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TRADEMARKS, HATE SPEECH, AND SOLVING A PUZZLE OF VIEWPOINT BIAS

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In the hierarchy of constitutional offenses to free speech principles, content discrimination is near the very top. Since the early 1970s, the Court has identified laws that regulate speech on the basis of its content as presumptively unconstitutional.¹ Content discrimination is considered an indication that the government is tipping the scales in public debate, the central ill against which the free speech clause protects.² Unless there is a narrow exception in play, content-based laws are subject to strict scrutiny, upheld only if the government can show that the regulation is narrowly tailored to satisfy a compelling interest.³ Only a handful of laws have satisfied such an exacting test.⁴ The commitment to content neutrality has become so central to free speech doctrine that the Court has brought it to bear to strike down laws that are far afield from those that appear to be pose a risk that “official suppression of ideas is afoot.”⁵

But at the apex of free speech affronts is not content discrimination but viewpoint discrimination. While content-based laws make regulatory choices on the basis of the topic or subject matter of the speech in question (for example, “no speech about abortion in

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¹ See Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 Va. L. Rev. 203 (1982) (pointing to the Court’s announcement in *Police Dept v Mosley*, 408 US 92, 95 (1972), that “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.”).

² See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm & Mary L Rev 189 (1983).

³ *Reed v Town of Gilbert*, 135 S Ct 2218 (2015).

⁴ See, for example, *Williams-Yulee v Florida Bar*, 575 U.S. 433 (2015).

⁵ See *Reed*, 135 S Ct at 2327-38 (Kagan concurring in the judgment)(critiquing Court’s decision as an overly aggressive application of its skepticism of content discrimination beyond “its intended function”).

public parks”), viewpoint-based laws make regulatory choices on the basis of the point of view of the speaker within a content category of speech (“no anti-choice speech in public parks”). The constitutional harm of content bias is setting aside categories of speech for greater or lesser protection based on its subject matter; the constitutional harm of viewpoint bias is setting aside speech within categories for greater or lesser protection based on its political, cultural, social, or economic point of view. Content bias skews debate by limiting categories of speech; viewpoint bias skews debate by limiting points of view within categories.

Content-based laws require strict scrutiny, but the Court has made clear that viewpoint bias is even worse than content bias. Justice Samuel Alito has called laws that discriminate on the basis of viewpoint “poison to a free society,” and there is little apparent disagreement on this point among his colleagues. While some members of the Court have argued that the doctrinal fixation on content bias has gone too far,⁶ no current justice has come close to suggesting that the Court’s fixation on ferreting out viewpoint bias is inappropriate. The unanimity is striking. While there has been a handful of instances where there was disagreement as to whether a specific law was viewpoint-based or not,⁷ there has not been a single instance in the last fifty years of the Court characterizing a law as viewpoint-based and nevertheless ruling that the law satisfied strict scrutiny.⁸

Notwithstanding the Court’s uniform condemnation of viewpoint bias, it is rarely a doctrinal game changer. A law that makes distinctions according to viewpoint also, by definition, makes distinctions according to content. A ban on anti-choice speech, for example, is both viewpoint-based and content-based. And because content discrimination usually triggers strict scrutiny by itself, the added constitutional affront of viewpoint discrimination does not

⁶ See *Reed*, 135 S Ct at 2328 (Kagan, concurring in the judgment) (arguing the Court’s fixation on content neutrality has led it to overreach, and the Court should instead “administer our content-regulation doctrine with a dose of common sense”); *Iancu v Brunetti*, 139 S Ct 2294, 2304 (2019) (Breyer, concurring in part and dissenting in part) (“Unfortunately, the Court has sometimes applied these rules—especially the category of “content discrimination”—too rigidly.”).

⁷ See, for example, *Brunetti*, 139 S Ct 2294; *Rosenberger v Rector and Visitors of Univ of Va*, 515 US 819 (1995).

⁸ In *R.A.V. v City of St. Paul*, 508 US 377, 395-96 (1992), the Court conceded that the “hate speech” ordinance at issue was based on a compelling interest, but held that the ordinance was not narrowly tailored to satisfy that interest. See below at notes 63-64.

increase the level of judicial scrutiny in the run of cases.⁹ Viewpoint bias is only material as a matter of doctrine in those cases in which the Court might otherwise be open to accepting some level of content basis in a legal framework — such as in cases pertaining to commercial speech,¹⁰ limited public fora,¹¹ or “low-value” speech such as fighting words.¹² In those cases, if the Court sees viewpoint bias, it ratchets up the level of scrutiny. In some cases, the Court has made clear that the viewpoint bias of the law increased the level of scrutiny over what would have been applied otherwise, but was vague in articulating what the final level of scrutiny should be.¹³ In others, the Court has applied strict scrutiny to speech restrictions that would, but for the viewpoint bias, otherwise receive only rational basis review.¹⁴

In any event, over the past few decades the viewpoint discrimination of a law has been dispositive in only a handful of Supreme Court cases. That means that the Court has had few opportunities to articulate the contours and limits of what amounts to viewpoint bias. The core of what constitutes viewpoint bias may be

⁹ As a theoretical matter, viewpoint bias could have doctrinal effects even in cases in which content bias already requires strict scrutiny in that viewpoint bias would make it even more difficult for the state to show that the biased law is narrowly tailored to serve a compelling interest. Not only would the state have to show a compelling interest to regulate specific content but to regulate content of a specific point of view. The tailoring analysis, too, would be doubly difficult. The Court implied something like this in *R.A.V.*, when it conceded that the St. Paul ordinance served a compelling interest but failed tailoring. See below at notes 63-64. But the Court has never struck down a viewpoint-biased law as failing strict scrutiny that the Court said would have survived a content-based application of strict scrutiny. This difference is thus mostly theoretical only.

¹⁰ *Central Hudson Gas & Elec Corp v Pub Svc Comm of NY*, 447 US 557 (1980).

¹¹ See, eg, *Good News Club v Milford Central School*, 533 US 98, 107 (2001); *Rosenberger*, 515 US at 831; *Lamb’s Chapel v Center Moriches Union Free School Dist*, 508 U S 384, 392-93 (1993). See also *Legal Services Corporation v. Velazquez*, 531 US 533, 544 (2001). As Justice Alito says in *Tam*: “When government creates such a forum, in either a literal or “metaphysical” sense... some content- and speaker-based restrictions may be allowed... However, even in such cases, what we have termed ‘viewpoint discrimination’ is forbidden.” *Matal v Tam*, 137 S Ct 1744, 1763 (2017) (quoting *Rosenberger*, 515 US at 830-31).

¹² See *R.A.V.*, 508 US 377.

¹³ See, for example, *Tam*, 137 S Ct at 1764 (Court need not decide level of scrutiny because provision would fail even intermediate review) (plurality); *Sorrell v IMS Health*, 564 U.S. 552, 571 (2011) (describing level of review for viewpoint-based regulation of commercial speech as “heightened”).

¹⁴ See *R.A.V.*, 508 US 377 (applying strict scrutiny to a viewpoint-based regulation of fighting words).

more or less clear — when the government regulates one point of view within a category of speech differently from others. But the edges of the doctrine are still being defined.

One enduring puzzle dates from the Court’s most famous modern viewpoint discrimination case, *R.A.V. v St. Paul*, from 1992.¹⁵ There, the city made it a misdemeanor to place “on public or private property a symbol ... including, but not limited to, a burning cross or Nazi swastika, which ... arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender.”¹⁶ This ordinance was clearly content-based — it made distinctions among symbols on the basis of the content of the communication. But the law’s content basis was not enough to trigger strict scrutiny alone, because (according to the Minnesota Supreme Court, whose interpretation was controlling for purposes of the case) the ordinance only applied to “fighting words,” a low-value category of speech that the Court had long considered “not within the area of constitutionally protected speech.”¹⁷ But the United States Supreme Court nevertheless applied strict scrutiny and struck down the ordinance as discriminating on the basis of viewpoint.

One aspect of *R.A.V.* has remained unclear since its announcement nearly thirty years ago. What exactly made the St. Paul ordinance viewpoint based?¹⁸ The text of the ordinance appears to ban a specific mode or manner of speech — fighting words that also contained some kind of racial, sexual, or religious epithet. The city argued that the law only applied to “racial, religious, or gender-specific symbols” and the Court interpreted the ordinance to mean that the use of such epithets “would be prohibited to proponents of all views.” In other words, the ordinance was arguably an even-handed limitation of a mode or manner of speech — the use of epithets. But the Court nevertheless held the ordinance to be viewpoint biased. One way to read *R.A.V.*, then, is that specific limits on the mode or manner of speech can trigger the Court’s ire against viewpoint discrimination.

That was not the only way to read the ordinance, and it is not the only way to read the Court’s opinion in *R.A.V.*. Was the ordinance

¹⁵ *Id.*

¹⁶ *Id.* at 380.

¹⁷ *Id.* at 383, citing *Chaplinsky v New Hampshire*, 315 US 568, 571-72 (1942).

¹⁸ Cf. Cass R. Sunstein, *On Analogical Reasoning*, 106 Harv L Rev 741, 762-63 & n 78 (1993) (*R.A.V.* ordinance not viewpoint-based in practice); Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v St. Paul, Rust v Sullivan, and the Problem of Content-Based Underinclusion*, 1992 S Ct Rev 29, 69-71 (*R.A.V.* ordinance viewpoint-based in practice).

viewpoint-based because of the underlying message of the speech, the idea expressed? Or was it because of the mode or manner regulated? In *R.A.V.* itself, the action that triggered the arrest under the ordinance was the burning of a cross on the lawn of a black family. The mode — the burning of the cross — expressed the idea — racial hatred. Justice Antonin Scalia’s opinion for the Court muddled the analysis and left unclear whether the constitutional infirmity of the ordinance was its selection of a specific viewpoint for greater punishment or its selection of a specific mode of communication for greater punishment.

The difference between these two possible readings matters for a range of possible applications. For example, if limits on specific modes or manners of speech are deemed to be viewpoint discrimination, then it may be “virtually impossible” to enact a speech code at a university that would not trigger strict scrutiny.¹⁹ Or, limits on sexually explicit speech in the workplace could be seen as constitutionally problematic.²⁰

Notwithstanding the lack of clarity in *R.A.V.* and the important implications of the definitional uncertainty, the Court has not taken the opportunity to clarify whether specific limits on the mode and manner of communication can amount to viewpoint bias. What we have known for the last generation is that viewpoint bias is the worst kind of First Amendment harm — but that its contours remain unclear. In the words of Justice Sonia Sotomayor, “the line between viewpoint-based and viewpoint-neutral content discrimination can be ‘slippery.’”²¹

¹⁹ David L. Hudson Jr. & Lata Nott, *Hate Speech and Campus Speech Codes*, Freedom Forum Institute, March 2017 (last accessed Oct 10, 2019) (“while speech codes faced an uphill battle under the constitutional precedent in place before *R.A.V.*, this decision made it virtually impossible for a speech code to pass constitutional muster”)(quoting S. Douglas Murray, *The Demise of Campus Speech Codes*, 24 West St U L Rev 247, 264-65 (1997); see also Erwin Chemerinsky, *Constitutional Law: Principles and Practices* 1013-14 (3d ed 2006) (*R.A.V.* “makes it difficult for hate speech codes to survive judicial analysis; if they prohibit only some forms of hate, they will be invalidated as impermissible content-based discrimination”); id at 1007 (“there is a strong presumption against content-based discrimination within categories of unprotected speech”).

²⁰ See below at note 45.

²¹ *Brunetti*, 139 S Ct at 2313 (Sotomayor, concurring in part and dissenting in part) (quoting Caroline Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 NYU L Rev 605, 651 (2008)). See also *Brunetti*, 139 S Ct at 2306 (Breyer, concurring in part and dissenting in part) (“As for the concepts of ‘viewpoint discrimination’ and ‘content discrimination,’ I agree with Justice Sotomayor that the boundaries between them may be difficult to discern.”); *Rosenberger*, 515 US at 831 (“[T]he distinction is not a precise one”).

But the Court has recently offered help.

In two cases over the last three Terms, the Supreme Court struck down provisions of the Lanham Act, the federal law governing the registration of trademarks, on the grounds that the laws discriminated on the basis of viewpoint. In the first, the 2017 case of *Matal v Tam*,²² the Court declared unconstitutional the provision of the Act that required the trademark office to refuse registration to those marks that “disparaged” individuals or groups. In the second, in *Iancu v Brunetti* from 2019, the Court ruled against the provision that prohibited the registration of marks that were “immoral” or “scandalous.”²³

According to the Court, both were straightforward viewpoint cases. Disparaging marks could not be trademarked, yet non-disparaging marks could. Marks celebrating immorality and scandalousness could not be registered, yet marks celebrating civility and decency could. The provisions put the government’s thumb on the scale in favor of racial harmony and morality by creating a regulatory framework that benefitted speech consistent with those views and refused benefits to speech inconsistent with those views. The Court reaffirmed its long-standing view that viewpoint discrimination is an “egregious form of content discrimination” and a presumptive First Amendment violation.²⁴ It was in his *Brunetti* concurrence where Justice Alito made his statement, mentioned above, that “viewpoint discrimination is poison to a free society.”²⁵

Tam was largely unhelpful as a matter of definition and doctrine, however, because the Court struck down the disparagement provision without a majority opinion. Justice Alito wrote for himself and three justices; Justice Anthony Kennedy headed up another contingent of four.²⁶ Both opinions described the disparagement provision as a violation of the First Amendment’s bar on viewpoint discrimination, but arrived at that destination by different routes. Doctrinal uncertainty remained.

But this past Term’s decision in *Brunetti* helped matters considerably. The Court struck down the provisions of the Lanham Act

²² 137 S Ct 1744 (2017).

²³ 139 S Ct 2294 (2019).

²⁴ See *Rosenberger*, 515 US at 829 (1995). See also *Brunetti*, 139 S Ct 2294 at 2299 (quoting *Rosenberger*); *Lamb’s Chapel*, 508 US at 394 (“[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others”).

²⁵ 139 S Ct 2294 at 2302.

²⁶ Justice Gorsuch took no part in the case.

prohibiting the registration of “immoral” and “scandalous” marks as viewpoint biased. The Court’s opinion was written by Justice Elena Kagan, and the main oppositional opinion — one concurring in part and dissenting in part — was penned by Justice Sonia Sotomayor. The conflict between the two in fact illuminated what appears to be an important area of agreement that, in all likelihood, is sufficient to control a majority of the Court. That agreement is this: that worries about viewpoint bias do not ordinary come into play when the government regulates the mode and manner of communication as opposed to the ideas conveyed.

Such a principle would have a number of implications. Perhaps the most important is that *R.A.V.* is less significant in First Amendment doctrine than it has seemed for thirty years. Also, some kinds of speech codes could survive First Amendment challenge, as long as they apply in certain fora and are aimed at the mode and manner of communication rather than the ideas expressed. Another implication would be that it would be possible for Congress to rewrite the now-defunct provisions of the Lanham Act to survive First Amendment challenge and also satisfy much of Congress’s original goals.

This essay proceeds as follows. I first describe two kinds of viewpoint bias, the first of which is “traditional” bias and the second is “manner” bias. Traditional bias is when the government puts its finger on the scale in a cultural, social, ideological, or political debate by enforcing some kind of speech restriction against one side and not against the other. Manner bias is when the government restricts a mode or manner of communication. Manner bias is indeed bias — it is the government enforcing a view that a certain type of communication is to be regulated in a different way than other kinds of communication. But it is a bias of a different kind than traditional viewpoint discrimination.

In Part II, I describe the lack of clarity in *R.A.V.* and other cases as to whether manner bias is constitutionally problematic. In Part III, I set out why the best reading of *Brunetti* is to exclude manner bias from the category of viewpoint bias the Court recognizes as constitutional “poison.” Finally, in Part IV, I describe what I believe to be the best understanding of the doctrine of viewpoint bias after *Brunetti* and explain some of the implications of this doctrinal understanding.

I. CONTENT BIAS AND TWO TYPES OF VIEWPOINT BIAS

Consider a series of hypothetical local sign ordinances. The first reads:

Signs on Private Property: Signs on private property are prohibited without a permit. Exempt from this prohibition shall be political signs (which shall be no larger than 20 square feet in size), ideological signs, (which shall be no larger than 16 square feet in size), and temporary signs indicating directions to an event (which shall be no larger than 6 square feet).

Ordinances such as this are ubiquitous in the United States.²⁷ Cities and towns regulate the location, size, appearance, of signs in order to guard against the visual clutter and distraction that the absence of such ordinances would engender. And one might think it is reasonable for cities and towns to make some distinctions among the kinds of signs when it creates such ordinances.

But this hypothetical ordinance is a simplified version of the ordinance the Court struck down in *Reed v Town of Gilbert*. The Court ruled that the ordinance created “content-based restrictions of speech that cannot survive strict scrutiny.”²⁸ As the Court explained, the regulations applicable to a particular sign “depend entirely on the communicative content of the sign.”²⁹ According to the Court, government regulations of speech that depend on the content of the speech raise the possibility that the government is placing its thumb on the scale of public debate. Content-based regulations are “presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”³⁰

Is this first ordinance viewpoint based? In a way, yes. The ordinance makes judgments about the allowable size of signs based on the subject matter of the speech conveyed by the sign. Political signs can be one particular size, ideological signs must be smaller, and

²⁷ See *Reed*, 135 S Ct at 2236 (Kagan concurring in 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 a critique of *Reed*’s reasoning and a description of why it has potentially broad-ranging impacts, see Genevieve Lakier, *Reed v Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment*, 2016 S Ct Rev 233 (2016).

²⁸ Id at 2224.

²⁹ Id at 2222.

³⁰ Id at 2226.

directional signs smaller still. This hierarchy implies that the town had a viewpoint about the importance of political speech and the lesser importance of other kinds of speech. Political speech was sufficiently crucial to the town that its regulation is less intrusive than other kinds of speech.

But this classification of speech, even if it is based on a view about the relative importance of various subject matters, is *not* what the Court considers viewpoint discrimination. Justice Clarence Thomas, writing for the Court, made clear that the ordinance in *Reed* was not to be considered viewpoint-based even though it established such a hierarchy. The Ninth Circuit below had opined that the ordinance should survive because it was not viewpoint based. In response, Thomas emphasized that content-based discrimination was enough to raise the level of judicial scrutiny and the ordinance was not required to be viewpoint-based to trigger strict scrutiny. The sign ordinance was a “paradigmatic example of content-based discrimination.” This was true “even if it does not target viewpoints within that subject matter.”³¹

The distinction between content-based and viewpoint-based laws, then, is the difference between creating categories of speech for special treatment and creating advantages or disadvantages *within* those categories based on points of view. This is true even if the creation of the categories is based, as it would have to be, on some government view about the merits, importance, or harms flowing from different categories of speech. For an ordinance to discriminate on the basis of viewpoint, the views differentiated have to be about something exogenous to the category rather than endogenous to it. The Court has sometimes referred to this distinction as the difference between “subject matter” and “particular views taken by speakers on a subject.”³²

This distinction between content and viewpoint, assumed by the Court in *Reed*, makes sense. If the categorization of speech was itself a viewpoint, then there would be no difference between a content-based statute and a viewpoint-based statute. If the creation of a category of

³¹ *Reed*, 135 S Ct at 2223. The definitive scholarly treatment of subject matter distinctions within free speech law remains Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject Matter Restrictions*, 46 U Chi L Rev 81 (1978).

³² *Rosenberger*, 515 US at 829. See *id* at 895 (Souter dissenting) (“It is precisely this element of taking sides in a public debate that identifies viewpoint discrimination and makes it the most pernicious of all distinctions based on content.”).

speech is viewpoint discrimination — because it would imply a point of view about that category — then viewpoint bias would collapse into content bias.³³

Now consider a second hypothetical ordinance. A city council adopts the following sign ordinance:

Signs on Private Property: Signs on private property are prohibited without a permit. Exempt from this prohibition shall be political signs, which shall be no larger than 20 square feet in size. But in no case shall a property owner erect a sign advocating Communism.

Such an ordinance would discriminate on the basis of viewpoint. Within the category of political signs one point of view — support of Communism — is more heavily regulated than competing points of view, such as the advocacy of capitalism or opposition to Communism. The government is putting its thumb on the scale of public debate in favor of one position and against another. This is a violation of a core principle of the First Amendment that the government may not regulate speech because of the ideas expressed. We do not see many of these blatant facial classifications in modern cases.³⁴ They are so

³³ In *Rosenberger*, Justice Souter in dissent accused the Court of doing this very thing. The University of Virginia refused funds for a student-run religious newspaper on the basis of a guideline prohibiting the use of student activity fees for any “religious activity,” defined as any activity that “primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.” 515 US at 825. Justice Souter dissented in the case, saying that this provision did not embody viewpoint discrimination because it excluded an entire category of subject matter from funding, whether it was to promote a Christian, Muslim, Buddhist, or even atheistic point of view. To Souter, the rule “den[ied] funding for the entire subject matter of religious apologetics.” Id at 896 (Souter, J, dissenting). But Justice Kennedy’s opinion for the Court interpreted the guideline differently, saying the “University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints.” Id at 831. The university had identified a “prohibited perspective, not the general subject matter” for disfavored treatment. Id. For a critique of the Court’s understanding of viewpoint bias in *Rosenberger*, see Kent Greenawalt, *Viewpoints From Olympus*, 96 Colum L Rev 697 (1996).

³⁴ One example was the ordinance at issue in *American Booksellers Association v. Hudnut*, 771 F2d 323 (7th Cir 1985) aff’d mem 475 US 1001 (1986). There, an Indianapolis ordinance prohibited “pornography” defined as “graphic sexually explicit subjugation of women” that also met several other criteria focused on the depiction’s degradation of women. Depictions of the subjugation of people not presenting as women were not regulated, nor were the depictions of women in a

clearly problematic that they do not easily win adoption, either out of a shared commitment to First Amendment principles or out of fear of litigation that will result in a quick and embarrassing defeat.³⁵

For the purpose of this article, I will call this kind of law as exhibiting “traditional” viewpoint bias. Traditional bias is the kind of bias that occurs when within a category of speech one viewpoint is regulated differently from others. The viewpoint that is regulated has to be exogenous to, or a subset within, the category. This will become clearer in comparison to a third hypothetical ordinance.

Consider a third ordinance that reads as follows:

Signs on Private Property: Signs on private property are prohibited without a permit or unless they fall into certain exempt categories [detailed elsewhere]. But in no case shall signs contain profanity.

Such an ordinance limiting profanity would not be like the first ordinance above. It regulates content, to be sure. One can only determine whether a sign contains profanity prohibited by the ordinance by looking at the content of the sign. But the ordinance focuses on the mode or manner of the communication rather than the subject matter or issue area of communication. The profanity ban does not “single[] out specific subject matter for differential treatment,”³⁶ delineating signs for different levels of regulation based on the subject matter of the informational content the sign contains.

Nor is this ordinance based on viewpoint like the second hypothetical above. It does not make distinctions within a category of

position of equality, no matter how sexually explicit. The Court of Appeals for the Seventh Circuit correctly held that the statute was viewpoint based, and the Supreme Court summarily affirmed. For such a law to survive, it would have to satisfy strict scrutiny. See Geoffrey R. Stone, *Anti-Pornography Legislation as Viewpoint-Discrimination*, 9 Harv J of L & Pub Pol 461 (1986).

³⁵ The viewpoint bias of a law need not appear on its face. A facially neutral law regulating speech that is motivated by a desire to benefit or hurt a specific viewpoint and implemented to do so will also be seen as discriminating on the basis of viewpoint. See *Ward v Rock Against Racism*, 491 US 781, 791 (1989) (“The government’s purpose is the controlling consideration.”). See also Geoffrey R. Stone, *Content Neutral Restrictions*, 54 U Chi L Rev 46, 56 (1987) (“A central task of first amendment jurisprudence is to ferret out improper motivations when they in fact exist.”); Lawrence H. Tribe, *American Constitutional Law* 794 (2d ed 1988) (law should be deemed content-based if it is discriminatory on its face or it was “motivated by (i.e., would not have occurred but for) an intent to single out constitutionally protected speech for control or penalty”).

³⁶ *Reed*, 135 S Ct at 2223.

speech based on viewpoints exogenous to, or a subset within, that category. It does not, for example, punish profanity against incumbents but permit profanity against political challengers. It does not prohibit profanity aimed at women but allow profanity aimed at men. It does not allow profanity aimed at anti-abortion protesters but prohibit it when aimed at pro-choice protesters.

Nevertheless, the anti-profanity ordinance does contain a viewpoint and regulates speech on the basis of that viewpoint. The law is inherently based on the view that profanity is of lower value than non-profanity. A regulator could have this view about profanity for a number of reasons. It could be that the law is based on the notion that profanity is uncivil discourse, or that it is likely to irritate or enrage passers-by, or that the appearance of profane signs will be harmful to property values, or that ubiquitous profanity decays the civility that some citizens want their neighborhoods to characterize. A ban on communication that is profane undoubtedly embeds within it a viewpoint about profanity.

This point can be generalized. Any content-based limit on the mode or manner of speech embeds within it a viewpoint about the propriety of that mode or manner. A ban on profane speech contains a viewpoint about profanity. A ban on sexually explicit speech embeds within it a viewpoint about sexual explicitness. A ban on deceptive speech embeds within it a viewpoint about deception. Other examples arise as well. A ban on racial epithets in schools embeds within it a view of the propriety of epithets as compared to other modes of speech. A requirement that signs be written in English embeds within it a view that English is superior for that purpose than other languages. For purposes of this essay, I will refer to the kind of bias contained in content-based restrictions on the mode or manner of speech as “manner” bias.³⁷

³⁷ One clarification is necessary here. The examples in the text pertain to limits on the mode or manner of speech that are attentive to the content of the speech. A ban on sexually explicit speech, profanity, deception, or racial epithets are limits that can only be determined by looking at the substance of the speech in question. So the viewpoint embedded in the limit is a viewpoint about speech. And the question considered by this article is whether that kind of “manner” viewpoint bias is the kind of viewpoint discrimination that the Court considers presumptively unconstitutional.

Other regulations of mode or manner are content neutral. For example, if a sign ordinance banned signs written in crayon, that would be a limit on the mode or manner of speech, but the limit would not discriminate on the basis of content. Similarly, a ban on graffiti on public buildings or a limit on the volume of sound trucks are both limits on the mode or manner of speech but would not be content-

One might think that manner bias does not present the kinds of concerns that the doctrinal fixation on viewpoint bias is meant to address. Limits on the mode and manner of communication are ubiquitous, which might suggest that few regulators, legislators, or judges believe that such limits “give rise to an inference of impermissible government motive”³⁸ or present the “realistic possibility that official suppression of ideas is afoot.”³⁹ It would not be unreasonable to think of these restrictions on mode and manner as being neutral vis-a-vis free speech values and principles.

But the lack of neutrality of a limit on mode or manner becomes clearer when there is a salient cultural or political debate about the propriety of the mode or manner of communication. In other words, when there is a public debate about communication itself, limits on the mode and manner of communication will indeed skew that debate. When there is public debate about whether certain modes of communication are proper, a government regulation of those modes will act as viewpoint discrimination in that discourse.

Consider a leading case on profanity, *Federal Communications Commission v Pacifica Foundation*.⁴⁰ An FM radio station broadcast George Carlin’s famous satiric monologue about the seven “filthy words” not allowed on public air waves. The Court upheld the FCC’s efforts to impose sanctions on the station for violating regulations proscribing “indecent” language.

The Court did not consider the regulation of profanity as viewpoint biased, and it was correct that the regulation did not raise traditional viewpoint problems.⁴¹ A restriction on profanity would

based. These examples also embed in them a view about the value of crayons, graffiti, or loud noises. Indeed, all laws embed within them a viewpoint about the activity that the law regulates. But those viewpoints do not even arguably raise issues of free speech, since the viewpoint at issue is not about speech but about something else. A murder statute may embed within it a viewpoint about the propriety of murder, but that does not make it problematic under the First Amendment. It is only even arguably problematic as a matter of free speech doctrine when the regulation of a mode of manner of speech is content-attentive. That is the focus of this article.

³⁸ *Reed*, 135 S Ct at 2237 (Kagan concurring).

³⁹ *Davenport v Washington Ed Assn*, 551 US 177, 189 (2007) (quoting *R.A.V.*, 505 US at 390).

⁴⁰ 438 US 726 (1978).

⁴¹ See *Pacifica*, 438 US at 745-46 & n 22 (“The monologue does present a point of view; it attempts to show that the words it uses are ‘harmless,’ and that our attitudes toward them are ‘essentially silly.’ ... The Commission objects not to this point of view, but to the way in which it is expressed. The belief that these words are harmless does not necessarily confer a First Amendment privilege to use them while

apply neutrally in all discussions or debates (or comedy routines) focused on exogenous issues. Both George Carlin — politically liberal — and Roseanne Barr — politically conservative — would be limited by such a regulation, and the ban on profanity would apply uniformly to discussions about taxes, race relations, gender roles, and climate change. In that respect, the ban on profanity is neutral. But in other respects a ban on profanity is not neutral at all in that it embeds within it a view about the propriety of profanity. Carlin’s monologue is itself a good illustration of this. His monologue was, in part, a broad attack on social prudishness, especially as embodied by limits on what was deemed appropriate on the public airways. And the speech regulation was about that very issue. In a debate about social prudishness, a regulation requiring prudishness acts as a government thumb on the scale to benefit one side of that debate and limit another. The advocates of profanity are hamstrung by the inability to use profanity to shock, surprise, challenge, titillate, and enliven the discussion. To limit Carlin’s use of profanity was to force him to adopt a schoolmarm’s norms in a debate about those norms.⁴²

Limits on sexually explicit speech raise analogous problems of bias. There is a salient debate on whether, and to what extent, sexually explicit speech should be regulated. While obscenity meeting the definition set out in *Miller v California* is considered low-value speech and its regulation is not typically subject to strict scrutiny,⁴³ non-obscene, sexually explicit speech remains protected by the First Amendment. Nevertheless, limits on such speech appear as a part of

proselytizing, just as the conviction that obscenity is harmless does not license one to communicate that conviction by the indiscriminate distribution of an obscene leaflet.”)

⁴² One can imagine situations in which the opponents of profanity (or, for example, sexually explicit speech or epithets) use profanity (or sexually explicit speech or epithets) in their efforts to illustrate how distasteful profanity (or sexually explicit speech or epithets) can be. In that way, a limit on the mode or manner of speech operates to limit both sides of the debate about that mode or manner. But it is quite likely that such a limit would burden one side of the debate more than the other. The greater the differential, the more the limit on mode or manner would operate to skew the debate about the propriety of the mode or manner.

⁴³ 413 U.S. 15 (1973). I say “typically” because it is possible after *R.A.V.* that the regulation of a subset of obscenity could raise the same kind of concerns raised by the regulation of a subset of fighting words. For one possible example, consider 18 U.S. Code § 48, which creates additional penalties for the subset of obscenity that features cruel depictions of animal mistreatment. See below at notes 153-54.

broadcast regulations and zoning laws.⁴⁴ They also appear as a matter of application in anti-discrimination law. Under Title VII of the Civil Rights Act of 1964, sexually explicit speech in the workplace can provide evidence of, and indeed embody, a hostile work environment constituting sexual harassment.⁴⁵

These restrictions on sexually explicit speech are not traditional viewpoint discrimination — they limit the use of sexually explicit speech for both those who believe a woman’s place is in the home and for those who believe a woman’s place is in the White House or C-suite. It does not restrict the expression of views on either side of that debate or any other exogenous debate.⁴⁶ But these regulations do operate as manner bias — they restrict the use of sexually explicit language but not the use of non-sexual language.

Such restrictions certainly discriminate against the view that sexually explicit language is appropriate on airwaves, in neighborhoods, and in the workplace. Those who believe such explicitness is inappropriate do not have their language restricted (because they would not use such language anyway), but those who believe such language belongs in the workplace cannot use the language that best illustrates and embodies their viewpoint. As in the Carlin example, the advocates for the controlled mode of speech cannot use that speech to puncture the conventional wisdom about the possible dangers or harms arising from that mode of speech. Limits on sexually explicit speech skew the debate about sexual explicitness.

Limits on fraud, deception, and misrepresentation are another common example of restrictions on the mode and manner of

⁴⁴ Federal law makes it a crime to utter “any obscene, indecent, or profane language by means of radio communication” 18 U.S.C. §1464. See also *City of Renton v Playtime Theatres*, 475 US 41 (1986) (upholding zoning restriction on adult theatres).

⁴⁵ See, for example, *Wolak v Spucci*, 217 F3d 157, 160-61 (2d Cir 2000) (“the mere presence of pornography in a workplace can alter ‘status of women’ therein”); *Petrosino v. Bell Atlantic*, 385 F3d 210 (2d Cir 2004)(sexually explicit speech in workplace supports hostile work environment claim).

⁴⁶ If, for example, Title VII is used by regulators or courts to restrict the expression of anti-woman views, however voiced, while allowing the expression of anti-man views, however voiced, then that would be a traditional viewpoint bias problem, not a manner bias problem. In the text I am focusing on the kind of hostile work environment case in which the language at issue is actionable because of sexual explicitness, not its use in favor of or against an exogenous viewpoint. See Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L Rev 1791 (1992).

speech. Communication that is deceptive is frequently regulated or banned; laws governing securities, consumer goods, home sales, and other business interactions routinely punish deception, misrepresentation, and fraud. Those laws govern speech, and while the Court has sometimes expressed skepticism about whether courts should be policing the line between truth and falsity broadly,⁴⁷ laws against fraud and misrepresentation have not been thought to raise serious First Amendment problems when it comes to commercial speech.⁴⁸

The ban does not operate as traditional viewpoint discrimination — it is unlawful to lie about the benefits of smoking or quitting; unlawful to lie about equity investments or bonds; unlawful to lie about the gas mileage of Volkswagens or Toyotas. But laws against lying and misrepresentation pose manner bias problems in the same way as bans on profane speech do. The restriction on the mode or manner of false communication operates as a government endorsement of truth over falsehood. In a debate over whether market participants should be required by law to tell the truth, the advocates of lying cannot use misrepresentation in their arsenal.

But these limits on deception do not seem as skewing to public debate as limits on profanity or sexual explicitness. That is not because there is any real difference as a matter of logic between a ban on deceptive speech and a ban on profane or sexually explicit speech. Instead, the failure to recognize bans on fraud as viewpoint bias is based more on the fact that there is not a salient argument in politics and culture about the propriety of lying, as compared with the salience of a cultural debate about whether language should be indecent or profane. When there is no public debate about the propriety of a mode or manner of speech, a limit on that mode or manner will appear neutral.

⁴⁷ See *United States v Alvarez*, 567 US 709 (2012). The Court seemed to be on the verge of protecting a corporate right to lie or mislead in non-commercial situations in the case of *Nike v Kasky*, 539 US 654 (2003), but the Court did not reach the merits.

⁴⁸ See *Va Pharmacy Bd v Va Consumer Council*, 425 US 748, 771 (1976) (extending free speech protections to commercial speech but “foresee[ing] no obstacle” to dealing with “provably false” or “deceptive or misleading” commercial speech); *Central Hudson*, 447 US at 563 (“The government may ban forms of communication more likely to deceive the public than to inform it”). I have argued elsewhere that corporate entities can be held to a blanket obligation to avoid fraud even outside the commercial speech context. See Kent Greenfield, *Corporations Are People Too (And They Should Act Like It)* 140-45 (2018).

II. IS MANNER BIAS UNCONSTITUTIONAL VIEWPOINT BIAS?

Traditional viewpoint bias is a clear constitutional problem. In the modern cases in which the Court has seen it, the Court has been firm and uniform in its condemnation of viewpoint discrimination as constitutional “poison.” Manner bias, on the other hand, does not raise the same level of difficulty as traditional bias but does skew debate when there is a salient public discussion about the mode or manner of speech being regulated. Is manner bias constitutionally problematic

One might think that the answer to this question is an easy “no.” The Court has said that regulations governing the time, place, and manner of speech, as long as they are not content-based, do not raise sufficient worries about speech freedoms to trigger strict scrutiny.⁴⁹ A city ban on sound trucks after 10 pm or a decibel limit for concerts in city parks are not seen as raising constitutional problems. And at least with regard to profanity, *Pacifica* implies that it can be regulated in certain circumstances without triggering the strictest of judicial scrutiny. Moreover, the ubiquity of restrictions on the mode and manner of speech is evidence that few regulators and courts have come to believe that such limits raise the kind of serious free speech concerns meriting strict scrutiny.⁵⁰

But the answer is more complicated, and the Court’s view is less clear. Limits on the mode or manner of speech of the kind discussed in the previous Part — limits on profanity, sexual explicitness, or deception — are indeed content-based, so they are not subject to the usual allowance for content-neutral time, place, and manner regulations. Moreover, the Court has emphasized the usual rule that speakers should be able to choose both the substance and the mode of their communication. In *Cohen v California*, for example, the Court struck down the application of a disturbance of the peace ordinance to punish a war protester in a municipal building wearing a jacket

⁴⁹ Ward, 491 US 781.

⁵⁰ Other areas of federal, state, and local laws place limits on profanity in various ways. For example, under Coast Guard regulations, to gain federal registration a vessel may not have a name that is or is phonetically identical to obscene, indecent, or profane language, or to racial or ethnic epithets. 46 CFR §67.117(b)(3). See also for examples, *American Freedom Defense Initiative v Mass Bay Transp Auth*, 989 F Supp 2d 182, 183 (Mass 2013) (limits on profanity on city-owned buses and billboards); *Bethel School Dist No 403 v Fraser*, 478 US 675, 677–678, 685 (1986) (upholding discipline of high school student for profanity at school event).

proclaiming “Fuck the Draft.”⁵¹ The Court decided that “the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.”⁵² Even though the word at issue was considered as “more distasteful than most,” Justice John Harlan explained that it is “often true that one man’s vulgarity is another’s lyric.”⁵³ The Court recognized that the mode or manner of speaking is an important aspect of communication: “expression ... conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well...words are often chosen as much for their emotive as their cognitive force.”⁵⁴

The Court said something similar in *Texas v Johnson*, as it struck down a state law punishing flag burning. The state argued the law did not burden speech because someone wishing to criticize the government could do so in a way other than burning a flag. But the Court answered that the “enduring lesson” of the First Amendment — the notion “that the government may not prohibit expression simply because it disagrees with its message” — does not depend “on the particular mode in which one chooses to express an idea.”⁵⁵ Both *Cohen* and *Johnson* can be read to mean that the choice of mode or manner of speech — profanity in *Cohen* and flag burning in *Johnson* — is an important part of free speech freedoms.

Neither, however, said that a limit on mode or manner is *itself* viewpoint discrimination. *Cohen* was decided before the Court routinely articulated its holdings as a function of content or viewpoint discrimination, and the Court did not describe its decision using that more modern doctrinal terminology. But even so, the ordinance was applied to punish expressive content, and that was enough to trigger the First Amendment’s protection.⁵⁶ Whether the ordinance was

⁵¹ 403 US 15 (1971).

⁵² *Id.* at 25.

⁵³ *Id.*

⁵⁴ *Id.* at 26. See also *Sable Communications v FCC*, 492 US 115 (1989) (striking down statute limiting indecent sex conversations by way of telephone); *Reno v ACLU*, 521 US 844 (1997) (striking down statutes limiting indecent communication on the internet).

⁵⁵ *Texas v. Johnson*, 491 US 397, 416 (1989)

⁵⁶ See *Cohen*, 403 US at 18 (“Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected.”) The Court did worry about the importance of viewpoint neutrality, but used the worry to buttress a protection of content neutrality. See *id.* at 27 (“Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.”).

applied in a viewpoint neutral way was not a material question in the case. A factual question may have lurked as to whether Cohen would have been arrested if his jacket had read “Fuck the Draft Dodgers” rather than “Fuck the Draft.” It is reasonable to believe, given the historical context, that he would not have been. If that is true, then his arrest would have been a product of traditional viewpoint bias, not “manner” bias. In any event, and notwithstanding *Cohen’s* important language reminding us that “one’s man vulgarity is another’s lyric,” the case should not be read to decide the doctrinal issue analyzed here — whether limits on vulgarity or other modes and manner of speech amount to viewpoint bias as opposed to mere content bias.

Nor should *Johnson* be read to establish a doctrinal rule saying limits on the mode or manner of communication, with nothing more, amount to viewpoint discrimination under the First Amendment. There, too, the statute banning flag burning was a regulation of expressive content, applied to punish an individual who was engaging in core political speech. And even though the statute was written in facially neutral terms, the Court made clear it had been adopted and applied to pursue a specific point of view about the sanctity and value of our national banner.⁵⁷ Those who burned the flag to protest the nation were arrested; those who burned it in respect to dispose of it were exempted from the law. As the Court explained, “To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries.”⁵⁸ That is *traditional* viewpoint discrimination of the most obvious and pernicious kind. The case cannot be read to say that *manner* bias alone amounts to viewpoint bias.

⁵⁷ *Johnson*, 491 US at 416-17 (“If we were to hold that a State may forbid flag burning wherever it is likely to endanger the flag’s symbolic role, but allow it wherever burning a flag promotes that role — as where, for example, a person ceremoniously burns a dirty flag — we would be saying that when it comes to impairing the flag’s physical integrity, the flag itself may be used as a symbol ... only in one direction. We would be permitting a State to ‘prescribe what shall be orthodox’ by saying that one may burn the flag to convey one’s attitude toward it and its referents only if one does not endanger the flag’s representation of nationhood and national unity.”).

⁵⁸ *Id* at 417.

A. *R.A.V.* and Manner Bias

R.A.V. is the case in which the Court comes closest to holding that a limit on a mode or manner of speech is viewpoint bias. The ordinance at issue was St. Paul’s version of a hate speech code. The law provided:

“Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.”⁵⁹

The state supreme court had previously ruled that the statute only covered “fighting words” within the meaning of *Chaplinsky v New Hampshire* — i.e., those words that “by their very utterance inflict injury or tend to incite an immediate breach of peace.”⁶⁰ But the St. Paul ordinance did not regulate all fighting words; some words arousing “anger, alarm, or resentment” went unregulated by the statute. The statute focused on a subset of fighting words that aroused such feelings “in others on the basis of race, color, creed, religion or gender.”

The Court struck down the ordinance as both content-based and viewpoint-based. Even though the category of fighting words had been considered prior to the case as “not within the area of constitutionally protected speech,”⁶¹ the Court saw the ordinance as constitutionally problematic because the city had chosen to regulate only a subset of fighting words. According to the Court, the ordinance was content-based because it defined the subcategory according to “specified disfavored topics.”⁶² The ordinance also “in its practical operation ...

⁵⁹ St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn, Legis Code § 292.02 (1990), as quoted in *R.A.V.*, 505 US at 380.

⁶⁰ *Chaplinsky*, 315 US at 571-72. Because the state supreme court was interpreting a state statute, the Court considered the state’s interpretation as controlling for purposes of the case. *R.A.V.*, 505 US at 381.

⁶¹ *R.A.V.*, 505 US at 383 (quoting *Chaplinsky*, at 571-72, among other cases).

⁶² *Id* at 391. It remains unclear whether the Court believed that the content basis of the statute was sufficient to raise the level of judicial inquiry to strict scrutiny. The ordinance was aimed at fighting words, which would normally receive only rational basis review. The selection of fighting words as a category is, by definition, a content-based selection. The ordinance was *of course* content-based, as is any law aimed at

goes even beyond mere content discrimination, to actual viewpoint discrimination.” The viewpoint bias of the ordinance meant that the ordinance would fail even though the Court conceded the city had a compelling interest in “ensur[ing] the basic human rights of members of groups that have historically been subjected to discrimination.”⁶³ The Court implied that a law that discriminated on the basis of viewpoint could never be narrowly tailored — the only interest “distinctively served” by such a law would be the city’s interest in “displaying [its] special hostility towards the particular biases singled out.”⁶⁴

Thus, we know that the Court in *R.A.V.* believed viewpoint bias to be a significant constitutional problem. The difficulty in interpreting the Court’s opinion is that it was not clear what exactly made the St. Paul ordinance viewpoint biased. Was it a law that exhibited traditional bias, mandating that one side of a social, political, or cultural debate use a smaller set of communicative tools than another side of the same debate? Or did the Court read the St. Paul ordinance as exhibiting manner bias, limiting the mode or manner of communication for all participants in an exogenous debate, but nevertheless seeing that limit on the mode or manner of communication to be itself tainted by viewpoint bias? At best, the Court’s analysis is muddled on this point.

The most straightforward reading of the ordinance was that it exhibited manner bias, limiting a mode or manner of communication. The manner of communication it targeted was epithets of some kind, whether racial, ethnic, or gender-based. The ordinance referenced a “burning cross or Nazi swastika” as examples of the subset of fighting words it banned, but was also clear that the subset was “not limited to” those examples. There is nothing in the ordinance to suggest that it could not extend to, for example, Black Lives Matters protesters who cried out an anti-white slur, or to feminist counter-protesters crying out anti-male epithets during a men’s rights march. There is also nothing in the text of the ordinance itself that would require it to be

obsenity, threats, libel, commercial fraud, and other areas of low-value speech. Moreover, the selection of a sub-set of category of speech within a low-value category is not itself problematic unless the subset reveals a viewpoint bias of the government. *R.A.V.*, 505 US at 388-90 (describing reasons why the selection of a subset might not raise concerns of viewpoint discrimination). It was thus the viewpoint bias of ordinance that deserves attention as triggering strict scrutiny.

⁶³ *Id.* at 395.

⁶⁴ *Id.* at 396.

used to punish “generic” fighting words — those that did not explicitly use racial, ethnic, or gender-specific epithets or terms.

This narrow reading of the ordinance was exactly the interpretation that the city had urged upon the Court. According to the city’s merits brief, the ordinance applied only to “racial, religious, or gender-specific symbols” such as “a burning cross, Nazi swastika or other instrumentality of like import.”⁶⁵ The ordinance was thus a limit of a subset of mode or manner of speech within fighting words — limits that would be applicable to all people expressing all viewpoints. Under the city’s interpretation, the ordinance could not be seen as exhibiting traditional viewpoint bias — it was not in “practical operation” banning all fighting words used in service of racial (or gender or religious) hatred but allowing them in service of racial (or gender or religious) harmony. Under the city’s interpretation the ordinance was at most exhibiting manner bias, banning a subset of fighting words not based on the ideas expressed but because of the use of “racial, religious, or gender-specific symbols.”

In part of Justice Scalia’s opinion, the Court acknowledged this reading by the city and even characterized it as a concession. “The city concedes in its brief that the ordinance applies only to ‘racial, religious, or gender-specific symbols.’”⁶⁶ If the Court took that limitation seriously, it would be difficult to consider the ordinance as embodying traditional viewpoint bias. No one would be able to use such “racial, religious, or gender-specific” fighting words, whether they were advocates of hatred or harmony. For such a limited ordinance to be seen as containing viewpoint bias, it would have to be because manner bias amounts to unconstitutional viewpoint bias.

Thus one common way to read *R.A.V.* has been to see it as designating a ban on a mode or manner of speech as viewpoint biased. On this reading, *R.A.V.* holds that manner bias is the kind of bias that constitutes an “egregious” form of content discrimination and is presumptively unconstitutional.⁶⁷ Moreover, this reading of *R.A.V.*

⁶⁵ Id at 393.

⁶⁶ Id.

⁶⁷ For examples of decisions of courts that interpreted *R.A.V.* this way, see *State v Vawter*, 136 N.J. 56, 75 (NJ 1994) (striking down statute punishing a subset of threats, saying “our statutes proscribe threats ‘on the basis of race, color, creed or religion.’ Under the Supreme Court’s ruling in *R.A.V.*, that limitation renders the statutes viewpoint-discriminatory and thus impermissible.”); *Washington v Talley*, 122 Wn.2d 192 (1993) (striking down portion of state’s anti-harassment law on the basis of *R.A.V.*). See also *Court Overturns Stanford University Code Barring Bigoted*

would make it virtually impossible to craft any regulation on fighting words (or, presumably of any other low-value speech such as threats) that explicitly limited its focus to racial, ethnic, or gender-based epithets.⁶⁸

But the Court’s opinion in *R.A.V.* also lends itself to a different reading, one that is based on a broader interpretation of the St. Paul ordinance and which would lead to less dramatic doctrinal implications. Two pages before the Court discussed the city’s asserted narrow reading of the statute, the Court agreed that the law’s ban of “some words — odious racial epithets, for example” would apply to “proponents of all views.”⁶⁹ To that extent, the Court seemed to adopt the city’s reading. But the Court went further, saying that other fighting words that did not themselves “invoke race, color, creed, religion, or gender” — Justice Scalia suggested an example was “aspersions upon a person’s mother” — could be used by advocates of harmony but not by advocates of hatred.⁷⁰ That is, “generic” fighting words could be used by those arguing in favor of “tolerance and equality” but not by those arguing on the other side.⁷¹ According to the Court, the city “has no authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.”⁷²

Speech, NY Times 28 (March 1, 1995) (Stanford speech code banning “gutter epithets” and other insults based on race and sex struck down under state law requiring private universities to offer speech protections of public universities); Murray, *Campus Speech Codes*, 24 West St U L Rev at 267- 70 (cited in note 19) (discussing Stanford case).

⁶⁸ Scholars have interpreted *R.A.V.* in this very way. See, eg, Nadine Strossen, *Hate: Why We Should Resist It With Free Speech, Not Censorship* 74 (2018) (describing *R.A.V.* as striking down the St. Paul ordinance “because it selectively outlawed only ‘abusive invective’ that was based on ‘race, color, creed, religion or gender’”; a law that is “underinclusive” “embodies viewpoint discrimination”); Chemerinsky, *Constitutional Law* at 1013-14 (*R.A.V.* “makes it difficult for hate speech codes to survive judicial analysis; if they prohibit only some forms of hate, they will be invalidated as impermissible content-based discrimination”) (cited in note 20); Murray, 24 West St U L Rev at 264-65 (“while speech codes faced an uphill battle under the constitutional precedent in place before *R.A.V.*, this decision made it virtually impossible for a speech code to pass constitutional muster”) (cited in note 19); David L. Hudson Jr. & Lata Nott, *Hate Speech and Campus Speech Codes*, Freedom Forum Institute, March 2017 (last accessed Oct 10, 2019) (same).

⁶⁹ Id at 391.

⁷⁰ Id at 391.

⁷¹ Id.

⁷² Id at 392.

By this reading, the ordinance was not viewpoint based because it banned all fighting words that themselves invoked race, color, creed, sex, and the like. What made the ordinance viewpoint biased was that it would ban *generic* fighting words — something like “you’re a piece of shit” — if used by one side of a public debate about race but not if used by the other. The ordinance did not “single[] out an especially offensive mode of expression.” Instead, the ordinance “proscribed fighting words *of whatever manner* that communicate messages of racial, gender, or religious intolerance.”⁷³ This imbalance made it clear to the Court that the ordinance was “directed at expression of group hatred”⁷⁴ — “a distinctive idea”⁷⁵ — and thus viewpoint biased.

This broad reading of the ordinance makes the Court’s opinion a commonplace and limited application of the longstanding skepticism of traditional viewpoint discrimination. A law cannot empower one side of a public debate to use certain words while the other side of a public debate cannot. That would be “proscribing speech ... because of disapproval of the ideas expressed.”⁷⁶

If this is the correct reading of the ordinance, the law indeed looks like it was aimed at punishing underlying ideas rather than a mode or manner of communication. The law’s defect was its traditional viewpoint bias, and the Court’s ruling striking it down was straightforward and unsurprising. It also means that *R.A.V.* should *not* be read to hold that manner bias is constitutionally problematic.

R.A.V., then, can be seen as either a case that significantly broadened the definition of viewpoint bias to include laws that limit the mode and manner of communication (manner bias) or a case that merely applied a classic and well-understood understanding of traditional viewpoint bias to a statute that criminalized speech on the basis of “disapproval of the ideas expressed.” The distinction matters. If *R.A.V.* is read narrowly, so that worries about viewpoint bias are triggered only when the government is picking sides in a cultural, social, or political debate, then *R.A.V.* is merely an iteration of the mainstream and conventional understanding of the importance of government not punishing citizens for their ideas. If, on the other hand, *R.A.V.* is read broadly to mean that worries about viewpoint bias kick in whenever the government punishes or regulates communication based on the mode or manner of that communication,

⁷³ Id at 393-94 (emphasis added).

⁷⁴ Id at 392.

⁷⁵ Id at 393.

⁷⁶ Id at 382.

then a host of regulations become subject to strict scrutiny. *R.A.V.* did not make clear which it was.

B. Reconciling *R.A.V.* and *Black*

The Court offered a clue eleven years later in *Virginia v Black*,⁷⁷ which considered a challenge to a Virginia state law that banned cross-burning. The statute read:

“It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place.”

This statute was different from the ordinance in *R.A.V.* in that it regulated speech that met the definition of threats rather than the definition of fighting words. Those are distinct categories — threats focus on the fear caused by a promise of violence against the hearer, while the category of fighting words focus on words creating a likelihood of violence against the speaker caused by the hearer’s anger or distress at the speaker’s words. But both are categories of speech long thought to be low value, regulable without triggering strict scrutiny.⁷⁸

The question, then, was whether the Virginia statute raised the same constitutional difficulties presented by the statute in *R.A.V.*. Both statutes identified a subset of a less-protected category of speech for special regulation. In both cases, the subset of highly-regulated speech was identified with regard to its tendency to intimidate or alarm on the basis of a characteristic that subjected people to discrimination and prejudice. The St. Paul ordinance made that connection explicit, identifying the traits (“race, color, creed, religion or gender”) at which the fighting words had to be targeted to be actionable. The Virginia law did not make the link explicit, though the long history of using cross-burnings as a way to threaten African Americans was clear and well

⁷⁷ 538 US 343 (2003).

⁷⁸ See *id.* at 359 (“The First Amendment permits ‘restrictions upon the content of speech in a few limited areas, which are “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”’) (quoting *R.A.V.*, 505 US at 382–383, and *Chaplinsky*, 315 US at 572).

understood.⁷⁹ The Virginia law was also narrower in that it was aimed only at cross burning, and the St. Paul ordinance allowed prosecutions for the use of symbols other than burning crosses, such as a “Nazi swastika or other instrumentality of like import.”⁸⁰

One might expect that given *R.A.V.*, the law in *Black* would be even more problematic as a matter of viewpoint bias. It was certainly content based, in that it regulated one kind of content (the burning of crosses to intimidate and threaten) more than other kinds of content (the use of curse words to intimidate and threaten, for example). And because the law was even more targeted than the one in St. Paul, it could be said to have been even more viewpoint based, in that it was based on a view that the kind of racial hatred embodied in cross burning was worse than other kinds of threats, even those based on sex, religion, or creed. In fact, the Virginia Supreme Court had struck down the cross-burning statute as “analytically indistinguishable” from the St. Paul ordinance because it “selectively chooses only cross burning because of its distinctive message.”⁸¹

But the United States Supreme Court upheld the part of the Virginia statute banning cross burning for the purpose of intimidation and threat.⁸² The Court believed the law survived *R.A.V.* because the reason for focusing on the subset of cross burning threats was the same reason that all threats are punishable.⁸³ In *R.A.V.*, the Court had said that an exception to its skepticism of creating subsets of speech categories might arise when the subcategory is identified and regulated for reasons that are identical to the reason the entire category receives lesser First Amendment protections. And the Court in *Black* said that “The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation” with a “long and pernicious history as a signal of impending violence.”⁸⁴

⁷⁹ Which the Court acknowledged. See, for example, 538 US at 352 (“Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan.”).

⁸⁰ *R.A.V.*, 505 US at 393.

⁸¹ *Black*, 538 US at 351.

⁸² The Court struck down the part of the law that established a prima facie evidentiary presumption that the burning of a cross amounted to a threat. *Black*, 538 US at 363-68 (O’Connor) (plurality).

⁸³ *Id* at 361-62.

⁸⁴ *Id* at 363.

The problem with this rationale is that if threats based on race are regulable because they are an especially dangerous subset of threats, the same should have been true in *R.A.V.* itself. The defendants in both cases had burned a cross on the yard of a black family.⁸⁵ For *Black* to be correct that the Virginia statute constitutionally punished cross burning and *R.A.V.* to be correct that the St. Paul ordinance unconstitutionally punished cross burning, one would have to believe that a subset of threats based on race can be punished more than generic threats, but that a subset of fighting words based on “race, color, creed, religion or gender” cannot be punished more than generic fighting words. In both cases, the reason why threats and fighting words are regulable — that their propensity to induce fear and violence outweighs their value in the “exposition of ideas” (to quote *Chaplinsky*)⁸⁶ — is doubly true when those words are aimed at people because of some characteristic that has historically been the basis of social prejudice, bias, violence, and hatred. The Court recognized this truth in *Black* but not in *R.A.V.*⁸⁷

Perhaps one could distinguish the cases by saying that Virginia punished the most dangerous kind of threat given its history, but that St. Paul punished more than the most dangerous fighting words. According to *Chaplinsky*, fighting words are those that are “likely to provoke the average person to retaliation,”⁸⁸ which will turn on a judgment of what the “average” person responds to with violence. Such a formulation has obvious gender and power discrepancies — those with less power will respond less often with violence than those with more prerogative. “You’re an asshole” aimed at an “average” male may be more likely to provoke violence than “you’re a whore” aimed at the “average” female, even though the latter would be fighting words based on “race, color, creed, religion or gender.” That difference is an unfortunate outcome of a test for fighting words that bases its

⁸⁵ *R.A.V.*, 505 US at 379; *Black*, 538 US at 350.

⁸⁶ *Chaplinsky*, 315 US at 572.

⁸⁷ In fact, of the seven justices who were on the Court for both cases, four of them believed the cases should come out identically. That is, two of the justices (Stevens and O’Connor) believed that the St. Paul ordinance was viewpoint neutral and also believed the Virginia ordinance was constitutional (either because it was viewpoint neutral or fell into one of the *R.A.V.* exceptions). Another two (Kennedy and Souter) believed both statutes to be unconstitutionally viewpoint-based. The difference in outcome in the two cases was driven by the three justices (Rehnquist, Scalia, and Thomas) who switched from voting to strike down the St. Paul ordinance as viewpoint-based to voting to uphold the Virginia law.

⁸⁸ *Chaplinsky*, 315 US at 574.

definition on the likelihood that the hearer will react violently.⁸⁹ But if taken seriously, that would ironically suggest that the St. Paul ordinance, which included gender as one of its identifiers, was further away from the core of fighting words than the Virginia law was from the core of threats.⁹⁰

Another, less problematic, way to distinguish the outcomes in *R.A.V.* and *Black* would be to focus on the difference between traditional viewpoint bias and manner bias. This differentiation would take seriously the Court's intimations in *R.A.V.* that the St. Paul ordinance was in fact a cloak for traditional viewpoint bias. In this reading of *R.A.V.*, the ordinance was best read broadly, to penalize not only fighting words using specific symbols but also generic fighting words that advocated racial, ethnic, and gender hatred. And because the ordinance ranged so broadly it was best seen as a law flawed by traditional viewpoint bias.

In *Black*, on the other hand, the law was a limitation on a specific mode or manner of speaking — a threat using a specific symbol — and would be applied to whomever used that specific mode or manner, regardless of the viewpoint of the speaker. The law banned a threatening use of a burning cross whether it was aimed at a black

⁸⁹ See Melody L. Hurdle, *R.A.V. v. City of St. Paul: The Continuing Confusion of the Fighting Words Doctrine*, 47 Vand L Rev 1143 (1994) (“fighting words may cause certain persons to withdraw, not fight, because individuals subject to verbal abuse often internalize their harm rather than escalate to conflict”); Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 Harv L Rev 517, 560-61 (1993) (“Unfortunately, the fighting words standard, as it has been interpreted thus far, is based upon a male stereotype; it presupposes an encounter between two persons of relatively equal power who have been socialized to respond to insults with violence. Although men may react to abusive language by engaging in a physical fight, women are neither socialized to fight in general nor secure enough - for good reason - to do so in a street harassment situation. Far from fighting back, the average female target of street harassment is likely to react with fear, to freeze, and to pretend to ignore what is happening to her.”); Kent Greenwalt, *Insults and Epithets: Are They Protected Speech?*, Rutgers L Rev 287, 296-97 (1990) (“The *Chaplinsky* language reflects the propensity of courts to imagine male actors for most legal problems.”); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich L Rev 2320, 2355 (1989) (“insults of such dimension that they bring men — this is a male-centered standard — to blows are subject to a first amendment exception”).

⁹⁰ This discussion assumes that the definition of fighting words is not expanded by the *Chaplinsky* phraseology that they include words that “by their very utterance inflict injury.” *Id.* at 771-72. If this adds to, rather than replicates, the attention the test pays to potential violence, then the St. Paul ordinance would be on stronger footing and the difference between the holdings in *R.A.V.* and *Black* less reconcilable.

family or a white family, a cleric or an atheist, a fan of the Virginia Cavaliers or the Richmond Spiders. As the Court said in *Black*, “Unlike the statute at issue in *R. A. V.*, the Virginia statute does not single out for opprobrium only that speech directed toward ‘one of the specified disfavored topics.’”⁹¹ The Court emphasized that “as a factual matter it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities” and the statute would apply to threatening cross burnings directed at people for other reasons, such as union membership.⁹² In other words, the law was not viewpoint biased in a traditional way, even though it did create a very specific limit on the mode or manner of expressing a threat.

This reading of *R.A.V.* and *Black* would suggest that while traditional viewpoint bias remains especially “egregious” from a First Amendment perspective, manner bias does not raise particular constitutional difficulties. But neither Court described its holding in this way.

III. THE TRADEMARK CASES AND MANNER BIAS

The two trademark cases decided by the Court over the past three Terms were both decided on the basis that the challenged language of the Lanham Act discriminated on the basis of viewpoint. In *Tam*, the Court struck down the law’s ban on the registration of “disparaging” marks. In *Brunetti*, the Court struck down the law’s ban on the registration of “immoral” or “scandalous” marks. While there was no majority opinion in *Tam*, Justice Elena Kagan penned a short, punchy opinion in *Brunetti* that garnered six votes. Implicit in the opinion is a distinction between traditional viewpoint bias and manner bias. This difference was made explicit in the separate concurrence of Justice Alito, and in the opinions concurring in part and dissenting in part by Chief Justice John Roberts and Justices Stephen Breyer and Sonia Sotomayor. *Brunetti* may thus be more than a straightforward trademark case. *Brunetti* may represent the clearest statement by the Court to date that manner bias does not constitute the kind of viewpoint bias the Court considers presumptively unconstitutional.

⁹¹ *Black*, 538 US at 362, quoting *R.A.V.*, 505 US at 391.

⁹² *Id.*

A. *Brunetti's* Narrow View of Viewpoint Bias

The language at issue in *Brunetti* was the Lanham Act's prohibition of the registration of "immoral" or "scandalous" trademarks. The U.S. Patent and Trademark Office (PTO) had denied the trademark application of Erik Brunetti, "an artist and entrepreneur who founded a clothing line that uses the trademark FUCT."⁹³ The Lanham Act created a federal registration system for trademarks, and a successful federal registration affords certain benefits to the trademark registrant. The Act prohibits registrations of marks that would create confusion among consumers, are "merely descriptive" of the goods so marked, or are deceptive. There are a handful of other restrictions as well, including a prohibition on the registration of marks that use the flag of a state or a country, or that depict a living person or a (recently) dead President.⁹⁴

Brunetti challenged the denial of his registration application, arguing that the ban on "immoral" and "scandalous" marks violated the First Amendment. The law was clearly content-based, since it required the PTO to make judgments about marks based on the content of those marks. This is true not only for the "immoral" and "scandalous" restrictions, but also for the other restrictions of marks based on their deceptiveness, their probability of causing confusion, and their use of flags or likenesses of dead Presidents. But the content basis of the law was not enough to require strict scrutiny alone. Though the Court did not explicitly explain, the reason was likely that trademark registration is best seen as the regulation of commercial speech and thus subject to intermediate scrutiny unless there is some reason — e.g., viewpoint bias — to increase the level of scrutiny.⁹⁵ Another possible reason that attentiveness to content would not alone be sufficient to necessitate strict scrutiny is that the entire field of trademark law requires the regulation of content.⁹⁶ It would be nonsensical to allow the

⁹³ *Brunetti*, 139 S Ct at 2294.

⁹⁴ The bar on using a likeness of a live person can be waived with the person's consent; the bar on the use of a Presidential likeness ends at the death of the President's "widow." 15 USC sec. 1052 (c). Presumably, "widow" will be read to mean "widower" or "spouse" going forward.

⁹⁵ See *Central Hudson*, 447 U.S. 557.

⁹⁶ See *Brunetti*, 139 S Ct at 2306 (Breyer concurring in part and dissenting in part) ("Moreover, while a restriction on the registration of highly vulgar words arguably places a content-based limit on trademark registration, it is hard to see why that label should be outcome-determinative here, for regulations governing trademark registration inevitably involve content discrimination.") (internal quotation omitted); Sonia K. Katyal, *Trademark Intersectionality*, 57 UCLA L Rev

registration of trademarks only if such registration could be performed without attention to content. Registration is the protection of marks, based on their content. Such regulation, in the words of the Court in *R.A.V.*, present “no realistic possibility that official suppression of ideas is afoot.”⁹⁷

For Brunetti to win, he had to show more than that the statute discriminated on the basis of content; he had to show it discriminated on the basis of viewpoint. That would raise the level of scrutiny from whatever it was — the Court never said for sure — to strict scrutiny. Because of *R.A.V.*, we know that viewpoint bias requires strict scrutiny even when it appears in a regulation otherwise receiving only rational basis review. Even if the Lanham Act would otherwise survive rational or intermediate scrutiny, it would require strict scrutiny as a matter of First Amendment law if the Court determined it discriminated on the basis of viewpoint.

Whether the Act exhibited traditional viewpoint bias or manner bias turned on a question of statutory interpretation. Like the ordinance in *R.A.V.*, the speech restriction could be read either of two ways, one creating traditional viewpoint bias and the other only manner bias. One way to read the statute would be to have the words “immoral” and “scandalous” be a limitation on marks that promoted depravity and wickedness, while allowing marks that favored civility and decency. This would suggest a traditional viewpoint discrimination against the idea of immorality, conventionally described. The other way to read the statute was to see the words as imposing a mode or manner limitation, similar to a limit on profanity.

If the Court had ignored or muddled the statutory question, as it had done in *R.A.V.*, readers of the opinion might assume that the statutory question did not matter — that the difference between traditional bias and manner bias was not a constitutional difference. But the Court did focus on the statutory question, and the disagreement between the Court’s opinion and the opinions of Chief Justice Roberts and Justices Breyer and Sotomayor turned on this very difference. Most of the Court read the statute as exhibiting traditional viewpoint discrimination — as restricting marks not on the basis of their mode or manner but because of their viewpoint in favor of civility, decency, and morality, and against depravity and scandal. A minority of the Court read the statute, at least in part, to impose a mode or

1601, 1602 (2010) (trademark law is “indelibly rooted in content-based considerations”).

⁹⁷ *R.A.V.*, 505 US at 390.

manner limitation. And every Justice who interpreted a portion of the statute that way would have voted to uphold that portion.

1. Sotomayor

It is easiest to understand these alternate readings by studying Justice Sotomayor's separate opinion. Sotomayor believed the restriction on "immoral" marks should be read separately from the limitation on "scandalous" marks, and she believed the best reading of "immoral" was that it imposed a traditional viewpoint bias on trademark registrations. "[T]here is no tenable way" to read "immoral" other than to "connote[] a preference for 'rectitude and morality' over its opposite."⁹⁸ In this respect Sotomayor agreed with Justice Kagan's opinion for the Court. A limitation on "immoral" marks "infringes the First Amendment" because, as Justice Kagan said, it "disfavors certain ideas"⁹⁹ — namely the idea of immorality. The provision was not neutral — it was a thumb on the scale of rectitude and uprightness as defined by conventional social and cultural mores. Marks consistent with morality could win registration under this provision, and those that were not consistent with morality could not be registered.¹⁰⁰ This was traditional viewpoint bias, and the Court unanimously saw it as such.

But Sotomayor saw the limitation on "scandalous" marks differently. She conceded that the ban on scandalous marks could be seen as "something similar to 'immoral' and thus favor some viewpoints over others."¹⁰¹ That is, it could be read to create a traditional viewpoint bias problem. But the better reading of the statute, she believed, was that it was a limitation on mode or manner. "To say that a word or image is 'scandalous' can instead mean that it is simply indecent, shocking, or generally offensive."¹⁰² Sotomayor made the distinction explicit: "The word 'scandalous' . . . can be read broadly (to cover both offensive ideas and offensive manners of expressing ideas), or it can be read narrowly (to cover only offensive modes of expression)."¹⁰³ She distinguished between offensiveness resulting

⁹⁸ *Brunetti*, 139 S Ct at 2309 (Sotomayor), quoting the Court's opinion, 139 S Ct at 2299.

⁹⁹ *Id.* at 2297.

¹⁰⁰ For example, the PTO denied registration to marks glamorizing drug use but granted them for marks urging sobriety. The PTO granted registration to pro-religious marks but denied marks that seemed to denigrate religion. See 139 S Ct at 2300-01.

¹⁰¹ *Id.* at 2309.

¹⁰² *Id.*

¹⁰³ *Id.*

“from the views expressed” and offensiveness “result[ing] from the way in which those views are expressed.”

Sotomayor made a strong statutory argument that “scandalous” should be read to focus on an offensive mode of communication while “immoral” is best read to cover ideas offensive on their own accord. But one need not take a position on the statutory question to recognize that the doctrinal implication of Justice Sotomayor’s narrow reading is significant. Sotomayor argued that if focused only on the mode or manner of communication, the “scandalous” limitation of Lanham Act would not constitute viewpoint bias, would not require strict scrutiny, and would survive. That is, Sotomayor says more clearly than in any other Supreme Court case that manner bias is not constitutionally problematic. “Properly narrowed, ‘scandalous’ is a viewpoint-neutral form of content discrimination that is permissible in the kind of discretionary program or limited forum typified by the trademark registration system.”¹⁰⁴ She explains that “restrictions on particular modes of expression do not inherently qualify as viewpoint discrimination” because they do not target “particular views taken by speakers on a subject.”¹⁰⁵

Sotomayor even describes a hypothetical about sexually explicit communication similar to the one spelled out above in Part I. “Some people,” she says, “may have the viewpoint that society should be more sexually liberated and feel that they cannot express that view sufficiently without the use of pornographic words or images. That does not automatically make a restriction on pornography into viewpoint discrimination, despite the fact that such a restriction limits communicating one’s views on sexual liberation in that way.” In other words, limitations on the mode and manner of communication is not unconstitutionally viewpoint-based even when there is a social and political debate about the appropriateness of that communication.

She suggests that under her reading of the statute and her reading of First Amendment requirements, a variety of speech limitations should survive, including limits on obscene words and “lewd or ‘swear’ words that cause a visceral reaction.”¹⁰⁶ She also implies, by reference to a Coast Guard regulation of vessel names, that the use of “racial or ethnic epithets” could be limited. And she laments that the Court’s ruling will compel the PTO to register “one particularly

¹⁰⁴ Id at 2303.

¹⁰⁵ Id at 2313, quoting *Rosenberger*, 515 US at 829.

¹⁰⁶ Id at 2309.

egregious racial epithet”¹⁰⁷ — presumably the n-word — though her reading of the statute would not.

Sotomayor’s opinion is the clearest statement to date that laws containing what I have called manner bias — laws that restrict the mode or manner of speech — are not what the Court should consider as viewpoint-based under the First Amendment. If her view controls a majority of the Court, it would provide important doctrinal clarity.

2. The Other Justices in *Brunetti*

Clues as to whether Justice Sotomayor’s narrow definition of viewpoint bias describes the doctrinal position of the entire Court can be gleaned from the votes and other opinions in *Brunetti*. Justice Breyer joined Sotomayor’s opinion, so he can be safely counted as holding the same view. He wrote separately to set out his broader critique of the Court’s free speech jurisprudence as too formalistic and categorically rigid.¹⁰⁸ But his judgment with regard to whether a restriction on the mode or manner of communication amounts to unconstitutional viewpoint bias can be counted with Sotomayor’s.¹⁰⁹

Chief Justice Roberts also wrote separately. He did not join Sotomayor’s opinion, but he announced his agreement with her narrower statutory construction of “scandalous” — that it can be read to focus on mode or manner — and believed that it could survive First Amendment challenge on that reading. “[T]he term “scandalous” need not be understood to reach marks that offend because of the ideas they convey; it can be read more narrowly to bar only marks that offend because of their mode of expression—marks that are obscene, vulgar, or profane.”¹¹⁰

This correlates with a question the Chief asked in oral argument. Counsel for *Brunetti*, John R. Sommer, was being pressed as to the meaning of viewpoint discrimination. He suggested that a limit on offensiveness was viewpoint bias because his client’s “viewpoint is, as already pointed out, I can be offensive, I don't have to obey the authority. And that's viewpoint.” In other words, counsel was arguing

¹⁰⁷ Id at 2313, & note 5.

¹⁰⁸ *Brunetti*, 139 S Ct at 2306 (Breyer concurring in part and dissenting in part)(“I believe we should focus on the interests the First Amendment protects and ask a more basic proportionality question: Does the regulation at issue work harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives?”)(internal quotation omitted).

¹⁰⁹ Id at 2306 (“it is hard to see how a statute prohibiting the registration of only highly vulgar or obscene words discriminates based on ‘viewpoint’”).

¹¹⁰ *Brunetti*, 139 S Ct at 2304 (Roberts concurring in part and dissenting in part).

that manner bias was unconstitutional because those who disagreed with the limitation were silenced. The Chief responded by saying “but that’s completely circular. It’s like saying my protest is that I want to use words ... not given trademark protection, and because I have that viewpoint, you have to give them trademark protection ... that’s totally circular.”¹¹¹ This makes clear that with Sotomayor and Breyer, the Chief would make three votes in favor of the notion that manner bias does not amount to unconstitutional viewpoint bias under the First Amendment.

The other separate opinion was penned by Justice Alito. He joined the Court’s opinion, but he wrote a separate opinion of two paragraphs, each making a single clarifying point. First, he emphasized the importance of standing firm against viewpoint bias: “Viewpoint discrimination is poison to a free society.”¹¹² He asserted that “free speech is under attack” in the United States and abroad, and that it was “especially important for this Court to remain firm on the principle that the First Amendment does not tolerate viewpoint discrimination.”¹¹³

Nevertheless, Alito posited that “our decision does not prevent Congress from adopting a more carefully focused statute” that limits trademarks containing “vulgar terms that play no real part in the expression of ideas.” Such a redrafted statute would allow the PTO to refuse to register Brunetti’s proposed mark, which is “not needed to express any idea ... and generally signifies nothing except emotion and a severely limited vocabulary.”¹¹⁴ This passage makes clear that Alito voted to strike down the “scandalous” language not because he believed that regulations of mode or manner of speech are constitutionally problematic. Rather, he believed the statute was best read as embodying traditional viewpoint bias, and that “we are not legislators and cannot substitute a new statute for the one now in force.”¹¹⁵ That makes four votes.

Justice Kagan’s short opinion for the Court falls short of explicitly declaring that manner bias does not constitute viewpoint discrimination. But the insinuations are there. Justice Kagan explained that the “immoral” and “scandalous” provisions were best read as a unitary provision even though they are separated by the adjective “deceptive” in the text of the Act. On this interpretation, the two words

¹¹¹ *Iancu v Brunetti*, Tr of Oral Arg at 38.

¹¹² *Brunetti*, 139 S Ct at 2303 (Alito concurring).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

read together “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.”¹¹⁶

Kagan thus describes the statute as embodying traditional viewpoint bias. Under the PTO’s application of the law, it had “refused to register marks communicating ‘immoral’ or ‘scandalous’ views about (among other things) drug use, religion, and terrorism. But all the while, it has approved registration of marks expressing more accepted views on the same topics.”¹¹⁷ The PTO was “disfavoring ‘ideas that offend’” and thus “discriminat[ing] based on viewpoint, in violation of the First Amendment.”¹¹⁸

The government had argued the statute should survive under a reading that would limit its application to marks that were “offensive ... because of their *mode* of expression, independent of the views that they may express.”¹¹⁹ The government argued that such a bar “would not turn on viewpoint” and could be upheld by the Court.¹²⁰ That is, the government argued that the Lanham Act embodied manner bias only, which did not amount to unconstitutional viewpoint discrimination.

In answering the government’s contention, the Court did not say the distinction was immaterial. Kagan said instead that the statute could not bear the narrower reading that it contained manner bias but not traditional viewpoint bias. The statute did not, according to the Court, “refer only to marks whose ‘mode of expression,’ independent of viewpoint, is particularly offensive.” Throughout this passage, Kagan continued the distinction between traditional bias and manner bias. She implied that a restriction on mode is not a restriction on viewpoint, because she juxtaposed the two: the statute “covers the universe of immoral or scandalous... whether the scandal or immorality comes from mode or *instead* from viewpoint.”¹²¹ In a footnote, she makes the point more strongly. In answering Sotomayor’s statutory argument, Kagan counters that even if separated from the “immoral” term, “the category of scandalous marks thus includes *both* marks that offend by the ideas they convey *and* marks that offend by their mode of

¹¹⁶ Id at 2300.

¹¹⁷ Id at 2300-01.

¹¹⁸ Id at 2301.

¹¹⁹ Id (emphasis in Court’s opinion) (quoting Tr of Oral Arg at 11.)

¹²⁰ Id.

¹²¹ Id at 2301-02.

expression. And its coverage of the former means that it discriminates based on viewpoint.”¹²²

Kagan wrote in the same footnote that the Court “say[s] nothing at all about a statute that covers only ... lewd, sexually explicit, and profane marks.” One might read this as saying that the Court remained agnostic as to whether such a statute would survive First Amendment scrutiny, and as a matter of technical Court practice it is certainly the case that a future Court would not feel bound by *Brunetti* to consider a statute containing manner bias as viewpoint neutral. But even this throw-away line by Kagan is probably best read not as an affirmative claim that manner bias embodies viewpoint discrimination. Instead it is best read to mean that there may be First Amendment challenges to such a statute other than on the basis that it is viewpoint biased.

All in all, as a matter of description and even prediction, *Brunetti* should stand for the proposition that regulations of mode and manner of communication will not be viewed by the Court as embodying viewpoint discrimination. Four justices say so more or less explicitly. And the Court’s opinion by Justice Kagan seems to make the same assumption.

B. Revisiting *Tam* After *Brunetti*

One possible objection to reading *Brunetti* to limit the meaning of viewpoint bias is that *Tam* came out the other way. The Court decided *Tam* in 2017, two years before *Brunetti*, ruling that the so called “disparagement clause” of the Lanham Act violated the First Amendment because of its viewpoint discrimination.¹²³ The provision prohibited the registration of a trademark “which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.”¹²⁴ The PTO had denied registration to a rock band’s proposed mark, “The Slants.” The band’s lead singer, Simon Tam, chose the name for the band to reclaim what is typically a slur and epithet against Asian Americans.¹²⁵

Justice Alito wrote the main opinion, but spoke for the Court only in the early, introductory portions. His reasoning for striking down the disparagement clause attracted only three other votes (the Chief Justice and Justices Thomas and Breyer). Meanwhile, Justice Kennedy wrote an opinion for himself and three other justices

¹²² *Id.* at 2302 note *.

¹²³ *Tam*, 137 S Ct 1744 (2017).

¹²⁴ 15 USC §1052(a).

¹²⁵ See *Tam*, 137 S Ct at 1754.

(Ginsburg, Sotomayor, and Kagan) reaching the same outcome with slightly different reasoning. But all eight justices agreed that the disparagement clause constituted viewpoint discrimination. (Justice Gorsuch took no part in the case.) In a portion of his opinion in which he spoke for the entire Court, Alito explained that the provision “offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.”¹²⁶

Does *Tam* stand for the proposition that the regulation of mode or manner of communication embodies viewpoint discrimination? Or is the best reading of *Tam*’s two opinions consistent with the interpretation of *Brunetti* above? The answer to this depends on if one can glean from the opinions whether the justices saw the disparagement clause as embodying traditional viewpoint bias or only manner bias. If manner bias only, and the Court nevertheless struck down the provision as discriminating on the basis of viewpoint, then the reading of *Brunetti* suggested above is less persuasive.

Alito’s opinion is not absolutely clear on this point. One passage does appear, at first look, to suggest that he found the disparagement clause to be about mode or manner rather than ideas. In describing the operation of the provision, he said it operates “evenhandedly” by banning the “disparagement of all groups.”¹²⁷ “It applies equally to marks that damn Democrats and Republicans, capitalists and socialists, and those arrayed on both sides of every possible issue.”¹²⁸ The law required the PTO to refuse registration to any mark “that is offensive to a substantial percentage of the members of any group.” He went on to say that “in the sense relevant here,” such a limitation on registration is “viewpoint discrimination” because “giving offense is a viewpoint.”¹²⁹

That does sound as if Alito believed that a ban on offensive language constitutes viewpoint discrimination. The law would be viewpoint biased, “in the sense relevant here” — that is, under the First Amendment — because a law that limits offensiveness is discrimination against offensiveness. That seems to suggest he thinks the disparagement clause presents a problem of manner bias, which constitutes viewpoint discrimination under the First Amendment.

But the remainder of the opinion did not build on that contention. Instead, the opinion is best read as interpreting the

¹²⁶ 137 S Ct at 1749.

¹²⁷ 137 S Ct at 1763.

¹²⁸ *Id.*

¹²⁹ *Id.*

disparagement clause as not limiting the mode or manner of offensive speech but limiting speech because of the disparaging ideas behind it. After the passage in which he said that offensiveness “is a viewpoint,” he explained that “the public expression of ideas may not be prohibited merely because the *ideas* are themselves offensive to some of their hearers.”¹³⁰ He quoted the Court’s opinion in *Texas v Johnson*, the flag burning case, repeating “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.”¹³¹ Later in the opinion, Alito made clear his reading of the statute requires the PTO to refuse marks that disparage on the basis of the idea conveyed in the mark rather than the mode or manner of the mark. He said the bans would apply “to trademarks like the following: ‘Down with racists,’ ‘Down with sexists,’ ‘Down with homophobes.’”¹³² That made clearer that Alito’s disagreement with the disparagement clause was not that it regulated the mode or manner of speech but that it punished “ideas that offend.”¹³³

Kennedy’s opinion, which spoke for four justices, revealed a similar conviction that the disparagement clause punished ideas. He began his opinion by asserting the “fundamental principle of the First Amendment that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys.”¹³⁴ The Lanham Act, according to Kennedy, acted as a requirement to be nice to people — “an applicant may register a positive or benign mark but not a derogatory one.”¹³⁵ The law “mandat[ed] positivity.” This might be seen as an indication that Kennedy saw the disparagement clause as a limitation on mode or manner. But given the opinion’s emphasis on the argument that the statute discriminated on the basis of ideas, Kennedy likely interpreted the statute as a mandate that marks be supportive of the idea that people and groups are praiseworthy and not worthy of scorn. And that is traditional viewpoint bias, not manner bias.

To be sure, it remains unclear whether Kennedy would have signed onto Sotomayor’s opinion in *Brunetti* making a distinction

¹³⁰ Id at 1763-64 (quoting *Street v. New York*, 394 US 576, 592 (1969)) (emphasis mine).

¹³¹ Id at 1764 (quoting *Texas v Johnson*, 491 US 397, 414 (1989)) (emphasis mine).

¹³² Id at 1765.

¹³³ Id at 1751.

¹³⁴ *Tam*, 137 S Ct at 1765 (Kennedy concurring in part and concurring in the judgment) (quoting *Rosenberger*, 515 US at 828-29).

¹³⁵ Id at 1750.

between traditional viewpoint bias and manner bias for purposes of the First Amendment. In all likelihood, Kennedy did not consider the distinction in *Tam*, and he left the Court before *Brunetti*. But of course even if Kennedy did think that regulations of mode or manner embodied viewpoint bias, he never said so explicitly and there is nothing in Kennedy's plurality opinion in *Tam* that would bar the Court's adoption of Sotomayor's *Brunetti* taxonomy going forward. Not only was his opinion in *Tam* not an opinion for the Court, Justice Sotomayor joined him. It would be unusual for Sotomayor to sign onto an opinion in *Tam* that she believed was inconsistent with her views in *Brunetti* two years later. *Brunetti*'s doctrinal analysis of viewpoint bias (springing both from Kagan's majority and Sotomayor's separate opinion) is more uniform, coherent, and sophisticated than anything in either opinion in *Tam*.

IV. VIEWPOINT BIAS AFTER *BRUNETTI*

It would be easy for *Brunetti* to be ignored by scholars as a small-bore decision in the narrow field of trademark law. What's more, one could see its outcome as unsurprising and even pre-ordained given the outcome in *Tam* two years before. But *Brunetti* is more significant than that. Reading the various opinions together, *Brunetti* offers more clarity on what does and does not constitute viewpoint discrimination as a matter of First Amendment doctrine than in any case in decades. Remember that viewpoint bias is only doctrinally material in a small subset of First Amendment cases — that is, when content discrimination itself is insufficient to trigger strict scrutiny. That means that the Court has few opportunities to define the contours of viewpoint bias, which the Court readily admits is slippery and imprecise.¹³⁶ *Brunetti* should be taken seriously, therefore, as the most recent and most revealing statement by the Court to date about the limits of what constitutes viewpoint discrimination.

This final part will describe what is the best understanding of viewpoint discrimination after *Brunetti* and then describe some of the implications of this new, clearer, and narrower understanding.

¹³⁶ See *Rosenberger*, 515 US at 831 (“[T]he distinction is not a precise one”); *Brunetti*, 139 S Ct at 2313 (Sotomayor concurring in part and dissenting in part) (saying the definition of viewpoint bias is “slippery”); *Brunetti*, 139 S Ct at 2305-06 (Breyer concurring in part and dissenting in part) (“As for the concepts of ‘viewpoint discrimination’ and ‘content discrimination,’ I agree with Justice Sotomayor that the boundaries between them may be difficult to discern.”).

A. Manner Bias Does Not Count as Viewpoint Bias

Brunetti reaffirms that traditional viewpoint discrimination is an “egregious form of content discrimination”¹³⁷ that triggers strict scrutiny and is presumptively a violation of the First Amendment. That is, the government discriminates on the basis of viewpoint when it regulates private communication in such a way so as to support or hinder an idea, point of view, opinion, or perspective, as compared to competing ideas, points of view, opinions, or perspectives. Regulations of fighting words that punish those who use such words to call for racial conflict, but do not punish those who use such words to call for racial harmony, discriminate on the basis of viewpoint. Regulations that grant trademark protections to marks that urge morality and decency, but deny protections to marks urging depravity, discriminate on the basis of viewpoint.

But regulations of mode and manner of speech do not constitute viewpoint bias under the First Amendment and should not be seen as an “egregious form of content discrimination.” That is, the government does not discriminate on the basis of viewpoint when the government regulates private speech in such a way as to discourage or punish a mode or manner of communication. This is true even when there is a salient public debate about whether such mode or manner should be regulated. A ban on profane trademarks, for example, does not discriminate on the basis of viewpoint. A ban on threats that contain racial epithets does not discriminate on the basis of viewpoint. A restriction on sexually explicit displays in workplaces does not discriminate on the basis of viewpoint.

To be clear, to say that these regulations of mode or manner of communication do not embody viewpoint bias is not to say that they should survive First Amendment challenge. Strict scrutiny might be triggered for other reasons. Courts may see regulations that are *viewpoint* neutral as nevertheless discriminating on the basis of *content*, subject to the longstanding rule that content discrimination presumptively triggers strict scrutiny.¹³⁸ Or limits on mode or manner that are applied in a non-neutral way would be viewpoint biased in application even if not facially. For example, the outcome in *Cohen*, the “fuck the draft” case, does not need rethinking under this

¹³⁷ See *Rosenberger*, 515 US at 829. See also *Brunetti*, 139 S Ct at 2299 (quoting *Rosenberger*); *Lamb’s Chapel*, 508 U S at 394 (“[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others”).

¹³⁸ See *Reed*, 133 S Ct 2218.

understanding of viewpoint bias. Limits on profanity in public places are regulations of content and presumptively subject to strict scrutiny even if applied evenhandedly to those protesting the draft and those protesting draft dodgers. And if a ban on profanity is selectively applied to draft protesters but not draft-dodging protesters, then the profanity ban is in application exhibiting traditional viewpoint bias rather than merely manner bias; it is no longer viewpoint neutral.

Consider again *R.A.V.* in this context. After *Brunetti*, the best reading of that case is that the Court thought of the city ordinance as imposing a limit on fighting words used to express the idea of racial disharmony, while not imposing a limit on fighting words used to express the idea of racial harmony. That is traditional viewpoint discrimination. If instead the Court had read the ordinance as banning all fighting words containing a racial epithet — but not banning “generic” fighting words even if they expressed the idea of racial disharmony — then the ordinance would have embodied only manner bias and would not have triggered strict scrutiny.

B. Some Implications

Consider a few concrete implications of this more precise understanding of viewpoint discrimination. First, and most obviously, Congress could amend the Lanham Act as Chief Justice Roberts and Justices Alito, Breyer, and Sotomayor suggested in their separate writings. There is little doubt that the Court would uphold a new provision prohibiting the registration of marks containing words that are “obscene,” “lewd,” “profane,” or “vulgar.”¹³⁹

Congress could also amend the Lanham Act — as Justice Sotomayor suggested in her concurrence — to bar the registration of marks containing “racial or ethnic epithets.”¹⁴⁰ If properly applied by the PTO, such a limit should be seen as a limit on mode or manner of communication rather than a discrimination against racist viewpoints. A restriction of racist epithets is not the same as a restriction on the communication of racist ideas, and a framework of trademark registration that prohibited the registration of marks containing epithets would not be seen as discriminating on the basis of viewpoint. This is true even though the broader disparagement clause was struck down in *Tam*. That clause banned disparagement generally, regardless

¹³⁹ *Brunetti*, 139 S Ct at 2304 (Roberts concurring in part and dissenting in part) (“obscene, vulgar or profane”); id at 2304 (Breyer concurring in part and dissenting in part) (“vulgar or obscene”); id at 2303 (Alito concurring) (“vulgar”); id at 2311 (Sotomayor concurring in part and dissenting in part) (“lewd or ‘swear’ words”).

¹⁴⁰ Id at 2311.

of the mode or manner in which it was communicated. A narrower ban on racial epithets should survive. This distinction is strengthened by reference to *Virginia v Black*, the case that upheld Virginia's ban on threats made by way of burning a cross. The ban on cross burning in that case was a limit on the mode or manner of expressing a threat, and the Court did not see it as discriminating on the basis of viewpoint.

These points can be generalized to other First Amendment contexts in which content discrimination alone does not trigger strict scrutiny. In a limited public forum, for example, limits on the mode or manner of communication should not trigger the exacting scrutiny that comes with viewpoint discrimination.¹⁴¹ One application would be schools' or universities' limits on lewd language and epithets that reference racial, sexual, ethnic, or other characteristics. In light of *Brunetti*, such limits on the mode or manner of communication in educational settings should be upheld, as long as the forum in question is correctly seen as a limited public forum (as opposed to a public forum).¹⁴²

One way to characterize this reading of *Brunetti* is as a caution to not over-read or over-emphasize *R.A.V.*. Before *Brunetti*, it would be easy to interpret *R.A.V.* as creating a broad definition of viewpoint bias that would doom virtually any attempt to draft a so-called hate speech code.¹⁴³ As explored in Part II above, it was possible before *Brunetti* to read *R.A.V.* to mean that a law discriminates on the basis of viewpoint if it identifies a subset of speech for extra penalties by reference to that subset's focus on racial, sexual, ethnic, or other such characteristics. This was not the only way to read Justice Scalia's opinion in *R.A.V.*, but it was a reasonable way to read it.¹⁴⁴ Now, however, such a broad

¹⁴¹ If, however, public officials were to apply such limits on mode or manner to benefit a point of view or the other, then the limits would of course violate the presumption against viewpoint bias. See *Ward*, 491 US at 791 (“The government’s purpose is the controlling consideration.”).

¹⁴² See *Bethel School Dist No 403 v Fraser*, 478 US 675, 685 (1986) (treating punishment of “offensively lewd and indecent speech” as viewpoint neutral).

¹⁴³ See Murray, 24 West St U L Rev at 264-65 (“while speech codes faced an uphill battle under the constitutional precedent in place before *R.A.V.*, this decision made it virtually impossible for a speech code to pass constitutional muster”) (cited in note 68); Hudson & Nott, *Hate Speech and Campus Speech Codes*, (same)(quoting S. Douglas Murray) (cited in note 19).

¹⁴⁴ See, e.g., Strossen, *Hate* 74 (describing *R.A.V.* as striking down the St. Paul ordinance “because it selectively outlawed only ‘abusive invective’ that was based on ‘race, color, creed, religion or gender’”; a law that is “underinclusive” “embodies viewpoint discrimination”) (cited in note 69); Chemerinsky, *Constitutional Law* at

reading of *R.A.V.* is less convincing. Instead, *R.A.V.* should be read as a straightforward application of the Court’s longstanding rule against traditional viewpoint bias.¹⁴⁵ In other words, the ordinance in St. Paul should have survived if it were a law punishing racist epithets, assuming it was applied equally to speakers on all sides of the racial divides in the city.

Another possible application of this new narrower interpretation of viewpoint bias is to so called “gruesome speech.”¹⁴⁶ According to Eugene Volokh, “recent years have seen a striking” number of instances in which “courts have concluded that [content-based] restrictions on the public display of ‘gruesome images,’ usually of aborted fetuses, are permissible” under the First Amendment.¹⁴⁷ Some jurisdictions have sought limits or punishments for the display of graphic depictions of not only aborted fetuses, but also victims of murder, violence, or other abuse.¹⁴⁸ Perhaps also included in this speech category could be so-called “crush videos” — depictions of the maiming or killing of animals, usually done for sexual pleasure.¹⁴⁹

These limits on gruesome displays would certainly be content based, in that they create regulations that depend entirely on the

1013-14 (*R.A.V.* “makes it difficult for hate speech codes to survive judicial analysis; if they prohibit only some forms of hate, they will be invalidated as impermissible content-based discrimination”) (cited in note 20); *id.* at 1007 (“there is a strong presumption against content-based discrimination within categories of unprotected speech”).

¹⁴⁵ More precisely: The ordinance in St. Paul was not a ban on (a subset of) a subset of speech based on the mode or manner of that communication, but a ban on (a subset of) a subset of speech based on the point of view that speech conveyed. The ordinance only applied to a subset of fighting words, itself a subset of speech.

¹⁴⁶ See Eugene Volokh, *Gruesome Speech*, 100 Cornell L Rev 901 (2015).

¹⁴⁷ *Id.* at 902. Volokh cites the following cases as embodying this trend: *Frye v Kan City Mo Police Dep’t*, 375 F3d 785, 790–91 (8th Cir 2004); *Tatton v City of Cuyahoga Falls*, 116 F Supp 2d 928, 931, 934 (ND Ohio 2000); *Saint John’s Church in the Wilderness v Scott*, 296 P3d 273, 281–85 (Colo App 2012); Preliminary Injunction at 3–4, *Wilkerson v Scott*, No 728883, 1999 WL 34994617 (Cal Super Ct, June 11, 1999); see also *Olmer v City of Lincoln*, 192 F3d 1176, 1180 (8th Cir 1999) (stating that a restriction on gruesome images focused on shielding young children would be constitutional); *Operation Save America v City of Jackson*, 275 P3d 438, 460–61 (Wyo 2012) (similar).

¹⁴⁸ Volokh, *Gruesome Speech* at 910-11 (cited in note 141).

¹⁴⁹ See *United States v. Stevens*, 559 U.S. 460 (2010) (striking down 18 U. S. C. §48, a federal law criminalizing the commercialization of animal crush videos, as overbroad).

content of the speech.¹⁵⁰ But they would not be viewpoint based, even though they embed within them a view that gruesomeness is a problematic subset of speech. Volokh agrees: “All these restrictions are viewpoint-neutral—they ban pictures of nudity, vulgarities, or violent images without regard to the viewpoint that the words or images are used to convey.”¹⁵¹ That would mean, for example, that limits on gruesome speech could very well survive in limited public fora, where content discrimination alone does not trigger strict scrutiny.¹⁵²

Another implication would be that the current version of the federal law criminalizing animal “crush videos” is constitutional. In 2010, the Court struck down a previous version of the law as content based and overbroad.¹⁵³ Congress quickly amended and re-passed the statute, but limited its scope to only those videos that depict defined animal cruelty and that are also obscene.¹⁵⁴ In other words, Congress identified a subset of obscenity — that which portrays cruelty to animals — as subject to heightened penalties. Because Congress is making content distinctions within the category of obscenity, a category of “low-value” speech the regulation of which does not ordinarily trigger strict scrutiny, the law should only require strict scrutiny if the law fails *R.A.V.*’s bar on the selection of subcategories for reasons of viewpoint bias. But we know after *Brunetti* that the selection of a subcategory by reason of a mode or manner such as gruesomeness is not discriminating on the basis of viewpoint.

V. CONCLUSION

In a compact and efficient opinion for the Court in *Iancu v Brunetti*, Justice Elena Kagan reaffirmed “a core postulate” of the First Amendment: that “government may not discriminate against speech

¹⁵⁰ See Volokh, *Gruesome Speech* at 911 (“Under well-established First Amendment doctrine, such statutes are content-based because they ban depictions of particular acts or things.”) (cited in note 141).

¹⁵¹ *Id.* at 912.

¹⁵² Volokh makes this point as well. *Id.* at 948 (if “the government is concerned simply that the gruesome image will disgust and alienate customers, quite apart from its political message... then the gruesome-image restriction is likely to be treated as facially viewpoint-neutral, even though it disproportionately affects some viewpoints. The restriction would still be content-based, but it would be viewpoint-neutral, and that is sufficient in nonpublic fora and limited public fora.”).

¹⁵³ See *Stevens*, 559 US 460.

¹⁵⁴ See 18 U.S. Code § 48; Pub. L. 111–294, § 2, Dec. 9, 2010, 124 Stat. 3177.

based on the ideas or opinions it conveys.”¹⁵⁵ A law that “disfavors certain ideas”¹⁵⁶ is “presumptively unconstitutional”¹⁵⁷ and dooms the law in question.¹⁵⁸ While the Court occasionally allows content discrimination in certain settings and in certain categories of analysis, the Court is firm and consistent in its suspicion of viewpoint choices by the government. Once a law falls into the “discriminates on the basis of viewpoint” box, it is done for.

In that respect, *Brunetti* is an unremarkable, straightforward application of longstanding free speech doctrine.¹⁵⁹

But a significant contribution to that doctrine can be derived from the exchange between Kagan’s opinion for the Court and the opinion concurring in part and dissenting in part by Justice Sonia Sotomayor. The disagreement between them was not a matter of free speech doctrine but a matter of statutory interpretation. Sotomayor read the ban on the registration of “scandalous” trademarks to be a manner restriction rather than a viewpoint restriction. As a restriction on manner or mode of communication, Sotomayor argued that the provision was viewpoint neutral and did not trigger strict scrutiny. At least three other justices explicitly agreed with Sotomayor’s description that a limit on mode or manner would not trigger the Court’s ire against viewpoint bias. And nothing in Kagan’s opinion is inconsistent with this understanding of viewpoint bias — the disagreement between her and Sotomayor was statutory, not doctrinal. Nor would anything in the two plurality opinions in *Tam* stand in the way of Sotomayor’s narrow reading of viewpoint discrimination.

This is an important clarification of the Court’s doctrine of viewpoint discrimination. It is now clear, for example, that *R.A.V.* is best seen as a case about traditional viewpoint bias, rather than a case that stands for a notion that limits on the modes or manner of speech discriminate on the basis of viewpoint. Limits on mode or manner of communication — including the regulation of profanity, racial epithets, sexually explicit speech, or the like — will continue to be constitutionally problematic in settings in which content

¹⁵⁵ *Brunetti*, 139 S Ct at 2299.

¹⁵⁶ *Id* at 2297.

¹⁵⁷ *Id* at 2299 (quoting *Rosenberger*, 515 US at 829-30).

¹⁵⁸ *Id* (discussing how viewpoint bias “doomed the disparagement bar” in *Tam*).

¹⁵⁹ The *Brunetti* opinion allowed Justice Kagan to reaffirm what she had said as a legal scholar more than twenty-five years earlier. See Elena Kagan, *Regulation of Hate Speech and Pornography after R. A. V.*, 60 U Chi L Rev 873, 877 (1993) (“What *R.A.V.* shows, then, is the depth, not the tenuousness, of the Court’s commitment to a viewpoint neutrality principle.”)

discrimination alone triggers strict scrutiny. But in contexts in which content discrimination is not itself sufficient to require strict scrutiny — in limited public fora, in commercial speech, or when regulating “low-value” speech such as threats and fighting words, for example — courts should not presume the unconstitutionality of limits on the mode or manner of communication fairly applied to all speakers.

This is true even when there is a debate about the mode or manner of communication itself. A ban on racial epithets applied to both anti-white and anti-black protesters, for example, is not constitutionally identical to a ban on racial epithets applied to only one side. Because of *Brunetti*, we now know that while the latter is correctly seen as discriminating on the basis of viewpoint, the former is not.

While the exact contours of viewpoint bias main remain “slippery,”¹⁶⁰ they are clearer than ever before.

¹⁶⁰ *Brunetti*, 139 S Ct at 2313 (Sotomayor concurring in part and dissenting in part) (quoting Corbin, 83 NYU L Rev at 651).