Chapter VIII: Content Based vs. Content Neutral Regulations

One of the most important distinctions in analyzing regulations of speech is the different treatment of content based vs. content neutral regulations. Content-based regulations can be either based on the viewpoint of the speech or the subject matter of the speech. Viewpoint based regulations are almost never constitutional. One example of a viewpoint based regulation from earlier in the reading is the Texas flag desecration statute struck down in *Texas v. Johnson*, 491 U.S. 397 (1989) (Chapter VI, pages 156-162). In that case, the Court wrote: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." While subject matter restrictions are slightly less violative of bedrock principles, they are nevertheless presumptively unconstitutional. To survive a constitutional challenge, the government must satisfy the strict scrutiny standard and show that it has a compelling interest for the regulation of speech, that it has employed a narrowly tailored means to accomplish its compelling interest, and that there are no less restrictive means available to accomplish its compelling interest.

By contrast, when the government regulates speech based on something other than its content it only as to satisfy a version of intermediate scrutiny. Such content-neutral regulations can be regulations of conduct that can also prohibit expressive conduct and are then analyzed under the *O'Brien* test (*United States v. O'Brien*, Chapter VI, pages 145-150) or, as they frequently are, based on the time, place, and manner of the speech rather than its content. The "government may regulate the time, place, and manner of expressive activity, so long as such restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication." *Burson v. Freeman*, 504 U.S. 191, 197 (1992). The government may be able to demonstrate that a content-neutral time, place, and manner regulation is constitutional, but that is not true in all such cases.

While the content based vs. content neutral distinction is often seen in cases involving access to government property, the distinction also applies to regulations of private property. In cases where government property is at issue, another issue often raised is the nature of the property and whether it is a public forum. While references to the public forum doctrine are found in the cases in this chapter, it is a subject that is addressed more specifically in Chapter X.

A. Content Based Regulations

1. POLICE DEPARTMENT OF THE CITY OF CHICAGO v. MOSLEY
408 U.S. 92 (1972)

JUSTICE MARSHALL delivered the opinion of the Court, joined by BURGER, C.J., and DOUGLAS, BRENNAN, STEWART, WHITE, and POWELL, JJ.

At issue in this case is the constitutionality of the following Chicago ordinance:

A person commits disorderly conduct when he knowingly:

.....

"(i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded, provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute . . . . Municipal Code, c. 193-1 (i).

The suit was brought by Earl Mosley, a federal postal employee, who for seven months prior to the enactment of the ordinance had frequently picketed Jones Commercial High School in Chicago. During school hours and usually by himself, Mosley would walk the public sidewalk adjoining the school, carrying a sign that read: "Jones High School practices black discrimination. Jones High School has a black quota." His lonely crusade was always peaceful, orderly, and quiet, and was conceded to be so by the city of Chicago.

On March 26, 1968, Chapter 193-1 (i) was passed, to become effective on April 5. Seeing a newspaper announcement of the new ordinance, Mosley contacted the Chicago Police Department to find out how the ordinance would affect him; he was told that, if his picketing continued, he would be arrested. On April 4, the day before the ordinance became effective, Mosley ended his picketing next to the school. Thereafter, he brought this action in the United States District Court for the Northern District of Illinois, seeking declaratory and injunctive relief. He alleged a violation of constitutional rights in that (1) the statute punished activity protected by the First Amendment; and (2) by exempting only peaceful labor picketing from its general prohibition against picketing, the statute denied him "equal protection of the law in violation of the First and Fourteenth Amendments."

The city of Chicago exempts peaceful labor picketing from its general prohibition on picketing next to a school. The question we consider here is whether this selective exclusion from a public place is permitted. Our answer is "No."

Because Chicago treats some picketing differently from others, we analyze this ordinance in terms of the Equal Protection Clause of the Fourteenth Amendment. Of course, the equal protection claim in this case is closely intertwined with First Amendment interests; the Chicago ordinance affects picketing, which is expressive conduct; moreover, it does so by classifications formulated in terms of the subject of the picketing. As in all equal protection cases, however, the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment.

The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the

"national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Guided by these principles, we have frequently condemned such discrimination among different users of the same medium for expression. In *Niemotko v. Maryland*, 340 U.S. 268 (1951), a group of Jehovah's Witnesses were denied a permit to use a city park for Bible talks, although other political and religious groups had been allowed to put the park to analogous uses. Concluding that the permit was denied because of the city's "dislike for or disagreement with the Witnesses or their views," this Court held that the permit refusal violated "[t]he right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments." *Id.* at 272.

The late Mr. Justice Black, who thought that picketing was not only a method of expressing an idea but also conduct subject to broad state regulation, nevertheless recognized the deficiencies of laws like Chicago's ordinance. This was the thrust of his opinion concurring in *Cox v. Louisiana*, 379 U.S. 536, 581 (1965):

> [B]y specifically permitting picketing for the publication of labor union views [but prohibiting other sorts of picketing], Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. It thus is trying to prescribe what matters of public interest people whom it allows to assemble on its streets may and may not discuss. This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments. And to deny this appellant and his group use of the streets because of their views against racial discrimination, while allowing other groups to voice opinions on other subjects, also amounts to an invidious discrimination forbidden by the Equal Protection Clause.

We accept Mr. Justice Black's quoted views.

This is not to say that all picketing must always be allowed. We have continually recognized that reasonable "time, place and manner" regulations of picketing may be necessary to further significant governmental interests. Because picketing plainly involves expressive conduct within the protection of the First Amendment, discriminations among pickets must be tailored to serve a substantial governmental interest.

In this case, the ordinance itself describes impermissible picketing not in terms of time, place, and manner, but in terms of subject matter. The regulation "thus slip[s] from the neutrality of

time, place, and circumstance into a concern about content." This is never permitted. In spite of this, Chicago urges that the ordinance is not improper content censorship, but rather a device for preventing disruption of the school. Cities certainly have a substantial interest in stopping picketing which disrupts a school. "The crucial question, however, is whether [Chicago's ordinance] advances that objective in a manner consistent with the command of the Equal Protection Clause." It does not.

Although preventing school disruption is a city's legitimate concern, Chicago itself has determined that peaceful labor picketing during school hours is not an undue interference with school. Therefore, under the Equal Protection Clause, Chicago may not maintain that other picketing disrupts the school unless that picketing is clearly more disruptive than the picketing Chicago already permits. If peaceful labor picketing is permitted, there is no justification for prohibiting all nonlabor picketing, both peaceful and nonpeaceful. "Peaceful" nonlabor picketing is obviously no more disruptive than "peaceful" labor picketing. But Chicago's ordinance permits the latter and prohibits the former.

Similarly, we reject the city's argument that, although it permits peaceful labor picketing, it may prohibit all nonlabor picketing because, as a class, nonlabor picketing is more prone to produce violence than labor picketing. Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter. Freedom of expression, and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis. Some labor picketing is peaceful, some disorderly; the same is true of picketing on other themes. No labor picketing could be more peaceful or less prone to violence than Mosley's solitary vigil. In seeking to restrict nonlabor picketing that is clearly more disruptive than peaceful labor picketing, Chicago may not prohibit all nonlabor picketing at the school forum.

The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives. Chicago may not vindicate its interest in preventing disruption by the wholesale exclusion of picketing on all but one preferred subject. Chicago's ordinance imposes a selective restriction on expressive conduct far "greater than is essential to the furtherance of [a substantial governmental] interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Far from being tailored to a substantial governmental interest, the discrimination among pickets is based on the content of their expression. Therefore, under the Equal Protection Clause, it may not stand.

2. BURSON v. FREEMAN
504 U.S. 191 (1992)

JUSTICE BLACKMUN announced the judgment of the Court and delivered an opinion in which CHIEF JUSTICE REHNQUIST and JUSTICES WHITE and KENNEDY join.

The question presented is whether a provision of the Tennessee Code, which prohibits the solicitation of votes and the display or distribution of campaign materials within 100 feet of

the entrance to a polling place, violates the First and Fourteenth Amendments.

I

The State of Tennessee has carved out an election-day "campaign-free zone" through § 2-7—111(b) of its election code. That section reads in pertinent part:

"Within the appropriate boundary as established in subsection (a) [100 feet from the entrances], and the building in which the polling place is located, the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question are prohibited." Tenn. Code Ann. § 2-7—111(b) (Supp. 1991).

Violation of § 2-7—111(b) is a Class C misdemeanor punishable by a term of imprisonment not greater than 30 days or a fine not to exceed $50, or both. Tenn. Code Ann. §§ 2-19— 119 and XX-XX-XXX(e)(3) (1990).

II

Respondent Mary Rebecca Freeman has been a candidate for office in Tennessee, has managed local campaigns, and has worked actively in statewide elections. In 1987, she was the treasurer for the campaign of a city-council candidate in Metropolitan Nashville-Davidson County.

Asserting that §§ 2-7—111(b) and 2-19-119 limited her ability to communicate with voters, respondent brought a facial challenge to these statutes in Davidson County Chancery Court. She sought a declaratory judgment that the provisions were unconstitutional under both the United States and the Tennessee Constitutions.

The Chancellor ruled that the statutes did not violate the United States or Tennessee Constitutions and dismissed respondent's suit. He determined that § 2-7—111(b) was a content-neutral and reasonable time, place, and manner restriction; that the 100-foot boundary served a compelling state interest in protecting voters from interference, harassment, and intimidation during the voting process; and that there was an alternative channel for respondent to exercise her free speech rights outside the 100-foot boundary.

The Tennessee Supreme Court, by a 4-to-1 vote, reversed. The court first held that § 2-7—111(b) was content based "because it regulates a specific subject matter, the solicitation of votes and the display or distribution of campaign materials, and a certain category of speakers, campaign workers." The court then held that such a content-based statute could not be upheld unless (i) the burden placed on free speech rights is justified by a compelling state interest and (ii) the means chosen bear a substantial relation to that interest and are the least intrusive to achieve the State's goals. While the Tennessee Supreme Court found that the State unquestionably had shown a compelling interest in banning solicitation of voters and distribution of campaign materials within the polling place itself, it concluded that the State had not shown a compelling interest in regulating the premises around the polling place. Accordingly, the court held that the 100-foot limit was not narrowly tailored to protect the demonstrated interest. The court also held that the statute was not the least restrictive means to serve the State's interests. The court found less restrictive the current Tennessee statutes

prohibiting interference with an election or the use of violence or intimidation to prevent voting. Finally, the court noted that if the State were able to show a compelling interest in preventing congestion and disruption at the entrances to polling places, a shorter radius "might perhaps pass constitutional muster."

Because of the importance of the issue, we granted certiorari. We now reverse the Tennessee Supreme Court's judgment that the statute violates the First Amendment.

III

The Tennessee statute implicates three central concerns in our First Amendment jurisprudence: regulation of political speech, regulation of speech in a public forum, and regulation based on the content of the speech. The speech restricted by § 2-7—111(b) obviously is political speech. "Speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Accordingly, this Court has recognized that "the First Amendment `has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco Cty. Democratic Central Comm.*, 489 U.S. 214, 223 (1989).

The second important feature of § 2-7—111(b) is that it bars speech in quintessential public forums. These forums include those places "which by long tradition or by government fiat have been devoted to assembly and debate," such as parks, streets, and sidewalks. *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). At the same time, however, expressive activity, even in a quintessential public forum, may interfere with other important activities for which the property is used. Accordingly, this Court has held that the government may regulate the time, place, and manner of the expressive activity, so long as such restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication. *United States v. Grace*, 461 U.S. 171, 177 (1983). See also *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

The Tennessee restriction under consideration, however, is not a facially content-neutral time, place, or manner restriction. Whether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign. The statute does not reach other categories of speech, such as commercial solicitation, distribution, and display. This Court has held that the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic.

As a facially content-based restriction on political speech in a public forum, § 2-7—111(b) must be subjected to exacting scrutiny: The State must show that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. at 45.

Despite the ritualistic ease with which we state this now familiar standard, its announcement does not allow us to avoid the truly difficult issues involving the First Amendment. Perhaps foremost among these serious issues are cases that force us to reconcile our commitment to free speech with our commitment to other constitutional rights embodied in government proceedings. This case presents us with a particularly difficult reconciliation: the

accommodation of the right to engage in political discourse with the right to vote—a right at the heart of our democracy.

IV

Tennessee asserts that its campaign-free zone serves two compelling interests. First, the State argues that its regulation serves its compelling interest in protecting the right of its citizens to vote freely for the candidates of their choice. Second, Tennessee argues that its restriction protects the right to vote in an election conducted with integrity and reliability. The interests advanced by Tennessee obviously are compelling ones. This Court has recognized that the "right to vote freely for the candidate of one's choice is of the essence of a democratic society." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Indeed,

> [n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

Accordingly, this Court has concluded that a State has a compelling interest in protecting voters from confusion and undue influence.

The Court also has recognized that a State "indisputably has a compelling interest in preserving the integrity of its election process." The Court thus has "upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." In other words, it has recognized that a State has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process.

To survive strict scrutiny, however, a State must do more than assert a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest. While we readily acknowledge that a law rarely survives such scrutiny, an examination of the evolution of election reform, both in this country and abroad, demonstrates the necessity of restricted areas in or around polling places.

During the colonial period, many government officials were elected by the viva voce method or by the showing of hands, as was the custom in most parts of Europe. That voting scheme was not a private affair, but an open, public decision, witnessed by all and improperly influenced by some. The opportunities that the viva voce system gave for bribery and intimidation gradually led to its repeal.

Within 20 years of the formation of the Union, most States had incorporated the paper ballot into their electoral system. Initially, this paper ballot was a vast improvement. Individual voters made their own handwritten ballots, marked them in the privacy of their homes, and then brought them to the polls for counting. But the effort of making out such a ballot became increasingly more complex and cumbersome.

Wishing to gain influence, political parties began to produce their own ballots for voters. These ballots were often printed with flamboyant colors, distinctive designs, and emblems so that they could be recognized at a distance. State attempts to standardize the ballots were easily thwarted—the vote buyer could simply place a ballot in the hands of the bribed voter

and watch until he placed it in the polling box. Thus, the evils associated with the earlier viva voce system reinfected the election process; the failure of the law to secure secrecy opened the door to bribery and intimidation.

Approaching the polling place under this system was akin to entering an open auction place. As the elector started his journey to the polls, he was met by various party ticket peddlers "who were only too anxious to supply him with their party tickets." Often the competition became heated when several such peddlers found an uncommitted or wavering voter. Sham battles were frequently engaged in to keep away elderly and timid voters of the opposition. In short, these early elections "were not a pleasant spectacle for those who believed in democratic government."

The problems with voter intimidation and election fraud that the United States was experiencing were not unique. Several other countries were attempting to work out satisfactory solutions to these same problems. Some Australian provinces adopted a series of reforms intended to secure the secrecy of an elector's vote. The most famous feature of the Australian system was its provision for an official ballot, encompassing all candidates of all parties on the same ticket. But this was not the only measure adopted to preserve the secrecy of the ballot. The Australian system also provided for the erection of polling booths (containing several voting compartments) open only to election officials, two "scrutinees" for each candidate, and electors about to vote.

The Australian system was enacted in England in 1872 after a study by the committee of election practices identified Australia's ballot as the best possible remedy for the existing situation. Belgium followed England's example in 1877. Like the Australian provinces, both England and Belgium excluded the general public from the entire polling room.

One of the earliest indications of the reform movement in this country came in 1882 when the Philadelphia Civil Service Reform Association urged its adoption. Many articles were written praising its usefulness in preventing bribery, intimidation, disorder, and inefficiency at the polls. Commentators argued that it would diminish the growing evil of bribery by removing the knowledge of whether it had been successful. Another argument strongly urged in favor of the reform was that it would protect the weak and dependent against intimidation and coercion by employers and creditors. The inability to determine the effectiveness of bribery and intimidation accordingly would create order and decency at the polls.

After several failed attempts to adopt the Australian system in Michigan and Wisconsin, the Louisville, Kentucky, municipal government, the Commonwealth of Massachusetts, and the State of New York adopted the Australian system in 1888. The Louisville law prohibited all but voters, candidates or their agents, and electors from coming within 50 feet of the voting room inclosure. The Louisville law also provided that candidates' agents within the restricted area "were not allowed to persuade, influence, or intimidate any one in the choice of his candidate, or to attempt doing so . . . ." The Massachusetts and New York laws excluded the general public only from the area encompassed within a guardrail constructed six feet from the voting compartments. This modification was considered an improvement because it provided additional monitoring by members of the general public and independent candidates.

Finally, New York also prohibited any person from "electioneering on election day within any polling-place, or within one hundred feet of any polling place."

The success achieved through these reforms was immediately noticed and widely praised. One commentator remarked of the New York law of 1888:

> We have secured secrecy; and intimidation by employers, party bosses, police officers, saloon keepers and others has come to an end. In earlier times our polling places were frequently, to quote the litany, "scenes of battle, murder, and sudden death." This also has come to an end, and our election days are now as peaceful as our Sabbaths. The new legislation has also rendered impossible the old methods of straightforward and shameless bribery of voters at the polls.

The triumphs of 1888 set off a rapid and widespread adoption of the Australian system in the United States. By 1896, almost 90 percent of the States had adopted the Australian system. This accounted for 92 percent of the national electorate.

The roots of Tennessee's regulation can be traced back to two provisions passed during this period of rapid reform. Tennessee passed the first relevant provision in 1890 as part of its switch to an Australian system. In its effort to "secur[e] the purity of elections," Tennessee provided that only voters and certain election officials were permitted within the room where the election was held or within 50 feet of the entrance. The Act did not provide any penalty for violation and applied only in the more highly populated counties and cities.

The second relevant provision was passed in 1901 as an amendment to Tennessee's "Act to preserve the purity of elections, and define and punish offenses against the elective franchise." The original Act, passed in 1897, made it a misdemeanor to commit various election offenses, including the use of bribery, violence, or intimidation in order to induce a person to vote or refrain from voting for any particular person or measure. The 1901 amendment made it a misdemeanor for any person, except the officers holding the elections, to approach nearer than 30 feet to any voter or ballot box. This provision applied to all Tennessee elections.

These two laws remained relatively unchanged until 1967, when Tennessee added yet another proscription to its secret ballot law. This amendment prohibited the distribution of campaign literature "on the same floor of a building, or within one hundred (100) feet thereof, where an election is in progress."

In 1972, the State enacted a comprehensive code to regulate the conduct of elections. The code included a section that proscribed the display and the distribution of campaign material and the solicitation of votes within 100 feet of the entrance to a polling place. The 1972 "campaign-free zone" is the precursor of the restriction challenged in the present litigation.

Today, all 50 States limit access to the areas in or around polling places. The National Labor Relations Board also limits activities at or near polling places in union-representation elections.

In sum, an examination of the history of election regulation in this country reveals a persistent battle against two evils: voter intimidation and election fraud. After an unsuccessful experiment with an unofficial ballot system, all 50 States, together with numerous other

Western democracies, settled on the same solution: a secret ballot secured in part by a restricted zone around the voting compartments. We find that this widespread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud.

Respondent and the dissent advance three principal challenges to this conclusion. First, respondent argues that restricted zones are overinclusive because States could secure these same compelling interests with statutes that make it a misdemeanor to interfere with an election or to use violence or intimidation to prevent voting. We are not persuaded. Intimidation and interference laws fall short of serving a State's compelling interests because they "deal with only the most blatant and specific attempts" to impede elections. Moreover, because law enforcement officers generally are barred from the vicinity of the polls to avoid any appearance of coercion in the electoral process, see Tenn. Code Ann. § 2-7—103 (1985), many acts of interference would go undetected. These undetected or less than blatant acts may nonetheless drive the voter away before remedial action can be taken.

Second, respondent and the dissent argue that Tennessee's statute is underinclusive because it does not restrict other types of speech, such as charitable and commercial solicitation or exit polling, within the 100-foot zone. We agree that distinguishing among types of speech requires that the statute be subjected to strict scrutiny. We do not, however, agree that the failure to regulate all speech renders the statute fatally underinclusive. In fact, as one early commentator pointed out, allowing members of the general public access to the polling place makes it more difficult for political machines to buy off all the monitors. But regardless of the need for such additional monitoring, there is, as summarized above, ample evidence that political candidates have used campaign workers to commit voter intimidation or electoral fraud. In contrast, there is simply no evidence that political candidates have used other forms of solicitation or exit polling to commit such electoral abuses. States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist.

Finally, the dissent argues that we confuse history with necessity. Yet the dissent concedes that a secret ballot was necessary to cure electoral abuses. Contrary to the dissent's contention, the link between ballot secrecy and some restricted zone surrounding the voting area is not merely timing—it is common sense. The only way to preserve the secrecy of the ballot is to limit access to the area around the voter. Accordingly, we hold that some restricted zone around the voting area is necessary to secure the State's compelling interest.

The real question then is how large a restricted zone is permissible or sufficiently tailored. Respondent and the dissent argue that Tennessee's 100-foot boundary is not narrowly drawn to achieve the State's compelling interest in protecting the right to vote. We disagree.

As a preliminary matter, the long, uninterrupted, and prevalent use of these statutes makes it difficult for States to come forward with the sort of proof the dissent wishes to require. The majority of these laws were adopted originally in the 1890's, long before States engaged in extensive legislative hearings on election regulations. The fact that these laws have been in effect for a long period of time also makes it difficult for the States to put on witnesses who

can testify as to what would happen without them. Finally, it is difficult to isolate the exact effect of these laws on voter intimidation and election fraud. Voter intimidation and election fraud are successful precisely because they are difficult to detect.

Furthermore, because a government has such a compelling interest in securing the right to vote freely and effectively, this Court never has held a State "to the burden of demonstrating empirically the objective effects on political stability that [are] produced" by the voting regulation in question. Elections vary from year to year, and place to place. It is therefore difficult to make specific findings about the effects of a voting regulation. Moreover, the remedy for a tainted election is an imperfect one. Rerunning an election would have a negative impact on voter turnout. Thus, requiring proof that a 100-foot boundary is perfectly tailored to deal with voter intimidation and election fraud

> would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights. *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986).

We do not think that the minor geographic limitation prescribed by § 2-7-111(b) constitutes such a significant impingement. Thus, we simply do not view the question whether the 100-foot boundary line could be somewhat tighter as a question of "constitutional dimension." Reducing the boundary to 25 feet, as suggested by the Tennessee Supreme Court, is a difference only in degree, not a less restrictive alternative in kind. As was pointed out in the dissenting opinion in the Tennessee Supreme Court, it "takes approximately 15 seconds to walk 75 feet." The State of Tennessee has decided that these last 15 seconds before its citizens enter the polling place should be their own, as free from interference as possible. We do not find that this is an unconstitutional choice.

At some measurable distance from the polls, of course, governmental regulation of vote solicitation could effectively become an impermissible burden. In reviewing challenges to specific provisions of a State's election laws, however, this Court has not employed any "'litmus-paper test' that will separate valid from invalid restrictions." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Accordingly, it is sufficient to say that in establishing a 100-foot boundary, Tennessee is on the constitutional side of the line.

In conclusion, we reaffirm that it is the rare case in which we have held that a law survives strict scrutiny. This, however, is such a rare case. Here, the State has asserted that the exercise of free speech rights conflicts with another fundamental right, the right to cast a ballot in an election free from the taint of intimidation and fraud. A long history, a substantial consensus, and simple common sense show that some restricted zone around polling places is necessary to protect that fundamental right. Given the conflict between these two rights, we hold that requiring solicitors to stand 100 feet from the entrances to polling places does not constitute an unconstitutional compromise.

Justice Scalia, concurring in the judgment.

If the category of "traditional public forum" is to be a tool of analysis rather than a conclusory label, it must remain faithful to its name and derive its content from tradition. Because restrictions on speech around polling places on election day are as venerable a part of the American tradition as the secret ballot, Tenn. Code Ann. § 2-7-111 (Supp. 1991) does not restrict speech in a traditional public forum, and the "exacting scrutiny" that the plurality purports to apply is inappropriate. Instead, I believe that § 2-7-111, though content based, is constitutional because it is a reasonable, viewpoint-neutral regulation of a nonpublic forum. I therefore concur in the judgment of the Court.

For the reasons that the plurality believes § 2-7-111 survives exacting scrutiny, I believe it is at least reasonable; and respondent does not contend that it is viewpoint discriminatory. I therefore agree with the judgment of the Court that § 2-7-111 is constitutional.

JUSTICE STEVENS, with whom JUSTICES O'CONNOR and SOUTER join, dissenting.

The speech and conduct prohibited in the campaign-free zone created by Tenn. Code Ann. § 2-7-111 (Supp. 1991) is classic political expression. Therefore, I fully agree with the plurality that Tennessee must show that its "'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" I do not agree, however, that Tennessee has made anything approaching such a showing.

Tennessee's statutory "campaign-free zone" raises constitutional concerns of the first magnitude. The statute directly regulates political expression and thus implicates a core concern of the First Amendment. Moreover, it targets only a specific subject matter (campaign speech) and a defined class of speakers (campaign workers) and thus regulates expression based on its content. In doing so, the Tennessee statute somewhat perversely disfavors speech that normally is accorded greater protection than the kinds of speech that the statute does not regulate. For these reasons, Tennessee unquestionably bears the heavy burden of demonstrating that its silencing of political expression is necessary and narrowly tailored to serve a compelling state interest.

Campaign-free zones are noteworthy for their broad, antiseptic sweep. The Tennessee zone encompasses at least 30,000 square feet around each polling place; in some States, such as Kentucky and Wisconsin, the radius of the restricted zone is 500 feet—silencing an area of over 750,000 square feet. Even under the most sanguine scenario of participatory democracy, it is difficult to imagine voter turnout so complete as to require the clearing of hundreds of thousands of square feet simply to ensure that the path to the polling place door remains open and that the curtain that protects the secrecy of the ballot box remains closed.

Moreover, the Tennessee statute does not merely regulate conduct that might inhibit voting; it bars the "display of campaign posters, signs, or other campaign materials." Bumper stickers on parked cars and lapel buttons on pedestrians are taboo. The notion that such sweeping restrictions on speech are necessary to maintain the freedom to vote and the integrity of the ballot box borders on the absurd.

The evidence introduced at trial to demonstrate the necessity for Tennessee's campaign-free zone was exceptionally thin. Perhaps in recognition of the poverty of the record, the plurality looks to history to assess whether Tennessee's statute is in fact necessary to serve the State's interests. This analysis is deeply flawed; it confuses history with necessity, and mistakes the traditional for the indispensable. The plurality's reasoning combines two logical errors: First, the plurality assumes that a practice's long life itself establishes its necessity; and second, the plurality assumes that a practice that was once necessary remains necessary until it is ended. We have never regarded tradition as a proxy for necessity.

Even if we assume that campaign-free zones were once somehow "necessary," it would not follow that, 100 years later, those practices remain necessary. Although the plurality today blithely dispenses with the need for factual findings to determine the necessity of "traditional" restrictions on speech, courts that have made such findings with regard to other campaign-free zones have, without exception, found such zones unnecessary.

In addition to sweeping too broadly in its reach, Tennessee's campaign-free zone selectively prohibits speech based on content. Within the zone, § 2-7-111 silences all campaign-related expression, but allows expression on any other subject: religious, artistic, commercial speech, even political debate and solicitation concerning issues or candidates not on the day's ballot.

Tennessee's content-based discrimination is particularly problematic because such a regulation will inevitably favor certain groups of candidates. As the testimony in this case illustrates, several groups of candidates rely heavily on last-minute campaigning. Candidates with fewer resources, candidates for lower visibility offices, and "grassroots" candidates benefit disproportionately from last-minute campaigning near the polling place.

Although the plurality recognizes that the Tennessee statute is content based, it does not inquire into whether that discrimination itself is related to any purported state interest. To the contrary, the plurality makes the surprising and unsupported claim that the selective regulation of protected speech is justified because, "[t]he First Amendment does not require States to regulate for problems that do not exist."

Tennessee's differential treatment of campaign speech furthers no asserted state interest. Access to, and order around, the polls would be just as threatened by the congregation of citizens concerned about a local environmental issue not on the ballot as by the congregation of citizens urging election of their favored candidate. Similarly, assuming that disorder immediately outside the polling place could lead to the commission of errors or the perpetration of fraud, such disorder could just as easily be caused by a religious dispute sparked by a colporteur as by a campaign-related dispute sparked by a campaign worker. In short, Tennessee has failed to point to any legitimate interest that would justify its selective regulation of campaign-related expression.

Although the plurality purports to apply "exacting scrutiny," its three marked departures from that familiar standard may have greater significance for the future than its precise holding about campaign-free zones. First, the plurality declines to take a hard look at whether a state law is in fact "necessary." Under the plurality's analysis, a State need not demonstrate that

contemporary demands compel its regulation of protected expression; it need only show that that regulation can be traced to a longstanding tradition. Second, the plurality lightens the State's burden of proof in showing that a restriction on speech is "narrowly tailored." Third, although the plurality recognizes the problematic character of Tennessee's content-based suppressive regulation, it nonetheless upholds the statute because "there is simply no evidence" that commercial or charitable solicitation outside the polling place poses the same potential dangers as campaigning outside the polling place. This analysis contradicts a core premise of strict scrutiny—namely, that the heavy burden of justification is on the State. The plurality has effectively shifted the burden of proving the necessity of content discrimination from the State to the plaintiff.

In sum, what the plurality early in its opinion calls "exacting scrutiny," appears by the end of its analysis to be neither exacting nor scrutiny. Tennessee must shoulder the burden of demonstrating that its restrictions on political speech are no broader than necessary to protect orderly access to the polls. It has not done so. I therefore respectfully dissent.

3. REED v. TOWN OF GILBERT
135 S. Ct. 2218 (2015)

Justice THOMAS delivered the opinion of the Court.

The town of Gilbert, Arizona (or Town), has adopted a comprehensive code governing the manner in which people may display outdoor signs. Gilbert, Ariz., Land Development Code (Sign Code or Code), ch. 1, § 4.402 (2005). The Sign Code identifies various categories of signs based on the type of information they convey, then subjects each category to different restrictions. One of the categories is "Temporary Directional Signs Relating to a Qualifying Event," loosely defined as signs directing the public to a meeting of a nonprofit group. The Code imposes more stringent restrictions on these signs than it does on signs conveying other messages. We hold that these provisions are content-based regulations of speech that cannot survive strict scrutiny.

I
The Sign Code prohibits the display of outdoor signs anywhere within the Town without a permit, but it then exempts 23 categories of signs from that requirement. These exemptions include everything from bazaar signs to flying banners. Three categories of exempt signs are particularly relevant here.

The first is "Ideological Sign[s]." This category includes any "sign communicating a message or ideas for noncommercial purposes that is not a Construction Sign, Directional Sign, Temporary Directional Sign Relating to a Qualifying Event, Political Sign, Garage Sale Sign, or a sign owned or required by a governmental agency." Of the three categories discussed here, the Code treats ideological signs most favorably, allowing them to be up to 20 square feet in area and to be placed in all "zoning districts" without time limits.

The second category is "Political Sign[s]." This includes any "temporary sign designed to influence the outcome of an election called by a public body." The Code treats these signs less

favorably than ideological signs. The Code allows the placement of political signs up to 16 square feet on residential property and up to 32 square feet on non-residential property, undeveloped municipal property, and "rights-of-way." These signs may be displayed up to 60 days before a primary election and up to 15 days following a general election.

The third category is "Temporary Directional Signs Relating to a Qualifying Event." This includes any "Temporary Sign intended to direct pedestrians, motorists, and other passersby to a 'qualifying event.'" A "qualifying event" is defined as any "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." The Code treats temporary directional signs even less favorably than political signs. Temporary directional signs may be no larger than six square feet. They may be placed on private property or on a public right-of-way, but no more than four signs may be placed on a single property at any time. And, they may be displayed no more than 12 hours before the "qualifying event" and no more than 1 hour afterward.

Petitioners Good News Community Church (Church) and its pastor, Clyde Reed, wish to advertise the time and location of their Sunday church services. The Church is a small, cash-strapped entity that owns no building, so it holds its services at elementary schools or other locations in or near the Town. In order to inform the public about its services, which are held in a variety of different locations, the Church began placing 15 to 20 temporary signs around the Town, frequently in the public right-of-way abutting the street. The signs typically displayed the Church's name, along with the time and location of the upcoming service. Church members would post the signs early in the day on Saturday and then remove them around midday on Sunday. The display of these signs requires little money and manpower, and thus has proved to be an economical and effective way for the Church to let the community know where its services are being held each week.

This practice caught the attention of the Town's Sign Code compliance manager, who twice cited the Church for violating the Code. The first citation noted that the Church exceeded the time limits for displaying its temporary directional signs. The second citation referred to the same problem, along with the Church's failure to include the date of the event on the signs. Town officials even confiscated one of the Church's signs, which Reed had to retrieve from the municipal offices.

Reed contacted the Sign Code Compliance Department in an attempt to reach an accommodation. His efforts proved unsuccessful. Shortly thereafter, petitioners filed a complaint in the United States District Court for the District of Arizona, arguing that the Sign Code abridged their freedom of speech. The District Court denied the petitioners' motion for a preliminary injunction. The Court of Appeals for the Ninth Circuit affirmed, holding that the Sign Code's provision regulating temporary directional signs did not regulate speech on the basis of content. It reasoned that, even though an enforcement officer would have to read the sign to determine what provisions of the Sign Code applied to it, the "'kind of cursory examination'" that would be necessary to classify it as a temporary directional sign was "not akin to an officer synthesizing the expressive content of the sign." It then remanded for the District Court to determine whether the Sign Code's distinctions among temporary directional

signs, political signs, and ideological signs nevertheless constituted a content-based regulation of speech.

The District Court granted summary judgment in favor of the Town. The Court of Appeals affirmed. The Court of Appeals concluded that the Sign Code is content neutral. As the court explained, "Gilbert did not adopt its regulation because it disagreed with the message conveyed" and its "interests in regulat[ing] temporary signs are unrelated to the content of the sign." Accordingly, the court believed that the Code was "content neutral as that term [has been] defined by the Supreme Court." In light of that determination, it applied a lower level of scrutiny and concluded that the law did not violate the First Amendment. We now reverse.

II

A government, including a municipal government vested with state authority, "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95, (1972). Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.

Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and are subject to strict scrutiny.

Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be "`justified without reference to the content of the regulated speech,'" or that were adopted by the government "because of disagreement with the message [the speech] conveys," *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Those laws, like those that are content based on their face, must also satisfy strict scrutiny.

The Town's Sign Code is content based on its face. It defines "Temporary Directional Signs" on the basis of whether a sign conveys the message of directing the public to church or some other "qualifying event." It defines "Political Signs" on the basis of whether a sign's message is "designed to influence the outcome of an election." And it defines "Ideological Signs" on the basis of whether a sign "communicat[es] a message or ideas" that do not fit within the Code's other categories. It then subjects each of these categories to different restrictions.

The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign. If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government. More to the point, the Church's

signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas. On its face, the Sign Code is a content-based regulation of speech. We thus have no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.

In reaching the contrary conclusion, the Court of Appeals offered several theories to explain why the Town's Sign Code should be deemed content neutral. None is persuasive. The Court of Appeals first determined that the Sign Code was content neutral because the Town "did not adopt its regulation of speech [based on] disagree[ment] with the message conveyed," and its justifications for regulating temporary directional signs were "unrelated to the content of the sign." In its brief to this Court, the United States similarly contends that a sign regulation is content neutral—even if it expressly draws distinctions based on the sign's communicative content—if those distinctions can be "'justified without reference to the content of the speech.'"

But this analysis skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face. A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993). We have thus made clear that "'[i]llicit legislative intent is not the sine qua non of a violation of the First Amendment,'" and a party opposing the government "need adduce 'no evidence of an improper censorial motive.'" Although "a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary." In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.

That is why we have repeatedly considered whether a law is content neutral on its face before turning to the law's justification or purpose. Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny.

The Court of Appeals and the United States misunderstand our decision in *Ward* as suggesting that a government's purpose is relevant even when a law is content based on its face. That is incorrect. *Ward* had nothing to say about facially content-based restrictions because it involved a facially content-neutral ban. In that context, we looked to governmental motive, including whether the government had regulated speech "because of disagreement" with its message, and whether the regulation was "'justified without reference to the content of the speech.'" But *Ward*'s framework "applies only if a statute is content neutral." Its rules thus operate "to protect speech," not "to restrict it."

The First Amendment requires no less. Innocent motives 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. That is why the First Amendment expressly targets the operation of the laws—i.e., the "abridg[ement] of speech"—rather than merely the motives of those who enacted them. "'The vice of content-based legislation . . . is

not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes.'" *Hill v. Colorado*, 530 U.S. 703, 743 (2000) (SCALIA, J., dissenting).

The Court of Appeals next reasoned that the Sign Code was content neutral because it "does not mention any idea or viewpoint, let alone single one out for differential treatment." It reasoned that, for the purpose of the Code provisions, "[i]t makes no difference which candidate is supported, who sponsors the event, or what ideological perspective is asserted."

The Town seizes on this reasoning, insisting that "content based" is a term of art that "should be applied flexibly" with the goal of protecting "viewpoints and ideas from government censorship or favoritism." In the Town's view, a sign regulation that "does not censor or favor particular viewpoints or ideas" cannot be content based. The Sign Code allegedly passes this test because its treatment of temporary directional signs does not raise any concerns that the government is "endorsing or suppressing 'ideas or viewpoints,'" and the provisions for political signs and ideological signs "are neutral as to particular ideas or viewpoints" within those categories.

This analysis conflates two distinct but related limitations that the First Amendment places on government regulation of speech. Government discrimination among viewpoints—or the regulation of speech based on "the specific motivating ideology or the opinion or perspective of the speaker"—is a "more blatant" and "egregious form of content discrimination." But it is well established that "[t]he hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic."

Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter. 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 messages concerning a political candidate, which are themselves given more favorable treatment than messages announcing an assembly of like-minded individuals. That is a paradigmatic example of content-based discrimination.

Finally, the Court of Appeals characterized the Sign Code's distinctions as turning on "'the content-neutral elements of who is speaking through the sign and whether and when an event is occurring.'" That analysis is mistaken on both factual and legal grounds.

To start, the Sign Code's distinctions are not speaker based. The restrictions for political, ideological, and temporary event signs apply equally no matter who sponsors them. If a local business, for example, sought to put up signs advertising the Church's meetings, those signs would be subject to the same limitations as such signs placed by the Church. And if Reed had decided to display signs in support of a particular candidate, he could have made those signs far larger—and kept them up for far longer—than signs inviting people to attend his church services. If the Code's distinctions were truly speaker based, both types of signs would receive the same treatment.

In any case, the fact that a distinction is speaker based does not, as the Court of Appeals seemed to believe, automatically render the distinction content neutral. Because "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content," we have insisted that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." Thus, a law limiting the content of newspapers, but only newspapers, could not evade strict scrutiny simply because it could be characterized as speaker based. Likewise, a content-based law that restricted the political speech of all corporations would not become content neutral just because it singled out corporations as a class of speakers. See *Citizens United v. FEC*, 558 U.S. 310, 340-41 (2010). Characterizing a distinction as speaker based is only the beginning—not the end—of the inquiry.

Nor do the Sign Code's distinctions hinge on "whether and when an event is occurring." The Code does not permit citizens to post signs on any topic whatsoever within a set period leading up to an election, for example. Instead, come election time, it requires Town officials to determine whether a sign is "designed to influence the outcome of an election" (and thus "political") or merely "communicating a message or ideas for noncommercial purposes" (and thus "ideological"). That obvious content-based inquiry does not evade strict scrutiny review simply because an event (i.e., an election) is involved.

And, just as with speaker-based laws, the fact that a distinction is event based does not render it content neutral. The Court of Appeals cited no precedent from this Court supporting its novel theory of an exception from the content-neutrality requirement for event-based laws. As we have explained, a speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message expressed. A regulation that targets a sign because it conveys an idea about a specific event is no less content based than a regulation that targets a sign because it conveys some other idea. Here, the Code singles out signs bearing a particular message: the time and location of a specific event. This type of ordinance may seem like a perfectly rational way to regulate signs, but a clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem "entirely reasonable" will sometimes be "struck down because of their content-based nature."

III

Because the Town's Sign Code imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny, "'which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'" Thus, it is the Town's burden to demonstrate that the Code's differentiation between temporary directional signs and other types of signs, such as political signs and ideological signs, furthers a compelling governmental interest and is narrowly tailored to that end.

The Town cannot do so. It has offered only two governmental interests in support of the distinctions the Sign Code draws: preserving the Town's aesthetic appeal and traffic safety. Assuming for the sake of argument that those are compelling governmental interests, the Code's distinctions fail as hopelessly underinclusive.

Starting with the preservation of aesthetics, temporary directional signs are "no greater an eyesore" than ideological or political ones. Yet the Code allows unlimited proliferation of larger ideological signs while strictly limiting the number, size, and duration of smaller directional ones. The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem.

The Town similarly has not shown that limiting temporary directional signs is necessary to eliminate threats to traffic safety, but that limiting other types of signs is not. The Town has offered no reason to believe that directional signs pose a greater threat to safety than do ideological or political signs. If anything, a sharply worded ideological sign seems more likely to distract a driver than a sign directing the public to a nearby church meeting.

In light of this underinclusiveness, the Town has not met its burden to prove that its Sign Code is narrowly tailored to further a compelling government interest. Because a "'law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited,'" the Sign Code fails strict scrutiny.

IV

Our decision today will not prevent governments from enacting effective sign laws. The Town asserts that an "`absolutist'" content-neutrality rule would render "virtually all distinctions in sign laws . . . subject to strict scrutiny," but that is not the case. Not "all distinctions" are subject to strict scrutiny, only content-based ones are. Laws that are content neutral are instead subject to lesser scrutiny.

The Town has ample content-neutral options available to resolve problems with safety and aesthetics. For example, its current Code regulates many aspects of signs that have nothing to do with a sign's message: size, building materials, lighting, moving parts, and portability. And on public property, the Town may go a long way toward entirely forbidding the posting of signs, so long as it does so in an evenhanded, content-neutral manner. See *City Council of Los Angeles v. Taxpayers for Vincent*, 466 US 789, 817 (1984) (upholding content-neutral ban against posting signs on public property). Indeed, some lower courts have long held that similar content-based sign laws receive strict scrutiny, but there is no evidence that towns in those jurisdictions have suffered catastrophic effects.

We acknowledge that a city might reasonably view the general regulation of signs as necessary because signs "take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation." At the same time, the presence of certain signs may be essential, both for vehicles and pedestrians, to guide traffic or to identify hazards and ensure safety. A sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses—well might survive strict scrutiny. The signs at issue in this case are far removed from those purposes. They are facially content based and are neither justified by traditional safety concerns nor narrowly tailored.

JUSTICE ALITO, with whom JUSTICES KENNEDY and SOTOMAYOR join, concurring.

I join the opinion of the Court but add a few words of further explanation. As the Court holds, what we have termed "content-based" laws must satisfy strict scrutiny. Content-based laws merit this protection because they present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint. Limiting speech based on its "topic" or "subject" favors those who do not want to disturb the status quo. Such regulations may interfere with democratic self-government and the search for truth.

As the Court shows, the regulations at issue in this case are replete with content-based distinctions, and as a result they must satisfy strict scrutiny. This does not mean, however, that municipalities are powerless to enact and enforce reasonable sign regulations. I will not attempt to provide anything like a comprehensive list, but here are some rules that would not be content based:

Rules regulating the size of signs. These rules may distinguish among signs based on any content-neutral criteria, including any relevant criteria listed below.

Rules regulating the locations in which signs may be placed. These rules may distinguish between free-standing signs and those attached to buildings.

Rules distinguishing between lighted and unlighted signs.

Rules distinguishing between signs with fixed messages and electronic signs with messages that change.

Rules that distinguish between the placement of signs on private and public property.

Rules distinguishing between the placement of signs on commercial and residential property.

Rules distinguishing between on-premises and off-premises signs.

Rules restricting the total number of signs allowed per mile of roadway.

Rules imposing time restrictions on signs advertising a one-time event. Rules of this nature do not discriminate based on topic or subject and are akin to rules restricting the times within which oral speech or music is allowed.

In addition to regulating signs put up by private actors, government entities may also erect their own signs consistent with the principles that allow governmental speech. See *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-69 (2009). They may put up signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots.

Properly understood, today's decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives.

JUSTICE KAGAN, with whom JUSTICES GINSBURG and BREYER join, concurring in the judgment.

Countless cities and towns across America have adopted ordinances regulating the posting of

signs, while exempting certain categories of signs based on their subject matter. For example, some municipalities generally prohibit illuminated signs in residential neighborhoods, but lift that ban for signs that identify the address of a home or the name of its owner or occupant. In other municipalities, safety signs such as "Blind Pedestrian Crossing" and "Hidden Driveway" can be posted without a permit, even as other permanent signs require one. Elsewhere, historic site markers—for example, "George Washington Slept Here"—are also exempt from general regulations. And similarly, the federal Highway Beautification Act limits signs along interstate highways unless, for instance, they direct travelers to "scenic and historical attractions" or advertise free coffee.

Given the Court's analysis, many sign ordinances of that kind are now in jeopardy. Says the majority: When laws "single[] out specific subject matter," they are "facially content based"; and when they are facially content based, they are automatically subject to strict scrutiny. And although the majority holds out hope that some sign laws with subject-matter exemptions "might survive" that stringent review, the likelihood is that most will be struck down. After all, it is the "rare case[] in which a speech restriction withstands strict scrutiny." To clear that high bar, the government must show that a content-based distinction "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." So on the majority's view, courts would have to determine that a town has a compelling interest in informing passersby where George Washington slept. And likewise, courts would have to find that a town has no other way to prevent hidden-driveway mishaps than by specially treating hidden-driveway signs. (Well-placed speed bumps? Lower speed limits? How about a ban on hidden driveways?) The consequence—unless courts water down strict scrutiny to something unrecognizable—is that our communities will find themselves in an unenviable bind: They will have to either repeal the exemptions that allow for helpful signs on streets and sidewalks, or else lift their sign restrictions altogether and resign themselves to the resulting clutter.

Although the majority insists that applying strict scrutiny to all such ordinances is "essential" to protecting First Amendment freedoms, I find it challenging to understand why that is so. This Court's decisions articulate two important and related reasons for subjecting content-based speech regulations to the most exacting standard of review. The first is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." The second is to ensure that the government has not regulated speech "based on hostility—or favoritism—towards the underlying message expressed." Yet the subject-matter exemptions included in many sign ordinances do not implicate those concerns. Allowing residents, say, to install a light bulb over "name and address" signs but no others does not distort the marketplace of ideas. Nor does that different treatment give rise to an inference of impermissible government motive.

We apply strict scrutiny to facially content-based regulations of speech, in keeping with the rationales just described, when there is any "realistic possibility that official suppression of ideas is afoot." That is always the case when the regulation facially differentiates on the basis of viewpoint. It is also the case (except in non-public or limited public forums) when a law restricts "discussion of an entire topic" in public debate. We have stated that "[i]f the marketplace of ideas is to remain free and open, governments must not be allowed to choose

'which issues are worth discussing or debating.'" And we have recognized that such subject-matter restrictions, even though viewpoint-neutral on their face, may "suggest[ ] an attempt to give one side of a debatable public question an advantage in expressing its views to the people." Subject-matter regulation, in other words, may have the intent or effect of favoring some ideas over others. When that is realistically possible—when the restriction "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace"—we insist that the law pass the most demanding constitutional test.

But when that is not realistically possible, we may do well to relax our guard so that "entirely reasonable" laws imperiled by strict scrutiny can survive. Our concern with content-based regulation arises from the fear that the government will skew the public's debate of ideas—so when "that risk is inconsequential, . . . strict scrutiny is unwarranted." To do its intended work, of course, the category of content-based regulation triggering strict scrutiny must sweep more broadly than the actual harm; that category exists to create a buffer zone guaranteeing that the government cannot favor or disfavor certain viewpoints. But that buffer zone need not extend forever. We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function.

And indeed we have done just that: Our cases have been far less rigid than the majority admits in applying strict scrutiny to facially content-based laws—including in cases just like this one. In *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the Court declined to apply strict scrutiny to a municipal ordinance that exempted address numbers and markers commemorating "historical, cultural, or artistic event[s]" from a generally applicable limit on sidewalk signs. After all, we explained, the law's enactment and enforcement revealed "not even a hint of bias or censorship." *Id.* at 804. And another decision involving a similar law provides an alternative model. In *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), the Court assumed arguendo that a sign ordinance's exceptions for address signs, safety signs, and for-sale signs in residential areas did not trigger strict scrutiny. We did not need decide the level-of-scrutiny because the law's breadth made it unconstitutional under any standard.

The majority could easily have taken *Ladue*'s tack here. The Town of Gilbert's defense of its sign ordinance—most notably, the law's distinctions between directional signs and others—does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test. The Town, for example, provides no reason at all for prohibiting more than four directional signs on a property while placing no limits on the number of other types of signs. Similarly, the Town offers no coherent justification for restricting the size of directional signs to 6 square feet while allowing other signs to reach 20 square feet. The absence of any sensible basis for these and other distinctions dooms the Town's ordinance under even the intermediate scrutiny that the Court typically applies to "time, place, or manner" speech regulations. Accordingly, there is no need to decide in this case whether strict scrutiny applies to every sign ordinance in every town across this country containing a subject-matter exemption.

I suspect this Court will regret the majority's insistence today on answering that question in the affirmative. As the years go by, courts will discover that thousands of towns have such ordinances, many of them "entirely reasonable." And as the challenges to them mount, courts will have to invalidate one after the other. (This Court may soon find itself a veritable

Supreme Board of Sign Review.) And courts will strike down those democratically enacted local laws even though no one—certainly not the majority—has explained why the First Amendment requires that result. Because I see no reason why such an easy case calls for us to cast a constitutional pall on reasonable regulations, I concur only in the judgment.

4. IANCU v. BRUNETTI
139 S. Ct. 2294 (2019)

JUSTICE KAGAN delivered the opinion of the Court joined by THOMAS, GINSBURG, ALITO, GORSUCH, and KAVANAUGH, JJ.

Two Terms ago, in *Matal v. Tam*, 137 S. Ct. 1744, (2017), this Court invalidated the Lanham Act's bar on the registration of "disparaging" trademarks. Although split between two non-majority opinions, all Members of the Court agreed that the provision violated the First Amendment because it discriminated on the basis of viewpoint. Today we consider a First Amendment challenge to a neighboring provision of the Act, prohibiting the registration of "immoral or scandalous" trademarks. We hold that this provision infringes the First Amendment for the same reason: It too disfavors certain ideas.

I
Respondent Erik Brunetti is an artist and entrepreneur who founded a clothing line that uses the trademark FUCT. According to Brunetti, the mark (which functions as the clothing's brand name) is pronounced as four letters, one after the other: F-U-C-T. But you might read it differently and, if so, you would hardly be alone. See Tr. of Oral Arg. 5 (describing the brand name as "the equivalent of [the] past participle form of a well-known word of profanity"). That common perception caused difficulties for Brunetti when he tried to register his mark with the U.S. Patent and Trademark Office (PTO).

Under the Lanham Act, the PTO administers a federal registration system for trademarks. Registration of a mark is not mandatory. The owner of an unregistered mark may still use it in commerce and enforce it against infringers. But registration gives trademark owners valuable benefits. For example, registration constitutes "prima facie evidence" of the mark's validity. And registration serves as "constructive notice of the registrant's claim of ownership," which forecloses some defenses in infringement actions. Generally, a trademark is eligible for registration, and receipt of such benefits, if it is "used in commerce." But the Act directs the PTO to "refuse registration" of certain marks. For instance, the PTO cannot register a mark that "so resembles" another mark as to create a likelihood of confusion. It cannot register a mark that is "merely descriptive" of the goods on which it is used. It cannot register a mark containing the flag or insignia of any nation or State. There are five or ten more (depending on how you count). And until we invalidated the criterion two years ago, the PTO could not register a mark that "disparaged" a "person, living or dead."

This case involves another of the Lanham Act's prohibitions on registration—one applying to marks that "consist of or comprise immoral or scandalous matter." §1052(a). The PTO applies that bar as a "unitary provision," rather than treating the two adjectives in it separately. To

determine whether a mark fits in the category, the PTO asks whether a "substantial composite of the general public" would find the mark "shocking to the sense of truth, decency, or propriety"; "giving offense to the conscience or moral feelings"; "calling out for condemnation"; "disgraceful"; "offensive"; "disreputable"; or "vulgar."

Both a PTO examining attorney and the PTO's Trademark Trial and Appeal Board decided that Brunetti's mark flunked that test. The attorney determined that FUCT was "a total vulgar" and "therefore unregistrable." On review, the Board stated that the mark was "highly offensive" and "vulgar," and that it had "decidedly negative sexual connotations." As part of its review, the Board also considered evidence of how Brunetti used the mark. It found that Brunetti's website and products contained imagery, near the mark, of "extreme nihilism" and "anti-social" behavior. In that context, the Board thought, the mark communicated "misogyny, depravity, [and] violence." The Board concluded: "Whether one considers [the mark] as a sexual term, or finds that [Brunetti] has used [the mark] in the context of extreme misogyny, nihilism or violence, we have no question but that [the term is] extremely offensive."

Brunetti then brought a facial challenge to the "immoral or scandalous" bar in the Court of Appeals for the Federal Circuit. That court found the prohibition to violate the First Amendment. We granted certiorari.

II

This Court first considered a First Amendment challenge to a trademark registration restriction in *Tam*, just two Terms ago. There, the Court declared unconstitutional the Lanham Act's ban on registering marks that "disparage" any "person, living or dead." The eight-Justice Court divided evenly between two opinions and could not agree on the overall framework for deciding the case. But all the Justices agreed on two propositions. First, if a trademark registration bar is viewpoint-based, it is unconstitutional. And second, the disparagement bar was viewpoint-based.

The Justices thus found common ground in a core postulate of free speech law: The government may not discriminate against speech based on the ideas or opinions it conveys. In Justice Kennedy's explanation, the disparagement bar allowed a trademark owner to register a mark if it was "positive" about a person, but not if it was "derogatory." That was the "essence of viewpoint discrimination," he continued, because "[t]he law thus reflects the Government's disapproval of a subset of messages it finds offensive."

. . . . So the key question becomes: Is the "immoral or scandalous" criterion in the Lanham Act viewpoint-neutral or viewpoint-based?

It is viewpoint-based. The meanings of "immoral" and "scandalous" are not mysterious, but resort to some dictionaries still helps to lay bare the problem. When is expressive material "immoral"? According to a standard definition, when it is "inconsistent with rectitude, purity, or good morals"; "wicked"; or "vicious." Or again, when it is "opposed to or violating morality"; or "morally evil." So the Lanham Act permits registration of marks that champion society's sense of rectitude and morality, but not marks that denigrate those concepts. And when is such material "scandalous"? Says a typical definition, when it "gives offense to the conscience or moral feelings"; "excite[s] reprobation"; or "call[s] out condemnation." Or

again, when it is "shocking to the sense of truth, decency, or propriety"; "disgraceful"; "offensive"; or "disreputable." So the Lanham Act allows registration of marks when their messages accord with, but not when their messages defy, society's sense of decency or propriety. Put the pair of overlapping terms together and the statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation. The statute favors the former, and disfavors the latter. "Love rules"? "Always be good"? Registration follows. "Hate rules"? "Always be cruel"? Not according to the Lanham Act's "immoral or scandalous" bar.

The facial viewpoint bias in the law results in viewpoint-discriminatory application. Recall that the PTO itself describes the "immoral or scandalous" criterion using much the same language as in the dictionary definitions recited above.

Here are some samples. The PTO rejected marks conveying approval of drug use (YOU CAN'T SPELL HEALTHCARE WITHOUT THC for pain-relief medication, MARIJUANA COLA and KO KANE for beverages) because it is scandalous to "inappropriately glamoriz[e] drug abuse." But at the same time, the PTO registered marks with such sayings as D.A.R.E. TO RESIST DRUGS AND VIOLENCE and SAY NO TO DRUGS—REALITY IS THE BEST TRIP IN LIFE. Similarly, the PTO disapproved registration for the mark BONG HITS 4 JESUS because it "suggests that people should engage in an illegal activity [in connection with] worship" and because "Christians would be morally outraged by a statement that connects Jesus Christ with illegal drug use." And the PTO refused to register trademarks associating religious references with products (AGNUS DEI for safes and MADONNA for wine) because they would be "offensive to most individuals of the Christian faith" and "shocking to the sense of propriety." But once again, the PTO approved marks—PRAISE THE LORD for a game and JESUS DIED FOR YOU on clothing—whose message suggested religious faith rather than blasphemy or irreverence. Finally, the PTO rejected marks reflecting support for al-Qaeda (BABY AL QAEDA and AL-QAEDA on t-shirts) "because the bombing of civilians and other terrorist acts are shocking to the sense of decency and call out for condemnation." Of course, all these decisions are understandable. The rejected marks express opinions offensive to many Americans. But as the Court made clear in *Tam*, a law disfavoring "ideas that offend" discriminates based on viewpoint, in violation of the First Amendment.

How, then, can the Government claim that the "immoral or scandalous" bar is viewpoint-neutral? The Government basically asks us to treat decisions like those described above as PTO examiners' mistakes. Still more, the Government tells us to ignore how the Lanham Act's language, on its face, disfavors some ideas. In urging that course, the Government does not dispute that the statutory language—and words used to define it—have just that effect. At oral argument, the Government conceded: "If you just looked at the words like 'shocking' and 'offensive' on their face and gave them their ordinary meanings, they could easily encompass material that was shocking [or offensive] because it expressed an outrageous point of view or a point of view that most members" of society reject. But no matter, says the Government, because the statute is "susceptible of" a limiting construction that would remove this viewpoint bias. The Government's idea, abstractly phrased, is to narrow the statutory bar

to "marks that are offensive [or] shocking to a substantial segment of the public because of their mode of expression, independent of any views that they may express." More concretely, the Government explains that this reinterpretation would mostly restrict the PTO to refusing marks that are "vulgar"—meaning "lewd," "sexually explicit or profane." Such a reconfigured bar, the Government says, would not turn on viewpoint, and so we could uphold it.

But we cannot accept the Government's proposal, because the statute says something markedly different. This Court, of course, may interpret "ambiguous statutory language" to "avoid serious constitutional doubts." But that canon of construction applies only when ambiguity exists. "We will not rewrite a law to conform it to constitutional requirements." So even assuming the Government's reading would eliminate First Amendment problems, we may adopt it only if we can see it in the statutory language. And we cannot. The "immoral or scandalous" bar stretches far beyond the Government's proposed construction. The statute as written does not draw the line at lewd, sexually explicit, or profane marks. . . .

And once the "immoral or scandalous" bar is interpreted fairly, it must be invalidated. The Government just barely argues otherwise. In the last paragraph of its brief, the Government gestures toward the idea that the provision is salvageable by virtue of its constitutionally permissible applications (in the Government's view, its applications to lewd, sexually explicit, or profane marks). In other words, the Government invokes our First Amendment overbreadth doctrine, and asks us to uphold the statute against facial attack because its unconstitutional applications are not "substantial" relative to "the statute's plainly legitimate sweep." But to begin with, this Court has never applied that kind of analysis to a viewpoint-discriminatory law. In *Tam*, for example, we did not pause to consider whether the disparagement clause might admit some permissible applications (say, to certain libelous speech) before striking it down. The Court's finding of viewpoint bias ended the matter. And similarly, it seems unlikely we would compare permissible and impermissible applications if Congress outright banned "offensive" (or to use some other examples, "divisive" or "subversive") speech. Once we have found that a law "aims at the suppression of" views, why would it matter that Congress could have captured some of the same speech through a viewpoint-neutral statute? But in any event, the "immoral or scandalous" bar is substantially overbroad. There are a great many immoral and scandalous ideas in the world (even more than there are swearwords), and the Lanham Act covers them all. It therefore violates the First Amendment.

B. Content Neutral Time, Place, and Manner Regulations

1. HEFFRON v. INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS
452 U.S. 640 (1981)

WHITE, J., delivered the opinion of the Court, in which BURGER, C.J., and STEWART, POWELL, and REHNQUIST, JJ., joined.

The question presented for review is whether a State, consistent with the First and Fourteenth Amendments, may require a religious organization desiring to distribute and sell religious literature and to solicit donations at a state fair to conduct those activities only at an assigned

location within the fairgrounds even though application of the rule limits the religious practices of the organization.

Minnesota State Fair Rule 6.05 provides in relevant part that "all persons, groups or firms which desire to sell, exhibit or distribute materials during the annual State Fair must do so only from fixed locations on the fairgrounds."Although the Rule does not prevent organizational representatives from walking about the fairgrounds and communicating the organization's views with fair patrons in face-to-face discussions, it does require that any exhibitor conduct its sales, distribution, and fund solicitation operations from a booth. Space in the fairgrounds is rented to all comers in a nondiscriminatory fashion on a first-come, first-served basis with the rental charge based on the size and location of the booth. The Rule applies alike to nonprofit, charitable, and commercial enterprises.

One day prior to the opening of the 1977 Minnesota State Fair, respondents International Society for Krishna Consciousness, Inc. (ISKCON), an international religious society espousing the views of the Krishna religion, and Joseph Beca, head of the Minneapolis ISKCON temple, filed suit seeking a declaration that Rule 6.05 violated respondents' rights under the First Amendment. Specifically, ISKCON asserted that the Rule would suppress the practice of Sankirtan, one of its religious rituals, which enjoins its members to go into public places to distribute or sell religious literature and to solicit donations for the support of the Krishna religion. The Minnesota Supreme Court [held] that Rule 6.05, as applied to respondents, unconstitutionally restricted the Krishnas' religious practice of Sankirtan.

The issue here is whether Rule 6.05 is a permissible restriction on the place and manner of communicating the views of the Krishna religion. A major criterion for a valid time, place, and manner restriction is that the restriction "may not be based upon either the content or subject matter of speech." Rule 6.05 qualifies in this respect, since the Rule applies evenhandedly to all who wish to distribute and sell written materials or to solicit funds. No person or organization, whether commercial or charitable, is permitted to engage in such activities except from a booth rented for those purposes. Nor does Rule 6.05 suffer from the more covert forms of discrimination that may result when arbitrary discretion is vested in governmental authority. The method of allocating space is a first-come, first-served system.

A valid time, place, and manner regulation must also "serve a significant governmental interest." Here, the principal justification asserted by the State in support of Rule 6.05 is the need to maintain the orderly movement of the crowd given the large number of exhibitors and persons attending the Fair. Because the Fair attracts large crowds, the State's interest in the orderly movement and control of such an assembly of persons is a substantial consideration.

We cannot agree with the Minnesota Supreme Court that Rule 6.05 is an unnecessary regulation because the State could avoid the threat to its interest posed by ISKCON by less restrictive means, such as penalizing disorder or disruption, limiting the number of solicitors, or putting more narrowly drawn restrictions on the location and movement of ISKCON's representatives. The inquiry must involve not only ISKCON, but also all other organizations that would be entitled to distribute, sell, or solicit if the booth rule may not be enforced with respect to ISKCON. Looked at in this way, it is quite improbable that the alternative means

suggested by the Minnesota Supreme Court would deal adequately with the problems posed by the much larger number of distributors and solicitors that would be present on the fairgrounds if the judgment below were affirmed.

For Rule 6.05 to be valid as a place and manner restriction, it must also be sufficiently clear that alternative forums for the expression of respondents' protected speech exist despite the effects of the Rule. Rule 6.05 is not vulnerable on this ground. First, the Rule does not prevent ISKCON from practicing Sankirtan anywhere outside the fairgrounds. More importantly, the Rule has not been shown to deny access within the forum in question. Here, the Rule does not exclude ISKCON from the fairgrounds, nor does it deny that organization the right to conduct any desired activity at some point within the forum. Its members may mingle with the crowd and orally propagate their views. The organization may also arrange for a booth and distribute and sell literature and solicit funds from that location on the fairgrounds itself.

The judgment of the Supreme Court of Minnesota is reversed.

2. FRISBY v. SCHULTZ
487 U.S. 474 (1988)

JUSTICE O'CONNOR delivered the opinion of the Court, joined by REHNQUIST, C.J., and BLACKMUN, SCALIA, and KENNEDY, JJ.

Brookfield, Wisconsin, has adopted an ordinance that completely bans picketing "before or about" any residence. This case presents a facial First Amendment challenge to that ordinance.

Brookfield is a residential suburb of Milwaukee with a population of approximately 4,300. The appellees, Sandra Schultz and Robert Braun, are individuals strongly opposed to abortion and wish to express their views on the subject by picketing on a public street outside the Brookfield residence of a doctor who performs abortions at two clinics in neighboring towns. Appellees and others engaged in precisely that activity, assembling outside the doctor's home on at least six occasions between April 20 and May 20, 1985, for periods ranging from one to one and a half hours. The size of the group varied from 11 to more than 40. The picketing was generally orderly and peaceful; the town never had occasion to invoke any of its ordinances prohibiting obstruction of the streets, loud and unnecessary noises, or disorderly conduct. Nonetheless, the picketing generated substantial controversy and numerous complaints.

The Town Board therefore passed an ordinance that prohibited all picketing in residential neighborhoods:

> "It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield."

The ordinance itself recites the primary purpose of this ban: "the protection and preservation of the home" through assurance "that members of the community enjoy in their homes and dwellings a feeling of well-being, tranquility, and privacy." The Town Board believed that a ban was necessary because it determined that "the practice of picketing before or about residences and dwellings causes emotional disturbance and distress to the occupants . . . [and]

has as its object the harassing of such occupants." The ordinance also evinces a concern for public safety, noting that picketing obstructs and interferes with "the free use of public sidewalks and public ways of travel."

Appellees filed this lawsuit in the United States District Court for the Eastern District of Wisconsin on the grounds that the ordinance violated the First Amendment.

The antipicketing ordinance operates at the core of the First Amendment by prohibiting appellees from engaging in picketing on an issue of public concern. Because of the importance of "uninhibited, robust, and wide-open" debate on public issues, we have traditionally subjected restrictions on public issue picketing to careful scrutiny. Of course, "[e]ven protected speech is not equally permissible in all places and at all times."

To ascertain what limits, if any, may be placed on protected speech, we have often focused on the "place" of that speech, considering the nature of the forum the speaker seeks to employ. Our cases have recognized that the standards by which limitations on speech must be evaluated "differ depending on the character of the property at issue." Specifically, we have identified three types of fora: "the traditional public forum, the public forum created by government designation, and the nonpublic forum."

The relevant forum here may be easily identified: appellees wish to picket on the public streets of Brookfield. Ordinarily, a determination of the nature of the forum would follow automatically from this identification; we have repeatedly referred to public streets as the archetype of a traditional public forum. "[T]ime out of mind" public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum. Appellants, however, urge us to disregard these "cliches." They argue that the streets of Brookfield should be considered a nonpublic forum. Pointing to the physical narrowness of Brookfield's streets as well as to their residential character, appellants contend that such streets have not by tradition or designation been held open for public communication.

We reject this suggestion. Our prior holdings make clear that a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood. In *Carey v. Brown*, 447 U.S. 455 (1980), we expressly recognized that "public streets and sidewalks in residential neighborhoods," were "public for[a]." This rather ready identification virtually forecloses appellants' argument.

In short, our decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a "cliche," but recognition that "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public." No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora. Accordingly, the streets of Brookfield are traditional public fora. The residential character of those streets may well inform the application of the relevant test, but it does not lead to a different test; the antipicketing ordinance must be judged against the stringent standards we have established for restrictions on speech in traditional public fora:

> In these quintessential public for[a], the government may not prohibit all

> communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. . . . The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983).

As *Perry* makes clear, the appropriate level of scrutiny is initially tied to whether the statute distinguishes between prohibited and permitted speech on the basis of content. Following our normal practice, "we defer to the construction of a state statute given it by the lower federal courts . . . to reflect our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States." Thus, we accept the lower courts' conclusion that the Brookfield ordinance is content neutral. Accordingly, we turn to consider whether the ordinance is "narrowly tailored to serve a significant government interest" and whether it "leave[s] open ample alternative channels of communication."

Because the last question is so easily answered, we address it first. Of course, before we are able to assess the available alternatives, we must consider more carefully the reach of the ordinance. The precise scope of the ban is not further described within the text of the ordinance, but in our view the ordinance is readily subject to a narrowing construction that avoids constitutional difficulties. Specifically, the use of the singular form of the words "residence" and "dwelling" suggests that the ordinance is intended to prohibit only picketing focused on, and taking place in front of, a particular residence. The lower courts described the ordinance as banning "all picketing in residential areas." But these general descriptions do not address the exact scope of the ordinance and are in no way inconsistent with our reading of its text. "Picketing," after all, is defined as posting at a particular place, a characterization in line with viewing the ordinance as limited to activity focused on a single residence. Moreover, while we ordinarily defer to lower court constructions of state statutes, we do not invariably do so. We are particularly reluctant to defer when the lower courts have fallen into plain error, which is precisely the situation presented here. To the extent they endorsed a broad reading of the ordinance, the lower courts ran afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties. Thus, we instead construe the ordinance more narrowly. This narrow reading is supported by the representations of counsel for the town at oral argument, which indicate that the town takes, and will enforce, a limited view of the "picketing" proscribed by the ordinance. Thus, generally speaking, "picketing would be having the picket proceed on a definite course or route in front of a home." The picket need not be carrying a sign, but in order to fall within the scope of the ordinance the picketing must be directed at a single residence. General marching through residential neighborhoods, or even walking a route in front of an entire block of houses, is not prohibited by this ordinance. Accordingly, we construe the ban to be a limited one; only focused picketing taking place solely in front of a particular residence is prohibited.

So narrowed, the ordinance permits the more general dissemination of a message. As appellants explain, the limited nature of the prohibition makes it virtually self-evident that

ample alternatives remain:

> "Protestors may enter neighborhoods, alone or in groups, even marching. They may go door-to-door. They may distribute literature in this manner or through the mails. They may contact residents by telephone, short of harassment."

We readily agree that the ordinance preserves ample alternative channels of communication and thus move on to inquire whether the ordinance serves a significant government interest. We find that such an interest is identified within the text of the ordinance itself: the protection of residential privacy.

"The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order." Our prior decisions have often remarked on the unique nature of the home, "the last citadel of the tired, the weary, and the sick," and have recognized that "[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value."

One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different. "That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere." Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their homes and the government may protect this freedom.

This principle is reflected even in prior decisions in which we have invalidated complete bans on expressive activity, including bans operating in residential areas. In all such cases, we have been careful to acknowledge that unwilling listeners may be protected when within their own homes. We have "never intimated that the visitor could insert a foot in the door and insist on a hearing." There simply is no right to force speech into the home of an unwilling listener.

It remains to be considered, however, whether the Brookfield ordinance is narrowly tailored to protect only unwilling recipients of the communications. A statute is narrowly tailored if it targets no more than the exact source of the "evil" it seeks to remedy. A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil. For example, we upheld an ordinance that banned all signs on public property because the interest supporting the regulation, an esthetic interest in avoiding visual clutter and blight, rendered each sign an evil. Complete prohibition was necessary because "the substantive evil -- visual blight -- [was] created by the medium of expression itself."

The same is true here. The type of focused picketing prohibited by the Brookfield ordinance is fundamentally different from more generally directed means of communication that may not be completely banned in residential areas. The type of picketers banned by the Brookfield ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way. Moreover, even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy. The devastating effect of targeted

picketing on the quiet enjoyment of the home is beyond doubt.

In this case, for example, appellees subjected the doctor and his family to the presence of a relatively large group of protesters on their doorstep in an attempt to force the doctor to cease performing abortions. But the actual size of the group is irrelevant; even a solitary picket can invade residential privacy. The offensive and disturbing nature of the form of the communication banned by the Brookfield ordinance thus can scarcely be questioned.

The First Amendment permits the government to prohibit offensive speech as intrusive when the "captive" audience cannot avoid the objectionable speech. The resident is figuratively, and perhaps literally, trapped within the home and left with no ready means of avoiding the speech. Thus, the "evil" of targeted residential picketing, "the very presence of an unwelcome visitor," is "created by the medium of expression itself." Accordingly, the Brookfield ordinance's complete ban of that particular medium of expression is narrowly tailored.

Of course, this case presents only a facial challenge to the ordinance. Particular hypothetical applications of the ordinance -- to, for example, a particular resident's use of his or her home as a place of business, or to picketers present at a home by invitation of the resident -- may present somewhat different questions. These are, however, questions we need not address today in order to dispose of appellees' facial challenge.

Because the picketing prohibited by the Brookfield ordinance is speech directed primarily at those who are presumptively unwilling to receive it, the State has a substantial and justifiable interest in banning it. The nature and scope of this interest make the ban narrowly tailored. The ordinance also leaves open ample alternative channels of communication and is content neutral. Largely because of its narrow scope, the facial challenge to the ordinance must fail.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The Court today sets out the appropriate legal tests and standards governing the question presented, and proceeds to apply most of them correctly. Regrettably, the Court errs in the final step of its analysis, and approves an ordinance banning significantly more speech than is necessary to achieve the government's substantial goal. Accordingly, I must dissent.

Without question there are many aspects of residential picketing that, if unregulated, might easily become intrusive or unduly coercive. Indeed, some of these aspects are illustrated by this very case. Before the ordinance took effect up to 40 sign-carrying, slogan shouting protesters regularly converged on Dr. Victoria's home and, in addition to protesting, warned young children not to go near the house because Dr. Victoria was a "baby killer." Further, the throng repeatedly trespassed onto the Victorias' property and at least once blocked the exits to their home. Surely it is within the government's power to enact regulations as necessary to prevent such intrusive and coercive abuses. Thus, for example, the government could constitutionally regulate the number of residential picketers, the hours during which a residential picket may take place, or the noise level of such a picket. In short, substantial regulation is permitted to neutralize the intrusive or unduly coercive aspects of picketing around the home. But to say that picketing may be regulated is not to say that it may be

prohibited. Once size, time, volume, and the like have been controlled to ensure that the picket is no longer intrusive or coercive, only the speech itself remains. Such speech, which no longer implicates the heightened governmental interest in residential privacy, is nevertheless banned by the Brookfield law. Therefore, the ordinance is not narrowly tailored.

JUSTICE STEVENS, dissenting.

"GET WELL CHARLIE -- OUR TEAM NEEDS YOU."

In Brookfield, Wisconsin, it is unlawful for a fifth grader to carry such a sign in front of a residence for the time necessary to convey its friendly message to its intended audience.

The Court's analysis of the question whether Brookfield's ban on picketing is constitutional concludes that the total ban on residential picketing is "narrowly tailored" to protect "only unwilling recipients of the communications." The plain language of the ordinance, however, applies to communications to willing and indifferent recipients as well as to the unwilling.

Two characteristics of picketing make this a difficult case. First, it is important to recognize that, "picketing is a mixture of conduct and communication." If we put the speech element to one side, I should think it perfectly clear that the town could prohibit pedestrians from loitering in front of a residence. On the other hand, it seems equally clear that a sign carrier has a right to march past a residence -- and presumably pause long enough to give the occupants an opportunity to read his or her message -- regardless of whether the reader agrees, disagrees, or is simply indifferent to the point of view being expressed. Second, it bears emphasis that: "[A] communication may be offensive in two different ways. Independently of the message the speaker intends to convey, the form of his communication may be offensive." Picketing is a form of speech that, by virtue of its repetition of message and often hostile presentation, may be disruptive irrespective of the substantive message conveyed.

The picketing that gave rise to the ordinance enacted in this case was obviously intended to cause him and his family substantial psychological distress. As the record reveals, the picketers' message was repeatedly redelivered by a relatively large group. As is often the function of picketing, during the periods of protest the doctor's home was held under a virtual siege. I do not believe that picketing for the sole purpose of imposing psychological harm on a family in the shelter of their home is constitutionally protected. I do believe, however, that the picketers have a right to communicate their strong opposition to abortion to the doctor, but after they have had a fair opportunity to communicate that message, I see little justification for allowing them to remain in front of his home and repeat it over and over again simply to harm the doctor and his family. Thus, I agree that the ordinance may be constitutionally applied to the kind of picketing that gave rise to its enactment.

On the other hand, the ordinance is unquestionably "overbroad." The scope of the ordinance gives the town officials far too much discretion in making enforcement decisions; potential picketers must act at their peril. Second, it is a simple matter for the town to amend its ordinance and to limit the ban to conduct that unreasonably interferes with the privacy of the home and does not serve a reasonable communicative purpose. I respectfully dissent.