with Supreme Court precedent. Courts most often uphold state action against a First Amendment challenge by determining it is content-based but viewpoint-neutral. This frequently occurs in nonpublic or limited public forums. Thus, it is important to review in more detail how courts come to such conclusions by taking a few example cases, analyzed in Subpart III.B.

<sup>108</sup> This search was conducted by gathering all cases heard from 2014 to 2017 in Westlaw with the following search key: “viewpoint discriminat!” OR (viewpoint /s discriminat!).

<sup>109</sup> See *Mech v. School Bd. of Palm Beach Cty.*, 806 F.3d 1070 (11th Cir. 2015) (upholding as viewpoint-based state action that constituted government speech).

<sup>110</sup> See *Machete Prods. v. Page*, 809 F.3d 281 (5th Cir. 2015) (rejecting First Amendment challenge to selective government funding to incentivize productions of films in Texas); *United States v. Richards*, 755 F.3d 269 (5th Cir. 2014) (upholding animal crushing statute because it only covered unprotected form of obscenity).

<sup>111</sup> See *ACLU of N.C. v. Tennyson*, 815 F.3d 183 (4th Cir. 2016) (upholding specialty license plate program as government speech).

Viewpoint-neutral determinations, without a thorough analysis or consideration for how they could be applied, may create more opportunities for government discretion, and viewpoint discrimination to occur in practice. In addition to questions regarding viewpoint neutrality findings, the impact of *Walker's* holding may give rise to further concerns that viewpoint discrimination is permissible if an expression is mixed with government speech and not in a forum, as discussed presently.

#### A. *Impact of Forum-Shifting*

As discussed in Subpart II.B, there are rare circumstances in which the Court has both recognized viewpoint discrimination in a regulation, and still upheld it. Yet, there continues to be disagreement in the federal judiciary across the country as to how to evaluate each step: finding that a regulation differentiates based on viewpoint (rather than content), and then analyzing its constitutionality. In particular, the federal courts of appeals have seen after *Walker* how taking a First Amendment claim outside of the forum analysis effectively releases viewpoint discrimination from consideration.

A deeper dive into *Walker* illustrates the impact of what happens when First Amendment considerations involving mixed private-government speech are taken outside of a forum. Additionally, consideration for how the federal courts of appeals hearing specialty license plate cases decided before and after *Walker* reflect the discord across the judiciary on what is viewpoint discrimination and when it may be permissible.

##### 1. *Walker Whiplash*

As previously noted, the Court in *Walker* held that the Texas DMV could refuse to approve specialty license plate designs because the plates amounted to government speech, despite mixed elements of private speech.<sup>112</sup> Because of such a determination, the majority reasoned that viewpoint discrimination was appropriate because there was no forum at issue, and no compulsion of private speakers to espouse a particular view.

Four Justices felt quite differently, vehemently declaring the majority's understanding of the expression as government speech to be "a large and painful bite [taken] out of the First Amendment."<sup>113</sup> Chief Justice Roberts and Justices Scalia and Kennedy joined the dissent written by Justice Alito, who argued the specialty license plates should be categorized as private speech in a limited public forum.<sup>114</sup> Certainly, in considering the factors in *Summum*, the dissent found elements of government speech within the plates,

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<sup>112</sup> *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.* 135 S. Ct. 2239, 2252–53 (2015).

<sup>113</sup> *Id.* at 2255 (Alito, J., dissenting).

<sup>114</sup> *Id.* at 2262.

but they were “essentially commissioned by private entities” and expressed a “message chosen by those entities,” which equated them more to private speech.<sup>115</sup> The design scheme was fairly newly established, in order to obtain revenue (each cost more than \$8,000), and Alito felt it was a slippery slope to consider such speech governmental, freeing it from most First Amendment restraints.<sup>116</sup> To push his point forward, Alito analogized:

It is essential that government be able to express its own viewpoint, the Court reminds us, because otherwise, how would it promote its programs, like recycling and vaccinations? So when Texas issues a “Rather Be Golfing” plate, but not a “Rather Be Playing Tennis” or “Rather Be Bowling” plate, it is furthering a state policy to promote golf but not tennis or bowling. And when Texas allows motorists to obtain a Notre Dame license plate but not a University of Southern California plate, it is taking sides in that long-time rivalry.<sup>117</sup>

The dissent felt this form of “pure viewpoint discrimination” clearly violated the First Amendment when applied to private speech.<sup>118</sup> Although Alito did not explicitly contemplate that such a form of viewpoint discrimination is per se unconstitutional, he did not conduct a strict scrutiny analysis.<sup>119</sup>

As the Justices clashed over each facet of the viewpoint discrimination analysis, the circuit courts before and after *Walker* also struggled with evaluating similar claims, and whether license plates constituted a “forum” within First Amendment analysis. Two members of the Fifth Circuit, hearing the *Walker* case before certiorari was granted, had utilized similar reasoning to the *Walker* dissent when they held the refusal of the Confederate flag design was unconstitutional viewpoint discrimination of private speech.<sup>120</sup> In reaching its conclusion, the court noted that they were not alone in reaching such a result: “In fact, the majority of the other circuits to consider this question have held that the state engaged in viewpoint discrimination when it denied a specialty license plate based on the speaker’s message.”<sup>121</sup> This support assumes, without qualifying in this context, that viewpoint discrimination is patently unconstitutional. The lone dissenter, Judge Jerry Smith, did not disagree that it was viewpoint discrimination, but felt the refusal was shielded

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<sup>115</sup> *Id.* at 2260.

<sup>116</sup> *See id.* at 2255–56 (“While all license plates unquestionably contain *some* government speech . . . Texas has converted the remaining space on its specialty plates into little mobile billboards on which motorists can display their own messages. And what Texas did here was to reject one of the [private] messages . . . because the State thought that many of its citizens would find the message offensive. That is blatant viewpoint discrimination.”).

<sup>117</sup> *Id.* at 2255 (citation omitted).

<sup>118</sup> *Id.* at 2262.

<sup>119</sup> *See id.* at 2263 (“This rationale [that the plate would distract drivers] cannot withstand strict scrutiny.”).

<sup>120</sup> *Tex. Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, 759 F.3d 388, 397–98 (5th Cir. 2014). Vandergriff was the Chairman of the Texas Board of the Department of Motor Vehicles at the time.

<sup>121</sup> *Id.* at 400.

by the government speech doctrine—as the *Walker* majority ultimately concluded.<sup>122</sup> Further, he found the comparison to other circuits unpersuasive, as they were all decided before *Sumnum*, except for one.<sup>123</sup>

In between the Fifth Circuit’s initial decision and the *Walker* opinion, the Second Circuit heard its own specialty license plate design dispute in *Children First Foundation, Inc. v. Fiala*.<sup>124</sup> In an opinion later vacated and remanded, then dismissed by the plaintiff after *Walker*, the majority of the Second Circuit panel found that the program was private speech in a nonpublic forum, and not government speech outside the forum context.<sup>125</sup> Similar to the *Walker* dissent, the court applied the *Sumnum* factors and had “little difficulty” concluding it was private speech, but that the plates were still government property, creating a nonpublic forum.<sup>126</sup> However, it argued the denial of a “Choose Life” license plate was done in a viewpoint-neutral manner because the program’s policy was to completely exclude “controversial political and social issues—regardless of the viewpoint espoused.”<sup>127</sup> Judge Livingston dissented, finding that the program led to unbridled discretion for the State, “thereby inviting viewpoint discrimination.”<sup>128</sup> Thus, the Second Circuit upheld the program, similar to the Supreme Court in *Walker*, but for completely different reasons. They disagreed on the category of the speech—private versus government—and disagreed about whether viewpoint discrimination was at play.

Given that the *Walker* majority effectively removed this form of speech outside the protection of the First Amendment<sup>129</sup> by declaring it government speech, other circuits followed suit. Indeed, the fears articulated in the *Walker* dissent, coupled with concerns expressed by both opinions in *Children First Foundation*, may have been realized in the discretion afforded to North Carolina’s specialty license plate program by the Fourth Circuit. In *ACLU of North Carolina v. Tata*, the Fourth Circuit had ruled in favor of a plaintiff who argued that North Carolina’s refusal to grant their pro-choice plate design

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<sup>122</sup> *Id.* at 401 (Smith, J., dissenting).

<sup>123</sup> *Id.* at 403–04.

<sup>124</sup> *Children First Found., Inc. v. Fiala*, 790 F.3d 328, 334 (2d Cir. 2015), *vacated*, 611 F. App’x 741 (2d Cir. 2015).

<sup>125</sup> *Id.* Interestingly, the Second Circuit felt that the Supreme Court “has not yet articulated a test to distinguish government speech from private speech,” even though this was decided after *Sumnum*. *Id.* at 338. It appears the Court was waiting for *Walker* to confirm that was the proper analysis.

<sup>126</sup> *Id.* at 338, 340–42.

<sup>127</sup> *Id.* at 346.

<sup>128</sup> *Id.* at 353–54 (Livingston, J., dissenting).

<sup>129</sup> Technically, this speech is still protected by the First Amendment because government speech cannot compel private speakers to espouse a certain view, but other protections seen in forum analysis or other forms of private speech are removed. *See Walker v. Tex. Div., Sons of Confederate Veterans, Inc.* 135 S. Ct. 2239, 2246 (2015) (“That is not to say that a government’s ability to express itself is without restriction. . . . [T]he Free Speech Clause itself may constrain the government’s speech if, for example, the government seeks to compel private persons to convey the government’s speech.”).

while approving a pro-life design violated the First Amendment.<sup>130</sup> The state's petition for writ of certiorari was granted, and the Supreme Court vacated and remanded following its decision in *Walker*.<sup>131</sup> After applying the Court's reasoning there, the Fourth Circuit then reversed its earlier decision and held that the specialty license plate program was government speech; therefore the state had the right to refuse (or accept) designs conveying certain messages.<sup>132</sup>

As is the trend with viewpoint-based claims, not everyone hearing the case agreed, with Judge Wynn attempting to distinguish the circumstances in North Carolina from those in *Walker*. In dissent, he argued that the *Walker* holding should be understood narrowly, and that the speech expressed in specialty license plates is not "pure government speech," which would impact the scrutiny applied and keep it in some sort of forum.<sup>133</sup> Further, Wynn reasoned that the plate "presents mixed speech—with private speech components that prohibit viewpoint discrimination. . . . [by] allowing a 'Choose Life' specialty plate while repeatedly rejecting a 'Respect Choice' plate, North Carolina violated the First Amendment."<sup>134</sup> A critical distinction from *Walker* was North Carolina's acceptance of one view—"Choose Life"—and the rejection of the opposing view—"Respect Choice." Such state action involving mixed speech was, to Judge Wynn, "viewpoint discrimination in violation of the First Amendment."<sup>135</sup> But this argument failed to convince a majority in the Fourth Circuit to strike down the program. Perhaps then, *Walker*'s reasoning could threaten other mixed but seemingly private messages, such as those at schools,<sup>136</sup> or even public advertising.

After *Walker*, by declaring an expression to constitute government speech, no further analysis beyond compulsion is required to comport with the First Amendment. Indeed, every Supreme Court Justice (seemingly), the Fifth and Fourth Circuits, and Judge Livingston on the Second Circuit agreed that refusing a license plate design was in fact viewpoint discrimination. As Justice Alito flatly stated: "Whatever it means to motorists who display that symbol

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<sup>130</sup> 742 F.3d 563, 566 (4th Cir. 2014).

<sup>131</sup> *Berger v. ACLU of N.C.*, 135 S. Ct. 2886, 2886 (2015).

<sup>132</sup> *ACLU of N.C. v. Tennyson*, 815 F.3d 183, 185 (4th Cir. 2016).

<sup>133</sup> *Id.* at 185–86 (Wynn, J., dissenting).

<sup>134</sup> *Id.* at 186. This selective decision-making of refusal and acceptance seemed to be under consideration in *Fiala* in the Second Circuit. See *Children First Found., Inc. v. Fiala*, 790 F.3d 328, 346 (2d Cir. 2015) ("It is not our place to evaluate and weigh the various hot button issues of our time against one another, assigning to each a specific place in the landscape of public debate in this country.").

<sup>135</sup> *Tennyson*, 815 F.3d at 187 (Wynn, J. dissenting).

<sup>136</sup> See *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2256 (2015) (Alito, J., dissenting). ("What if a state college or university did the same thing with a similar billboard or a campus bulletin board or dorm list serve? What if it allowed private messages that are consistent with prevailing views on campus but banned those that disturbed some students or faculty? Can there be any doubt that these examples of viewpoint discrimination would violate the First Amendment? I hope not, but the future uses of today's precedent remain to be seen.").

and to those who see it, the [Confederate] flag expresses a viewpoint.”<sup>137</sup> Permissible viewpoint discrimination may be extended to apply to more mixed-speech if the Court finds no analysis is necessary so long as government speech is at issue and there is no compulsion of private speech.

## 2. *Foreshadowing Forum Shifts Elsewhere*

The worry with the *Walker* Court’s decision to cabin a viewpoint-based regulation from heightened scrutiny so long as it constitutes government speech, is largely that it is unclear how far this principle can be applied to mixed private-government speech.<sup>138</sup> Ironically, in *Mech v. School Board of Palm Beach County*, the Eleventh Circuit quoted Alito’s dissent when it found government speech was at issue, noting: “Because characterizing speech as government speech ‘strips it of all First Amendment protection’ under the Free Speech Clause, we do not do so lightly.”<sup>139</sup> In *Mech*, a school board’s decision to remove tutoring business signs from its school fences was held to be constitutional because it was government speech.<sup>140</sup> Unlike in the specialty license plate line of cases discussed previously, the signs were not controversial on their face, advertising for “The Happy/Fun Math Tutor” organization.<sup>141</sup> However, the tutor was a retired pornographic film star, performing in hundreds of films and who still owned a production company that formerly produced pornographic material.<sup>142</sup> Finding that the advertising banners were technically endorsed by the school under the terms of school policy, the Court sided with the State that this was government speech, and therefore the schools were free to remove signs with which they disagreed.<sup>143</sup> While the Court never flatly stated that the ban was viewpoint discrimination, it argued that for government speech, the state is free to select the views it wants to express.<sup>144</sup> Thus, determining that the banners were government speech was wholly dispositive of the First Amendment claim at issue, and no further viewpoint discrimination analysis was required.

Airports may be another area of mixed private speech and state regulation that could cause headaches to courts trying to decipher the viewpoint neutrality mandate. In *NAACP v. City of Philadelphia*, the Third Circuit found the city’s ban on noncommercial content in airport advertising

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<sup>137</sup> *Id.* at 2262.

<sup>138</sup> See *Mech v. Sch. Bd. of Palm Beach Cty.*, 806 F.3d 1070, 1074 (11th Cir. 2015) (“The Supreme Court has not articulated a precise test for separating government speech from private speech . . .”).

<sup>139</sup> *Id.* (citation omitted).

<sup>140</sup> *Id.* at 1075.

<sup>141</sup> *Id.* at 1072–73.

<sup>142</sup> *Id.* at 1072.

<sup>143</sup> *Id.* at 1075.

<sup>144</sup> *Id.* at 1074.



space to be unreasonable within the limited public forum context, and therefore unconstitutional.<sup>145</sup> In its brief before the appeal was litigated, the NAACP argued that the Third Circuit could rule in its favor just because the statute was not viewpoint-neutral: “On its face, the Policy allows the City to display ads expressing the City’s views on any and all topics, even on potentially controversial social issues—and the City has in fact displayed such ads—while prohibiting organizations with contrary views from displaying their own ads.”<sup>146</sup> However, because it could rule on unreasonableness, the court forewent any viewpoint discrimination analysis because it was unnecessary, while still acknowledging the intent behind the statute might have been viewpoint-discriminatory.<sup>147</sup>

In dissent, Judge Hardiman felt that the ban was a reasonable attempt to “avoid controversy” at the airport—a vague rationale that seemed to cut against the free flow of ideas.<sup>148</sup> Hardiman also, seemingly begrudgingly, attempted to follow *Walker* and applied it to the State’s ability to regulate its airport advertising space. Specifically, he wrote:

In addition, with the power to express noncommercial positions and exclude those to the contrary, the City could create an environment in which passersby are led to believe that the City’s positions are uncontested. . . . This illusion of consensus, which uniquely threatens the marketplace of ideas, is similar to the concern Justice Alito warned of in his dissent in *Walker*. In response to that concern, the Court has instructed that when the government speaks, “it is not barred by the Free Speech Clause from determining the content of what it says” . . . . Based on that directive, I must conclude that the Policy does not implicate viewpoint discrimination concerns that would plainly exist if private speech were at issue.<sup>149</sup>

The City utilized a similar line of argument in its reply brief, where it argued that permitting government speech and not private speech should not constitute viewpoint discrimination after *Walker* and *Reed*. Specifically, “in the Airport advertising space forum—where we rigorously prohibit private noncommercial speech—we have no obligation to allow Plaintiff to speak, even if we have the opportunity to speak ourselves.”<sup>150</sup> Ultimately, perhaps to avoid controversial consideration of viewpoint neutrality, the Third Circuit avoided these arguments, and only Hardiman supported the reasoning expressed in the City’s brief that *Walker* should apply to this sort of regulation in such a forum.

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<sup>145</sup> 834 F.3d 435, 448–49 (3d Cir. 2016).

<sup>146</sup> Brief for Appellee at 23, *NAACP v. City of Philadelphia*, 834 F.3d 435 (3d Cir. 2016) (No. 15-1002).

<sup>147</sup> *NAACP*, 834 F.3d at 449 n.7.

<sup>148</sup> *Id.* at 449 (Hardiman, J., dissenting).

<sup>149</sup> *Id.* at 457.

<sup>150</sup> Reply Brief for Appellant at 16, *NAACP v. City of Philadelphia*, 834 F.3d 435 (3d Cir. 2016) (No. 15-1002).

While this was a single dissenting judge positing that *Walker* could be extended in this manner, it reflects ambiguity over the extent of the government speech rationale, and the absence of an articulated approach to managing viewpoint discrimination concerns. At minimum, it suggests that a more precise standard for analyzing viewpoint-based regulations involving mixed government speech should be provided.

*B. Government Discretion in Limited Public or Nonpublic Forums*

While *Walker*'s government speech directive may not have spread to other forums such as airports yet, judges continue to disagree about what constitutes viewpoint discrimination, the type of speech, or the forum at issue. Even if a speech regulation applies to a nonpublic or limited, designated, or traditional public forum, the impact of subjectivity and discretion may permit otherwise-impermissible viewpoint discrimination to trickle into state action. Indeed, even facially viewpoint-neutral statutes "do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech."<sup>151</sup>

Public agencies exercise extensive discretion, for example, in approving advertising in public spaces, like airports or buses. Not all circuits analyze speech regulations over public advertising in the same manner, or treat them as the same forum. For example, the Ninth Circuit analyzes regulations of local bus advertising as a nonpublic forum while others view them as designated public forums.<sup>152</sup> In *Seattle Mideast Awareness Campaign v. King County* ("*SeaMAC*") the Ninth Circuit found that the county bus advertising system was a constitutionally content-based, but viewpoint-neutral means of regulating speech in the forum.<sup>153</sup> Metro had approved an ad by SeaMAC, a non-profit organization opposed to U.S. support for Israel, that displayed messages such as "Israel's War Crimes: Your Tax Dollars at Work."<sup>154</sup> After extensive media coverage (but before the ads ran), pro-Israel groups submitted bus ads to Metro that displayed messages such as "Support Israel, Defeat Islamic Jihad."<sup>155</sup> The county withdrew approval of the SeaMAC ad and rejected the pro-Israel ads, then revised its policy to exclude any political or ideological advertising.<sup>156</sup> The

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<sup>151</sup> *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2229 (2015).

<sup>152</sup> *See Seattle Mideast Awareness Campaign v. King Cty.*, 781 F.3d 489, 498–99 (9th Cir. 2015) ("We recognize that other courts have held that similar transit advertising programs constitute designated public forums. Some of those courts, in our view, mistakenly concluded that if the government opens a forum and is willing to accept political speech, it has necessarily signaled an intent to create a designated public forum."). Dissenting in *SeaMAC*, Judge Christen argued that the bus was a designated public forum, and should be remanded for a proper strict scrutiny analysis. *Id.* at 503 (Christen, J., dissenting).

<sup>153</sup> *Id.* at 501–03.

<sup>154</sup> *Id.* at 494–95.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 495.

Ninth Circuit seemed satisfied that the regulation was constitutional where county discretion was applied in a viewpoint-neutral manner.<sup>157</sup>

The First Circuit, faced with a similar legal question about its bus advertising program and ads regarding the Israeli-Palestinian conflict, came to an analogous conclusion as the Ninth Circuit did in *SeaMAC*—that this was a nonpublic forum and that the discretionary policy was exercised without discriminating by viewpoint.<sup>158</sup> In *American Freedom Defense Initiative v. Massachusetts Bay Transport Authority* (“*MBTA*”), the MBTA had approved an ad depicting different maps of Israel and Palestine that demonstrated alleged Palestinian loss of land.<sup>159</sup> A pro-Israeli group submitted several ads in response, and its third version was rejected because the juxtaposition of the “civilized man” and “the savage” above a “Support Israel” caption contained demeaning information that disparaged individuals or groups according to the MBTA board.<sup>160</sup> The majority of the First Circuit found that the MBTA’s consideration of linguistic and grammatical distinctions in the advertisements and that it accepted some of the pro-Israel ads, reflected that the policy was viewpoint-neutral.<sup>161</sup> Thus, the subjective conclusions by the MBTA of what is “disparaging” and what is not were not found to be viewpoint-based.

Like in *SeaMAC*, there was a dissenter in *MBTA*, but unlike the dissenting judge in *SeaMAC*, Judge Stahl felt that the transit authority’s rejection of a pro-Israel ad was “neither viewpoint neutral nor reasonable.”<sup>162</sup> He pointed out that the pro-Palestine ad containing maps depicted a message that arguably demeaned and disparaged Israelis as people who caused a refugee crisis, violating the regulatory scheme, and that riders only had access to one viewpoint on the Israeli-Palestinian conflict.<sup>163</sup> Judge Stahl distinguished from *SeaMAC*, noting that the transit system policy there rejected all pending ads related to the political conflict, while “the MBTA’s incongruous decision to post the Committee for Peace ad, but reject AFDI’s submissions, at the very least, raises the specter of viewpoint discrimination by the MBTA.”<sup>164</sup>

Even though the MBTA was following protocol of language and grammar in its decisions, the power of discretion in selecting whether speech will be published can leave the door open for viewpoint discrimination. A case recently decided in federal district court in Washington, D.C., also

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<sup>157</sup> *Id.* at 501–03.

<sup>158</sup> *Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 781 F.3d 571, 581–84 (1st Cir. 2015).

<sup>159</sup> *Id.* at 574–75.

<sup>160</sup> *Id.* at 576–77; accord *Beauharnais v. Illinois*, 343 U.S. 250, 258–59 (1952) (upholding a state statute that criminalized the exhibit of any play or sketch portraying a class of citizens in a significantly negative light, reasoning that the state should have power to punish libel “directed at a defined group”).

<sup>161</sup> 781 F.3d at 584–87.

<sup>162</sup> *Id.* at 593 (Stahl, J., dissenting).

<sup>163</sup> *Id.* at 594.

<sup>164</sup> *Id.* at 595.

brought by the American Freedom Defense Initiative,<sup>165</sup> suggests how forum analysis and “viewpoint neutral” use of discretion could continue to disguise plausibly viewpoint-discriminatory actions in limited or nonpublic forums.

#### IV. *MATAL V. TAM*

The Court had an opportunity to provide the federal judiciary and the Bar with a more precise viewpoint neutrality mandate in its decision in *Matal v. Tam*.<sup>166</sup> Simon Tam, an Asian-American musician, claimed his First Amendment rights were violated through viewpoint discrimination after the Patent and Trademark Office (“PTO”) refused to register a trademark of his band’s name, “The Slants.”<sup>167</sup> Specifically, the PTO reasoned that the name, a derogatory term for individuals of Asian descent, may “disparage . . . or bring . . . into contemp[t] or disrepute” persons of Asian descent, violating the disparagement clause of the Lanham Act.<sup>168</sup> The PTO normally employs a two-part test to evaluate whether a trademark would be disparaging: first, consideration of the meaning of the trademark in question, and whether it refers to “identifiable persons, institutions, beliefs or national symbols,”<sup>169</sup> and second, whether such a meaning would be “disparaging to a substantial composite of the referenced group.”<sup>170</sup> Applying this test, the PTO rejected Tam’s trademark request because “a substantial composite of persons . . . find the term in the applied-for mark offensive.”<sup>171</sup> Tam appealed the denial to the PTO’s Trademark Trial and Appeal Board, where the panel affirmed the PTO’s original decision.<sup>172</sup> Then, Tam filed suit in federal court.

##### A. *Tam at the Federal Circuit*

The Court of Appeals for the Federal Circuit held that the government unconstitutionally denied a trademark registration because the trademark violated the disparagement provision of the Lanham Act.<sup>173</sup> The en banc majority found such a provision to amount to viewpoint discrimination of private speech—not government speech. To decide otherwise, they reasoned, “would transform every act of government registration into one of

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<sup>165</sup> See *Am. Freedom Def. Initiative v. WMATA*, 245 F. Supp. 3d 205, 211–13 (D.D.C. 2017) (finding public bus advertising space to constitute a nonpublic forum, and its decision to close the space to issue-oriented ads—even though it had “published issue-oriented ads in the past”—was viewpoint neutral). The decision was not appealed to the D.C. Circuit.

<sup>166</sup> 137 S. Ct. 1744 (2017).

<sup>167</sup> *Id.* at 1751.

<sup>168</sup> *Id.* (quoting 15 U.S.C. § 1052(a) (2012)).

<sup>169</sup> *Id.* at 1753 (quoting TMEP § 1203.03(b)(i) (8th ed. Apr. 2017)).

<sup>170</sup> *Id.* at 1754 (quoting TMEP § 1203.03(b)(i) (8th ed. Apr. 2017)).

<sup>171</sup> *Id.* (citation omitted).

<sup>172</sup> *Id.*

<sup>173</sup> *In re Tam*, 808 F.3d 1321, 1328 (Fed. Cir. 2016).

government speech and thus allow rampant viewpoint discrimination. When the government registers a trademark, it regulates private speech. It does not speak for itself.”<sup>174</sup> Because this was viewpoint discrimination, the court determined that strict scrutiny applied, but had no need to go through the analysis because the Government did not argue that the disparagement provision of the Act would satisfy strict scrutiny.<sup>175</sup>

The *Tam* circuit judges proffered widely different opinions, however, on the level of scrutiny, whether viewpoint discrimination was at issue, and whether, even if it did exist, it was that sort of viewpoint discrimination that was permissible. Judge Dyk, dissenting in part, argued that the trademark registration process was a subsidy, where viewpoint neutrality is not necessary, or at the very least that the Supreme Court has not declared it as such.<sup>176</sup> Assuming *arguendo* it was, Dyk reasoned that the Act’s disparagement provision was viewpoint-neutral because it looks “only to the views of the referenced group” when determining whether it is disparaging.<sup>177</sup> Judge Lourie, dissenting, felt that the First Amendment should not be implicated at all.<sup>178</sup> Even if it were, the registration program and disparagement provision were not viewpoint-discriminatory, similar to Dyk’s rationale.<sup>179</sup>

Finally, Judge Reyna, dissenting, argued that the regulation survived intermediate scrutiny under a commercial speech analysis.<sup>180</sup> Additionally, he went so far as to suggest that the law is content-neutral because “an apparently content-based law is nevertheless considered content-neutral if the government’s purpose is *not* to suppress speech, but to address the harmful secondary effects of that speech.”<sup>181</sup> Reyna relied on the secondary

<sup>174</sup> *Id.* at 1348. In the state university trademark context, the Eighth Circuit similarly found that denying a trademark request with evidence of viewpoint-discriminatory motive was an impermissible restriction on private speech, but in a limited public forum. *See Gerlich v. Leath*, 861 F.3d 697, 707 (8th Cir. 2017) (holding that university officials denying plaintiff’s request for a design with a cannabis leaf was impermissible viewpoint discrimination). In *Gerlich*, the State did not even bring forth an argument that the trademark program was narrowly tailored, suggesting that the Bar also struggles with understanding the force and contours of viewpoint neutrality requirements. *Id.* at 705–07.

<sup>175</sup> *In re Tam*, 808 F.3d at 1328, 1355–56. *But see id.* at 1364 (Dyk, J., concurring in part and dissenting in part) (“Ultimately, unlike the majority, I do not think that the government must support, or society tolerate, disparaging trademarks in the name of commercial speech.”).

<sup>176</sup> *Id.* at 1368 (Dyk, J., concurring in part and dissenting in part).

<sup>177</sup> *Id.* at 1371. He also argued that viewpoint discrimination only applies to whether the government disagrees with the view, not other individuals or groups. *Id.* at 1372. *But see Bell v. City of Winter Park*, 745 F.3d 1318, 1324–25 (11th Cir. 2014) (invalidating an ordinance that allowed a person residing in a dwelling unit to post “no loitering” signs, enforceable by city officers, because the private citizens had discretion to enforce in a viewpoint-discriminatory manner).

<sup>178</sup> *In re Tam*, 808 F.3d at 1374 (Lourie, J., dissenting).

<sup>179</sup> *See id.* at 1375–76 (“The government action does not include a judgment on the worthiness or the effectiveness of the mark; if it did, it might—but not necessarily—venture into viewpoint-discrimination territory.”).

<sup>180</sup> *Id.* at 1376 (Reyna, J., dissenting) (“[T]he refusal to register disparaging marks under § 2(a) of the Lanham Act is an appropriate regulation that directly advances the government’s substantial interest in the orderly flow of commerce.”).

<sup>181</sup> *Id.* at 1378 (citation omitted). Judge Reyna’s syntactical attempt to categorize the seemingly

effects doctrine to support this argument, and then turned to a sort of burden-balancing test to justify the suppression (“of particularly low-value speech”) at issue in the commercial context.<sup>182</sup>

*In re Tam* exemplifies the judicial discord in evaluating First Amendment claims implicating questions of viewpoint discrimination. Federal judges at the highest levels frequently disagree on what it really means to discriminate based on ideology and viewpoint, whether the motive behind an action requires the intent to suppress ideas, and when, if ever, such discrimination may be appropriate. Given that the Federal Circuit left all of these questions in contention—type of speech at issue, level of scrutiny, motives behind the regulation, state interest—it was critical for the Supreme Court to provide answers when it granted certiorari.<sup>183</sup>

### B. *Tam at the Supreme Court*

As much as a clear, articulable rule or standard for evaluating viewpoint-based regulations is desired, *Matal v. Tam* proved once again how critical viewpoint neutrality may be, but how challenging it is to fix its boundaries within our constitutional constellation. During oral arguments for *Tam*, Justice Kagan flatly stated that the disparagement clause of the Lanham Act was a “fairly classic case of viewpoint discrimination”<sup>184</sup>—but clarity on that conclusion, as well as sound reasoning to be replicated was needed in the Court’s opinion. *Why* was the rejection of *Tam*’s trademark so classically viewpoint discrimination?

A majority of the Justices agreed that the PTO’s decision was indeed viewpoint discrimination, but the consensus stopped there: Justice Alito announced the judgment of the Court and delivered the opinion of the Court with respect to certain parts of his opinion, with only Chief Justice Roberts and Justices Thomas and Breyer joining him for the entire opinion.<sup>185</sup> Alito began by noting that the PTO’s action offended a “bedrock” principle of the First Amendment: “Speech may not be banned on the ground that it expresses ideas that offend.”<sup>186</sup> After briefly outlining the history of trademarks and their protection at common law before such federal laws

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content-based regulation as “content-neutral,” rather than argue that the content-based regulation survives strict scrutiny, cuts at the core of the confusion in forum-shifting and speech-shifting.

<sup>182</sup> *Id.* at 1379–81.

<sup>183</sup> *Lee v. Tam*, 137 S. Ct. 30 (2016).

<sup>184</sup> Transcript of Oral Argument at 12–13, *Matal v. Tam*, 137 S. Ct. 1744 (2017) (No. 15-1293).

<sup>185</sup> *Tam*, 137 S. Ct. at 1751. Justice Gorsuch took no part in the consideration or decision of the case. All of the Justices who took part in the decision joined Part I, discussing facts and procedural history, and Part III-A, holding that federally registered trademarks were private, not government speech. All but Justice Thomas joined Part II of the opinion, rejecting *Tam*’s argument that Asians as a group were not “persons” within the meaning of the Lanham Act. Then Chief Justice Roberts and Justices Thomas and Breyer joined Justice Alito in Parts III-B, III-V, and IV.

<sup>186</sup> *Id.*

were enacted, Alito emphasized that regardless of their commercial history, trademarks extend “beyond phrases that do no more than identify a good or service,” and frequently include “phrases that convey a message.”<sup>187</sup>

The Court unanimously agreed that federally registered trademarks are private speech, rather than government speech.<sup>188</sup> And given the Justices’ unanimity here, it is fair to presume the Court has no intention of extending *Walker* and other government speech precedent. Indeed, the Court directly distinguished registered trademarks from the specialty license plates at issue in *Walker* as well as the public park monuments at issue in *Sumnum*.<sup>189</sup> Further, while Alito acknowledged the importance of the government speech doctrine in order for the government to function by expressing certain views, he also emphasized how it was a doctrine “susceptible to dangerous misuse.”<sup>190</sup> Applying similar reasoning from his dissenting opinion in *Walker*, Alito wrote:

The Federal Government does not dream up these marks, and it does not edit marks submitted for registration. . . .

In light of all this, it is far-fetched to suggest that the content of a registered mark is government speech. If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently. It is saying many unseemly things. It is expressing contradictory views. It is unashamedly endorsing a vast array of commercial products and services. And it is providing Delphic advice to the consuming public.<sup>191</sup>

Thus, the Court made clear that federally registered trademarks were not an area where viewpoint discrimination could be shielded by the government speech doctrine.

Next, Alito rejected the Government’s argument that this was a case involving government subsidies or government programs, an area where viewpoint discrimination may be permissible.<sup>192</sup> This conclusion, however, was only joined by three other Justices. This part of the opinion also argued (in dicta) that if this were a scenario in which the Government created a limited public forum for private speech, viewpoint discrimination would still be

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<sup>187</sup> *Id.* at 1752.

<sup>188</sup> *Id.* at 1760.

<sup>189</sup> *Id.* at 1757–60; *cf. supra* notes 75, 100–102 and accompanying text (discussing government speech doctrine in *Walker*, 135 S. Ct. at 2253, and *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 464 (2009)). All eight participating Justices joined in this section of the opinion—Parts III-A.

<sup>190</sup> *Tam*, 137 S. Ct. at 1758.

<sup>191</sup> *Id.* (citations omitted).

<sup>192</sup> *Id.* at 1760–61; *see also supra* Subpart II.B (discussing permissibility of viewpoint discrimination in cases of government subsidies, including *Rust* and *Finley*). Alito distinguished precedents such as *Rust v. Sullivan*, 500 U.S. 173, 177–78 (1991), and *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), primarily because they “all involved cash subsidies or their equivalent,” which was not at issue in *Tam*. *Tam*, 137 S. Ct. at 1761.

“forbidden.”<sup>193</sup> And for three Justices joining Part III-B of Alito’s opinion, the disparagement clause of the Lanham Act was clearly viewpoint discrimination:

Our cases use the term “viewpoint” discrimination in a broad sense, and in that sense, the disparagement clause discriminates on the bases of “viewpoint.” To be sure, the clause evenhandedly prohibits disparagement of all groups. It applies equally to marks that damn Democrats and Republicans, capitalists and socialists, and those arrayed on both sides of every possible issue. It denies registration to any mark that is offensive to a substantial percentage of the members of any group. But in the sense relevant here, that is viewpoint discrimination: Giving offense is a viewpoint.<sup>194</sup>

Once viewpoint discrimination was evidenced, Alito looked next to what level of scrutiny could apply to see if there would ever be a circumstance in which the Lanham Act’s viewpoint-based disparagement clause could be constitutionally viable. But instead of proffering a clear answer, Alito concluded that the disparagement clause failed even intermediate scrutiny applied to commercial speech under *Central Hudson*.<sup>195</sup> Thus, to these four Justices, the disparagement clause was not narrowly drawn to serve a substantial government interest. An interest in promoting racial tolerance was insufficient, running counter to the First Amendment’s protection of the freedom to express “thought that we hate”—to quote Justice Holmes.<sup>196</sup> And the clause was not narrowly drawn to promote the government’s other asserted interest—protecting the orderly flow of commerce by “driv[ing] out trademarks that support invidious discrimination.”<sup>197</sup> Alito’s opinion did not provide a roadmap for lower courts to (i) clearly identify *what* viewpoint discrimination is, and (ii) when and how to determine whether such viewpoint discrimination is constitutionally permissible. Given a lack of any language regarding viewpoint discrimination of private speech as per se unconstitutional, courts may still infer that there are some undefined scenarios in which it is permissible.

Justice Kennedy, in a concurring opinion joined by Justices Ginsburg, Sotomayor and Kagan, wavered more on whether viewpoint-based regulations—such as the one at issue in *Tam*—could ever be constitutional. Kennedy agreed with Justice Alito that the disparagement clause of the Lanham Act constituted viewpoint discrimination, but argued that such a determination “renders unnecessary any extended treatment of other questions raised.”<sup>198</sup> He first noted that viewpoint-based regulations are

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<sup>193</sup> *Tam*, 137 S. Ct. at 1763.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 1763–64 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 573 (1980) (Blackmun, J., concurring)).

<sup>196</sup> *Id.* at 1764 (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

<sup>197</sup> *Id.* at 1765.

<sup>198</sup> *Id.* (Kennedy, J., concurring).



“presumptively unconstitutional,”<sup>199</sup> and that the disparagement clause exemplified viewpoint discrimination because the PTO may deny a trademark that offends a person, institution, or national symbol, but not a trademark that praises. Such a regulation “might silence dissent and distort the marketplace of ideas.”<sup>200</sup> Kennedy did not explicitly argue that viewpoint discrimination was per se unconstitutional—just that it invokes some form of heightened scrutiny. Only a few lines later, however, Kennedy wrote, “It is telling that the Court’s precedents have recognized just one narrow situation in which viewpoint discrimination is permissible: where the government itself is speaking or recruiting others to communicate a message on its behalf.”<sup>201</sup> By concluding that the disparagement clause is not government speech, for Kennedy, that is enough to strike down the regulation.

Justice Thomas joined Justice Alito’s opinion in all parts except Part II—analyzing and ultimately rejecting Tam’s statutory argument that Asians were not “persons” within the meaning of the Lanham Act. Thomas chose to emphasize in his two-paragraph-opinion that viewpoint-based regulations should be subject to strict scrutiny, regardless of whether the speech constitutes commercial or noncommercial speech.<sup>202</sup>

### C. Contextualizing Tam

It is too early to say how the lower courts will interpret *Tam*, although some decisions suggest it will narrow the circumstances by which a regulation that squawks like viewpoint discrimination will be upheld.<sup>203</sup> But there are several points worth noting here. First, Alito’s *Walker* dissent effectively triumphs in his *Tam* majority opinion, and very likely limited the expansion of *Walker* into recognizing more mixed private-public speech as free from the strictures of viewpoint neutrality. Second, the Court has yet to articulate exactly what level of scrutiny should be applied to viewpoint-based

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199 *Id.* at 1766 (citing *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 830 (1995)).

200 *Id.*

201 *Id.* at 1768.

202 *Id.* at 1769 (Thomas, J., concurring).

203 See, e.g., *Freedom from Religion Found. Inc. v. Abbott*, No. A-16-CA-00233-SS, 2017 WL 4582804, at \*5–7 (W.D. Tex. Oct. 13, 2017), *appeal filed*, No. 17-50956 (5th Cir. Oct. 27, 2017) (finding the decision to take down plaintiff’s exhibit in a limited public forum either “for its satiric tone or for its nontheistic point of view . . . constitutes impermissible viewpoint discrimination” and an unconstitutional motive under *Matal*); *Davison v. Loudoun Cty. Bd. of Supervisors*, No. 1:16-CV-00932-JCC-IDD, 2017 WL 3158389, at \*11–12 (E.D. Va. July 25, 2017), *appeal filed sub nom.*, *Davison v. Randall*, No. 17-2002 (4th Cir. Aug. 29, 2017) (banning plaintiff from participating in defendant public official’s social media page because plaintiff’s views were unconstitutional viewpoint discrimination, even if the ban only lasted a few hours); cf. *March v. Mills*, 867 F.3d 46, 65–66 (1st Cir. 2017) (invoking *Matal* to acknowledge that “when a restriction on speech is underinclusive, there may be reason to doubt whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint,” though finding the statute at issue had no underinclusivity problem).

regulations on *commercial* speech, since Justice Alito's majority opinion simply found the provision could not even withstand *Central Hudson*.<sup>204</sup>

Third, by Justice Kennedy's reasoning, viewpoint-based regulations might always be considered unconstitutional *except* in situations where the government speaks for itself. Indeed, he concludes his *Matal* concurrence by saying:

A law that can be directed against speech found offensive to some portion of the public [is] . . . to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.<sup>205</sup>

This generalization seems to buck other accepted forms of viewpoint discrimination outside of the government speech context, and avoids a clear analysis of when viewpoint discrimination is permissible in those circumstances. Finally, as the composition of the Supreme Court bench may shift in the coming years—for example Justice Gorsuch's past First Amendment jurisprudence seems to align closely with Justice Scalia<sup>206</sup>—a more concrete structure towards approaching viewpoint-based regulations of protected speech outside of the government speech doctrine is possible, and needed.

Discord across the federal judiciary when facing viewpoint discrimination claims suggest that the Court should expound further upon the general inquiry of when a speech restriction constitutes viewpoint discrimination. Further, every circumstance for which viewpoint discrimination is permissible have yet to be discovered. A more effective, executable analysis of i) what is viewpoint discrimination and ii) when (if ever) the Constitution permits it will help guide federal courts through a questionably viewpoint-discriminatory, but perhaps permissible regulation of speech. It also would help litigants who do not put forth arguments for different levels of scrutiny or speech characterizations.<sup>207</sup> The Court could provide this through adjusting levels of scrutiny for which Kagan's *Reed* concurrence advocated; requiring a

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<sup>204</sup> See *supra* note 105 and accompanying text.

<sup>205</sup> *Tam*, 137 S. Ct. at 1769 (Kennedy, J., concurring).

<sup>206</sup> Tejinder Singh, *Judge Gorsuch's First Amendment Jurisprudence*, SCOTUSBLOG (Mar. 7, 2017, 11:16 AM), <http://www.scotusblog.com/2017/03/judge-gorsuchs-first-amendment-jurisprudence/>.

<sup>207</sup> See, e.g., *Gerlich v. Leath*, 861 F.3d 697, 704–07 (8th Cir. 2017) (denying plaintiff's request for a design with a cannabis leaf was impermissible viewpoint discrimination); *supra* note 174 and accompanying text.

It should also be noted that because the law is not clearly established—or at least it does not appear to be clearly established—immunity defenses of state actors are significantly more likely to be sustained against viewpoint discrimination challenges. See, e.g., *Morgan v. Swanson*, 755 F.3d 757, 761–62 (5th Cir. 2014) (finding a school principal had qualified immunity for prohibiting students from distributing written religious materials at school because it was not clear she was violating clearly established law). *But see* *Heaney v. Roberts*, 846 F.3d 795, 802–03 (5th Cir. 2017) (denying a qualified immunity defense because there was a dispute as to whether a councilman, who removed a citizen from a parish council meeting, acted with improper motive—thereby amounting to viewpoint discrimination; viewpoint neutrality was considered a clearly established First Amendment right).

discriminatory motive analysis, as seen by several circuits;<sup>208</sup> declaring that viewpoint-based restrictions are per se invalid in any forum except for when the government speaks, suggested by *Tam*; or another test yet to be seen.

## CONCLUSION

While viewpoint discrimination is still highly disapproved, it is not absolutely barred by the First Amendment. Indeed, the Court has permitted viewpoint discrimination in several contexts, including schools, subsidies, government speech, and left open the possibility it may be permissible in other areas. It would be impossible to eradicate viewpoint discrimination completely from state action, nor is that a goal espoused by any member of the Court. However, clarity is needed to protect free speech and to monitor potential suppression of ideas, both on the face of a statute targeting mixed speech and also through discriminatory application of a viewpoint-neutral statute. Only then will it be clear where viewpoint neutrality should be concretely situated in First Amendment doctrine.

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<sup>208</sup> Some judges and circuit courts advocate for an intent or motive requirement for all viewpoint discrimination claims. See, e.g., *Gerlich*, 861 F.3d at 705 (“Every viewpoint discrimination claim ‘requires, by its very nature, that the purposes or motives of governmental officials be determined.’” (quoting *Gay & Lesbian Student Ass’n v. Gohn*, 850 F.2d 361, 367 (1988)); *NAACP v. City of Philadelphia*, 834 F.3d 435, 449 n.7 (3rd Cir. 2016) (“Though some courts appear to say that motive is not enough and that there must be evidence that the restriction is being implemented in a discriminatory way . . . we have never so held. As such, we note that this remains an open question in our Court.”); *Seattle Mideast Awareness Campaign v. King Cty.*, 781 F.3d 489, 502 (9th Cir. 2015) (“Prevailing on this as-applied [viewpoint-discrimination] claim requires evidence that the government intended to ‘suppress expression merely because public officials oppose the speaker’s view.’” (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983)); *Pahls v. Thomas*, 718 F.3d 1210, 1230–31 (10th Cir. 2013) (comparing established Supreme Court doctrine on viewpoint discrimination in the First Amendment context with the Tenth Circuit approach, which requires a showing that the “defendant [state] acted with a viewpoint-discriminatory purpose”).

Plaintiffs argued in *Jacobson v. United States Dep’t of Homeland Sec.* in the Ninth Circuit that viewpoint discrimination occurred under the guise of a viewpoint-neutral application of an enforcement zone regulation, not because of the words of the policy itself, but because the state action was “plainly motivated by the nature of [Plaintiffs’] message.” Plaintiff-Appellants’ Leesa Jacobson et al.’s Opening Brief at 36, *Jacobson v. U.S. Dept. of Homeland Sec.*, 882 F.3d 878 (9th Cir. 2018) (No. 16-17199) (internal quotation marks omitted). The Ninth Circuit vacated and remanded back to the district court to determine whether “the enforcement zone is a public forum, and whether the government’s exclusion policy is permissible under the principles of forum analysis.” 882 F.3d 878, 884 (9th Cir. 2018). It will be interesting to see how the court rules in this case, as the Ninth Circuit currently has decided in the government’s favor for content-based, viewpoint-neutral regulations, more than any other circuit. See *supra* tbl.1.

