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Ripples in the Pond: United States Supreme Court Decision Impact Predictions v. Reality

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I. INTRODUCTION

United States Supreme Court decisions are like pebbles thrown in the jurisprudential pond, creating ripples throughout the American body of law. A study of the ripples from a single decision pebble yields unique insight into the true impacts of a particular finding, especially when enough time has passed to make reflection on the size and scope of the ripples meaningful. And such an analysis will reveal discrepancies between any hypothesized ripple effects found in post-decision literature and the actual impacts later observed. This Comment examines those phenomena using the 2015 Supreme Court decision in *Reed v. Town of Gilbert*[1] as a case study to compare the repercussions of the holding, as reflected in its subsequent application by state and federal courts, to the impacts predicted by scholars at the time of its resolution. Utilizing the First Amendment,[2] the *Reed* decision held a municipal sign ordinance, which differentiated the treatment of signs based on category and type, to be content-based on its face.[3] The Court applied strict scrutiny, without consideration of the governmental intent that had been often used by lower courts in defense of content-neutrality,[4] and found the sign ordinance unconstitutional.[5]

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1 135 S. Ct. 2218 (2015).
2 U.S. CONST. amend. I.
3 135 S. Ct. at 2224.
4 Richard Wolf, *What the First Amendment protects—and what it doesn't*, USA TODAY (Apr. 6, 2018, 2:11 PM), http://www.usatoday.com/story/news/politics/2018/04/06/what-first-amendment-protects-and-what-doesnt/469920002/ [http://perma.cc/7Q9Y-LN9K] ("The First

Supreme Court decisions such as *Reed* are analogized herein to pebbles cast into a pond. Ofttimes, the mass of the pebble is not fully understood before it is launched; but the ripples it produces can be easily observed and analyzed, given sufficient time. This Comment posits that characteristics of the pebble itself are often less consequential—it is the reach of the ripples created that matters. But before the ripples can be meaningfully examined, an adequate amount of time must pass to allow the pebble's impact to propagate throughout the legal pond. Then, an analysis of the actual ripples produced can be compared to the results predicted at the time the pebble was tossed.

Not all United States Supreme Court decisions seem momentous. Although some decisions may be highly anticipated—where anticipation may sometimes be directly proportional to media coverage—the Court's judgments that resolve circuit splits or clarify nuances of specific laws are some of the routine functions of our highest Court of the land.[6] Because they operate as the final say, Supreme Court opinions are ofttimes the subject of academic ponderings and predictions in literature. Occasionally, however, these jurisprudential prophecies may fail to materialize.

A richer understanding of the true impacts of Supreme Court cases can sometimes be derived by assessing their significance after a sufficient passage of time. It is recognized that, for most cases, a majority of academic and popular commentary frequently occurs within a few years of a decision, and by its very nature, such commentary is incapable of assessing any long-term effects. Often the body of initial literature is not reexamined at a later point in time. That is, very few analyses have examined the track record of a decision to determine its more global effects over time. This Comment aims to be different. It investigates the advantages of reflecting on lower courts' treatment and implementation of the Supreme Court's reasoning, and it compares the actual treatment of the opinion with the initial commentary, using *Reed* as an example. This type of exercise can result in confirmation or contradiction. On the one hand, it may sometimes disprove less-evidenced earlier predictions. If the reality of subsequent applications has not mirrored initial prognostications, over-reliance on the body of predictive literature without such reflection has the risk of skewing our perception of a decision's true impact. On the other hand, if applying

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Amendment is a mere 45 words. But it's still giving lawmakers and judges fits 227 years after its adoption.").

5 135 S. Ct. at 2224.

6 *See, e.g.*, CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3507 (3d ed. 2019).

this method shows results consistent with earlier predictions, it provides validation through its testing. At the very least, we should embrace such an inquiry to create a more robust understanding of a decision's place within our American jurisprudence.

This Comment adds to the body of literature on the Supreme Court's 2015 *Reed* decision by exploring how courts at all levels have applied and incorporated *Reed*. Part I develops the analogy of Supreme Court decisions to pebbles pitched into the jurisprudential pond, and looks at exemplar cases at each end of the ripple spectrum to get a sense of the analytical frame used in this Comment. Part I also discusses the importance of allowing a sufficient amount of time to pass for examination to be meaningful. Part II chronicles the rise of *Reed* and its journey to the Supreme Court, and it postulates that *Reed* is an ideal test case to analyze. Part III reviews the post-*Reed* literature, noting particularly a variety of predictions forecasting *Reed*'s impact. This part paints the backdrop against which the true Supreme Court decision effects will be compared. Part IV presents a comprehensive assessment of *Reed*'s application in state and federal courts. Comparisons among jurisdictions are given, as well as topical analyses of holdings citing and relying upon the *Reed* decision. Part V summarizes the *Reed* application results and offers reflections on when similar United States Supreme Court decisions should be examined. In conclusion, although certain areas of First Amendment law have undoubtedly been influenced by *Reed*, it does not appear that the predicted far-reaching impacts of *Reed* have materialized.

This Comment posits that a robust impact analysis of a United States Supreme Court decision is best accomplished after allowing for an adequate passage of time. Such a study controls against two potential risks. First, without giving these decisions time to inversely percolate—a phrase used herein to denote the application of Supreme Court precedent by the lower courts—predictive literature runs the risk of misleading legal practitioners, as well as the general public. Specifically, advertised assumptions about anticipated aftermath may never actualize. Second, to understand the true impacts of a singular Supreme Court ruling, a conscious research effort evaluating the lower courts' implementation is required, and will either validate or repudiate any hypothesized applications. Absent such a study, unsubstantiated conjectures in the literature may come to be accepted as valid truisms, thus undermining, rather than enhancing, the body of legal analysis surrounding a particular case like *Reed*.

II. THE PEBBLES AND THE POND

The smooth surface of the American legal pond is regularly disrupted by United States Supreme Court decision pebbles.[7] Even the lightest of these pebbles will produce a ripple. And although the true mass of the pebble may not be known or clearly understood at the time it is tossed, the resulting ripples observed in the jurisprudence are of particular interest.

A. Supreme Court Cases as Pebbles

Case law forms through judicial proceedings. The decisions handed down by the courts form precedent—an essential, dynamic part of our American legal system.[8] It is no wonder then that when a case is granted certiorari and comes before the United States Supreme Court, curiosity is piqued throughout the legal community to see if the Court's ruling will hold to an established norm or offer valid expostulation to alter a judicial rudder.[9] The Court's decisions may naturally result in ripples[10] that are unpredictable in scope. Seemingly mundane findings that are passed down without fanfare may produce lasting legal effects.[11] And seemingly major holdings that produce immediate uproar among legal scholars and/or the general public may turn out to have limited future impact.[12] It is nigh impossible to accurately predict the exact impacts that will arise from a single

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7 For example, the October 2018 term has heard sixty-nine cases argued. *See Statistics*, SCOTUSBLOG, http://www.scotusblog.com/statistics/ [http://perma.cc/69MH-UKJT] (last visited May 14, 2019).

8 WILLIAM M. LILE ET AL., BRIEF MAKING AND THE USE OF LAW BOOKS 288 (Roger W. Cooley & Charles Lesley James eds., 3d ed. 1914) ("In law a precedent is an adjudged case or decision of a court of justice, considered as furnishing a rule or authority for the determination of an identical or similar case afterwards arising, or of a similar question of law.").

9 See Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705, 710–17 (2018), for a history of the development of the modern certiorari process.

10 Craig Haney, *Psychology and the Limits to Prison Pain: Confronting the Coming Crisis in Eighth Amendment Law*, 3 PSYCHOL. PUB. POL'Y & L. 499, 556 n.271 (1997) ("Supreme Court opinions obviously have a powerful ripple effect throughout the entire legal system. Particularly when, as I suggest, the Court seems intent on changing the direction of a particular constitutional trend, even the tone and dicta in the opinions can have an enormously influential effect."). *See also* George D. Brown, *The Constitution as an Obstacle to Government Ethics–Reformist Legislation After* National Treasury Employees Union, 37 WM. & MARY L. REV. 979, 1042 (1996) (noting most Supreme Court decisions have ripple effects).

11 *See, e.g.*, Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984).

12 *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

decision,[13] for it may be that although "[t]he Court intended [one] result, . . . there have also been ripple effects it did not foresee."[14]

We should perhaps be cautious of repercussion forecasts. This is because predictive literature may be rendered moot over time if the impacts imagined fail to materialize. It may be prudent, therefore, to draw upon the benefits of a reflective analysis after sufficient time has passed in order to assess predictive counterparts. If a case is revisited after a few years, the true impact it has had on the legal system can be compared to the impacts predicted by the initial literature. Such an examination will produce a more robust understanding of the case as a whole, and may highlight disparities or consistencies between hypothesized and actual impacts.

B. The Spectrum of Resulting Ripples

The existence of Supreme Court decision impacts has long been recognized: "[F]ew Supreme Court decisions stand alone without 'ripple effects' beyond their immediate facts."[15] Since these ripples are part of our legal reality,[16] a further examination is warranted and, indeed, prudent.[17] The potential disconnect between predicted and actual Supreme Court decision repercussions can be demonstrated by examining the two ends of the spectrum—opinions announced without pomp but that had profound impacts, and cases decided amidst a great deal of attention but that resulted in negligible impacts.

At one end of the spectrum are cases that passed through the Court quietly without ruffling any feathers or creating much stir in academia, but nonetheless have left a deep and lasting impression. One such case was *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[18] decided in June of 1984. In the year following, twenty-six law review articles cited the case; however, of

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13 *See* Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 375 (1993) ("[T]he promulgation of bold new rules, or the abandonment of old ones, can have ripple effects that the Supreme Court may not be well situated to anticipate.").

14 James E. von der Heydt, *Ripple Effects: The Unintended Change to Jurisdictional Pleading Standards After* Iqbal, 60 CLEV. ST. L. REV. 799, 801 (2012) (footnote omitted).

15 Brown, *supra* note 10, at 1042. *See also* Fallon, *supra* note 13, at 375 (noting ripple effects may be unanticipated).

16 Haney, *supra* note 10, at 556 ("Supreme Court opinions obviously have a powerful ripple effect throughout the entire legal system.").

17 This seems especially true in our current society which appears to be developing an increased tendency to jump to conclusions without due consideration of the validity of underlying facts or analysis. *See, e.g.*, Kim Hart, *The snap decision society*, AXIOS (Apr. 4, 2019), http://www.axios.com/snap-decisions-society-jumping-to-conclusions-14bf251e-d51e-4685-bcf9-9e948496353b.html [http://perma.cc/ZF6U-ZFZG].

18 467 U.S. 837 (1984).

these, seventeen referred to the holding only in footnotes,[19] four gave it no more than a passing mention,[20] and one simply compared it to prior court findings.[21] The six remaining articles voiced cautious opinions, hedged with words such as "may," "perhaps," "if," and "suggests."[22] *Chevron* certainly did not seem to cause important legal reverberations at the time it was decided.[23] But the resulting doctrine of "*Chevron* deference" is well-established and widely relied upon today.[24] This "icon of administrative law"[25] is an example of a case with little to no predicted impacts, but one that has had a large, long-lasting influence in reality.

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19 *See, e.g.*, Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 385 n.27 (1985); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 596 n.250 (1985); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 26 n.114 (1985).

20 James E. Alexander, Aluminum Co. of America v. Central Lincoln Peoples' Utility District, 15 ENVTL. L. 325, 336 (1985); Michael Fix & George C. Eads, *The Prospects for Regulatory Reform: The Legacy of Reagan's First Term*, 2 YALE J. ON REG. 293, 306–07 (1985); David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223, 1242–43 (1985); Andrew Joseph Siegel, *The U.S.–Japanese Whaling Accord: A Result of the Discretionary Loophole in the Packwood-Magnuson Amendment*, 19 GEO. WASH. J. INT'L L. & ECON. 577, 600 (1985).

21 Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 549–53 (1985).

22 *The Supreme Court, 1983 Term*, 98 HARV. L. REV. 247, 247 (1984) ("[T]he Court's opinion last Term in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, which upheld EPA regulations on air pollution as a reasonable exercise of administrative discretion, suggests that courts have a very limited role in reviewing agency decisions . . . .") (footnote omitted); Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 225 (1984) ("This approach, if adhered to by the Court, will maximize agency discretion."); Jack L. Landau, Chevron, U.S.A. v. NRDC: *The Supreme Court Declines to Burst EPA's Bubble Concept*, 15 ENVTL. L. 285, 287–88 (1985) ("The United States Supreme Court's decision in *Chevron, U.S.A. v. Natural Resources Defense Council*, may signal an end to this hostile regulatory climate.") (footnote omitted); Stephen M. Lynch, *A Framework for Judicial Review of an Agency's Statutory Interpretation:* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 1985 DUKE L.J. 469, 470 (1985) ("In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, the Supreme Court may have forged the analytic framework for assessing the validity of an administrative agency's construction of the statute that it is charged with administering.") (footnote omitted); Eric Redman, *Statutory Construction in the Supreme Court: A Northwest Power Act Example*, 15 ENVTL. L. 353, 354 (1985) ("Thus, *Chevron* is perhaps more likely than *ALCOA* to have a lasting impact . . . .").

23 Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 257 (2014) ("Most landmark decisions are born great—they are understood to be of special significance from the moment they are decided. But *Chevron* was little noticed when it was decided, and came to be regarded as a landmark case only some years later."). *See also* FedSoc Films, *Chevron: Accidental Landmark*, FEDERALIST SOCIETY (Dec. 19, 2018), http://fedsoc.org/commentary/videos/chevron-accidental-landmark [http://perma.cc/B68U-MNVQ] (discussing the origins of the Chevron doctrine and how it rose to become an "accidental landmark").

24 *See* Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1579 (2006).

25 Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 VAND. L. REV. 937, 938 (2018).

At the other end of the spectrum, there are cases that approached the Court with high-level publicity or political hype, and with great attention paid by the general public. For example, *Burwell v. Hobby Lobby Stores, Inc.*[26] came before the Supreme Court in 2014 in the middle of a media storm.[27] The case sought to answer whether a Christian-owned corporation which objected on religious grounds to the mandatory provision of post-conception contraceptives could be exempted from the requirement.[28] While the press coverage was extensive, the actual ruling's impact was minor: "*Burwell v. Hobby Lobby Stores*[,] . . . despite significant media attention, has virtually no current impact . . . ."[29] This case seemed, at the time, destined to create a fire storm, but produced minor sparks in reality. These two cases together illustrate that unanticipated effects may subsequently emerge, or anticipated effects simply may not materialize.

C. The Importance of Time

Supreme Court decisions need time to unfold. Each one inevitably takes on a life of its own as it is fostered by the lower courts.[30] Some remain in the background, simply adding to the broad base of authority on a particular subject. Some grow up to be seminal cases in their field, earning their place in hornbooks

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26 573 U.S. 682 (2014).

27 *See* Jaime Fuller, *Here's what you need to know about the Hobby Lobby case*, WASH. POST (Mar. 24, 2014), http://www.washingtonpost.com/news/the-fix/wp/2014/03/24/heres-what-you-need-to-know-about-the-hobby-lobby-case/?utm_term=.c74ae27a7a4f [http://perma.cc/T7WP-XEL3]; Julia Mirabella & Sandhya Bathija, Hobby Lobby v. Sebelius*: Crafting a Dangerous Precedent*, CTR. FOR AM. PROGRESS (Oct. 1, 2013, 9:08 AM), http://www.americanprogress.org/issues/courts/reports/2013/10/01/76033/hobby-lobby-v-sebelius-crafting-a-dangerous-precedent/ [http://perma.cc/K9F5-N9HR].

28 573 U.S. at 688–90.

29 Matthew J. Schenck & Jennifer L. Berry, *Supreme Court's Hobby Lobby Decision: Little Immediate Impact on Employers*, PAUL, PLEVIN, SULLIVAN & CONNAUGHTON LLP (July 1, 2014), http://www.paulplevin.com/blog/supreme-courts-ihobby-lobbyi-decision-little-immediate-impact-on-employers [http://perma.cc/U7LE-NYUK]. *See also* Gregg Fisch, *The Supreme Court's Ruling in Hobby Lobby that Closely Held, For-Profit Companies Should Receive Religious Exemptions From ObamaCare's Conception Mandate Likely Will Have Little Practical Impact Immediately in the Employment Arena*, L. & EMP. L. BLOG (June 30, 2014), http://www.laboremploymentlawblog.com/2014/06/articles/discrimination/the-supreme-courts-ruling-in-hobby-lobby-that-closely-held-for-profit-companies-should-receive-religious-exemptions-from-obamacares-conception-mandate-likely-will-have-little-practi/ [http://perma.cc/45H3-788Y] ("[I]t is easy to understand why this case has touched such a political nerve and is causing such a heated response. In terms of practical effects in the employment arena, however, the immediate impact on employers and employees likely will be limited for the foreseeable future."); Emma Green, *The Supreme Court Isn't Waging a War on Women in* Hobby Lobby, ATLANTIC (June 30, 2014), http://www.theatlantic.com/national/archive/2014/06/hobby-lobby-isnt-waging-a-war-on-women/373717 [http://perma.cc/QC9A-WREE] (quoting the White House Office of Faith-Based Initiatives director, John J. Dilulio Jr., as saying, "Love it or loathe it, the Hobby Lobby decision is limited in scope.").

30 *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 865–66 (1994).

across the land. This growth can be thought of as a type of percolation in reverse. The "concept of percolation" refers to the process by which "cases involving constitutional or statutory interpretation are generally granted certiorari only when they have been sufficiently vetted in the lower courts and have risen to the level of a dispute or split."[31] I will refer to this reverse type of percolation as "inverse percolation." Just as the initial percolation is a beneficial element of our judicial system,[32] there is also value in inverse percolation, whereby a Supreme Court decision becomes infused into the general jurisprudence via lower court application.

The inverse percolation process does not occur overnight. It takes time for cases to arise with factual and legal patterns appropriate for lower court application of a particular Supreme Court opinion. And it takes time for such cases to reach the high state courts, and to be found throughout the various federal circuit courts. Eventually, Supreme Court decision influence will surface in the lower courts as they comply with the reasoning handed down, but this compliance may not always be automatic.[33] Indeed, it has been suggested that other factors, like the age of an overruled precedent, for example, will play into a lowers court's decision of how quickly it will implement such precedent.[34] But when sufficient time has passed, an investigation of the inverse percolation results can be fruitful. Thus, time is an essential element in reflective analysis, reasonably requiring several years.

I suggest four years is an adequate inverse percolation time window to capture a well-developed snapshot of lower court application, misapplication, or in-application of the precedent set by a Supreme Court decision. *Reed* is, therefore, a good case to examine. At the time of its release, the decision evoked strong reactions among commentators who shared dire predictions

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31 Berkolow, *Much Ado About Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-Percolation After* Rapanos, 15 VA. J. SOC. POL'Y & L. 299, 348 (2008). *See also* Arizona v. Evans, 514 U.S. 1, 24 n.1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.").

32 *See, e.g.*, Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L. Q. 389, 439 (2004) ("Embracing the concept of percolation demonstrates a willingness to tolerate disuniformity for a time—the period needed for multiple lower courts to address an issue and flesh out the relevant considerations—but not necessarily forever.").

33 *See, e.g.*, Sara C. Benesh & Malia Reddick, *Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent*, 64 J. POL. 534, 534 (2002).

34 *Id.* at 537.

about the breadth and scope of its impacts.[35] A meaningful assessment of *Reed*'s effects may now be conducted because time has passed, and the inverse percolation process has been active for several years. Before looking at the literature the decision generated or the categorization of courts' post-*Reed* applications, a review of the *Reed* litigation, its journey to the Supreme Court, and the Court's analysis of its First Amendment issue will be useful. The next Part takes on that task.

III. A PEBBLE IS CAST

Reed is an interesting case on its merits alone, especially to First Amendment scholars and practitioners, since it addressed an important First Amendment issue dealing with content-based regulations and mended a circuit split on the same. More importantly here, however, it is a case that is well-situated for the type of examination described in this Comment. *Reed* was decided in 2015.[36] The Court's decision in *Reed* induced a reaction among constitutional law professors and other scholars who predicted far-reaching impacts.[37] We are at a good spot now to reflect and see if any of those predicted impacts have materialized.

The *Reed* case involved how, why, and to what extent a city could regulate the placement of signs around town for various events.[38] Seemingly simple on its face, the Supreme Court granted certiorari to resolve a three-way circuit split on determining content-neutrality and, thus, the appropriate level of scrutiny. The level of scrutiny applied in *Reed* hinged on whether the laws regulating the signs were content-based or content-neutral.[39] Thus, the question before the Court focused on the subsection of First Amendment jurisprudence dealing with content-neutral analyses.[40] The *Reed* case evolved as follows.

A. *Reed v. Town of Gilbert*

1. Background

In the Town of Gilbert, Arizona, Clyde Reed served as the pastor of Good News Community Church, a small congregation that owned no building and held Sunday services at various

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35 *See infra* Part III.

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

37 *See infra* Part IV(A).

38 *Reed*, 135 S. Ct. at 2221–22.

39 *Id.* at 2228.

40 *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1204 (2013) ("In examining the First Amendment's protection of freedom of expression . . . any law can be reviewed to determine whether it is content-based or content-neutral . . . .").

locations throughout the town.[41] To inform the public and its parishioners of each weekend's service location, the church would post fifteen to twenty signs every Saturday morning and remove them midday on Sunday.[42] The signs were mainly posted in public right-of-way areas.[43]

Unfortunately for Pastor Reed, the Town of Gilbert had enacted the Gilbert, Arizona Land Development Code ("Sign Code") which regulated signs throughout the city.[44] The Sign Code required parties posting outdoor signs within the town's limits to obtain a permit, but it exempted twenty three categories of signs from the permitting provision.[45] Pastor Reed's signs qualified as "Temporary Directional Signs Relating to a Qualifying Event" ("Qualifying Event Signs"), one of the exempted classifications, and, as such, were subject to restrictions on size, placement, and display duration.[46] The church was cited by the town twice for leaving signs up longer than the permissible thirteen hours, and, when Pastor Reed attempted to negotiate with the Sign Code Compliance Department, he was informed "there would be 'no leniency under the Code' and . . . any future violations" would be punished.[47] Pastor Reed and the Good News Community Church sued the Town of Gilbert, claiming the Sign Code violated the First Amendment by abridging their freedom of speech.[48]

2. *Reed* Analysis and Holding

The Court analyzed the question presented in *Reed* by examining the varying constraints on three Sign Code exceptions: Ideological Signs, Political Signs, and the aforementioned Qualifying Event Signs.[49] By noting the obvious differences in restraints on each sign category, the Court pointed out the Sign Code favored some types of signs over others;[50] therefore, the Sign Code was content-based on its face.[51] This conclusion triggered strict scrutiny, whereby, in order to be constitutional, the Sign Code needed to be found to serve a compelling government interest and needed to achieve that

41 *Reed*, 135 S. Ct. at 2225.
42 *Id.*
43 *Id.*
44 *Id.* at 2224.
45 *Id.*
46 *Id.* at 2224–25.
47 *Id.* at 2225–26.
48 *Id.* at 2226.
49 *Id.* at 2224–25.
50 *Id.*
51 *Id.* at 2227.

interest in the least restrictive manner possible.[52] Although the government had offered justifications for enacting the Sign Code in the lower court, the Supreme Court deemed these justifications irrelevant in light of the fact that the ordinance was content-based on its face.[53] The Supreme Court refuted each of the arguments the government presented in support of content-neutrality.[54] Then, the Court systematically dismantled the Ninth Circuit's finding of content-neutrality based on lack of governmental intent to discriminate,[55] as well as assertions that there existed no differential treatment based on viewpoint or speaker.[56] The Sign Code did not survive strict scrutiny. The Court found the Sign Code to be unconstitutional because the City of Gilbert had no valid reason for crafting it in a manner that showed favoritism to some categories of signs but not to others.[57]

3. *Reed* Concurrences

Although one adage claims "great minds think alike," I prefer Thomas Paine's quip: "I do not believe that any two men . . . think alike who think at all. It is only those who have not thought that appear to agree."[58] Perhaps this observation is well-suited to describe many Court opinions, and so it was in *Reed*. Justice Thomas penned the majority opinion described above, and was joined by Chief Justice Roberts and Justices Scalia, Kennedy, Alito, and Sotomayor.[59] However, three concurring opinions were also put forth by the Court.

Justice Alito, joined by Justices Kennedy and Sotomayor,[60] filed a concurring opinion in which he noted that "[p]roperly understood, today's decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives."[61] This is because Justice Alito took the view that, although the *Reed* regulations were "replete with content-based distinctions, and . . . must satisfy strict scrutiny. . . . This does not mean . . . municipalities are

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52 *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 800–01 (2006).

53 *Reed*, 135 S. Ct. at 2227.

54 *Id.* at 2228–31.

55 *Id.* at 2228–29 ("[A]n innocuous justification cannot transform a facially content-based law into one that is content neutral.").

56 *Id.* at 2230 ("[A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.").

57 *Id.* at 2232.

58 THOMAS PAINE, *Rights of Man. Part the Second. Combining Principle and Practice*, *in* SELECTED WRITINGS OF THOMAS PAINE 262, 360 (Ian Shapiro & Jane E. Calvert eds., 2014).

59 *Reed*, 135 S. Ct. at 2223.

60 *Id.* at 2233 (Alito, J., concurring).

61 *Id.* at 2233–34.

powerless to enact and enforce reasonable sign regulations."[62] He then provided a non-comprehensive list of "rules that would not be content based," including rules "regulating the size of signs," "distinguishing between on-premises and off-premises signs," and "restricting the total number of signs allowed per mile of roadway," to name a few.[63]

Although Justice Breyer also concurred in the judgment,[64] he wrote a solo opinion arguing that "content discrimination . . . cannot and should not *always* trigger strict scrutiny"[65] because "virtually all government activities involve speech, many of which involve the regulation of speech. . . . [And] [r]egulatory programs almost always require content discrimination."[66] Thus, according to Justice Breyer, "to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity."[67] He further expressed fears of "watering down" strict scrutiny, and offered:

> The better approach is to generally treat content discrimination as a strong reason weighing against the constitutionality of a rule . . . but elsewhere treat it as a rule of thumb, finding it a helpful, but not determinative legal tool . . . to determine the strength of a justification.[68]

Justice Kagan entered a third concurring opinion, joined by Justices Ginsburg and Breyer,[69] in which she opined that the majority was reaching too far. "We apply strict scrutiny to facially content-based regulations of speech . . . when there is any 'realistic possibility that official suppression of ideas is afoot.'"[70] Furthermore, the "concern with content-based regulation arises from the fear that the government will skew the public's debate of ideas—so when 'that risk is inconsequential, . . . strict scrutiny is unwarranted.'"[71] Justice Kagan found the "Town of Gilbert's defense of its sign ordinance . . . [did] not pass strict scrutiny, or

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62 *Id.* at 2233.

63 *Id.* Additional content neutral categories of rules were offered by Justice Alito in his concurrence: rules regulating the locations in which signs may be placed; rules distinguishing between lighted and unlighted signs; rules distinguishing between signs with fixed messages and electronic signs with messages that change; rules that distinguish between the placement of signs on private and public property; rules distinguishing between the placement of signs on commercial and residential property; and rules imposing time restrictions on signs advertising a one-time event. Again, Justice Alito does "not attempt to provide anything like a comprehensive list," but opines that the rules he has listed would not be content-based. *Id.*

64 *Id.* at 2234.

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.* at 2235.

69 *Id.* at 2236.

70 *Id.* at 2237 (quoting Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 189 (2007)).

71 *Id.* at 2238 (quoting *Davenport*, 551 U.S. at 188).

intermediate scrutiny, or even the laugh test."[72] She concluded: "I suspect this Court and others will regret the majority's [finding] today . . . [as] [t]his Court may soon find itself a veritable Supreme Board of Sign Review."[73]

It is doubtful that the *Reed* case ruling generated many cheers outside the realm of those directly involved. Rather, it produced furrowed brows, uncertainty, and disagreement,[74] as the concurrences seemed to suggest varying avenues of thought would ultimately converge in upholding a decision in Pastor Reed's favor. It has yet to be determined how significant the effects of *Reed* will eventually be and how far its reach will eventually extend.

B. Journey to the U.S. Supreme Court

Reed had appeared to call for a straight-forward application of the First Amendment by the Ninth Circuit. But cases like *Reed* can find their way in front of the United States Supreme Court because there has been disagreement among the lower courts over how they should be handled.[75] Indeed, *Reed* presented the Supreme Court with the opportunity to resolve a circuit split and instruct on the appropriate test to use in similar situations. The Court's resolution of this split aligned with four of the circuits, leaving those in the remaining circuits to question the Court's wisdom, and to postulate on widespread application of *Reed* to the detriment of First Amendment jurisprudence.[76]

1. Ninth Circuit's Dealings with *Reed*

Reed was originally filed in the U.S. District Court for the District of Arizona in 2008,[77] and the Ninth Circuit was afforded two opportunities to rule on the matter.[78] When the District Court first concluded the Sign Code was content-neutral and survived intermediate scrutiny, the Ninth Circuit affirmed and remanded the case to consider whether the differential treatment of "Ideological . . ., Political . . ., and Qualifying Event Signs" was

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72 *Id.* at 2239.

73 *Id.*

74 *See, e.g.*, David S. Han, *Transparency in First Amendment Doctrine*, 65 EMORY L.J. 359, 360 (2015) (referring to *Reed* inter alia, "I argue that the Court has struck the wrong doctrinal balance in these areas . . . .").

75 *See, e.g.*, WRIGHT ET AL, *supra* note 6, § 3506.

76 *See infra* Part III.

77 Reed v. Town of Gilbert, Ariz., No. 07-CV-522-PHX-SRB, 2008 WL 11339947 (D. Ariz. Sept. 30, 2008).

78 Reed v. Town of Gilbert, Ariz., 587 F.3d 966 (9th Cir. 2009) [hereinafter *Reed I*]; Reed v. Town of Gilbert, Ariz., 707 F.3d 1057 (9th Cir. 2013) [hereinafter *Reed II*].

constitutional.[79] On remand, the District Court repeated its previous findings regarding content-neutrality and the satisfaction of intermediate scrutiny,[80] and the Ninth Circuit again affirmed.[81] The United States Supreme Court granted certiorari to resolve a three-way circuit split over how to properly distinguish between content-based and content-neutral laws.[82] It has been suggested that the three-way circuit split developed out of lower courts' "discomfort" with the idea that "all distinctions between speech based on content are presumptively impermissible."[83] In other words, it seems that courts may have trouble concurrently applying the idea that speech may not be categorized and treated disparately, yet some types of speech, such as commercial speech, are deemed to be of lower value.[84]

2. Circuit Split

An "on-its-face" test, such as was applied in *Reed*,[85] had not been uniformly applied across the circuits for determining content-neutrality pre-2015. The Fourth, Sixth, and Ninth Circuits, among others, deemed laws to be content-neutral if the government could offer a content-neutral justification or pure legislative motive for the law.[86] These "practical" circuits[87] employed a "motive-based test" that allowed content-neutrality to be found in the absence of a showing of governmental intent to create content-based law.[88] In contrast, the "absolutist"[89] First,

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79 *Reed I*, 587 F.3d at 973, 983.

80 Reed v. Town of Gilbert, 832 F. Supp. 2d 1070, 1078 (D. Ariz. 2011).

81 *Reed II*, 707 F.3d at 1077.

82 *Id.* at 1057, *cert. granted*, 573 U.S. 957 (July 1, 2014) (No. 13–502).

83 Ashutosh Bhagwat, Reed v. Town of Gilbert*: Signs of (Dis)content?*, 9 N.Y.U. J.L. & LIBERTY 137, 144 (2015) [hereinafter Bhagwat, *(Dis)content*]. *See also* Ashutosh Bhagwat, *In Defense of Content Regulation*, 102 IOWA L. REV. 1427, 1429–30 (2017) ("[T]he reason why lower courts disagree about the definition of content discrimination, and why the Supreme Court itself has not been consistent on this question, is an unstated discomfort with the implications of the all-speech-is-equal premise. The truth is that this premise simply does not coincide with the instincts of most citizens and—importantly—most judges. As a result, when a law that regulates fully protected speech that seems less socially valuable than speech at the core of First Amendment's protections is coupled with a strong, albeit likely not 'compelling,' government reason to restrict the speech, judges regularly look to avoid labeling the law as content-based, even when it is clearly so."); Genevieve Lakier, *Reed v. Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233, 235 (2016) ("[N]otwithstanding the conflicting instructions they received from the Supreme Court, lower courts frequently held that laws that made facial content distinctions were content-neutral.").

84 *See, e.g.*, Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 3 (2000).

85 Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2228 (2015).

86 Petition for Writ of Certiorari at 18, *Reed*, 135 S. Ct. 2218 (2015) (No. 13–502).

87 Leah K. Brady, *Lawn Sign Litigation: What Makes a Statute Content-Based for First Amendment Purposes?*, 21 SUFFOLK J. TRIAL & APP. ADVOC. 319, 333 (2016).

88 *See, e.g.*, Brown v. Town of Cary, 706 F.3d 294, 301 (4th Cir. 2013) (holding a law "may distinguish speech based on its content so long as its reasons for doing so are not

Second, Eighth, and Eleventh Circuits judged content-neutrality by examining the law's terms,[90] characterized as a "text-based test."[91] And the Third Circuit developed a more complex five-part "'context-sensitive' test"[92] that weighed the value of the message at a given location against the underlying regulatory interests.[93] In light of this discontinuity, it is not surprising that the Supreme Court granted certiorari in *Reed*.

C. *Reed's* First Amendment Application

In resolving the circuit split, the Supreme Court used *Reed* to establish a uniform test for determining whether a law is content-based or content-neutral.[94] This test begins with "the crucial first step" of "determining whether the law is content neutral *on its face*."[95] It follows that "[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."[96] Thus, if a municipal code "imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny . . . ."[97]

Reed solidified how courts should approach content-neutral versus content-based analyses, and the ensuing effect is best understood by examining subsequent court interpretations and applications of *Reed*. It may appear that, strictly speaking, *Reed* addressed an extremely narrow portion of First Amendment law,

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based on the message conveyed"); H.D.V.-Greektown, LLC v. City of Detroit, 568 F.3d 609, 621 (6th Cir. 2009) (finding an ordinance to be content-neutral as long as "the regulation was not adopted because of disagreement with the message that the speech conveys"). See also the Ninth Circuit's rationale in *Reed I* and *Reed II*.

89 Brady, *supra* note 87, at 333.

90 Petition for Writ of Certiorari, *supra* note 86, at 19.

91 *Id.* at 21. *See also* Neighborhood Enters., Inc. v. City of St. Louis, 644 F.3d 728, 737 (8th Cir. 2011) (holding sign code distinctions based solely on the message conveyed to be impermissible); Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1264 (11th Cir. 2005) (finding exemptions from obtaining a permit to fly a flag bearing government or religious insignia to be content-based); Nat'l Advert. Co. v. Town of Babylon, 900 F.2d 551, 557 (2d Cir. 1990) (ruling exemptions of political signs and signs identifying a grand opening, parade, festival, fund drive, or similar occasion from a general sign ban unconstitutional); Matthews v. Town of Needham, 764 F.2d 58, 60 (1st Cir. 1985) (noting a sign code that facially banned political signs but permitted for sale, professional office, and religious and charitable cause signs to be content-based).

92 Petition for Writ of Certiorari, *supra* note 86, at 25.

93 *Id.* at 18–19. *See also* Rappa v. New Castle Cty., 18 F.3d 1043, 1087 (3d Cir. 1994) (finding a "For Sale" sign to be entitled to greater First Amendment protection than a political sign).

94 135 S. Ct. 2218, 2228 (2015).

95 *Id.* (emphasis added).

96 *Id.* (emphasis added) (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)).

97 *Id.* at 2231.

only applying to how municipalities regulate signs. But it can be argued the actual reach of the opinion is much wider. As of 2012, there were 35,886 municipalities and townships in the United States,[98] each of which would be subject to suit for any facial distinctions in their sign regulations if we use the narrowest possible application of *Reed*. If that application is expanded to examine facial distinctions in *any* municipal ordinance, regardless of subject, it is likely the effects from the *Reed* decision would expand significantly.

For the purposes of this Comment, *Reed* is an important case chronologically because it is not so far past as to create an unmanageable review of its subsequent appearance in general jurisprudence. The number of cases that have cited to *Reed* is currently high enough to yield a significant population to be examined and categorized, but is not so high as to make the review of the citations daunting. Therefore, this case analysis will be illuminating. Before examining the cases that have cited to *Reed*, it will be useful in the next part to review the literature that the *Reed* decision spawned—literature which expressed fears of how far *Reed*'s impacts would be felt. These *Reed* predictions will then be measured against the actual manifested repercussions summarized in Part IV.

IV. THE PREDICTED RIPPLES

A survey of the post-*Reed* literature is instructive, as it contains predictions of *Reed*'s reach. By reviewing the variety of published and expressed impact forecasts, a backdrop can be painted against which *Reed*'s effects become apparent. That is, comparison of *Reed*'s implementation by the lower courts to the hypothesized repercussions expressed in law reviews and the public forum yields a richer understanding of the decision's true reach, and enables us to judge the accuracy of its predictive literature.

In the immediate aftermath of *Reed*, colorful remarks such as "*Reed* has set off a firestorm"[99] were not unfamiliar. The *Reed* decision was handed down by the Court in June 2015 and, almost immediately, prophesies about how lower courts would use the decision as an excuse to run rough-shod over other areas of First Amendment law arose in the public forum and in legal literature.[100] Such forecasts have continued to trickle out in law

98 *Census Bureau Reports There Are 89,004 Local Governments in the United States*, U.S. Census Bureau (Aug. 30, 2012), http://www.census.gov/newsroom/releases/archives/governments/cb12-161.html [http://perma.cc/AH9Z-ZC9R].

99 Enrique Armijo, Reed v. Town of Gilbert: *Relax, Everybody*, 58 B.C. L. REV. 65, 66 (2017).

100 *See infra* Part IV(A).

review articles since.[101] The current body of literature that cites to *Reed* ranges from single footnote mentions that are largely inconsequential, to textual allusions assuming pre-existing *Reed* knowledge,[102] to brief fact and holding descriptions,[103] to analyses of *Reed*'s impact on particular doctrines or topics,[104] to entire articles devoted to the *Reed* case and its ensuing doctrine.[105]

This Part reviews the *Reed* impacts prophesized by those in the public forum and by authors of law review articles, as well as consequences noted from the bench. Although many commentators addressed how they felt *Reed* would affect American jurisprudence in general, some focused on its significance with respect to particular doctrines, while some expressed estimations of exaggerated eventualities.

A. *Reed*'s Hypothesized Impacts

1. Impacts Recognized in the Public Forum

When *Reed* was decided on June 18, 2015, a posting by law professor Eugene Volokh appeared on *The Washington Post* website the same day.[106] The post summarized the *Reed* case, the Court holding, and the three concurrences, then critically raised questions about the decision's ramifications on the secondary effects doctrine, on *Hill v. Colorado*, and on the preservation of the marketplace of ideas.[107] Altogether, Volokh felt *Reed* had reached too far in mandating the application of strict scrutiny, noting that "[w]e can administer our content-regulation doctrine

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101 For example, on Westlaw there are two law review articles published in 2019 that substantially address *Reed*. *See e.g.*, Dan V. Kozlowski & Derigan Silver, *Measuring* Reed*'s Reach: Content Discrimination in the U.S. Circuit Courts of Appeals After* Reed v. Town of Gilbert, 24 COMM. L. & POL'Y 191 (2019).

102 *See* Mark Chenoweth, Expressions Hair Design*: Detangling the Commercial-Free-Speech Knot*, 2016–2017 CATO SUP. CT. REV. 227, 234; Mary Christine Brady, Comment, *Enforcing an Unenforceable Law: The National Bioengineered Food Disclosure Standard*, 67 EMORY L.J. 771, 774 (2018).

103 *See* Kyle Langvardt, *A Model of First Amendment Decision-Making at a Divided Court*, 84 TENN. L. REV. 833, 849 (2017); Maura Douglas, Comment, *Finding Viewpoint Neutrality in Our Constitutional Constellation*, 20 U. PA. J. CONST. L. 727, 732 (2018).

104 *See* Ashutosh Bhagwat, *When Speech is Not "Speech"*, 78 OHIO ST. L.J. 839, 847 (2017); Leslie Gielow Jacobs, *Making Sense of Secondary Effects Analysis After* Reed v. Town of Gilbert, 57 SANTA CLARA L. REV. 385, 388 (2017); Joseph Mead, *Why We Need* Reed*: Unmasking Pretext in Anti-Panhandling Legislation*, 7 CONLAWNOW 37, 38 (2015).

105 *See* Brian J. Connolly & Alan C. Weinstein, *Sign Regulation After* Reed*: Suggestions for Coping with Legal Uncertainty*, 47 URB. LAW. 569, 570 (2015); Urja Mittal, Note, *The "Supreme Board of Sign Review":* Reed *and Its Aftermath*, 125 YALE L.J.F. 359, 359 (2016).

106 Eugene Volokh, *Supreme Court reaffirms broad prohibition on content-based speech restrictions, in today's* Reed v. Town of Gilbert *decision*, WASH. POST (June 18, 2015), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/18/supreme-court-reaffirms-broad-prohibition-on-content-based-speech-restrictions-in-todays-reed-v-town-of-gilbert-decision/?utm_term=.501e5173cee0 [http://perma.cc/9WX4-F5RB].

107 *Id.*

with a dose of common sense, so as to leave standing laws that in no way implicate its intended function."[108]

That same summer, another criticism of the High Court's *Reed* decision surfaced in the public forum.[109] On August 17, 2015, *The New York Times* published an article by its Supreme Court correspondent, Adam Liptak, that analyzed *Reed* as "the sleeper case of the last Supreme Court term."[110] Liptak claimed *Reed* had "transformed the First Amendment" and "mark[ed] an important shift toward treating countless laws that regulate speech with exceptional skepticism."[111] Robert Post, the Dean of Yale Law School, opined in the article that the *Reed* "decision was so bold and so sweeping that the Supreme Court could not have thought through its consequences."[112] Moreover, Dean Post claimed "the [*Reed*] majority opinion, read literally, would so destabilize First Amendment law that courts might have to . . . rethink what counts as speech . . . or . . . water down the potency of strict scrutiny."[113]

2. Impacts Predicted in Law Review Articles

One exemplar of the law review coverage of *Reed* concluded that "[a]lthough prominent legal minds differ in their reactions to the decision, most agree that [*Reed*] will have influential and significant effects on laws that regulate speech."[114] As of this writing, there are over 340 law review articles available on Westlaw that cite to *Reed*.[115] Some discuss the case; some refer to it only via footnote. Of the approximately fifty-five articles criticizing *Reed*, the common thread seems to be an expressed apprehension over expansive application of the *Reed* result to other areas of First Amendment law, and beyond. A sampling of these articles is discussed below.

Some of the initial articles written in the latter half of 2015 conveyed concerns such as: "[I]n *Reed v. Town of Gilbert*, the U.S. Supreme Court may have opened the door to a broader

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108 *Id.*

109 Adam Liptak, *Court's Free-Speech Expansion Has Far-Reaching Consequences*, N.Y. TIMES (Aug. 17, 2015), http://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html [http://perma.cc/6TLE-RX22].

110 *Id.*

111 *Id.*

112 *Id.*

113 *Id.*

114 Jacquelyn M. Lyons, Comment, *The Future Implications for Ag-Gag Laws*, 47 SETON HALL L. REV. 915, 928 (2017).

115 As of January 30, 2019, Westlaw had linked 342 law review articles to the *Reed v. Town of Gilbert* case under the Secondary Sources subsection of the associated Citing References tab. WESTLAW, http://westlaw.com (from 135 S. Ct. 2218, follow "Citing References" tab; then filter by "Secondary Sources" and "Law Reviews").

application of strict scrutiny"[116] since "the opinion is startlingly broad and attempts to apply a one-size-fits-all approach despite the nuances of First Amendment doctrine."[117] Additionally, it was feared that "the Courts [sic] ruling was so broad that . . . it has transformed First Amendment jurisprudence as a whole. . . . [It] appears to greatly expand the reach of First Amendment rights."[118] These initial worries of a sweeping application of the decision have remained a theme in *Reed* critiques, although some articles focused on *Reed*'s impact on a particular subject or doctrine.

a. Broad Application

The fear of broad application has been addressed by many commentators. For example, in 2016, Genevieve Lakier authored an article titled, Reed v. Town of Gilbert, Arizona, *and the Rise of the Anticlassificatory First Amendment*,[119] in which she decried *Reed*'s sweeping application: "*Reed* thus represents an important change in First Amendment doctrine, and one that will in all likelihood have a significant impact in many areas of law."[120] Whereas some pre-*Reed* jurisprudence applied intermediate scrutiny to laws where the government could demonstrate no intent to discriminate, Lakier opined that *Reed*'s approach of first subjecting the statute or ordinance to an on-its-face evaluation of content-neutrality "likely imperils many laws that pose no significant threat to First Amendment interests."[121] She worried:

> This may only be the tip of the iceberg. By insisting that strict scrutiny applies to all laws that treat speakers differently because of the content of their speech, *Reed* potentially imperils the hundreds, even perhaps thousands, of local, state, and federal laws that make subject matter or viewpoint distinctions.[122]

Lakier claimed *Reed* produced "a test of content-based lawmaking that is both too broad and too narrow."[123]

Such concerns were echoed the following year in a note by James Andrew Howard titled, *Salvaging Commercial Speech Doctrine: Reconciling* Reed v. Town of Gilbert *with Constitutional*

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116 Erika Schutzman, Note, *We Need Professional Help: Advocating for a Consistent Standard of Review When Regulations of Professional Speech Implicate the First Amendment*, 56 B.C. L. REV. 2019, 2051 (2015).

117 *Id.* at 2054–55.

118 Matthew Hector, *Groundbreaking Supreme Court Opinion Dooms Panhandling Law*, 103 ILL. B.J. 15, 15 (2015).

119 Lakier, *supra* note 83, at 233.

120 *Id.* at 235.

121 *Id.* at 274–77.

122 *Id.* at 235. Lakier suggested that this result is perhaps not surprising, as it "demonstrates once again the pronounced deregulatory tilt of the Roberts Court's First Amendment jurisprudence." *Id.* at 235–36.

123 *Id.* at 296.

Free Speech Tradition.[124] Howard claimed that "if taken at face value, [*Reed*] would reverse the Court's extensive case law determining that certain categories of speech are more valuable than others, and thus, that different categories may be regulated in different ways."[125] In particular, Howard opined that *Reed*'s impacts could not have been fully realized by the Court as the "decision unintentionally overturns thousands of federal, state, and local regulations, implicitly revokes clearly established Supreme Court case law, and ignores other governmental and public interests . . . ."[126]

Claudia Haupt, in her article, *Professional Speech and the Content-Neutrality Trap*,[127] suspected *Reed* of being a harbinger of First Amendment change: "*Wollschlaeger v. Governor of Florida* . . . reflects a new form of aggressive content neutrality on the rise in First Amendment jurisprudence beginning with *Reed v. Town of Gilbert*."[128] Haupt felt that "*Reed* ushered in what may turn out to be a dramatic shift in the way courts employ content-neutrality as a core principle of the First Amendment."[129] Although the article addresses professional speech, Haupt notes that "[t]aken literally, [*Reed*] could plausibly encompass 'any regulation that even incidentally distinguishes between activities or industries.' In short, the potential doctrinal impact of *Reed* is sweeping."[130]

Moreover, according to Emily Jessup in *When "Free Coffee" Violates the First Amendment*,[131] after the Court in *Reed* gave a "sweeping definition of 'content based,'"[132] it was "likely setting the stage for many more challenges across the country."[133] She pointed out that "the majority [has] departed from previous standards"[134] and "'rearticulated the standard for when regulation of speech is content based,' possibly changing the

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124 James Andrew Howard, Comment, *Salvaging Commercial Speech Doctrine: Reconciling* Reed v. Town of Gilbert *with Constitutional Free Speech Tradition*, 27 GEO. MASON U. CIV. RTS. L.J. 239, 239 (2017).

125 *Id.* at 243.

126 *Id.* at 244.

127 Claudia E. Haupt, *Professional Speech and the Content-Neutrality Trap*, 127 YALE L.J.F. 150 (2017).

128 *Id.* at 150.

129 *Id.*

130 *Id.* at 162 (footnote omitted) (quoting Note, *Free Speech Doctrine After* Reed v. Town of Gilbert, 129 HARV. L. REV. 1981, 1987 (2016)).

131 Emily Jessup, *When "Free Coffee" Violates the First Amendment: The Federal Highway Beautification Act After* Reed v. Town of Gilbert, 16 FIRST AMEND. L. REV. 73 (2017).

132 *Id.* at 75.

133 *Id.* at 94.

134 *Id.* at 80.

content-neutrality analysis for all government ordinances."[135] Thus, similar to the opinions expressed by Howard, Jessup concluded that the "Supreme Court's decision [in *Reed*] . . . has had far-reaching effects, . . . [which have] fundamentally changed the content-neutrality analysis . . . ."[136]

These commentators are just a few who expressed the common thought that the *Reed* decision was too broad and sweeping, and potentially impacted a wide range of government regulations.[137] Yet another commentator provided a good summary of these concerns, opining that *Reed* presented a "[d]octrinal distortion,"[138] because usually there is a "very low likelihood that forbidden governmental motives are involved . . . [and there is a] limited extent to which such ordinances are likely to distort the marketplace of ideas."[139]

b. Topical Application

The literature criticizing the Court's ruling in *Reed* is also peppered with applications of the *Reed* reasoning to specific topics and doctrines. One such topic of concern was commercial speech,[140] as it was feared that "[f]ull [a]pplication of *Reed* [w]ould [e]viscerate [c]ommercial [s]peech [d]octrine."[141] Since it was handed down in 1980, the four-part *Central Hudson* test[142]

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135 *Id.* at 78 (quoting Anthony D. Lauriello, *Panhandling Regulation After* Reed v. Town of Gilbert, 116 COLUM. L. REV. 1105, 1105 (2016)) (footnote omitted).

136 *Id.* at 94.

137 *See also* Margaret Rosso Grossman, *Genetically Engineered Animals in the United States: The AquAdvantage Salmon*, 11 EUR. FOOD & FEED L. REV. 190, 199 (2016) ("[T]he *Reed* decision may pose barriers to required labels on GE food."); Shaakirrah R. Sanders, *Ag-Gag Free Detroit*, 93 U. DET. MERCY L. REV. 669, 678 (2016) ("*Reed* may constitute a game changer with regard to the constitutionality of ag-gag legislation . . . ."); Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 179 (2016) ("[W]ere *Reed* applied universally as advocates urge, the commercial speech doctrine—along with other topic-based sub-doctrines such as those that currently permit the greater regulation of child pornography, obscenity, fraud, perjury, price-fixing, conspiracy, or solicitation—would be rendered obsolete, thereby rendering large swaths of the administrative state presumptively unconstitutional."); Nat Stern, *Judicial Candidates' Right to Lie*, 77 MD. L. REV. 774, 796–97 (2018) ("[*Reed*] criterion appears to collapse the distinction between content regulation and subject-matter regulation."); Rebecca Tushnet, *The First Amendment Walks into a Bar: Trademark Registration and Free Speech*, 92 NOTRE DAME L. REV. 381, 381–82 (2016) (applying *Reed* to federal law governing trademarks, via the Lanham Act).

138 Han, *supra* note 74, at 405.

139 *Id.* at 407.

140 Lee Mason, Comment, *Content Neutrality and Commercial Speech Doctrine After* Reed v. Town of Gilbert, 84 U. CHI. L. REV. 955, 968 (2017) ("[C]ommercial speech, quite simply, is speech which does 'no more than propose a commercial transaction.'" (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976))).

141 *Id.* at 983.

142 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980) ("In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful

has been applied to commercial speech regulations imposing intermediate scrutiny,[143] because commercial speech is accorded lesser protection than other speech on the grounds that speech proposing a commercial transaction takes a subordinate position in the scale of First Amendment values.[144] To extend *Reed* to commercial speech would demand such ordinances pass strict scrutiny. It was feared, therefore, that the well-developed commercial speech doctrine would be undermined by a heightened level of review, and more—if not most—commercial speech regulations would now be found unconstitutional.[145] This hypothetical was perhaps not far-fetched, as it is not an irrational stretch to think—at least for signs—that courts could find a commercial sign regulation content-based on its face simply because it differentiates between commercial and non-commercial signs. When one commentator doubted that such an application would be made, he nonetheless noted that tension exists in this area of First Amendment law.[146]

It was also feared that application of *Reed* would destroy the secondary effects doctrine under which government agencies were permitted to craft statutes "designed to combat the undesirable secondary effects" of speech.[147] Again, although the Supreme Court was silent in this regard in *Reed*, concern was voiced that the *Reed* whale would swallow the secondary effects Jonah.[148] *Reed* seemed, to some, to "signify a coming . . . change

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activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.").

143 *Id.* at 564.

144 *See, e.g.*, Post, *supra* note 84, at 3.

145 Howard, *supra* note 124, at 244 ("If *Reed* is to be taken on its face, then any separate distinctions for commercial speech must be implicitly overturned."); Mason, *supra* note 140, at 983 ("Based on this straightforward reading, then, one could argue that content-based regulations, whether facial or justification based, will trigger strict scrutiny, even with respect to commercial speech. Although this solution seems straightforward, complete application of *Reed* to commercial speech would essentially overrule all existing commercial speech doctrine."); Shanor, *supra* note 137, at 179 ("*Reed sub silentio* overruled decades of commercial speech precedent, including landmark commercial speech cases such as *Central Hudson* and *Zauderer*.").

146 Shanor, *supra* note 137, at 179 ("While it strains credulity, in the words of the late Justice Scalia, to suggest that the Supreme Court hid such an elephant in the mouse hole of a relatively obscure case about an Arizona sign ordinance, *Reed*, . . . signals growing tension between various First Amendment sub-doctrines." (footnote omitted)).

147 Renton v. Playtime Theatres, Inc., 475 U.S. 41, 49 (1986) (observing the secondary effects doctrine is mainly applied to adult entertainment regulations).

148 Jacobs, *supra* note 104, at 388–89 ("[T]he Supreme Court has shot a missile into its own [secondary effects] reasoning. . . . It could be that the six Justices in the *Reed* majority meant to sweep away four decades of precedent and subject the full range of detailed zoning, public health and safety regulations imposed by localities across the country . . . to the most demanding level of Free Speech Clause scrutiny. But this conclusion would ignore the Justices' steadfast cultivation, development, and embrace of

in how American municipalities regulate their streets . . . ."[149] All in all, many suspected that *Reed* had "complicat[ed] government efforts to regulate speech in furtherance of state interests."[150]

c. Extreme Views

Various, rather unlikely, predictions of *Reed* have been offered as well, such as: "*Reed* is so wildly inconsistent with so much of existing law that the Court probably did not mean what it said;"[151] "It is hard to tell what weight to give to *Reed*, because it is hard to believe the Court is serious;"[152] "Justice Thomas's doctrine would have courts repent of these earlier sins and hew to the formal variant unbendingly in all future cases;"[153] and "*Reed's* hard line is almost certainly too extreme to hold . . . ."[154]

Additionally, others predicted that "[i]n *Reed*, Justice Thomas articulated a new standard for courts to assess the content neutrality of laws regulating speech, a move likely to have profound consequences on a broad array of subjects."[155] Or, that "the term 'content-based' as recently used in *Reed* is unsustainably overbroad,"[156] thus a "corrosive First Amendment . . . emerges from *Reed*."[157] These predictions of improbable results demonstrate the severity of suspicion with which some viewed the *Reed* outcome.

3. Impacts Noted from the Bench

Critiques of the *Reed* holding was not limited to the academic legal community or the public forum. Judges applying *Reed* expressed their opinions on the case in the midst of their written decisions as well. The following examples illustrate:

> [T]he Supreme Court complicated matters when it issued its opinion in *Reed*.[158]

Secondary Effects Analysis, in the face of persistent and persuasive external and internal criticism over many years." (footnotes omitted)).

149 Anthony D. Lauriello, Note, *Panhandling Regulation After* Reed v. Town of Gilbert, 116 COLUM. L. REV. 1105, 1106 (2016).

150 Anna S. Roy, Comment, *Ninth Circuit Applies Intermediate Scrutiny to Mandated Abortion Clinic Notices*—Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823 (9th Cir. 2016), Cert. Granted in Part Sub Nom.* Nat'l Inst. of Family & Life Advocates v. Becerra*, No. 16-1140, 2017 WL 5240894 (U.S. Nov. 13, 2017) (mem.)*, 50 SUFFOLK U. L. REV. 771, 775 (2017).

151 Andrew Koppelman, *A Free Speech Response to the Gay Rights/Religious Liberty Conflict*, 110 NW. U. L. REV. 1125, 1133 (2016).

152 *Id.* at 1159.

153 Langvardt, *supra* note 103, at 851.

154 *Id.*

155 Lauriello, *supra* note 149, at 1106 (footnote omitted).

156 Tushnet, *supra* note 137, at 412.

157 *Id.* at 423.

158 Free Speech Coal., Inc. v. Attorney Gen. U.S., 825 F.3d 149, 174 (3d Cir. 2016) (Rendell, J., dissenting).

> Our sister circuits have also noted that *Reed* represents a drastic change in First Amendment jurisprudence.[159]
>
> The majority opinion in *Reed* effectively abolishes any distinction between content regulation and subject-matter regulation.[160]
>
> *Reed v. Town of Gilbert* then worked a sea [of] change in First Amendment law.[161]
>
> [A]mbiguity . . . remains in the wake of *Reed* regarding how broadly or narrowly courts must interpret the subject matters between which a government speech restriction distinguishes . . . .[162]
>
> "*Reed* did not relate to commercial speech, or mandatory disclosures as a part of commercial speech, and therefore did not have occasion to consider those doctrines." To view it as doing so, and "to find a new First Amendment principle between the lines of *Reed*, is like trying 'to find a black cat in a dark room, especially if there is no cat.'"[163]

Additionally, Judge Gerald Tjoflat dissented in the Eleventh Circuit's *Wollschlaeger* decision because of "the uncertainty introduced by *Reed*" and its "pernicious and far reaching effects."[164] He opined that "[t]he First Amendment trajectory created by the *Reed* majority carries with it the dangerous potential to legitimize judicial interference in the implementation of reasonable, democratically enacted laws. The First Amendment does not require such rigorous interventionism . . . ."[165]

B. The Role of Lower Courts

Commentary on the role of the lower courts is also instructive. For example, Minch Minchin opined in his article, *A Doctrine at Risk: Content Neutrality in a Post-*Reed *Landscape*:

> [T]he Supreme Court has been sending mixed signals to the lower federal courts by oscillating between definitions of the [First Amendment] doctrine, selectively applying it and carving out *ad hoc* exemptions that circumvent the doctrine's purpose. Perhaps worse still, the high Court in *Reed* has now permitted an already-muddled doctrine to be possibly applied to a much greater number of cases, thus potentially pouring a generous measure of perplexing potion into the cauldron of confusion.[166]

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159 *Id.* at n.7 at 176 (majority opinion).

160 Norton v. City of Springfield, Ill., 806 F.3d 411, 412 (7th Cir. 2015).

161 Blitch v. City of Slidell, 260 F. Supp. 3d 656, 666 (E.D. La. 2017).

162 Silberberg v. Bd. of Elections of N.Y., 272 F. Supp. 3d 454, 475 (S.D.N.Y. 2017).

163 Roland Dig. Media, Inc. v. City of Livingston, No. 2:17-CV-00069, 2018 WL 6788594, at *9 (M.D. Tenn. Dec. 26, 2018) (citations omitted) (quoting Nationwide Biweekly Admin., Inc. v. Owen, 873 F.3d 716, 732 (9th Cir. 2017)).

164 Wollschlaeger v. Governor, Fla., 848 F.3d 1293, 1331 (11th Cir. 2017) (Tjoflat, J., dissenting).

165 *Id.* at 1333.

166 Minch Minchin, *A Doctrine at Risk: Content Neutrality in a Post-Reed Landscape*, 22 COMM. L. & POL'Y 123, 150–51 (2017) (footnote omitted).

Furthermore, he suggested that "[s]uch a broad, ill-defined canon has been of little use to federal jurists, who have essentially been asked to hit an amorphous and mobile doctrinal target."[167] But some of this application process that Minchin seems to denounce is an inevitable, par-for-the-course part of the structure of our legal system.[168]

For example, when decisions such as *Reed* are handed down by the Supreme Court, it is the duty of the lower courts to apply the case law developed therein.[169] However, findings do not come with an instructional manual on how to apply them. Details as to exactly how, when, and where the application should be made are not necessarily included in the four corners of the opinion. The lower courts, thus, take on the important task of absorbing high Court decisions into current jurisprudence.[170] Although commentators like Minchin may be critical of some of the confusion this process can create, it is nonetheless the normal course of business in our American legal world.[171]

Ashutosh Bhagwat suggested in his article, Reed v. Town of Gilbert*: Signs of (Dis)Content?*, that the existence of the *Reed* case "demonstrate[s] a fundamental confusion among the lower courts about the meaning of the phrase 'content based.'"[172] He also opined that there is "resistance on the part of the lower courts to the Supreme Court's insistence that all content-based restrictions on protected speech are presumptively unconstitutional"[173] because of their "discomfort with the foundational principle of modern free speech doctrine."[174] Similar resistance and discomfort most likely gave rise to the circuit split discussed earlier,[175] thus prompting the Supreme Court to grant certiorari in *Reed*. Whether *Reed* helped relieve that discomfort and quell that resistance has yet to be determined; but, if such discomfort causes movement towards resolution, its results, as described by Minchin, may not be a bad thing. After all, "*Reed's* potentially more radical implications may be domesticated by the lower courts."[176]

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167 *Id.*

168 *See, e.g.*, WRIGHT ET AL., *supra* note 6, § 4478.3.

169 *See, e.g.*, Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457, 481–82 (2012).

170 *Id.*

171 *See, e.g.*, WRIGHT ET AL., *supra* note 6, § 4478.3.

172 Bhagwat, *(Dis)content*, *supra* note 83, at 137.

173 *Id.*

174 *Id.* at 144.

175 *See supra* Part III.

176 Lakier, *supra* note 83, at 293.

C. Existing Studies

The mass of *Reed* literature was dense directly following the decision, but tapered off over time. The immediate articles tended to offer application predictions, but seemed to give way over time to more topical analyses of *Reed*'s influence. One of the only attempts to measure the reach of *Reed* did not surface until several years after the case, and only calculated the extent of the reach along a narrow strand of metrics.

In April 2019, an article examining *Reed*'s influence was published in the Taylor & Francis Online journal, *Communication Law and Policy*.[177] Authored by Dan Kozlowski and Derigan Silver—professors of communication, and media and journalism, respectively[178]—the article provided a look at U.S. Circuit Court of Appeals cases which cited to *Reed* from the time of its decision in June 2015, up through July 2018.[179] It started off by detailing the distinctions between content-neutral, content-based, and viewpoint-based regulations[180] and courts' historic approaches to content,[181] before moving into a circuit-by-circuit examination of the cases, particularly noting idiosyncrasies and inconsistencies in *Reed* application within and among the circuits.[182] The article then shifted to a discussion of whether *Reed* has operated as a clarifying lens through which content-based regulations can be viewed, or if it has only further muddied already murky waters.[183] It concluded "that *Reed* has not produced the First Amendment revolution of Armageddon proportions that some commentators predicted."[184]

It is encouraging that their study reached a conclusion consistent with this Comment, although it is important to recognize that Kozlowski and Silver limited their examination to the subset of U.S. Circuit Court of Appeals cases applying *Reed*. The authors justified the constraint, saying "Circuit court cases were chosen because of the courts' ability to set precedent and influence the law within their jurisdiction."[185] However, for *Reed*-citing cases

177 *See generally* Dan V. Kozlowski & Derigan Silver, *Measuring* Reed*'s Reach: Content Discrimination in the U.S. Circuit Courts of Appeals After* Reed v. Town of Gilbert, 24 COMM. L. & POL'Y 191 (2019).

178 *Id.*

179 *Id.* at 191–92. The article notes that sixty-eight cases, resulting from a LexisNexis search of *Reed* citations, were reviewed by the authors. *Id.* at 192 n.7. However, only cases related to *Reed*'s approach on content discrimination were addressed. *Id.* at 215 n.176. The latest *Reed*-citing case in the article, *Archdiocese of Washington v. Washington Metropolitan Area Transit Authority*, is dated July 31, 2018. *Id.* at 254 n.460.

180 *See* Kozlowski & Silver, *supra* note 177, at 193–97.

181 *See id.* at 197–208.

182 *See id.* at 215–59.

183 *See id.* at 263–70.

184 *Id.* at 259.

185 *Id.* at 192 n.7.

available through the time of this writing, such a limitation means examination of only 17% of the total cases available.[186] The subset chosen by Kozlowski and Silver is an excellent introduction to the inquiry, but expansion of the set of cases examined is a profitable endeavor that reveals possible skews introduced by the choice of their subset. This Comment, therefore, considers *all* available State and Federal Court cases in order to paint a more detailed picture of how *Reed* has been accepted and implemented at all available court levels.

The smaller subset of cases reviewed by Kozlowski and Silver enabled the authors to provide details of each case, as well as scrutiny of the reasoning of individual judges in each circuit.[187] There is value to such an in-depth assessment, particularly for attorneys deliberating whether to appeal a content-analysis case at the federal level. That level of analysis was manageable with their small sample. The same level of inspection on the almost 500 cases which currently cite *Reed* would be daunting, and has not been attempted here. A higher-level review of State and Federal cases at all levels, noting only if *Reed* was applied and its result, however, is feasible and can provide a valuable alternative and wider angle from which to assess the impact of a case. Part IV of this Comment undertakes this type of altitudinous analysis, allowing a broader picture of *Reed*'s application to be painted.

Kozlowski and Silver have provided an exemplary starting point for the type of analysis advocated herein. Their article is a welcome contribution to the body of literature on *Reed*, but, by the nature of its narrow focus, it creates an opportunity for extension. The gap they left open acts as an implicit invitation to fill it. This invitation for a broader review of courts at all levels, over an extended time frame, is accepted here and results in a broader, more detailed understanding of how the *Reed* approach has melded into our jurisprudence as a whole.

The cases reviewed in Part IV of this Comment include, but are not limited to, the cases that Kozlowski and Silver studied, and the data gathered for this Comment's analysis contains the same findings noted in the Kozlowski and Silver article. In addition to expanding the scope of courts analyzed and thereby increasing the size and diversity of the sample set of cases, this Comment's analysis also benefits from a wider range of time studied, namely ten months of jurisprudential development beyond the Kozlowski and Silver analysis.

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186 *See infra* Table 1 (83 U.S. Circuit Court of Appeals cases / 477 cases total = 17%).
187 *See* Kozlowski & Silver, *supra* note 177, at 215–59.

As will be seen in Part V of this Comment, Kozlowski and Silver reach similar conclusions about the predictive literature. They found that "*Reed* has not been the basis of a First Amendment revolution,"[188] thus, "[p]laintiffs have found . . . crying out '*Reed*' does not instinctively bully a court into declaring that a regulation is content based."[189] Rather, their article concludes that "although *Reed* seemingly had the potential to be revolutionary,"[190] so far it "hasn't triggered any sort of dramatic overturning of First Amendment jurisprudence."[191] This Comment, therefore, reinforces Kozlowski and Silver's conclusions and builds upon their foundation by expanding the scope and diversity of courts, and by extending the time frame of court opinions considered.

In summary, the *Reed* decision was not universally welcomed. The above review of hypothesized consequences provides a contextual backdrop against which the reality of *Reed*'s standing in case law today can be compared. We turn now to an examination of *Reed*'s actual application by lower courts.

V. THE ACTUAL RIPPLES

The import of a Supreme Court decision to American jurisprudence may not always be accurately measured by the extent of publicity or the volume of literature written immediately following the ruling. The true impact from the decision is best gauged by examining how the lower courts applied or distinguished the finding in the subsequent development of case law. As previously mentioned, this process of inverse percolation takes several years, but the study of its consequences yields a fuller understanding of a case's true repercussions.

A. Gathering the Data

The data examined herein are cases that quote or cite to the *Reed* decision. An initial comparison of the number of *Reed*-linked cases available on LexisNexis versus Westlaw yielded a slightly higher number of cases on Westlaw; thus, Westlaw was chosen as the preferred repository from which cases were drawn for this impact investigation. Imposing a cut-off date for my review as May 21, 2019, I downloaded 477 cases. The cases were initially categorized as "State" or "Federal," divided into calendar years, and then further parsed by jurisdictional level (i.e., U.S. District Courts, U.S. Courts of Appeals, U.S. Supreme Court, State

188 *Id.* at 193.
189 *Id.* at 263.
190 *Id.* at 270.
191 *Id.* at 259.

Appellate Court, and State High Court). This basic break-down is summarized in Table 1.[192]

Table 1: Categorization of *Reed* Cases by Jurisdiction and Year

Federal Cases	**2015**	**2016**	**2017**	**2018**	**2019**	***TOTAL***
U.S. District Court	40	76	82	81	46	***325***
U.S. Courts of Appeals	11	22	24	18	8	***83***
U.S. Bankruptcy Court	0	0	0	2	0	***2***
U.S. Supreme Court	4	0	1	1	0	***6***
State Cases[193]						
State Appellate Court	5	9	7	15	7	***43***
State High Court	2	5	2	6	3	***18***

The distribution of State Cases among the states was fairly uniform, ranging from zero to four, with the exception of Ohio, Illinois, and Texas, which listed seven, nine, and fifteen cases, respectively. Overall, the State High Court level addressed 30% of the total number of *Reed*-citing State Cases.[194]

Refining the Federal Case categories, the U.S. District Court cases were next grouped according to their respective Circuit. These totals are compared to the U.S. Courts of Appeals cases for each circuit in Table 2. Overall, the number of appellate level cases citing *Reed* was 20% of the total number of Federal Cases.[195]

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192 It is noted that Westlaw (and LexisNexis) includes only state appellate and high court cases. The state trial courts produce such a sheer overwhelming volume of cases that inclusion is nigh impossible, and unwieldly at best.

193 State Cases were grouped by court level using the lists at Ballotpedia. *See State supreme courts*, BALLOTPEDIA, http://ballotpedia.org/State_supreme_courts [http://perma.cc/2L6S-GP5W] (last visited June 3, 2019); *Intermediate appellate courts*, BALLOTPEDIA, http://ballotpedia.org/Intermediate_appellate_courts#List_of_state_intermediate_appellate_courts [http://perma.cc/Y8SF-CGSU] (last visited June 3, 2019).

194 *See supra* Table 1 (Calculated as: (number of State High Court cases) / (number of State Appellate Court cases + number of State High Court cases) = 18 / (43 + 18) = 30%).

195 *See supra* Table 1 (Calculated as: (number of U.S. Courts of Appeals cases) / (number of U.S. Courts of Appeals cases + number of U.S. District Court cases) = 83 / (83 + 325) = 20%). For each Circuit individually, the number of U.S. Courts of Appeals cases over the total number of U.S. District Court cases and U.S. Courts of Appeals cases was, on average, 21%, with outliers being the D.C. Circuit (44%) and the Tenth Circuit (6%).

Table 2: Federal *Reed* Cases by Jurisdictional Level

U.S. Circuit	U.S. Courts of Appeals Cases	U.S. District Court Cases
1	6	19
2	2	18
3	5	17
4	9	77
5	4	18
6	7	25
7	9	36
8	4	22
9	21	50
10	1	17
11	6	17
D.C.	7	9
Federal	2	-
TOTAL	***83***	***325***

B. Summarizing the Data

Having all the cases in-hand, I developed a spreadsheet to fill out as I reviewed each case. Included were the basics (case name, citation, date, court, case subject) and answers to a series of questions:

(1) Does the case address First Amendment issues?

(2) Are the *Reed* citations found in the body of the holding or only in footnotes?

(3) Did the court apply *Reed*, and if so, how did the case fare?

(4) If the court chose not to apply *Reed*, why not?

(5) What level of discussion/analysis was given to *Reed* in the case?

The spreadsheet was done in Excel to facilitate cross-parsing comparisons and the creation of tables.[196]

C. Examining the Data

Initial examination of the results necessitated a reduction of the data set to a meaningful subset. Since this Comment examines the impact of *Reed* on case opinions, I first chose to

196 Completed spreadsheet is available from author upon request.

exclude cases that only cited *Reed* in a footnote,[197] as well as those which only mentioned *Reed* tangentially, as abrogating another case or applying the Fourteenth Amendment, for example.[198] Also eliminated were intermediate rulings on any case[199]—including remands of cases to be considered in light of *Reed*[200]—since the interest here is limited to the ultimate application of the *Reed* decision. Finally, the cases that considered *Reed*, but whose holdings ultimately rested on other grounds, were omitted.[201] Thus, the data set discussed below contains 162 cases.

1. *Reed* Distinguished

Recall that the fears expressed in Part III above were mostly concerned with broad application of *Reed* to areas outside of municipal sign ordinances. Hence, we would have expected, based on these predictions, that the lower courts would rarely distinguish *Reed*, but instead use a broad reading to apply it to almost any situation. The data did not exhibit such a pattern. Rather, in forty-five of 154 cases,[202] i.e., 29% of the time, the court distinguished *Reed* for the subjects listed in Table 3. That is, for the cases indexed in Table 3, the lower courts found that *Reed*—examining first content-neutrality, then applying strict scrutiny to content-based regulations—did not apply for their review of the law at issue.

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197 Out of 477 cases examined, fifty-one contained reference to *Reed* in a footnote only.

198 Included here are the sixty-one times a cited case was abrogated by Reed. *See, e.g.*, Wicomico Nursing Home v. Padilla, 910 F.3d 739, 749 (4th Cir. 2018) ("*Brown v. Town of Cary*, 706 F.3d 294, 299 (4th Cir. 2013), *abrogated on other grounds by Reed v. Town of Gilbert, Ariz.*, —— U.S. ——, 135 S. Ct. 2218, 192 L.Ed.2d 236 (2015)."); Retfalvi v. United States, 335 F. Supp. 3d 791, 796 (E.D.N.C. 2018) ("*Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 557 (4th Cir. 2013), *abrogated on other grounds by Reed v. Town of Gilbert*, —— U.S. ——, 135 S. Ct. 2218, 192 L.Ed.2d 236 (2015)."). In four cases, *Reed* was only used to apply the Fourteenth Amendment. *See, e.g.*, Kemp v. Liebel, 229 F. Supp. 3d 828, 835 (S.D. Ind. 2017). One case quoted *Reed* in support of a definition. *See* Mason v. Range Resources-Appalachia LLC, 120 F. Supp. 3d 425, 446 (W.D. Pa. 2015) (referring to *Reed* to establish that the phrase "as well as" applies in the several sense). In addition, one case was stayed in light of pending resolution of a parallel case. *See* Meza v. Sirius XM Radio, Inc., No. 17-CV-2252-AJB-JMA, 2018 WL 4599718, at *5 (S.D. Cal. Sept. 25, 2018).

199 There were eighty-one cases with additional appearances below. Most cases had 1–2 such appearances. Thomas v. Schroer, filed in the U.S. District Court for the Western District of Tennessee, had seven prior rulings. 116 F. Supp. 3d 869, 873–74 (W.D. Tenn. 2015). This category often intersected with the categories noted in footnotes 173–75 above.

200 Eight cases fell in this category.

201 This description forms a set of 139 cases.

202 Because eight "Signs" category cases applied *Reed* as straightforward precedent, 154 cases are examined here to see if they are distinguished (i.e., 162 – 8 = 154).

Table 3: Summary of Cases Distinguishing *Reed*

Case Subject	U.S. District Court	U.S. Courts of Appeals	State Appellate Court	State High Court	*TOTAL*
Abortion Protests	1	1	0	0	***2***
Bankruptcy[203]	—	—	—	—	***2***
Billboards	4	0	2	0	***6***
Commercial Speech	8	1	1	0	***10***
Picket/Boycott	0	2	0	0	***2***
Privacy	2	0	0	0	***2***
Regulations[204]	5	0	0	0	***5***
Secondary Effects	3	1	1	0	***5***
Signs	4	1	0	0	***5***
T.C.P.A.[205]	0	1	0	0	***1***
Other[206]	2	3	0	0	***5***

The fact that 29% of the cases analyzed distinguished *Reed* should help assuage fears of broad-brush application. Indeed, it appears the concern that "*Reed* signaled a potentially vast shift in the Court's content-neutrality doctrine, . . . superseding whole swaths of doctrine," has not come to fruition, at least not in whole.[207] In particular, courts at both state and federal levels did not extend *Reed* to the Commercial Speech category, applying instead, and leaving untouched, the commercial speech doctrine developed and refined by the courts over the past half-century.[208] The courts also did not attempt to use *Reed* to overrule the secondary effects doctrine, thus declining the opportunity to up-end the forty-year-old judiciary treatment of regulations on adult entertainment establishments. Instead, relying on unrelated precedent, unedited by *Reed*, the courts allowed governmental

203 U.S. Bankruptcy Court is separate and distinct from the District and Circuit Courts. Rather than exclude the two bankruptcy court cases at the outset, they are included here to demonstrate an area of law in which *Reed* held no sway.

204 The Regulations category cases deal with enforcement of a variety of state and municipal regulations, such as home-sharing (i.e., Airbnb), professional practice without a license, etc.

205 T.C.P.A. is the Telephone Consumer Protection Act, 47 U.S.C. § 227. This category includes "robocall" cases under state statutes as well.

206 Other category topics include cell phone radiofrequency emissions, product labeling, impersonation, etc.

207 Mason, *supra* note 140, at 956.

208 *See, e.g.*, Micah L. Berman, *Manipulative Marketing and the First Amendment*, 103 GEO. L.J. 497, 503 (2015).

ordinances regulating these businesses to stand as constitutional because, despite being content-based on their face, the government had a compelling interest in combating any undesirable secondary effects from such enterprises.[209]

Not all of the topics listed in Table 3 were uniquely distinguished by the courts. For example, Billboard and Picket/Boycott cases were sometimes subjected to the *Reed* content-neutrality analysis and failed strict scrutiny.[210] Similarly, the categories of Privacy, Regulations, T.C.P.A., and Other were sometimes distinguished, sometimes failed strict scrutiny, and sometimes passed the same.[211] The Signs, Billboards, and T.C.P.A. categories will be discussed further in the Subject Summaries section below.

2. *Reed* Applied

Again, the relatively high percentage of times the lower courts distinguished *Reed* seems to contradict the predictive literature and raises doubts as to the validity of such predictions. Further insight can also be gained by examining the results obtained by courts when *Reed* was not distinguished. Consider the cases where the *Reed* content-neutrality analysis was applied. Recall from Part II, that this analysis begins with the "crucial first step [of] . . . determining whether the law is content neutral *on its face*,"[212] and then applies strict scrutiny if the inquiry finds the law to be content-based.[213] Table 4 summarizes the complement of cases distinguishing *Reed*, i.e., the set of cases where *Reed* was applied.

209 *See, e.g.*, CHEMERINSKY, *supra* note 40, at 1226.

210 *See infra* Table 5.

211 *See infra* Table 5 & Table 6.

212 Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2228 (2015) (emphasis added).

213 *Id.* ("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." (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993))).

Table 4: Summary of Cases Applying *Reed*[214]

	U.S. District Court	**U.S. Courts of Appeals**	**State Appellate Court**	**State High Court**	***TOTAL***
Content Neutral	28	11	4	2	***45***
Fails Strict Scrutiny	34	8	5	4	***51***
Passes Strict Scrutiny	14	3	4	0	***21***

We see from Table 4 that laws were found to be content-neutral about 38% of the time.[215] That is, the courts deemed 38% of the laws examined in this data set to be content neutral on their face, thus passing the initial inquiry posed by a *Reed* analysis. Perhaps of greatest note from this result is the encouragement that it is not only possible to write regulations and ordinances in content-neutral language, but instances where such language is being debated before the courts, it passed the test one-third of the time. This outcome does not bolster the predictions of far-reaching effects found in the literature, but rather supports an opposite conclusion.

a. Failed Strict Scrutiny

For those laws found to be content-based, strict scrutiny was applied. In 71% of these strict scrutiny cases, the test was not satisfied.[216] Table 5 summarizes the topics addressed by cases that applied strict scrutiny and found that the regulations failed to meet the standard, so that the regulation, law, or ordinance at issue was deemed unconstitutional.

214 One case declined to give a standard of review and was not included in these results. *See* Otto v. City of Boca Raton, Fla., 353 F. Supp. 3d 1237, 1257 (S.D. Fla. 2019).

215 *See supra* Table 4. (Calculated as: (number of cases with a content-neutral finding) / (total number of cases where *Reed* was applied) = 45/117 = 38%).

216 *See supra* Table 4. (Calculated as: (number of content-based cases that failed strict scrutiny) / (total number of content-based cases) = 51/72 = 71%).

Table 5: Summary of Cases that Applied *Reed* and Failed Strict Scrutiny

Case Subject	U.S. District Court	U.S. Courts of Appeals	State Appellate Court	State High Court	*TOTAL*
Ballot Selfies	1	1	0	0	***2***
Billboards	2	0	0	0	***2***
Panhandling	8	0	0	2	***10***
Picket/Boycott	1	0	0	0	***1***
Privacy	5	0	2	0	***7***
Regulations	5	0	0	0	***5***
Signs	4	3	1	0	***8***
Speech[217]	3	1	1	0	***5***
T.C.P.A.	2	2	0	0	***4***
Other[218]	3	1	1	2	***7***

Again, if a regulation has failed strict scrutiny in this analysis, it means (1) the regulation was content-based on its face, and (2) either it could not be shown that the legislature passed the law to further a compelling governmental interest, or the law was not narrowly tailored to achieve that interest, or both.[219] For example, in the two Ballot Selfie cases listed in Table 5, laws prohibiting the taking and disclosing of photos of completed ballots were not narrowly tailored to serve a compelling government interest because the states failed to show a vote-buying problem existed.[220]

b. Passed Strict Scrutiny

When some judges and commentators refer to strict scrutiny as "fatal scrutiny,"[221] it may be a misnomer. At least, in examining the post-*Reed* cases, we can see from Table 4 that, of the seventy-two times the *Reed* content-neutrality analysis passed a case along to be subjected to strict scrutiny, the

217 The "Speech" category included topics such as false political campaign statements and criticisms voiced at school board meetings.

218 Other category topics included, for example, conversion therapy, child support arrears, doctor-patient communications, etc.

219 *See* Winkler, *supra* note 52.

220 *See* Ind. Civil Liberties Union Found., Inc. v. Ind. Sec'y of State, 229 F. Supp. 3d 817, 824–26 (S.D. Ind. 2017); Rideout v. Gardner, 838 F.3d 65, 72 (1st Cir. 2016).

221 Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) ("'[S]trict scrutiny'—scrutiny that is strict in theory, but fatal in fact.") (Marshall, J., concurring).

governmental action satisfied the test 29% of the time.[222] Similar to instances when courts distinguished *Reed*, these cases, where the application of *Reed* was not fatal to the regulation in question, undermine the literature predictions of sweeping changes instigated by *Reed*, and show that, even applying heightened scrutiny, government regulations are constitutional a significant portion of the time. The subjects where strict scrutiny was satisfied are summarized in Table 6.

Table 6: Summary of Cases that Applied *Reed* and Passed Strict Scrutiny

Case Subject	U.S. District Court	U.S. Courts of Appeals	State Appellate Court	State High Court	*TOTAL*
Ballot Selfies	1	0	0	0	***1***
Panhandling	1	0	0	0	***1***
Privacy	1	1	1	0	***3***
Regulations	1	0	0	0	***1***
Speech	1	0	0	0	***1***
T.C.P.A.	7	1	0	0	***8***
Other[223]	2	1	3	0	***6***

For example, in contrast to the Ballot Selfie cases that failed strict scrutiny, the District Court for the Southern District of New York determined a similar New York election law passed strict scrutiny.[224] The court found the State had a compelling interest in preserving the integrity of its election process, and the law was narrowly tailored to prevent vote buying, voter intimidation, and voter coercion.[225] A comparison of additional cases separated by subject is given in the next section.

3. Subject Summaries

Topics which the courts have generally treated inconsistently warrant further study. For these subjects, the court findings appear at odds, sometimes distinguishing cases from *Reed* and sometimes applying *Reed*'s standard. Table 7 combines the information from the tables above for an easy comparison of the

222 *See supra* Table 4. (Calculated as: (number of content-based cases that passed strict scrutiny) / (total number of content-based cases) = 21/72 = 29%).

223 Other category topics included, for example, intimidation of a flight crew, juvenile probation terms, etc.

224 *See* Silberberg v. Bd. of Elections of N.Y., 272 F. Supp. 3d 454, 481 (S.D.N.Y. 2017).

225 *See id.*

previous results, arranged by subject. Table 7 is rich with information that could be further analyzed; however, this Comment provides particular focus on Sign, Billboard, and T.C.P.A. cases.

Table 7: Inconsistent Topic Treatment

	Distinguished	Passed Strict Scrutiny	Failed Strict Scrutiny
Ballot Selfies	0	1	2
Billboards[226]	6	0	2
Panhandling[227]	0	1	10
Picket/Boycott	2	0	1
Privacy[228]	2	3	7
Regulations[229]	5	1	5
Signs	5	0	8
Speech[230]	0	1	5
T.C.P.A.	1	8	4
Other[231]	5	6	7

Given the subject matter of *Reed* itself, the Billboards and Signs categories are interesting to consider. These two categories were originally differentiated because sign ordinances were limited to individual municipalities, whereas regulations governing billboards tended to be county or state ordinances. Both categories apply *Reed* in the same manner. Perhaps not surprisingly, none of the facts of the billboard or sign cases were found to support a compelling government interest accomplished in a narrowly tailored manner; i.e., none passed strict scrutiny. The courts' analyses in these cases were, for the most part, a

226 *Compare* GEFT Outdoor LLC v. Consol. City of Indianapolis, 187 F. Supp. 3d 1002, 1004, 1016–17 (S.D. Ind. 2016), *with* Lamar Cent. Outdoor, LLC v. City of L.A., 245 Cal. App. 4th 610, 613, 624–25 (2016).

227 *Compare* Gbalazeh v. City of Dallas, Tex., No. 3:18-CV-0076-N, 2019 WL 1569345, *1–2 (N.D. Tex. Apr. 11, 2019), *with* Blitch v. City of Slidell, 260 F. Supp. 3d 656, 659, 666 (E.D. La. 2017).

228 *Compare* Dahlstrom v. Sun-Times Media, LLC, 346 F. Supp. 3d 1162, 1170–72 (N.D. Ill. 2018), *with In re* Nat'l Sec. Letter, 863 F.3d 1110, 1114, 1121 (9th Cir. 2017).

229 As previously mentioned, the Regulations category cases deal with enforcement of a variety of state and municipal regulations, such as home-sharing (i.e., Airbnb), professional practice without a license, as well as business permits, animal rights, etc.

230 The "Speech" category included such topics as false political campaign statements and protests during the presidential inaugural parade.

231 The "Other" category includes all previously mentioned "Other" categories including, but not limited to: cell phone radiofrequency emissions, conversion therapy, intimidation of a flight crew, juvenile probation terms, child support arrears, etc.

straightforward application of *Reed* and its reasoning.[232] Of the case holdings that distinguished *Reed*, all found the content at issue to be commercial in nature, and, in line with the results presented above, deigned to extend *Reed* to commercial speech.[233]

The T.C.P.A. cases also present an interesting distribution: one was distinguished, eight passed strict scrutiny, and four failed strict scrutiny. The distinguished case found a Minnesota T.C.P.A. extension statute to be based on phone receivers' consent, differentiating it from statutes delineating content restrictions.[234] Five cases addressing state robocall statutes, also attempting to expand the T.C.P.A., passed strict scrutiny twice and failed three times. These state robocall cases were found unconstitutional twice because the court recognized residential privacy as only a substantial interest, not a compelling state interest.[235] In the remaining case, *Cahaly v. Larosa*, the U.S. Court of Appeals for the Fourth Circuit ruled that the statute was overinclusive and not narrowly tailored.[236] Interestingly, of the seven cases addressing the T.C.P.A. directly,[237] all had been found to satisfy strict scrutiny under the *Reed* application until the Fourth Circuit found the debt-collection exemption failed as underinclusive and ordered it severed from the T.C.P.A. regulations.[238] It appears robocall and T.C.P.A. legislation has yet to be fully refined.

Looking at these categories of cases helps us understand *Reed*'s true impact. For cases on-point dealing with the same subjects and similar fact patterns to those found in the initial *Reed* dispute, the lower courts applied *Reed* and obtained similar results. When *Reed* was applied to different facts and types of regulations, however, the particular facts of each case controlled if and how *Reed* would impact the finding. This is not surprising. Although predictive literature seemed to view *Reed* as an excuse the courts would use to strike down regulations across the board, *Reed* has inversely percolated in a seemingly straightforward manner, wherein the lower courts appear to have exercised reasonable restraint instead of rubberstamping broad swathes of governmental regulation unconstitutional as was feared.

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232 *See, e.g.*, Cent. Radio Co. v. City of Norfolk, VA., 811 F.3d 625, 628 (4th Cir. 2016).

233 *See, e.g.*, Contest Promotions, LLC v. City of S.F., 874 F.3d 597, 601 (9th Cir. 2017).

234 Gresham v. Swanson, 866 F.3d 853, 856 (8th Cir. 2017).

235 *See, e.g.*, Gresham v. Rutledge, 198 F. Supp. 3d 965, 970 (E.D. Ark. 2016).

236 796 F.3d 399, 406 (4th Cir. 2015).

237 *See* Am. Ass'n of Political Consultants v. Sessions, 323 F. Supp. 3d 737, 744 (E.D.N.C. 2018), *vacated and remanded*, Am. Ass'n of Political Consultants, Inc. v. Fed. Commc'ns Comm'n, 923 F.3d 159 (4th Cir. 2019).

238 *See Am. Ass'n of Political Consultants*, 923 F.3d at 167.

D. Conclusions from the Data

Has "*Reed* ushered in . . . a dramatic shift in the way courts employ content neutrality as a core principle of the First Amendment"?[239] Is "Justice Thomas's formulation of the content-neutrality test . . . a radical shift in doctrine"?[240] Has *Reed* "render[ed] the Supreme Court's commercial speech jurisprudence moot"?[241]

These questions, reflecting the general post-*Reed* fears, can be answered in the negative. *Reed* has had repercussions on subjects like sign ordinances, but the lower courts have not extended *Reed* to topics such as the commercial speech doctrine or the secondary effects doctrine. That is, the lower courts have resisted the potential to upend First Amendment doctrine by imposing a uniform application of strict scrutiny across the board.

Furthermore, the *Reed* decision itself may have resulted in behavioral changes among potential parties, thereby keeping some cases from being filed or from reaching the population of cases examined herein. For example, if a sign code interpretation arose on-point for a *Reed* analysis and the ruling seemed predestined, there is little chance that the case would have made it through the legal system far enough to fall within the orbit of cases considered here. Additionally, it is likely that many municipalities revisited their sign and city codes after *Reed*—or upon threat of lawsuits based on *Reed*—and redrafted their codes where possible to preempt parallel attacks, thereby keeping the number of on-point cases filed since *Reed* to a minimum. Thus, the narrow application of *Reed* by the lower courts has most likely contributed to the reduction in the number of these types of cases over time.

VI. WHEN SHOULD RIPPLES BE EXAMINED?

Examination of the *Reed* impact shows that many of the fears hypothesized in predictive literature failed to materialize. The lower courts did not wield *Reed* to hack away at First Amendment jurisprudence, nor did they use *Reed* as an excuse to cast broad application of strict scrutiny across a wide variety of legal matters. For *Reed* in general, predictions did not become reality. By observing the divergence of *Reed*'s actual impacts and those predicted in the literature, we can see that the lower courts have "best protect[ed] core First Amendment values . . . by

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239 Haupt, *supra* note 127, at 150.

240 Lauriello, *supra* note 149, at 1132.

241 Daniel D. Bracciano, *Commercial Speech Doctrine and Virginia's 'Thirsty Thursday' Ban*, 27 GEO. MASON U. CIV. RTS. L.J. 207, 228 (2017).

refusing to let the content-based tail wag the First Amendment dog."[242] Specifically, the inverse percolation of *Reed* has remained tame compared to the envisioned far-reaching effects that have not come to fruition.

This evidenced disparity between predictions and reality relating to the *Reed* case raises the question of when such an analysis should be done on other Supreme Court opinions. Clearly such a study is useful, whether the inverse percolation results parallel and validate the forecasts, or diverge from the predicted effects. But the degree to which hypotheses and realities are out of phase may not be evident until sufficient time has passed for the incongruity to be recognizable. I assert that four or more years is an acceptable amount of time for the inverse percolation of a case through the lower courts into general jurisprudence to produce statistically significant results, and, thus, for a richer understanding of the true repercussions originating from a Supreme Court opinion to be obtained. Failure to allocate sufficient time for this process may introduce a risk of misleading conclusions about the impacts of individual Supreme Court decisions, as well as a risk that uncertain predictions of a decision's impact may be accepted as accurate.

A robust impact analysis of the results of inverse percolation, as described herein, is useful for evaluating the true place a particular Supreme Court decision holds in American jurisprudence. Conducting a reflective study on a decision by reviewing the actual manner in which the lower courts have applied a Supreme Court holding after a few years allows for a broader understanding of the decision in general. The analysis also enables the researcher to compare such application to the corresponding predictive literature, and confirm or correct any impact prophecies. Thus, this type of impact analysis reflects a more evidence-based way of narrowing in on a decision's true significance, and its utility counsels others on the informational benefits available from undertaking similar studies to revisit prior impact predictions via an evidence-based analysis of actual effects.

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242 Note, *Free Speech Doctrine After* Reed v. Town of Gilbert, 129 HARV. L. REV. 1981, 1982 (2016).