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Pipe Down: Examining the Speech-Suppressing Effect of Critical Infrastructure Statutes

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Pipe Down: Examining the Speech-Suppressing Effect of Critical Infrastructure Statutes

TABLE OF CONTENTS

Introduction	255
I. Louisiana Revised Statutes Section 14:61 and the Pipeline Protests	258
II. Unconstitutional Vagueness	261
III. First Amendment Values.....	262
A. The Value of Protecting Free Expression	263
B. How Does the First Amendment Protect Speech?.....	264
IV. Modern First Amendment Doctrine	265
A. Expressive Conduct	266
B. Tiered-Scrutiny Approach	267
C. Application of the Tiered Scrutiny Approach to Louisiana Revised Statutes Section 14:61	270
V. The Underlying Issue	272
A. Distortion of Public Discourse.....	272
B. Stifling an Individual’s Self-Realization	274
C. Offending Democracy	274
VI. Solution	275
Conclusion.....	278

INTRODUCTION

The citizens of a small town in the path of a fast-growing industry, residents of St. James, Louisiana,¹ face concerns about their health and the health of their families due to pollution arising from the industrialization

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1. St. James is a census-designated place within St. James Parish; this Comment will include “Parish” when referring to St. James Parish. *St. James Parish, Louisiana*, WIKIPEDIA, https://en.wikipedia.org/wiki/St._James_Parish,_Louisiana [https://perma.cc/XC87-WLSJ] (last visited Aug. 3, 2020).

of former farmlands bordering their community.² Known to the locals as “Cancer Alley,” Louisiana’s petrochemical³ corridor is an 85-mile stretch along the Mississippi River housing over 100 petrochemical plants.⁴ In spite of their concerns about their health, the low-income citizens of St. James cannot afford to escape Cancer Alley as a result of the devaluation of their homes caused by the increasing amount of industrial infrastructure near their community.⁵

Despite pushback from the residents of St. James, the growth of infrastructure within the area has not slowed: in 2018, controversy arose regarding the construction of the Bayou Bridge Pipeline, a 163-mile crude oil pipeline running from Lake Charles to St. James Parish in Louisiana.⁶ Bayou Bridge’s parent company, Energy Transfer Partners, is responsible for 527 hazardous incidents between the years 2002 and 2017.⁷ After protests in opposition of the pipeline, the Louisiana Legislature amended Louisiana’s “critical infrastructure” statute, Louisiana Revised Statutes section 14:61, to protect pipelines from criminal trespass, leading to the arrests of protestors.⁸

2. Lauren Zanolli, ‘Cancer Alley’ residents say industry is hurting town, THE GUARDIAN (Jun. 6, 2017, 6:00 AM), <https://www.theguardian.com/us-news/2017/jun/06/louisiana-cancer-alley-st-james-industry-environment> [<https://perma.cc/DAU6-4ZYZ>].

3. “Petrochemical” is defined as “a chemical isolated or derived from petroleum or natural gas.” *Petrochemical*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/petrochemical> [<https://perma.cc/89MW-QL69>] (last visited Aug. 3, 2020).

4. Julie Dermansky, *Breaking: Environmental Justice March Hits Road Block in Louisiana’s Cancer Alley*, DESMOG (May 31, 2019, 1:45 PM), <https://www.desmogblog.com/2019/05/31/environmental-justice-march-louisiana-cancer-alley> [<https://perma.cc/C8UX-DYH4>].

5. Zanolli, *supra* note 2.

6. Erin Mundahl, *Protestors in Louisiana Take to Treesitting, Kayaks to Stop Bayou Bridge Pipeline*, INSIDESOURCES (Aug. 2, 2018), <https://www.insidesources.com/protesters-in-louisiana-take-to-treesitting-kayaks-to-stop-bayou-bridge-pipeline> [<https://perma.cc/9DA7-SZMT>].

7. Mark Schleifstein, *Bayou Bridge Pipeline Owners Had 527 Hazardous Incidents Over 16 Years*, THE TIMES-PICAYUNE (Apr. 17, 2018, 7:55 PM), https://www.nola.com/news/environment/article_e6b40553-c4af-5792-98da-a328bc68dd4e.html [<https://perma.cc/DJA9-GHUG>].

8. Act No. 692, 2018 La. Acts 2114 (codified at LA. REV. STAT. § 14:61 (2018)); Steve Hardy, *Protest a Pipeline, Become a Felon?*, THE ADVOCATE (May 22, 2019, 4:30 PM), https://www.theadvocate.com/baton_rouge/news/environment/article_47bf22f6-7bf6-11e9-9e4b-bbd2c9dfcd97.html [<https://perma.cc/VJR7-6ZRN>].

As of 2019, protestors arrested under section 14:61 have filed two complaints in the U.S. District Court for the Middle District of Louisiana.⁹ These complaints challenge both the constitutionality of Louisiana Revised Statutes section 14:61 and the arrests made under the statute, alleging in part that the legislative action is impermissible viewpoint discrimination¹⁰ in violation of the First Amendment of the United States Constitution.¹¹

This Comment argues that the changes to Louisiana Revised Statutes section 14:61 should be revoked because the statute is impermissibly vague in violation of the Due Process Clause of the Constitution,¹² and the statute infringes on the values underlying the First Amendment:¹³ self-realization, preserving the “marketplace of ideas,” and upholding democracy. Part I will provide a background of the conflict arising from the construction of the Bayou Bridge Pipeline and will highlight the changes made to Louisiana’s critical infrastructure statute. Part II will provide the standard for determining unconstitutional vagueness. This Part will also underscore policy concerns, including the difficulties in complying with and enforcing a vague statute, in order to determine whether Louisiana Revised Statutes section 14:61 is impermissibly vague in violation of the Fourteenth Amendment’s Due Process Clause.¹⁴ Part III will then provide an overview of modern First Amendment doctrine, focusing on the United States Supreme Court’s tiered scrutiny approach and the tests to be applied to the expressive conduct taken by protestors of the pipeline. This Part will also analyze Louisiana Revised Statutes section 14:61 under the legal framework provided. Part IV will present the problem of synthesizing a collective legislative intent from the statements of individual legislators and determining the true intent of officials despite their ability to conceal impermissible motives. Part V will suggest moving toward an approach that discerns legislative intent based upon the effects of a regulation in order to bypass the problems with determining an improper governmental motive within current First Amendment doctrine.

9. Complaint, *Hat v. Landry*, No. 3:19-cv-00322 (M.D. La. May 22, 2019), 2019 WL 2209382 [hereinafter *Hat Complaint*]; Complaint, *Spoon v. Bayou Bridge Pipeline LLC*, No. 3:19-cv-00516 (M.D. La. Aug. 9, 2019), 2019 WL 3781092 [hereinafter *Spoon Complaint*].

10. Viewpoint discrimination occurs when “[t]he law . . . reflects the Government’s disapproval of a subset of messages it finds offensive.” *Iancu v. Brunetti*, 139 S.Ct. 2294, 2299 (2019).

11. *Hat Complaint supra* note 9; *Spoon Complaint supra* note 9.

12. U.S. CONST. amend. XIV, § 1.

13. U.S. CONST. amend. I.

14. U.S. CONST. amend. XIV, § 1.

I. LOUISIANA REVISED STATUTES SECTION 14:61 AND THE PIPELINE PROTESTS

On May 5, 2018, the Louisiana Legislature passed Act No. 692 in order to change definitions found within Louisiana's "critical infrastructure" statute.¹⁵ Most notably, the statute was amended to include "pipelines" among the transportation facilities falling within the definition of "critical infrastructure."¹⁶ Act No. 692 also created the crime of "criminal damage to a critical infrastructure,"¹⁷ establishing a penalty of imprisonment of no more than 20 years or a fine of not more than \$25,000 if "human life will be threatened or [if] operations of a critical infrastructure will be disrupted as a result of the conduct."¹⁸ The Louisiana Mid-Continent Oil and Gas Association ("LMOGA")—the trade association responsible for proposing the amendment to Louisiana's critical infrastructure statute—stated that the regulation "protects Louisiana and its citizens from individuals who attempt to unlawfully interrupt construction of pipeline projects or damage existing facilities[.]"¹⁹ LMOGA also stated that damage to infrastructure in Louisiana "risks interrupting critical services across the United States."²⁰

Though the changes to Louisiana's critical infrastructure statute may seem benign, an individual may struggle with interpreting the statute because of the sheer number of pipelines within the state. LMOGA estimates that there are approximately 87,764 miles of pipeline onshore in Louisiana, and approximately 125,000 total miles of pipeline in the state.²¹ Under Louisiana Revised Statutes section 14:61, an individual's

15. Act No. 692, 2018 La. Acts 2114 (codified at LA. REV. STAT. § 14:61 (2018)). As of 2020, a new bill had been proposed to further add "water control structures, floodgates, and pump stations" to the definition of critical infrastructure, but after passage was vetoed by the Governor. H.B. 197, 2020 Leg., Reg. Sess. (La. 2020).

16. LA. REV. STAT. § 14:61 (2018).

17. Act No. 692, 2018 La. Acts 2114 (codified at LA. REV. STAT. § 14:61 (2018)).

18. *Id.*

19. Sabrina Canfield, *Louisiana Trespass Law Targeting Pipeline Protestors Spurs Lawsuit*, COURTHOUSE NEWS SERV. (May 22, 2019), <https://www.courthousenews.com/louisiana-trespass-law-targeting-pipeline-protests-spurs-lawsuit> [<https://perma.cc/GB3Z-EAAZ>].

20. *Id.*

21. *Pipeline Infrastructure Huge Asset for Southwest Louisiana*, LA. MID-CONTINENT OIL & GAS ASS'N (May 14, 2013), <https://www.lmoga.com/news/pipeline-infrastructure-huge-asset-for-southwest-louisiana> [<https://perma.cc/WEZ4-FXSH>].

unauthorized entry onto areas where these pipelines run may result in imprisonment, a fine, or both, despite the fact that these pipelines cross through major highways and navigable waterways throughout the state.²² Thus, the statute's vagueness may result in the arrest of individuals who believe they are in a place where they are permitted to be.²³

In addition to the vagueness issue described above, the circumstances surrounding the modifications to Louisiana Revised Statutes section 14:61 suggest that the Louisiana Legislature may have intended for the change to silence protestors in violation of the First Amendment.²⁴ This legislation arose during the construction of the Bayou Bridge Pipeline, a 163-mile crude oil pipeline running from Lake Charles, Louisiana to St. James, Louisiana, for the purpose of "provid[ing] Gulf Coast refineries more efficient and sustainable access to North American crude oil."²⁵ L'eau Est La Vie Camp, a floating pipeline resistance organization, and residents of St. James opposed the construction of the pipeline due to several public interest and safety concerns, including: (1) threats to the ecosystem of the Atchafalaya Basin, the largest river swamp in North America;²⁶ (2) threats to drinking water in Terrebonne and Lafourche Parish because of the risk of contamination of Bayou Lafourche; and (3) an increased risk of harm to the residents of St. James.²⁷ As a result of these concerns, protestors turned to expressive conduct,²⁸ such as kayaking on public waterways near where the pipeline was under construction and building aerial pods within

22. LA. REV. STAT. § 14:61 (2018); *Office of Conservation – Pipeline Division – Pipeline Operations Program*, LA. DEP'T OF NAT. RES., <http://www.dnr.louisiana.gov/index.cfm/page/150> [<https://perma.cc/7QNN-SFUU>] (last visited Aug. 3, 2020); see also *Louisiana Pipelines & Platforms*, LA. DEP'T OF NAT. RES., http://www.dnr.louisiana.gov/assets/images/oilgas/refineries/LA_pipelines_2008.jpg [<https://perma.cc/MPZ2-CQRW>] (last visited Aug. 3, 2020).

23. See Hat Complaint, *supra* note 9.

24. U.S. CONST. amend. I.

25. BAYOU BRIDGE, <https://bayoubridge.com/> [<https://perma.cc/QZB3-NXDS>] (last visited Aug. 3, 2020).

26. *Atchafalaya Basin*, ATCHAFALAYA.ORG, <https://www.atchafalaya.org/atchafalaya-basin#> [<https://perma.cc/48YG-LFTQ>] (last visited Aug. 3, 2020).

27. *L'eau Est La Vie: The Fight at Standing Rock Continues in the Bayous of Louisiana*, VOID NETWORK (Dec. 18, 2018), <https://voidnetwork.gr/2018/12/18/leau-est-la-vie-fight-standing-rock-continues-bayous-louisiana/> [<https://perma.cc/FXL4-YJ6K>].

28. "Expressive conduct is behavior designed to convey a message." Katrina Hoch, *Expressive Conduct*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/952/expressive-conduct> [<https://perma.cc/7LJR-QJUE>] (last visited Aug. 3, 2020).

trees set to be cut down, to bring attention to the potential environmental harm caused by pipeline construction.²⁹

L'eau Est La Vie set up its resistance camp in June of 2017 and began its demonstrations against pipeline construction.³⁰ On August 1, 2018, the amendments to Louisiana Revised Statutes section 14:61 took effect.³¹ On August 9, 2018, several protestors of the Bayou Bridge Pipeline were arrested and charged under the statute for trespassing near "critical infrastructure," in this case, the pipeline under construction.³² As a result of these arrests, the aggrieved protestors filed two complaints in the Middle District of Louisiana challenging the constitutionality of section 14:61.

Stemming from the arrests of protestors on August 9, 2018, the complaint in *Hat v. Landry* ("the *Hat* complaint") alleges that Louisiana Revised Statutes section 14:61 is unconstitutional on its face and as applied.³³ Specifically, plaintiffs argue that the statute: (1) is unconstitutional on its face because it is overly vague in violation of the Due Process Clause of the Fourteenth Amendment; (2) is overbroad and chills constitutionally protected speech; and (3) targets expressive conduct with a specific viewpoint for harsher punishment in violation of the First Amendment of the United States Constitution.³⁴

The complaint in *Spoon v. Bayou Bridge Pipeline, LLC* ("the *Spoon* complaint") arises from additional arrests of protestors on September 3, 2018.³⁵ The *Spoon* plaintiffs alleged that Bayou Bridge Pipeline, LLC, and HUB Enterprises, Inc.,³⁶ contracted with officials to arrest pipeline protestors boating in the public waterways of the state in retaliation for the exercise of protected speech that expressed opposition toward the construction of the pipeline.³⁷

29. Mundahl, *supra* note 6.

30. Yessenia Funes, *Prayer and Construction Camp Launches in Louisiana to Challenge Pipeline Connected to DAPL*, COLORLINES (Jun 26, 2017, 12:39PM), <https://www.colorlines.com/articles/icymi-prayer-and-resistance-camp-launches-louisiana-challenge-pipeline-connected-dapl> [<https://perma.cc/K329-MD76>].

31. LA. REV. STAT. § 14:61 (2018).

32. Mike Ludwig, *Water Protectors Charged with Felonies Under Louisiana's Anti-Protest Law*, TRUTHOUT.ORG (Aug. 17, 2018), <https://truthout.org/articles/water-protectors-charged-with-felonies-under-louisianas-anti-protest-law/> [<https://perma.cc/6SYC-VQWX>].

33. *Hat Complaint*, *supra* note 9.

34. *Id.* at 2.

35. *Spoon Complaint*, *supra* note 9, at 1.

36. HUB Enterprises is a company which was responsible for providing security services during the construction of the Bayou Bridge Pipeline. *See id.* at 8.

37. *Id.* at 21; *id.* at 65–78.

II. UNCONSTITUTIONAL VAGUENESS

Louisiana Revised Statutes section 14:61 is overly vague because it is unclear for those attempting to abide by the law, and because it provides authorities standardless discretion in its enforcement, resulting in an unconstitutional chilling of expressive conduct.

The Due Process Clause of the Fourteenth Amendment of the United States Constitution requires clarity in regulation and “the invalidation of laws that are impermissibly vague.”³⁸ A violation of due process occurs when a statute “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.”³⁹ In effect, this doctrine should aid in eliminating confusion relating to both compliance with and enforcement of the law.⁴⁰ In *City of Lakewood v. Plain Dealer Publishing Co.*, the Court articulated two policy concerns regarding ordinances conferring standardless administrative discretion to public officials: (1) self-censorship by individuals to avoid punishment under the law resulting in an unconstitutional chilling of free speech, and (2) difficulty preventing content-based censorship on a case-by-case basis.⁴¹

Louisiana’s critical infrastructure statute is overly vague because it does not sufficiently clarify where within the state’s 125,000 miles of pipeline individuals are allowed to express their views against the construction of a pipeline.⁴² First, although Louisiana Revised Statutes section 14:61 maintains that the critical infrastructure must be “enclosed by any type of physical barrier,”⁴³ it does not clarify what this physical barrier requirement means. Because the public waterways of the state are not enclosed by any physical barriers, this is especially confusing to protestors who are arrested near waterways.⁴⁴ This ambiguity is likely to

38. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

39. U.S. CONST. amend. XIV, § 1; *Fox Television*, 567 U.S. at 253.

40. *Fox Television*, 567 U.S. at 253.

41. *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750 (1988) (holding that a statute giving a mayor unbridled discretion over whether to permit news racks is unconstitutional).

42. See LA. REV. STAT. § 14:61 (2018); see also *LMOGA Statement on Critical Infrastructure Protection*, LA. MID CONTINENT OIL AND GAS ASS’N, <https://www.lmoga.com/news/lmoga-statement-on-critical-infrastructure-protection> [<https://perma.cc/95JT-AVDB>] (last visited Oct. 14, 2020).

43. LA. REV. STAT. § 14:61(A)(1) (2018).

44. Jessica Corbett, *Anti-Pipeline Kayaktivists Hit With Felony Charges Under Louisiana’s New ALEC-Inspired Law That Criminalizes Protest*, COMMON DREAMS (Aug. 10, 2018), <https://www.commondreams.org/news/2018/08/10/>

have the effect of self-censorship because if individuals cannot discern where they can express their beliefs without being arrested and charged with a felony, they may find self-censorship to be a safer alternative. An individual may be especially confused when officers arrest protestors in waterways around the pipeline, despite statutory language stating that Louisiana Revised Statutes section 14:61 shall not be construed to apply to “[l]awful assembly and peaceful and orderly . . . demonstration” or “boating in the open or unconfined areas around a pipeline.”⁴⁵

A law is also impermissibly vague when it is “so standardless that it authorizes or encourages seriously discriminatory enforcement.”⁴⁶ Under section 14:61, police officers, prosecutors, and juries are responsible for deciding who should be punished under the critical infrastructure statute.⁴⁷ Though the statute purports to allow peaceful protest,⁴⁸ officers have used their discretion to arrest protestors canoeing and kayaking in navigable waters.⁴⁹ It is unlikely that these arrests are unrelated to the views expressed, especially since the *Spoon* petition alleged that the officers were instructed to conduct the arrests by agents or employees of a private security company providing services to Bayou Bridge Pipeline, LLC.⁵⁰

III. FIRST AMENDMENT VALUES

In order to analyze a protestor’s First Amendment claims—that Louisiana Revised Statutes section 14:61 is overly vague and suppresses speech—it is necessary to establish how the United States Supreme Court analyzes regulations contested under the First Amendment.⁵¹ This Part will first explain the importance of protecting free speech and expression by highlighting the values underlying the First Amendment: individual self-fulfillment, the societal search for truth, and the preservation of democracy. This Part will then provide three approaches used to determine whether a regulation serves these values.

anti-pipeline-kayaktivists-hit-felony-charges-under-louisianas-new-alec-inspired-law [<https://perma.cc/Z656-HZ7Y>].

45. LA. REV. STAT. § 14:61(D)(1); LA. REV. STAT. § 14:61(D)(2); *Spoon Complaint*, *supra* note 9 (challenging the constitutionality of the arrest of plaintiffs therein who were protesting in a kayak in a public waterway).

46. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

47. LA. REV. STAT. § 14:61.

48. LA. REV. STAT. § 14:61(D).

49. *Spoon Complaint*, *supra* note 9.

50. *Id.*

51. U.S. CONST. amend. I.

A. The Value of Protecting Free Expression

Under the First Amendment, “Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”⁵² As the United States Supreme Court has recognized, “[t]he freedom of speech . . . which [is] secured by the First Amendment against abridgment by the United States [is] among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state.”⁵³ In order to protect these rights, it is important to identify the values underlying them.

The first theory supporting the First Amendment—the “self-realization” theory—focuses on the “privilege to speak one’s mind[.]”⁵⁴ Under the self-realization theory, free speech serves the value of individual self-fulfillment.⁵⁵ Individuals are entitled to form their own beliefs and opinions, and the individual should be able to express these beliefs in order to realize their potential as a human being.⁵⁶ Repressive societies—those that ban free speech or heavily control the speech of their constituents—reduce individuals’ ownership of their lives by interfering with this basic principle.⁵⁷ Repressing speech reduces the ability of individuals to make personal choices as to their way of life because they are barred from communicating knowledge and shaping their own views.⁵⁸

A second theory explaining the importance of free speech focuses on the societal attainment of truth by preserving the “marketplace of ideas.”⁵⁹ Under this theory, open debate is more likely to lead to a greater availability of ideas, which allows individuals to make more rational judgments because they can consider facts and arguments on either side of a proposition.⁶⁰ For example, if the government bans educational institutions from teaching evolution, and individuals are only able to hear arguments in favor of creationism, judgments that creationism must be the truth will be less sound, as the individuals would not consider the possible

52. *Id.*

53. *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

54. *Bridges v. California*, 314 U.S. 252, 270 (1941).

55. DANIEL A. FARBER, *THE FIRST AMENDMENT 6–7* (4th ed. 2014); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L. J.* 877, 879 (1963).

56. Emerson, *supra* note 55, at 879.

57. See FARBER, *supra* note 55, at 6; see also Emerson, *supra* note 55, at 879.

58. See FARBER, *supra* note 55, at 6; see also Emerson, *supra* note 55, at 879.

59. FARBER, *supra* note 55, at 6–7; Emerson, *supra* note 55, at 881.

60. FARBER, *supra* note 55, at 6; Emerson, *supra* note 55, at 881–82.

alternatives. Alternatively, if each individual is able to make their decisions by considering opposing viewpoints, society, by the collective judgment of its members, is thereby pushed forward in its quest for truth.⁶¹

A third theory focuses on the democratic value of free speech.⁶² If the government derives its powers from the consent of the community, it is necessary that citizens are able to express their beliefs in order to exercise this consent.⁶³ For example, if the government restricts the speech of a specific political party during a presidential election, democracy is offended, as voters are no longer free to consider the views of that party.⁶⁴ Though it may be argued that this theory operates to protect only political speech, self-realization theorists argue that maintaining a democratic government fosters self-realization among its citizens by allowing them the freedom to shape their own way of life.⁶⁵

B. How Does the First Amendment Protect Speech?

Two effects-based models are used to determine whether a contested regulation infringes upon an individual's self-fulfillment or the marketplace of ideas: the "speaker-based" model, and the "audience-based" model.⁶⁶ The speaker-based model values self-realization, thus any limitation on speech or expressive conduct necessarily harms individuals because the limitation reduces the benefit they derive from being able to communicate.⁶⁷ Using the speaker-based model, laws that suppress more speech will cause greater harm.⁶⁸ Alternatively, the audience-based model values the societal search for truth by preserving the marketplace of ideas.⁶⁹ Under the audience-based model, importance is placed on the extent to which legislation distorts or impoverishes public discourse, rather than the amount of speech restricted.⁷⁰

61. Emerson, *supra* note 55, at 881–82.

62. *Id.* at 882–84.

63. *Id.* at 883.

64. See FARBER, *supra* note 55, at 7 (“[I]f democracy is to function effectively, there must be a good deal of latitude for criticizing the government . . . [i]t doesn’t make much sense to have a ‘free’ election if opponents of the government have been gagged.”).

65. *Id.* at 8.

66. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 424 (1996).

67. *Id.*

68. *Id.*

69. *Id.* at 424–25.

70. *Id.*

For example, suppose a group of ten people are discussing whether to vaccinate their children. If nine people within the group believe that children should be vaccinated and only one expresses a contrary viewpoint, the authorities silencing five of the pro-vaccine individuals would certainly restrict a larger amount of speech. It would not have a distorting effect on the discourse, however, as their viewpoint is still accessible through the remaining majority. Alternatively, if the anti-vaccine individual is silenced, substantially less speech is suppressed, but there is a larger distortion of discourse, as that viewpoint is no longer accessible to the rest of the group. Thus, a combination of the two effects-based approaches should be used to preserve an individual's ability to achieve self-realization and to maintain a rich marketplace of ideas.

Finally, a third approach, the "government-based" model, focuses on the motive behind a regulation rather than its effects.⁷¹ Some overlap exists between this motive-based model and the effects-based models, though, as the effects of a regulation often reflect the motives of the legislature. For example, if a state government enacts a harsher penalty for speeding, and that regulation has the effect of reducing the overall amount of car accidents, one can reasonably assume that the legislative intent behind heightening the penalty was to reduce the number of accidents. In addition, the two values underlying the effects-based approaches—self-realization and the search for truth—may both be considered when determining what constitutes a permissible governmental motive.⁷² For example, a governmental motive to silence a certain viewpoint may be deemed impermissible specifically because it stifles an individual's self-realization or distorts the public discourse.

IV. MODERN FIRST AMENDMENT DOCTRINE

This Part will first show how the First Amendment protects expressive conduct in order to establish a link between the values underlying the protection of speech and the methods taken by pipeline protestors to express their views (kayaking and tree-sitting). This Part will then explain the United States Supreme Court's tiered-scrutiny approach, in which the Court applies a different level of scrutiny based upon whether a regulation targets specific content or bans speech without respect to content.⁷³

71. *Id.* at 425–26.

72. *Id.* at 427–28.

73. *See Reed v. Town of Gilbert*, 576 U.S. 155 (2015); *McCullen v. Coakley*, 573 U.S. 464 (2014); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 289 (1984).

A. Expressive Conduct

First Amendment protection is not exclusive to speech; rather, the Supreme Court also affords protections to expressive conduct that qualifies as symbolic speech.⁷⁴ In determining whether specific conduct warrants First Amendment protection, the Court considers whether the conduct was intended to convey a particularized message and whether the audience would understand that message.⁷⁵ For example, in *Spence v. Washington*, the United States Supreme Court held that the application of a Washington statute prohibiting improper use of an American flag to the expressive conduct of a college student was unconstitutional.⁷⁶ The appellant had used black tape to construct a peace sign on a United States flag, which he then displayed from his apartment window in protest of the United States' invasion of Cambodia and the killings at Kent State University.⁷⁷ In overturning the appellant's conviction, the Court reasoned that the appellant's conduct was protected under the First Amendment because his message was direct and likely to be understood as an anti-violence message.⁷⁸

Not all conduct intended to express an idea is protected by the First Amendment.⁷⁹ For example, a criminal defendant who set their ex-spouse's house on fire may have intended for their arson to communicate a message to the victim, but the public would likely still wish for the arsonist to be punished, regardless of how expressive the conduct was. The United States Supreme Court has held that "when both 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important government interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."⁸⁰ The government interest is sufficient to uphold a statute when: (1) the regulation is within the constitutional power of the government; (2) the regulation furthers a substantial interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on the First Amendment is not more

74. See, e.g., *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969) (holding that students wearing black armbands to protest the Vietnam War constitutes symbolic speech, affording them First Amendment protection).

75. *Spence v. Washington*, 418 U.S. 405, 410–11 (1974). See WASH. REV. CODE § 9.86.030 (Westlaw 2019) (prohibiting desecration of the American flag).

76. *Id.* at 405–08.

77. *Id.*

78. *Id.* at 414.

79. *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

80. *Id.*

restrictive than needed to further the governmental interest.⁸¹ In order to apply this test it is necessary to understand how the United States Supreme Court's tiered-scrutiny approach operates to determine whether a regulation violates the First Amendment.⁸²

B. Tiered-Scrutiny Approach

In analyzing the constitutionality of statutes under the First Amendment, the United States Supreme Court uses a “tiered-scrutiny” approach.⁸³ Under this approach, the Court applies a different standard based upon whether a particular regulation is considered content-neutral or content-based.⁸⁴ Though First Amendment jurisprudence does not establish a clear definition of this distinction,⁸⁵ the United States Supreme Court in *Turner Broadcasting System, Inc. v. FCC* provided that content-based regulations are those which “distinguish favored speech from disfavored speech on the basis of the ideas or views expressed.”⁸⁶ Alternatively, content-neutral regulations are those that burden speech without reference to specific views or ideas expressed.⁸⁷ For example, a law prohibiting the display or distribution of campaign materials within a set distance of a polling station is content-based because it favors non-political speech while suppressing political speech.⁸⁸ Alternatively, a regulation prohibiting the posting of signs on public property is content-neutral, as it does not reference or favor any specific view or idea.⁸⁹

If a regulation is found to be content-based, it is presumptively unconstitutional.⁹⁰ The regulation is subject to “strict scrutiny”—which

81. *Id.* at 377.

82. U.S. CONST. amend. I.

83. See *Reed v. Town of Gilbert*, 576 U.S. 155 (2015); *McCullen v. Coakley*, 573 U.S. 464 (2014); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 289 (1984).

84. FARBER, *supra* note 55, at 25–27.

85. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (stating that the governmental purpose in enacting a regulation is the “controlling consideration” in determining whether that regulation is content-neutral or content-based). *But see Reed*, 576 U.S. at 165–66 (stating that a facial determination must be made as to whether a regulation is content-neutral or content-based before inquiring into legislative intent).

86. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994).

87. *Id.*

88. *Burson v. Freeman*, 504 U.S. 191, 197–98 (1992).

89. *Boos v. Barry*, 485 U.S. 312, 318–19 (1988).

90. *Reed*, 576 U.S. at 163.

requires the contested regulation to have the least restrictive speech-suppressing effect.⁹¹

If a regulation is content-neutral, the government may enact time, place, and manner restrictions on speech, which are subject to a lower level of scrutiny.⁹² For example, a blanket prohibition on passing out leaflets within a set distance from a polling station does not discriminate on the basis of viewpoint, but it identifies a specific place where a certain manner of speech (handing out leaflets) is prohibited. It is permissible for the government to enact time, place, and manner restrictions on speech and expressive conduct when the restriction: (1) is justified without reference to the content of regulated speech (content-neutral); (2) is “narrowly tailored” to serve a significant governmental interest; and (3) leaves open “ample alternative channels of communication.”⁹³ The “narrowly tailored” prong is fulfilled when the government interests at issue would be achieved less effectively absent the regulation, and the means chosen are not substantially broader than necessary to achieve that interest.⁹⁴ Thus, a content-neutral statute does not unlawfully suppress free speech simply because there is a less restrictive alternative available.⁹⁵

In *Reed v. Town of Gilbert*, the Court clarified that a facial determination of content-neutrality must be made before contemplating the legislative intent.⁹⁶ The Court held that the United States Court of Appeals for the Ninth Circuit erred in determining that a regulation exempting certain categories of signs from a permit requirement was content-neutral simply because the regulation was not adopted based on a disagreement with certain messages conveyed.⁹⁷ Instead, the Court said that a facial determination must first be made because “an innocuous justification cannot transform a facially content-based law into one that is content neutral.”⁹⁸ In *Reed*, the regulation was content-based, as it treated different categories of signs disparately. Therefore, the regulation was subject to strict scrutiny.⁹⁹ Rather than eliminating the inquiry into legislative purpose or justification, *Reed* established that a two-step analysis is necessary.¹⁰⁰ The first step of this analysis is to determine

91. *McCullen v. Coakley*, 573 U.S. 464, 478 (2014).

92. *Ward v. Rock Against Racism*, 491 U.S. 781, 787 (1989).

93. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

94. *Ward*, 491 U.S. at 783.

95. *Id.* at 798.

96. *Reed v. Town of Gilbert*, 576 U.S. 155, 166 (2015).

97. *Id.* at 165.

98. *Id.* at 166.

99. *Id.* at 164.

100. *Id.* at 166.

whether the regulation on its face is content-neutral or content-based.¹⁰¹ If the regulation is facially content-based, the inquiry ends and strict scrutiny is applied; however, when the regulation is facially content-neutral, it is then proper to determine whether the government had a content-based purpose in enacting the legislation.¹⁰² If it is determined that the legislative motive was content-based, strict scrutiny will be applied to the facially content-neutral regulation.¹⁰³

Though *Reed* provides guidance in determining which classification a regulation falls into, some scholars argue that this approach results in the under-protection of speech.¹⁰⁴ This is because making the determination that a regulation is facially content-neutral implies that the government is not attempting to sway the public discourse in any particular direction.¹⁰⁵ The next step in the *Reed* analysis is to look at governmental motive; an “asserted [governmental] interest . . . may be only a façade for content-based suppression.”¹⁰⁶ An asserted content-neutral interest, then, may result in a lower standard of scrutiny being applied to a facially content-neutral regulation, which ultimately has the effect of suppressing speech based on content.

Another problem that arises is the “intermediate scrutiny” standard being applied by lower courts to any governmental regulation of speech that does not trigger strict scrutiny.¹⁰⁷ Scholars argue that this standard disproportionality favors the government by upholding regulations, in turn suppressing speech and thus veering away from the policies articulated by the Supreme Court.¹⁰⁸

101. *Id.*

102. *Id.*

103. *Id.*

104. Enrique Armijo, *Reed v. Town of Gilbert: Relax, Everybody*, 58 B.C. L. REV. 65, 92 (2017).

105. *Id.*

106. *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 821 (1984) (Brennan, J., dissenting).

107. Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 830 (2007).

108. *See id.* at 830–31; *see also* Armijo, *supra* note 104, at 96 n.138; Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 237 (2012) (“Content-based laws receive strict scrutiny, which nearly always proves fatal. Meanwhile, content-neutral laws receive what the Court calls ‘intermediate scrutiny,’ in practice a highly deferential form of review which virtually all laws pass.”).

C. Application of the Tiered Scrutiny Approach to Louisiana Revised Statutes Section 14:61

On its face, Louisiana Revised Statutes section 14:61 is content-neutral.¹⁰⁹ First, the statute does not single out a specific viewpoint to be suppressed. Rather, the statute simply prohibits the unauthorized entry onto critical infrastructure.¹¹⁰ Second, the statute states that it shall not be construed to prevent “[l]awful assembly . . . to express ideas or views regarding legitimate matters of public interest.”¹¹¹ This is likely fatal to the claims currently challenging the constitutionality of the regulation under the First Amendment, as lower courts generally uphold facially content-neutral regulations when applying time, place, and manner regulations, as well as “intermediate scrutiny.”¹¹² However, despite being content-neutral, section 14:61 may be subject to strict scrutiny if it is found that the legislature had an improper motive.¹¹³

In *Reed v. Town of Gilbert*, the United States Supreme Court clarified its view that while it is irrelevant to consider the governmental purpose behind a content-based statute, for a facially content-neutral statute, governmental motive determines the standard of review.¹¹⁴ The Court stated that when a statute is found to be facially content-neutral, it is appropriate to then conduct an analysis of the legislative intent.¹¹⁵ Thus, a deciding court must look to legislative purpose to determine whether the regulation is “justified without reference to the content of speech.”¹¹⁶ If the governmental purpose is then found to be content-based (discriminatory of a certain viewpoint), the court must apply strict scrutiny.¹¹⁷

The government cannot restrict speech or expressive conduct on the basis that: (1) the government disagrees with the ideas of the speaker;¹¹⁸ (2) the ideas threaten a government official’s own self-interest;¹¹⁹ or (3) privileging certain ideas advances the government’s own interest.¹²⁰ The

109. LA. REV. STAT. § 14:61 (2018).

110. *Id.*

111. LA. REV. STAT. § 14:61(D)(1).

112. Armijo, *supra* note 104, at 96 n.138.

113. *See Reed v. Town of Gilbert*, 576 U.S. 155 (2015).

114. *Id.* at 166.

115. *Id.* at 167.

116. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

117. *Reed*, 576 U.S. at 166.

118. Kagan, *supra* note 66, at 428.

119. *Id.*

120. *Id.* at 428–29.

applicable standard regarding section 14:61 should be strict scrutiny, due to an impermissible legislative motive underlying the regulation.

The modifications to Louisiana Revised Statutes section 14:61 seem to be a direct response to the Bayou Bridge Pipeline protests for four reasons. First, this is evidenced by the addition of pipelines to the definition of “critical infrastructure” protected by the statute, as well as the creation of heightened penalties aimed at deterring those speaking out against the further construction of pipelines within the state.¹²¹ Second, the arrests of protestors were made within weeks of the modification of the statute, supporting the contention that the legislature made these changes to silence protestors.¹²² Third, a sponsor of Louisiana House Bill 727, which gave rise to the changes in section 14:61, could potentially have a personal motive for silencing protestors of pipeline construction in Louisiana, as energy and natural resources companies are his or her leading campaign donor by sector.¹²³ Finally, the national trend of statutes protecting critical infrastructure which arose after the Dakota Access Pipeline protests seems to suggest that the fear of opposition toward pipeline construction is what led the Louisiana Legislature to amend section 14:61.¹²⁴

121. Act No. 692, 2018 La. Acts 2114 (codified at LA. REV. STAT. § 14:61 (2018)).

122. Alleen Brown, *Pipeline Opponents Strike Back Against Anti Protest Laws*, THE INTERCEPT (May 23, 2019), <https://theintercept.com/2019/05/23/pipeline-protest-laws-louisiana-south-dakota/> [<https://perma.cc/PHY4-7NE6>]; Hat Complaint, *supra* note 9, at 2; Spoon Complaint, *supra* note 9.

123. Alleen Brown & Will Parrish, *Louisiana and Minnesota Introduce Anti-Protest Bills Amid Fights Over Bayou Bridge and Enbridge Pipelines*, THE INTERCEPT (Mar 31, 2018, 10:05 AM), <https://theintercept.com/2018/03/31/louisiana-minnesota-anti-protest-bills-bayou-bridge-enbridge-pipelines/> [<https://perma.cc/JR72-F78U>].

124. See H.B. 3557, 86th Leg. (Tex. 2019) (creating a criminal penalty for “impairing or interrupting operation of a critical infrastructure facility” and adding “any pipeline transporting oil or gas” to the definition of “critical infrastructure”); S.B. 471, 121st Gen. Assemb., Reg. Sess. (Ind. 2019) (heightened the criminal penalties for knowingly entering a critical infrastructure facility without permission, allowing a sentencing of up to 30 months in prison); H.B. 355, 100th Gen. Assemb., 1st Reg. Sess. (Mo. 2019) (includes a punishment of up to one year in jail and a \$2,000 fine for trespassing with the intent to “impede or inhibit the operations” of a facility, including any oil or gas pipeline). See also *Dakota Rural Action v. Noem*, 416 F. Supp. 3d 874, 880 (D.S.D. 2019) (providing a background of the constitutional claim against South Dakota’s riot boosting statute).

V. THE UNDERLYING ISSUE

A. Distortion of Public Discourse

If left unchanged, the amendments to Louisiana Revised Statutes section 14:61 will distort the public discourse, impeding the societal search for truth. Though content-neutral on its face, section 14:61 has the effect of suppressing speech made in opposition of pipeline construction¹²⁵ as protestors who wish to speak out against the pipeline are being arrested.¹²⁶ As a result, others who oppose the pipeline construction may begin to engage in self-censorship to avoid punishment. Without access to the protestors' viewpoint, members of the public are less equipped to make a rational judgment regarding whether pipeline construction should continue in the state.¹²⁷ This is not to say that the modifications will simply prevent the public from understanding the plight of protestors, but rather that the statute prevents the public from encountering competing ideas which would enable them to make the best judgment on the issue of whether the infrastructure should be constructed.

One may argue that a content-neutral time, place, and manner restriction is still appropriate in regards to section 14:61, since preventing protestors from expressing their viewpoints near a critical infrastructure does not stop them from communicating their viewpoints through other means; however, the protestors' expressive conduct—such as tree-sitting and kayaking—contains an intent to convey a particularized message.¹²⁸ Specifically, tree-sitting expresses the concern of the protestors regarding environmental harm to the Atchafalaya basin because the trees must be cut down in order to construct the pipeline.¹²⁹

In *Clark v. Community for Creative Non-Violence*, the U.S. Supreme Court evaluated the constitutionality of a “camping” regulation that prevented the demonstrators from sleeping in tents in Lafayette Park overnight to protest the plight of the homeless in the nation's capital.¹³⁰ After assuming that the sleep-in was constitutionally protected behavior, the Court held that this was a permissible time, place, and manner

125. LA. REV. STAT. § 14:61 (2018).

126. Corbett, *supra* note 44.

127. See Emerson, *supra* note 55, at 881 (“suppression of information, discussion, or the clash of opinion prevents one from reaching the most rational judgement, blocks the generation of new ideas, and tends to perpetuate error”).

128. Mundahl, *supra* note 6.

129. *Id.*

130. 468 U.S. 288, 289–91 (1984).

restriction.¹³¹ Highlighting the importance of the place and manner chosen by demonstrators therein, Justice Marshall criticized the majority for assuming, without discussing, that the behavior was constitutionally protected.¹³² Justice Marshall, dissenting in *Clark*, discussed the importance of the specific conduct chosen by protestors.¹³³ He emphasized that camping in the tents overnight was a powerful manner of bringing awareness to the fact that homeless individuals must sleep outside in these conditions throughout the winter.¹³⁴ Additionally, the location chosen, Lafayette Park,¹³⁵ highlighted the political character of the conduct.¹³⁶ Because the majority failed to consider this, Justice Marshall argued that the Court made it too easy to provide an interest that justified abridgement of the protected conduct.¹³⁷ Justice Marshall's dissent illustrates why the place and manner chosen by the pipeline protestors is significant; an argument that protestors can communicate in alternative channels of communication would, as the majority did in *Clark*, ignore the significance of the manner and location chosen by protestors.¹³⁸ This oversight eases the government's burden of providing an interest sufficient to outweigh the protected conduct by reducing the importance of that conduct.¹³⁹ Thus, it is important to consider the increased value to public discourse by the method of expression chosen by protestors of the Bayou Bridge Pipeline.

Regardless of whether "ample alternative" avenues exist for a protestor's message, the vagueness of section 14:61 and fear of criminal penalties will have the effect of chilling constitutional speech that complies with these time, place, and manner regulations due to individuals' self-censorship because of fear of punishment.¹⁴⁰ Thus, even if the statute is upheld as a permissible content-neutral time, place, and

131. *Id.* at 288–89.

132. *Id.* at 301–02 (Marshall, J., dissenting).

133. *See id.*

134. *Id.*

135. Lafayette Park, located in Washington, D.C., has been "a racetrack, a graveyard, a zoo, a slave market, an encampment for soldiers during the War of 1812, and the site of many political protests and celebrations." *Lafayette Square, Washington, DC*, U.S. GEN. SERVS. ADMIN., <https://www.gsa.gov/real-estate/historic-preservation/explore-historic-buildings/heritage-tourism/our-capital/lafayette-square-washington-dc> [<https://perma.cc/66YQ-YQ8M>] (last visited Oct. 14, 2020).

136. *Clark*, 468 U.S. at 302 (Marshall, J., dissenting).

137. *Id.*

138. *See Clark*, 468 U.S. 288.

139. *See id.*

140. *See City of Lakewood v. Plain Dealer Publ'g. Co.*, 486 U.S. 750 (1988).

manner restriction, public discourse will still be distorted as individuals will be afraid to express their beliefs, and the availability of knowledge will be lessened for audiences.

B. Stifling an Individual's Self-Realization

Louisiana Revised Statutes section 14:61 stifles individuals' self-realization by preventing them from expressing their true beliefs. In this instance, an individual who is passionate about protecting the natural environment and their community is unable to express those beliefs in a meaningful way, due to the fear of punishment under the statute or the limitations on specific forms of conduct. Thus, an individual's ownership of his or her life is reduced, devaluing the individual's beliefs due to the inability to express them.¹⁴¹

C. Offending Democracy

Democracy is offended by enacting regulations that silence opposition as the power to shape society is taken out of the hands of the government's constituents.¹⁴² By suppressing the speech of those opposing pipeline construction within the state, the government restricts the ability of citizens to articulate their desires, inherently excluding them from the political process of making changes within their community and perpetuating their plight. By attempting to suppress opposition to the construction of additional pipelines, the government also lowers the possibility of compromise, which carries the risk of a more radical or violent method of expression in the future.¹⁴³ Instead, allowing the protestors to express their beliefs and attempt to persuade others will make protestors more inclined to feel like a future governmental decision is a legitimate one.¹⁴⁴

For example, imagine an elementary school class burdened with the task of deciding whether to have recess indoors or outdoors. If the teacher allows some students to share their viewpoint expressing why they would rather have recess outside, unpersuaded students who wish to stay inside

141. Emerson, *supra* note 55, at 879 ("For expression is an integral part of the development of ideas, of mental exploration and of the affirmation of self.").

142. See FARBER, *supra* note 55, at 7.

143. Emerson, *supra* note 55, at 883.

144. Emerson, *supra* note 55, at 885 ("The principle of political legitimization . . . asserts that persons who have had full freedom to state their position and persuade others to adopt it will, when the decision goes against them, be more ready to accept the common judgement.").

will likely complain that the result is unfair when the majority votes in favor of going out. Alternatively, if students on both sides are allowed to express their preference in an attempt to persuade their classmates before voting on the result, even the students who prefer to stay inside, though likely disappointed, will be more inclined to feel as though this was a legitimate result. This hypothetical illustrates how the suppression of certain viewpoints fundamentally detracts from a democratic government.

VI. SOLUTION

In order for lower courts to reach a more policy-aligned approach regarding the First Amendment, the United States Supreme Court should refine its approach to the content distinction by focusing on governmental motive through the speaker-based and audience-based effects a regulation has. The facial determination step articulated in *Reed*¹⁴⁵ should give rise to a rebuttable presumption in favor of its determination. Finding that a regulation is facially content-neutral would give rise to a rebuttable presumption that it is content-neutral. A law whose language contains no reference to specific speech would be considered content-neutral, but challengers of the regulation should be allowed to set forth evidence to overcome this presumption by a preponderance of the evidence standard.¹⁴⁶ If this presumption is successfully rebutted, the law should then be considered content-based and subject to strict scrutiny.

It is well established that there is a category of laws that are facially content-neutral yet subject to strict scrutiny, but a content-neutral designation will likely be deadly to constitutional claims among the lower courts due to the confusion that arises in attempting to ascertain legislative intent.¹⁴⁷ As the Court stated in *United States v. O'Brien*, “[i]nquiries into congressional motives or purposes are a hazardous matter.”¹⁴⁸ In *O'Brien*, the Court looked to statements made by individual legislators throughout the regulation’s decision-making process in order to determine legislative intent but acknowledged that “[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to

145. *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015).

146. “Preponderance of the evidence is one type of evidentiary standard used in a burden of proof analysis. Under the preponderance standard, the burden of proof is met when the party with the burden convinces the fact finder that there is a greater than 50% chance that the claim is true.” *Preponderance of the Evidence*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/preponderance_of_the_evidence [<https://perma.cc/XA69-A5E7>] (last visited Aug. 3, 2020).

147. See discussion *supra* Part I.C.2.

148. *United States v. O'Brien*, 391 U.S. 367, 383 (1968).

enact it.”¹⁴⁹ In the present instance, even assuming that a senator had an improper motive for sponsoring House Bill 727,¹⁵⁰ other members of the legislature may have had a purpose behind enacting changes to the statute that is justified without reference to suppressing the expressive conduct of protestors. If a bill is proposed by a senator with discriminatory intent, but the rest of the majority who vote in its favor do so in pursuit of a purported content-neutral interest, should this regulation then be subject to strict scrutiny?

A more plausible solution is to assume the collective legislative intent based upon the effects of a regulation. Consider a hypothetical school in which the student government decides to purchase doormats for the school’s entrance. Student A proposes this idea, stating that the increased aesthetic value to the school will be more inviting to potential students, providing an eventual financial benefit to the school. Student A’s true motivation, however, is that A owns a doormat business, and using school funds to buy doormats would result in a profit to A. Student B speaks in favor of implementing doormats, stating that it may prevent slip-and-fall incidents, as the mats will help reduce wet footprints around the school. A handful of other students vote upon the proposition in the affirmative, but they do not state their reasons.

Now imagine that the proposal passes and these effects are observed over the following year: (1) the amount of slip-and-fall incidents in the school is reduced; (2) the school purchased the mats from student A’s business, resulting in a financial benefit to A; and (3) the school’s incoming class has fewer students than prior classes. If personal financial gain is an impermissible motive pursuant to school policy, was the implementation of mats appropriate here? Looking to the statements made by individual students, there seems to be no impermissible motive; however, looking to the effects of the regulation, it seems as though A violated the school’s policy by making a proposal for his personal financial benefit.

The above hypothetical illustrates how, even when applying *Reed*’s two-step analysis, a law that suppresses certain expressive conduct on the basis of viewpoint in violation of public policy may still stand due to the limited ability to discern collective intent from the rationales claimed by a small number of legislators. In the doormat example, an effects-based approach to determine legislative intent would unearth the impermissible motive, allowing a reviewing body to weigh the impermissible interest of personal financial gain with the permissible interest of preventing slip-

149. *Id.* at 384.

150. *See* discussion *supra* Part II.B.

and-falls. Similarly, it would allow the speech suppressing effect of a statute to be weighed against the benefits that the statute brings about. Legislative intent is more accurately measured by assuming that legislators collectively intended the effects of their regulation in order to adequately discern whether a regulation is justified without reference to the content of regulated speech and whether it is “narrowly tailored” to serve a significant government interest.¹⁵¹

In regards to Louisiana Revised Statutes section 14:61, if the court hearing the *Spoon* and *Hat* complaints accepts the purported governmental intent or looks to comments from individual legislators, it would be inappropriate to apply strict scrutiny under *Reed*. The regulation will likely be upheld due to the statutory language, which purports to permit peaceful protest.¹⁵² Furthermore, it is highly unlikely that any individual legislator will state an intent to suppress opposition by silencing protestors. Yet, as implemented, the statute has the impermissible effect of distorting discourse by punishing a certain viewpoint.

Instead, determining the legislative intent through the effects of the statute would allow the court, under *Reed*, to apply strict scrutiny because the regulation’s effects would reveal an improper governmental motive, despite the statute being facially content-neutral.¹⁵³ Of course, this does not mean that no proper governmental purpose exists, but rather allows the reviewing court to weigh legislative intent in a more policy-aligned way. Another benefit of this approach is that the legislature will likely be more conscientious about passing regulations with speech suppressing effects, resulting in a more careful tailoring of laws to meet the legislature’s goal.

One may argue that taking this approach will result in applying more-relaxed scrutiny to content-based laws which do not have an observable, substantial skewing effect on public discourse. Those laws, however, would not progress beyond the first step of *Reed*, because if they are facially content-based, strict scrutiny will be applied.¹⁵⁴ One may also argue that content-neutral laws that further a substantial government interest, but incidentally have the effect of weighing more heavily on one viewpoint, would be subject to strict scrutiny even if the individual legislators had no intention of discriminating against certain viewpoints.

151. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

152. *Hat Complaint*, *supra* note 9; *Spoon Complaint*, *supra* note 9.

153. *See Reed v. Town of Gilbert*, 576 U.S. 155 (2015).

154. *See id.* at 165 (“A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.”).

While this is a natural consequence of this approach, it is the consequence anticipated by policy. An individual's access to truth and self-realization should not be diminished because of a failure to consider the effects of a regulation, or a dishonest stated intent for enacting a regulation.

CONCLUSION

Due to the values underlying the First Amendment of the United States Constitution, the modifications to Louisiana Revised Statutes section 14:61 should be overturned. Despite being content-neutral on its face, section 14:61 should be subject to strict scrutiny due to improper legislative motive. Though some regulations of conduct are permissible, it is impermissible for the legislature to suppress the expressive conduct of those opposing the Bayou Bridge pipeline construction, as this suppression results in a governmental distortion of public debate and offends the democratic system. While there is a possibility that the statute may still be upheld under strict scrutiny, provided that it is the least speech-restrictive means of achieving a compelling state interest, Louisiana Revised Statutes section 14:61 should not survive this challenge, because its vagueness and standardless administrative discretion results in the suppression of lawful speech, unrelated to the expressive conduct of demonstrators.

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