

PANHANDLING REGULATION AFTER *REED V. TOWN OF GILBERT*

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In Reed v. Town of Gilbert the Supreme Court rearticulated the standard for when regulation of speech is content based. This determination has already had a large impact on cases involving panhandling regulations and is likely to result in the invalidation of the majority of this nation's panhandling laws.

This Note will begin with a discussion of First Amendment doctrine and how panhandling is protected speech. This Note will then demonstrate that it is helpful to think of panhandling regulations categorically and explore how these categories of panhandling laws have fared in lower courts. This Note will then discuss the holding in Reed and how jurisdictions have already begun to invalidate panhandling laws. Finally, this Note proposes using the captive audience doctrine to uphold the validity of some salutary panhandling regulations while invalidating laws that are burdensome and oppressive to free expression.

INTRODUCTION

In the summer of 2015, the nation's attention once again focused intently on the highest court of the land as the Supreme Court delivered dramatic decisions on issues including gay marriage,¹ Obamacare,² and housing discrimination.³

It is a small wonder, then, that a decision concerning signage regulation in the Phoenix suburb of Gilbert received scant attention⁴ and a decision remanding a case about panhandling in Worcester, Massachusetts received next to none.⁵ While ordinary Americans (and

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1. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

2. *King v. Burwell*, 135 S. Ct. 2480 (2015).

3. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015).

4. *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015); see also 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> (on file with the *Columbia Law Review*) [hereinafter Liptak, *Court's Free-Speech Expansion*] (calling *Reed* a "sleeper case" of 2015 term).

5. *Thayer v. City of Worcester*, 135 S. Ct. 2887 (2015) (mem.); cf. David G. Savage, *Death Penalty, Same-Sex Marriage and Air Pollution: Supreme Court's Most Important Decisions This Term*, L.A. Times (June 29, 2015, 7:36 AM), <http://www.latimes.com/nation/la-na-court-key-cases-2015-20150526-story.html> [<http://perma.cc/8GJM-E6Y8>] (failing to include *Thayer* or *Gilbert* on list of thirteen important decisions from 2015 Supreme Court term).

indeed perhaps some of those in legal academia) may have never heard of *Reed v. Town of Gilbert* or *Thayer v. City of Worcester*, these two cases signify a coming sea change in how American municipalities regulate their streets and police their most vulnerable and indigent populations.

In *Reed*, Justice Thomas articulated a new standard for courts to assess the content neutrality of laws regulating speech,⁶ a move likely to have profound consequences on a broad array of subjects from advertising regulations to securities laws because deciding a law is content based is virtually tantamount to deciding it is unconstitutional.⁷ This Note focuses on the often-ignored area of panhandling where *Reed* has already had tremendous effect: In *Thayer*, the Supreme Court remanded a decision by former-Justice Souter to be decided in accordance with *Reed*.⁸ This decision signals that the Supreme Court views *Reed* as the new standard for content-neutrality determinations and that it fully expects this standard to alter panhandling jurisprudence.

The Court's dismantling of the constitutionality of panhandling regulations will affect cities across America that have passed laws regulating and curbing panhandling, particularly focusing on the problem of beggars that aggressively solicit donations.⁹ Albuquerque outlaws all panhandling that occurs within three feet of a potential donor, unless the donor has agreed to donate.¹⁰ Fort Lauderdale prohibits soliciting for alms on its beaches.¹¹ And the City of San Antonio has even considered penalizing those who give to beggars.¹² New York City bans soliciting donations on its subways,¹³ as well as aggressive

6. *Reed*, 135 S. Ct. at 2228–29 (stating first step in analysis is “determining whether the law is content neutral on its face”).

7. See *infra* section I.A.2 (discussing importance of content neutrality); see also Liptak, Court's Free-Speech Expansion, *supra* note 4 (quoting Yale Law School Dean Robert Post stating *Reed* will have far-reaching consequences).

8. *Thayer*, 135 S. Ct. at 2887.

9. See Dan Frosch, Homeless Are Fighting Back Against Panhandling Bans, *N.Y. Times* (Oct. 5, 2012), <http://www.nytimes.com/2012/10/06/us/homeless-are-fighting-back-in-court-against-panhandling-bans.html> (on file with the *Columbia Law Review*) (“[C]ities across the country have been cracking down on an apparent rise in aggressive panhandling . . .”); see also Richard Fausset, With This Many Buskers in Asheville, a Discordant Note Was Inevitable, *N.Y. Times* (May 16, 2015), <http://www.nytimes.com/2015/05/17/us/with-this-many-buskers-in-asheville-a-discordant-note-was-inevitable.html> (on file with the *Columbia Law Review*) (discussing consideration of new ordinances regulating street performers soliciting donations in Asheville).

10. Albuquerque Code of Ordinances § 12-2-28 (2014).

11. See *Smith v. City of Fort Lauderdale*, 177 F.3d 954, 955 (11th Cir. 1999).

12. See Myra Arthur, SAPD Chief Abandons Panhandling Proposal, *KSAT 12* (Oct. 1, 2014 9:21 PM), <http://www.ksat.com/content/pns/ksat/news/2014/10/01/sapd-chief-abandons-panhandling-proposal.html> [<http://perma.cc/C9RE-YGC6>] (noting proposal supported by San Antonio Police Chief to criminalize giving money to panhandlers failed due to lack of support from city council).

13. See N.Y. Comp. Codes R. & Regs. tit. 21, § 1050.6(b)(2) (2015) (outlawing “solicitation of money” in New York subway system). The Port Authority of New York and

begging,¹⁴ and is currently looking for a method to curb costumed characters and topless women from asking for donations in Times Square.¹⁵ As this Note discusses, these panhandling regulations differ greatly from one another, with some laws outlawing all conduct and others more carefully targeting harmful behavior.¹⁶ With the recent decision in *Reed*, however, there is a real danger that virtually *all* panhandling laws will be invalidated, even though some serve to protect pedestrians and others.

As anyone who has lived in an urban environment knows, panhandling takes many forms, ranging from musicians playing concertos with their violin cases on the sidewalk to encourage donations to an imposing homeless man demanding money in a secluded alley.¹⁷ Instead, this Note defines panhandling as any in-person solicitation for immediate charitable giving of either cash or goods for the purpose of benefiting the person doing the solicitation.¹⁸ This definition therefore excludes face-to-face solicitation for third parties or charities. Using this definition, this Note will show that the constitutionality of current panhandling laws is dubious after *Reed*.

Part I of this Note will discuss background First Amendment doctrine necessary to understand the importance of *Reed's* effect on panhandling laws and introduce the captive audience doctrine. Part II will argue that panhandling is protected speech, discuss panhandling

New Jersey also bans panhandling at the World Trade Center site and the Port Authority Bus Terminal. See *id.* §§ 1220.16, 1290.3(d).

14. N.Y.C. Administrative Code § 10-136 (LEXIS through March 2015).

15. See Josh Dawsey & Adam Janos, *De Blasio Takes Aim at Panhandling by Topless Women in Times Square*, *Wall St. J.* (Aug. 18, 2015, 11:37 PM), <http://www.wsj.com/articles/de-blasio-takes-aim-at-panhandling-by-topless-women-in-times-square-1439945701> (on file with the *Columbia Law Review*) (discussing attempts by city to regulate panhandling in Times Square); Thomas MacMillan, *Curb the Times Square Tip-Seekers, Lawmakers Say*, *Wall St. J.* (Mar. 28, 2016, 7:24 PM), <http://www.wsj.com/articles/curb-the-times-square-tip-seekers-lawmakers-say-1459207369> (on file with the *Columbia Law Review*) (same).

16. See *infra* Part III (discussing need to view panhandling regulations as categories). This Note will also argue that appellate courts have been treating different categories of panhandling regulation differently. See *infra* section II.B.2 (discussing pattern of appellate rules on different categories of panhandling law).

17. For example, New York City's anti-aggressive begging law groups together soliciting, asking, and begging, which it defines as: "[U]sing the spoken, written, or printed word, or bodily gestures, signs or other means with the purpose of obtaining an immediate donation of money or other thing of value or soliciting the sale of goods or services." N.Y.C. Administrative Code § 10-136.

18. This definition would include the officious intermeddler, such as the infamous "squeegee man," who provides an unwanted service and then begins soliciting for his or her "compensation." See Richard A. Epstein, *Principles of a Free Society* 115 (1998) (defining and discussing "officious intermeddler"). For another definition of panhandling, see *Norton v. City of Springfield*, 768 F.3d 713, 714 (7th Cir. 2014) ("The ordinance defines panhandling as an oral request for an immediate donation of money."), *rev'd*, 806 F.3d 411 (7th Cir. 2015).

laws, and offer a tripartite categorization of those laws. Part II will then discuss how appellate courts before *Reed* tackled different types of panhandling laws and explain the *Reed* decision in greater depth. Finally, Part III will show that virtually no panhandling regulations can withstand constitutional scrutiny under *Reed* and *Thayer*. It will then offer the solution of balancing the rights of those panhandling with the rights of captive audiences so that courts may retain salubrious panhandling regulations.

I. AN OVERVIEW OF FIRST AMENDMENT DOCTRINE

This Part explores the current understandings of the First Amendment's protection of aggressive panhandling and the captive audience doctrine. Section I.A summarizes background on First Amendment doctrine and discusses how courts analyze whether regulations of speech or expression violate the Constitution. Section I.B then explains the captive audience doctrine, which this Note later argues is a possible solution to prevent the wholesale invalidation of panhandling regulations.¹⁹

A. *First Amendment Doctrine*

The doctrine surrounding the First Amendment is notoriously complex.²⁰ This section summarizes the relevant legal frameworks that courts use to determine whether speech is protected by the First Amendment and if so, how to regulate the protected speech.

1. *What Speech Is Protected?* — The First Amendment's mandate that "Congress shall make no law . . . abridging the freedom of speech"²¹ is arguably the most famous and sacrosanct in all of American law.²² Despite this ostensibly simple language, determining what "abridgment of the freedom of speech" means is no simple task. Fighting words, obscenity, and threats, for example, fall outside of many of the Constitution's protections,²³ and governments can often regulate such

19. See *infra* section III.B (discussing use of captive audience doctrine to analyze aggressive panhandling laws).

20. See, e.g., Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 *Calif. L. Rev.* 2353, 2355 (2000) ("The free speech jurisprudence of the First Amendment is notorious for its flagrantly proliferating and contradictory rules, its profoundly chaotic collection of methods and theories.").

21. U.S. Const. amend. I.

22. See e.g., *Whitney v. California*, 274 U.S. 357, 375–77 (1927) (Brandeis, J., concurring) ("[The Founders] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth[;] . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government.").

23. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) ("[T]he lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words[,] . . . epithets or

“low value” speech as long as the law does not discriminate on the basis of viewpoint.²⁴

Even if an utterance is not unprotected low-value speech, the full aegis of the First Amendment may not protect it. If the speech is commercial in nature, courts apply a less exacting test in determining the validity of the regulation.²⁵ Courts, however, do not consider all expression involving financial transactions commercial speech.

In a trio of cases in the 1980s, the Supreme Court found solicitation from charitable groups was noncommercial speech deserving of the First Amendment’s full protections. In the first of these cases, *Schaumburg v. Citizens for a Better Environment*, the Court considered a law requiring charities that solicited door to door to dedicate at least seventy-five percent of donations to charitable purposes.²⁶ Striking down the law, the Court rejected the Village of Schaumburg’s arguments that canvassing for donations is “purely commercial speech” because charitable solicitors advocate for particular social or political issues as opposed to merely trying to inform economic decisions.²⁷ In subsequent cases, the Court has expanded and affirmed *Schaumburg*’s protection for solicitation.²⁸ Despite

personal abuse [are] not in any proper sense communication of information or opinion safeguarded by the Constitution . . .”).

24. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (holding regulations cannot discriminate on viewpoint of speech for categories of speech excluded from First Amendment protection). While this Note mostly discusses whether a law discriminates based on just content, see *infra* notes 33–36 and accompanying text (discussing content-based discrimination), a law that discriminates based on viewpoint not only discriminates based on content but also chooses a side concerning the regulated speech. To borrow an example from then-Professor Elena Kagan, a law that was only content based would outlaw using a billboard for political candidates while a viewpoint-discriminatory law would outlaw using a billboard for Democrats. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 444–45 (1996).

25. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 565–66 (1980) (articulating four-part analysis for determining if commercial speech laws violate First Amendment); see also *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 479–80 (1989) (modifying *Central Hudson* test). The current test for commercial speech considers whether the speech concerns illegal activity or is misleading, whether the asserted governmental interest is substantial, whether the regulation directly advances governmental interests, and whether the regulation in question is more extensive than necessary to advance those interests. See *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002) (articulating modern *Central Hudson* test).

26. 444 U.S. 620, 620 (1980).

27. *Id.* at 632. The Court cited *New York Times Co. v. Sullivan*, a seminal libel case in which the Court treated an advertisement soliciting donations to help aid Civil Rights in the South as fully protected by the First Amendment. *Id.* at 633 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

28. In *Secretary of State of Maryland v. Joseph H. Munson Co.*, the Court struck down another law mandating percentage requirements for charities, despite the fact that unlike in *Schaumburg*, the regulation in *Munson* provided a process for organizations to seek an exemption from the law. 467 U.S. 947, 966–68 (1984). Furthermore, in *Riley v. National Federation of the Blind of North Carolina*, the Court ruled that even requiring reporting of

the fact that solicitation at many times involves commercial elements,²⁹ *Schaumburg* stands for the proposition that the Court will not try to parse out which parts of solicitation involve traditional elements of First Amendment protection and which constitute mere commerce; instead, it will treat all such speech as protected.³⁰

2. *The Content-Based and Content-Neutral Distinction.* — Protected speech is not entirely immune from regulation. The Court interprets the First Amendment to generally prohibit any laws that regulate or restrict “expression because of its message, its ideas, its subject matter, or its content.”³¹ Therefore, an often-dispositive facet of First Amendment analysis is whether the law in question is content based and contingent on what the expression says or content neutral and agnostic to the message conveyed.³²

Courts subject laws that discriminate on the basis of content to strict scrutiny.³³ For a law to survive this exacting test, a court must find that the regulation serves a “compelling state interest” and “is narrowly drawn to achieve that end.”³⁴ Courts define narrowly tailored as a “least restrictive means” test.³⁵ Thus, if the government could accomplish its

what percentage of expenditures a charity spent on charitable purposes unduly burdened freedom of speech. 487 U.S. 781, 795 (1988).

29. A well-known example of commercial elements intermixing with solicitation would be the famous annual sale of cookies to support the Girls Scouts of the USA. See Yum! It's Time for Girl Scout Cookies!, http://www.girlscouts.org/program/gs_cookies/find_cookies.asp [<http://perma.cc/Y94R-NUAP>] (last visited Feb. 2, 2016) (describing Girl Scout Cookie Program). A purchase of Thin Mints likely will involve elements of giving to the nonprofit Girl Scouts of the USA, in addition to simply buying the cookies.

30. The Court arguably weakened protection for charitable solicitation in *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, where in dicta the Court said if an ordinance requiring permits for door-to-door solicitation applied only to “commercial activities and the solicitation of funds, arguably the ordinance” would not have posed constitutional issues. 536 U.S. 150, 165 (2002). The Court noted, however, that since the ordinance affected “noncommercial” canvassers promoting “causes,” it invoked First Amendment protection, seemingly contradicting *Schaumburg*. *Id.* But the Court has not yet made this dictum doctrine, and for now, *Schaumburg* remains good law. See *Henry v. City of Cincinnati*, No. C-1-03-509, 2005 WL 1198814, at *6 (S.D. Ohio Apr. 28, 2005) (noting *Watchtower* did not overturn *Schaumburg*).

31. *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972).

32. See Kathleen M. Sullivan & Noah Feldman, *Constitutional Law* 1112 (18th ed. 2013) (describing distinction between content-based and content-neutral laws as “crucial”); Kagan, *supra* note 24, at 443 (“The distinction between content-based and content-neutral regulations of speech serves as the keystone of First Amendment law.”).

33. See *Mosley*, 408 U.S. at 98–99 (explaining laws that discriminate between kinds of picketing “must be tailored to serve a substantial government interest”).

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

35. See *Sable Commc'ns. of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (“The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.”).

interest in any other way than a content-based regulation on speech, the law fails strict scrutiny and is unconstitutional.³⁶

Due to the stringent requirements of the strict scrutiny test, content-based laws are nearly per se considered illegal.³⁷ The Court has nonetheless shown some willingness to uphold a content-based law when balancing another fundamental right, such as the right to vote.³⁸ Still, determining the content-neutral or content-based distinction remains critically important and dispositive in nearly all cases.

Making the determination of what laws fall into each category has traditionally been murky. Academics routinely have denounced the byzantine and inconsistent manner courts determine whether a regulation discriminates against the content of speech.³⁹ This Note explores how *Reed v. Town of Gilbert*⁴⁰ articulates a new standard for determining content neutrality in section II.C.⁴¹

3. *Intermediate Scrutiny Test.* — Courts group content-neutral laws into two categories: those that place an incidental burden on speech and those that merely regulate the time, place, and manner of speech.⁴² Unlike content-based laws, which require strict scrutiny, these tests employ “intermediate scrutiny” to determine if the regulation violates the First Amendment.⁴³

Courts use a test from *United States v. O’Brien*⁴⁴ to analyze laws that primarily regulate conduct but also place burdens on speech. In *O’Brien*, a protester faced charges for destroying his draft card during a protest of

36. See, e.g., *Boos v. Barry*, 485 U.S. 312, 329 (1998) (striking down law creating buffer zone around embassies because “less restrictive alternative” existed to protect foreign dignitaries); see also *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 119–20 (1991) (finding law preventing criminals from profiting from memoirs of their exploits unconstitutional because while state has compelling interest in preventing wrongdoers from profiting from crimes, law was not narrowly tailored because government had no justification for treating criminals’ assets differently).

37. See *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 818 (2000) (“It is rare that a regulation restricting speech because of its content will ever be permissible.”); Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 *Notre Dame L. Rev.* 1347, 1351 (2006) (noting laws deemed content based are “categorically invalidated”).

38. See, e.g., *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (upholding law prohibiting campaign materials near polling places as “rare case” in which “law survives strict scrutiny”).

39. See Case Comment, *McCullen v. Coakley*, 128 *Harv. L. Rev.* 221, 226 (2014) [hereinafter Case Comment, *McCullen*] (“Perhaps no branch of the Supreme Court’s constitutional jurisprudence has been so roundly and routinely criticized as that concerning content neutrality.”).

40. 135 S. Ct. 2218 (2015).

41. See *infra* section II.C (discussing *Reed*).

42. See Sullivan & Feldman, *supra* note 32, at 1128–29 (discussing content-neutral tests).

43. *Id.*

44. 391 U.S. 367 (1968).

the Vietnam War.⁴⁵ The Court upheld the prohibition on burning draft cards after evaluating the law under what is now referred to as the *O'Brien* test:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.⁴⁶

O'Brien's progeny have further clarified this four-part analysis. In particular, the Court in *Ward v. Rock Against Racism* made clear that *O'Brien's* fourth prong—that burdens on speech be “no greater than essential”—does not equate to the “least restrictive means” requirement of strict scrutiny.⁴⁷ Instead, intermediate scrutiny requires that the law in question is “not substantially broader than necessary to achieve the government’s interest.”⁴⁸

The second category of content-neutral laws regulates speech directly but does so irrespective of its content.⁴⁹ The law in *Ward*—an ordinance that regulated decibel levels in a Central Park band shell—serves as an exemplar for such a “time, place and manner” law.⁵⁰ The Court in *Ward* applied a test requiring the regulation to be “justified without reference to the content of the regulated speech,” to be “narrowly tailored to serve a significant governmental interest,” and to “leave open ample alternative channels for communication.”⁵¹

The major difference between the tests in *O'Brien* and *Ward* is the requirement in the latter that regulations allow “ample alternative channels” for the expression.⁵² *Ward* stated there was “little, if any” difference between the two tests.⁵³ As a result, some scholars view the tests as virtually identical,⁵⁴ while others believe that the additional

45. *Id.* at 369.

46. *Id.* at 377.

47. *Ward v. Rock Against Racism*, 491 U.S. 781, 798–99 (1989). *Ward* concerned a time, place, and manner test, but at that point in time the Court had rolled the *O'Brien* and time, place, and manner tests into one intermediate scrutiny test. See *infra* note 53 and accompanying text (discussing blending of intermediate scrutiny tests).

48. *Id.* at 799–800.

49. See Sullivan & Feldman, *supra* note 32, at 1120 (defining “time, place and manner” restrictions).

50. See *Ward*, 491 U.S. at 784.

51. *Id.* at 791 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

52. *Id.*

53. *Id.* at 797–98 (quoting *Clark*, 468 U.S. at 298).

54. See, e.g., James M. McGoldrick, Jr., *Symbolic Speech: A Message from Mind to Mind*, 61 Okla. L. Rev. 1, 31 (2008) (describing *O'Brien* and time, place, and manner test as “essentially interchangeable”).

requirement of alternative communications for the time, place, and manner test still affects courtroom outcomes.⁵⁵

4. *Public Forum Doctrine.* — In summarizing First Amendment doctrine, this Note has made an important assumption: The laws regulating First Amendment expression do so in public forums. As Justice Owen Roberts noted in the case of *Hague v. Committee for Industrial Organization*, public forums such as streets and parks serve a crucial function for “purposes of assembly, communicating thoughts between citizens and discussing public questions.”⁵⁶ Thus, courts feel their use of the exacting tests for both content-neutral and content-based laws is justified when such laws seek to regulate speech in these forums.⁵⁷

In addition to “traditional” public forums such as streets and parks, courts also recognize designated public forums: private property that the government has opened for expression.⁵⁸ Examples of designated public forums include university meeting places⁵⁹ and municipal theaters.⁶⁰ While nothing compels governments to create designated public forums, once the state has designated property for expression, courts will analyze speech regulations under the same tests employed for traditional public forums.⁶¹

Not all property owned by the government is a public forum or designated public forum.⁶² Courts treat a government forum as nonpublic if the government excludes the public from its property or

55. See, e.g., Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. Ill. L. Rev. 783, 792 (“[I]n applying *O’Brien* the Court does not seem inclined to enforce an ‘ample alternative channels of communication’ requirement . . .”). In analyzing panhandling cases, this Note will not attempt to synthesize the difference between these two tests but will simply recognize which intermediate scrutiny test the court in question applied.

56. 307 U.S. 496, 515 (1939).

57. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011) (noting public forums have “special position in terms of First Amendment protection” due to their importance for public assembly and debate (quoting *United States v. Grace*, 461 U.S. 171, 180 (1983))).

58. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (defining designated public forums as “public property which the State has opened for use by the public as a place for expressive activity”); see also Kent Greenawalt, *Viewpoints from Olympus*, 96 Colum. L. Rev. 697, 699 n.10 (1996) (noting distinction between public and limited public forums).

59. See *Widmar v. Vincent*, 454 U.S. 263, 267–68 (1981) (deciding *University of Missouri*, by accommodating student meetings, “created a forum generally open for use by student groups”).

60. See *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (holding municipal theaters were “public forums designed for and dedicated to expressive activities”).

61. See *Perry Educ. Ass’n*, 460 U.S. at 46 (“Although a State is not required to indefinitely retain the open character of [a designated public forum], as long as it does so it is bound by the same standards as apply in a traditional public forum.”).

62. See *U.S. Postal Serv. v. Council of Greenburg Civic Ass’ns*, 453 U.S. 114, 129 (1981) (noting “First Amendment does not guarantee access to property simply because it is owned or controlled by the government”).

opens areas to the public for reasons independent of expression—such as commercial activities or trade.⁶³ Examples include state fairgrounds⁶⁴ and airports, where the government allows the general public to use facilities for the respective purposes of commerce and transportation.⁶⁵ Courts evaluate regulation of speech in these areas under a far more lenient standard⁶⁶ that asks if the regulation was “reasonable in light of the purpose which the forum at issue serves.”⁶⁷ Unlike strict or intermediate scrutiny, this reasonableness test does not require narrow tailoring or a compelling governmental interest.⁶⁸ Like the distinction between content-based and content-neutral speech, deciding the forum has an outsized impact on whether a law will pass constitutional muster. First Amendment doctrine represents a complex framework of overlapping tests that courts use to ascertain which speech is protected and if speech is protected, whether or not a law regulates the speech in a manner consistent with the Constitution.

B. *Captive Audience Doctrine*

As the constitutionality of the noise-control ordinance at issue in *Ward* demonstrates, privacy and tranquility of citizens subjected to speech can be a compelling interest.⁶⁹ Despite this holding, First Amendment doctrine usually does not protect those subjected to speech they dislike in public forums because individuals can simply choose to walk away and not listen.⁷⁰ A problem arises, however, when people cannot avoid expression—when they are captive to speech they find disturbing or unsettling.

Courts usually apply the First Amendment as an active right to both speak and listen (or read or watch). Yet embedded in the freedom of speech is a right not to speak⁷¹ and a right not to listen. As one

63. See *United States v. Kokinda*, 497 U.S. 720, 725 (1990) (noting forums become nonpublic when government acts as operator or manager as opposed to lawmaker).

64. See *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654–55 (1981) (holding Minnesota state fairgrounds are nonpublic forum).

65. See, e.g., *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 681–83 (1992) (holding New York metropolitan area airports to be limited public forums).

66. *Id.* at 679 (noting regulations of nonpublic forums “need only be reasonable, as long as the regulation is not an effort to suppress the speaker’s activity due to disagreement with the speaker’s view”).

67. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983).

68. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

69. See *supra* notes 49–51 and accompanying text (discussing facts of *Ward*).

70. See, e.g., *Bolger v. Young's Drug Prods. Corp.*, 463 U.S. 60, 72 (1983) (noting government cannot decide to prohibit mailing of potentially offensive materials because such missives can easily be discarded); *Cohen v. California*, 403 U.S. 15, 21 (1971) (noting onlookers could simply avert eyes from jacket displaying provocative swear word to protest conscription).

71. See, e.g., *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (ruling school officials cannot compel students to recite Pledge of Allegiance and stating “no official,

commentator has stated: “[C]ompulsion to listen is the hallmark of a totalitarian society.”⁷² This right not to listen is often referred to as the captive audience doctrine.⁷³ It reaches its apex in one’s residence. The Court noted “[t]he right to avoid unwelcome speech has special force in the privacy of the home.”⁷⁴ The Court has upheld laws that allow residents to direct the Post Office not to send advertisements to their domiciles⁷⁵ and municipal ordinances preventing picketing around personal residences.⁷⁶

How far the right to avoid speech extends beyond the home—and the government’s compelling interest in protecting that right—is unclear.⁷⁷ The Supreme Court has extended the doctrine at least once in the limited case of public transportation. In *Lehman v. Shaker Heights*, the Court upheld Shaker Heights’s refusal to allow a political candidate to run an advertisement on public buses in part because bus passengers

high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein”).

72. Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 15 Ga. L. Rev. 795, 833 (1981). Indeed, one of the more terrifying aspects of George Orwell’s infamous repressive regime depicted in *1984* was television screens in every apartment that could never be turned off. See George Orwell, 1984, at 2 (1949).

73. See William E. Lee, *The Unwilling Listener: Hill v. Colorado’s Chilling Effect on Unorthodox Speech*, 35 U.C. Davis L. Rev. 387, 404 (2002) (“A captive audience exists where listeners are either unable to avoid exposure to speech or avoidance entails a significant burden.”).

74. *Hill v. Colorado*, 530 U.S. 703, 717 (2000) (citing *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 738 (1970)).

75. *Rowan*, 397 U.S. at 738 (“That we are often ‘captives’ outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere. The asserted right of a mailer, we repeat, stops at the outer boundary of every person’s domain.” (citing *Pub. Utils. Comm’n v. Pollak*, 343 U.S. 451 (1952))); see also *Nat’l Fed’n of the Blind v. FTC*, 420 F.3d 331, 340, 350–51 (4th Cir. 2005) (upholding law creating “do not call” list that allows people to opt out of telephone solicitations).

76. *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (“The First Amendment permits the government to prohibit offensive speech as intrusive when the ‘captive’ audience cannot avoid the objectionable speech.”).

77. Some scholars argue the captive audience doctrine should apply to the workplace and protect employees from an employer who insists on propagating political views or creates a hostile work environment. See Roger C. Hartley, *Freedom Not to Listen: A Constitutional Analysis of Compulsory Indoctrination Through Workplace Captive Audience Meetings*, 31 Berkeley J. Emp. & Lab. L. 65, 90–91 (2010) (arguing for application of captive audience doctrine to workplace); see also *id.* at 91 n.143 (listing scholars who argue for some application of captive audience doctrine to workplace setting). The Court has never applied the right in this context, however, and Professor Eugene Volokh argues doing so would violate important First Amendment principles. See Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. Rev. 1791, 1840 (1992) (arguing applying captive audience doctrine to workplace would create slippery slope because “if captivity consists of an inability to avoid offensive speech, in today’s society we are all ‘captive’ to profanity”).

were members of a captive audience.⁷⁸ Courts, however, have not applied the captive audience doctrine when transit authorities' allowance of both political and commercial speech creates a designated public forum.⁷⁹ For example, the Second Circuit has ruled that because the Metropolitan Transportation Authority (MTA) accepts political advertisements, it cannot refuse advertisements due to potentially objectionable content.⁸⁰ The Southern District of New York has applied the rule even to advertisements many would find extremely inflammatory, without considering any captive audience rights of subway passengers.⁸¹

Furthermore, the captive audience doctrine has a very limited function outside the home. In *Erznoznik v. City of Jacksonville*, while acknowledging the "privacy rights" of captive audiences, the Court struck down an ordinance preventing the showing of nudity at drive-in movie theaters visible from a public place due to concerns about government censorship.⁸²

Despite the doctrine's limitations, the Court has historically shown interest in applying the captive audience framework to the healthcare context. In *Hill v. Colorado*, the Court upheld a law designed to protect people near abortion clinics from protesters by creating eight-foot "buffer zones" around those near health care facilities where protesters could not approach without consent.⁸³ Writing for the Court, Justice Stevens applied the captive audience doctrine to those seeking healthcare, carving out a governmental interest to protect the ability of one to

78. 418 U.S. 298, 303–04 (1974). In his concurrence Justice Douglas went further, contending that even commercial advertisements on a public bus might be unconstitutional due to the captive nature of passengers. See *id.* at 307–08 (Douglas, J., concurring in the judgment) ("Commercial advertisements may be as offensive and intrusive to captive audiences as any political message."). Justice Douglas also expressed this view in *Public Utilities Commission v. Pollak*, a case decided more than twenty years before *Lehman. Pollak*, 343 U.S. at 467–69 (Douglas, J., dissenting). In that case, Justice Douglas wrote that music played for passengers of streetcars and buses by the Capital Transit Company violated the First Amendment because "the man on the streetcar has no choice but to sit and listen, or perhaps to sit and to try *not* to listen" and that "[w]hen we force people to listen to another's ideas we give the propagandist a powerful weapon." *Id.* at 468–69.

79. See *supra* notes 56–61 and accompanying text (discussing designated public forums).

80. See *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 125–26, 130 (2d Cir. 1998) (holding MTA could not refuse *New York Magazine* advertisement because it contained name of Mayor Rudolph Giuliani).

81. See *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 880 F. Supp. 2d 456, 477–78 (S.D.N.Y. 2012) (holding MTA could not refuse to display pro-Israeli advertisement that MTA felt was demeaning to Muslims).

82. See 422 U.S. 205, 208–12, 217 (1975) ("Thus, we conclude that the limited privacy interest of persons on the public streets cannot justify this censorship of otherwise protected speech on the basis of its content."). Justice Douglas wrote a short concurrence where he identified the case as one with a captive audience but still found the ordinance unconstitutional. *Id.* at 218 (Douglas, J., concurring in the judgment).

83. 530 U.S. 703, 707–08 (2000) (describing statute).

go from their house to a healthcare facility without having to enter a “confrontational setting[.]”⁸⁴

This ruling in *Hill* has come under question after another abortion-protest case: the recent decision of *McCullen v. Coakley*.⁸⁵ In *McCullen*, Chief Justice Roberts discussed being a captive audience not as a First Amendment violation but rather a virtuous element of the marketplace of ideas:

It is no accident that public streets and sidewalks have developed as venues for the exchange of ideas. Even today, they remain one of the few places where a speaker can be confident that he is not simply preaching to the choir. With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out. In light of the First Amendment’s purpose “to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail” this aspect of traditional public forums is a virtue, not a vice.⁸⁶

Whether this holding applies in the panhandling context, in particular the aggressive panhandling context, will be discussed later in section III.B.

II. PANHANDLING REGULATIONS AND JURISPRUDENCE

Part I discussed the First Amendment doctrinal frameworks; this Part discusses how appellate courts have applied those frameworks to panhandling cases. It also discusses the recent case of *Reed v. Town of Gilbert*⁸⁷ and its potential effects on panhandling laws. Section II.A argues that panhandling is protected First Amendment speech. Section II.B discusses how appellate courts have interpreted First Amendment doctrine as applied to panhandling cases and shows that the current content-based analysis of panhandling creates doctrinal difficulties. Section II.C notes how *Reed* altered existing frameworks for determining whether speech regulations are content-based or content-neutral.

A. *Panhandling Is Protected Speech*

While the Supreme Court has made clear that the First Amendment protects soliciting donations for charities,⁸⁸ it has remained silent on the

84. *Id.* at 717.

85. 134 S. Ct. 2518 (2014).

86. *Id.* at 2529 (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984)).

87. 135 S. Ct. 2218 (2015).

88. See *supra* notes 26–28 and accompanying text (discussing charitable solicitation cases). Justice Rehnquist in his dissent in *Schaumburg*, however, argued that governments

issue of whether personal solicitation or panhandling falls under such protections.⁸⁹ This section argues panhandling now enjoys—and should enjoy—First Amendment protection. It begins by rejecting alternative methods of treating panhandling and then discusses the current de facto consensus among appellate courts that panhandling is protected speech.

1. *Alternatives to Protected Speech.* — It is easy to conceive of potential classifications for panhandling other than protected speech. Since panhandling involves an exchange—or a request of an exchange—of goods or currency, one possible paradigm to view panhandling would be commercial speech.⁹⁰ As most cases now find panhandling to fall under the auspices of *Schaumburg*,⁹¹ courts do not question whether such personal solicitation is “purely commercial” and therefore subject to the *Central Hudson* test.⁹² It makes sense that courts would be loath to try to find what panhandling was purely commercial, just like solicitation it would be almost impossible to see where the commercial speech ended and First Amendment speech began. Even in situations where the panhandling has more commercial elements, such as someone who performs a song or washes a windshield in order to help spur donations, it would be impossible to delineate which part of the message is protected solicitation and which is commercial.⁹³

In a 2005 case in the Southern District of Ohio, the City of Cincinnati argued the court should treat panhandling as commercial speech.⁹⁴ The district court rejected this claim, holding that *Schaumburg* controlled even for personal solicitations, evincing the widespread consensus among the courts that panhandling is not commercial speech.⁹⁵

Courts could alternatively analyze panhandling as purely “low value” speech or conduct outside of the First Amendment’s protections.⁹⁶ The

should be able to distinguish valid charities from “panhandlers, profiteers and peddlers.” See *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 644 (1980) (Rehnquist, J., dissenting).

89. See *Speet v. Schuette*, 726 F.3d 867, 874 (6th Cir. 2013) (“[T]he United States Supreme Court has not . . . directly decided the question of whether the First Amendment protects soliciting alms when done by an individual . . .”).

90. See *supra* note 25 and accompanying text (discussing commercial speech).

91. See *infra* notes 121–129 and accompanying text (noting widespread adoption of panhandling as protected solicitation).

92. But see *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 151 (2002) (positing that given regulation of “commercial activities and the solicitation of funds, arguably the ordinance” would not violate Constitution).

93. For an example on parsing out solicitation, see *supra* note 29 (discussing how selling Girl Scout cookies is both solicitation and commercial speech).

94. See *Henry v. City of Cincinnati*, No. C-1-03-509, 2005 WL 1198814, at *6 (S.D. Ohio Apr. 28, 2005) (discussing Cincinnati’s legal theory in case); see also *supra* notes 26–27 and accompanying text (discussing *Schaumburg*).

95. See *Henry*, 2005 WL 1198814, at *6–7 (“[P]anhandling, like charitable solicitation is more than mere commercial speech.”).

96. See *supra* notes 21–24 and accompanying text (discussing expression First Amendment does not protect).

Second Circuit in *Young v. New York City Transit Authority*⁹⁷ exemplifies this approach.

In *Young* the court took up a challenge of the New York City Transportation Authority's⁹⁸ (MTA'S) longtime ban on panhandling and begging in New York City subway system.⁹⁹ While the Supreme Court in *Schaumburg* ruled solicitation for charities conveyed important political and economic messages,¹⁰⁰ the *Young* court noted in dicta that “[t]he only message that we are able to espy as common to all acts of begging is that beggars want to extract money from those whom they *accost*” and that “[w]hile organized charities serve community interests by enhancing communication and disseminating ideas, the conduct of begging and panhandling in the subway amounts to nothing less than a menace to the common good.”¹⁰¹ Thus, the court argued “common sense tells us that begging is much more ‘conduct’ than it is ‘speech’” and therefore is outside the First Amendment’s protections.¹⁰²

The Second Circuit, however, declined to declare panhandling unprotected conduct, and despite its dismissive language on panhandling’s First Amendment value and its determination that the subway system was a nonpublic forum,¹⁰³ the court still performed an intermediate scrutiny *O’Brien* analysis as well as a “time, manner and place” test “arguendo.”¹⁰⁴ Unsurprisingly, the *Young* court found the MTA’s regulation passed both intermediate scrutiny tests.¹⁰⁵ As the next section demonstrates, this holding proved to be ephemeral.

2. *The Loper Approach: Panhandling as Protected Speech.* — The Second Circuit’s view of panhandling as conduct or low-value speech

97. 903 F.2d 146, 148 (2d Cir. 1990).

98. The New York City Transportation Authority is the subsidiary of the MTA in charge of New York City transportation and the subway system. See New York City Transit—History and Chronology, Metropolitan Transportation Authority, <http://web.mta.info/nyc/facts/ffhist.htm> [<http://perma.cc/T6E7-9G7R>] (last visited Feb. 2, 2016). This Note will refer to the authority under the commonly known acronym of its parent corporation: MTA.

99. 903 F.2d at 148.

100. See *supra* note 27 and accompanying text (discussing rationale in *Schaumburg* for protecting charitable solicitation).

101. *Young*, 903 F.2d at 153–54 (emphasis added); *id.* at 156.

102. *Id.* at 153–54.

103. *Id.* at 161–62 (“[T]he [M]TA never intended to designate sections of the subway system, including platforms and mezzanines, as a place for begging and panhandling . . . the subway system is not a traditional or designated public forum.”).

104. See *id.* at 157–61 (applying intermediate scrutiny tests to prohibition of panhandling in subway cars).

105. See *id.* at 161 (“[E]ven if begging and panhandling constitute protected expressive conduct, which is in serious doubt, we hold that the regulation at issue more than satisfies the *O’Brien* standard”); see also *id.* at 160 (holding regulation allowed for “ample alternatives of communication” (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989))).

from *Young* did not last long: In an influential and oft-cited opinion,¹⁰⁶ the court shifted its position in *Loper v. New York City Police Department* three years later, beginning the process of a widespread recognition among federal courts that panhandling deserves constitutional protection.¹⁰⁷ In *Loper*, the Second Circuit struck down a law punishing loitering with the intent to panhandle.¹⁰⁸ In sharp contrast to *Young*,¹⁰⁹ the *Loper* court defined begging as “communicative activity,” finding the loitering statute content neutral.¹¹⁰

Unlike *Young*, where the court applied intermediate scrutiny only in arguendo, the *Loper* court believed panhandling fell under the First Amendment’s protection as solicitation as established in *Schaumburg*.¹¹¹ The *Loper* court went as far as stating that there is “little difference between those who solicit for organized charities and those who solicit for themselves”¹¹² Accordingly, the *Loper* court analyzed the law under the time, place, and manner test and ruled that while banning panhandling in the subway still allowed beggars to communicate above ground, a ban on all panhandling would foreclose all alternative means of communication.¹¹³ Distinguishing the case from *Young* by noting that the statute in *Loper* regulated the traditional public forums of streets and parks while the MTA ban in *Young* only applied to subway cars and their immediate environs,¹¹⁴ the Second Circuit applied the arguably more

106. See *infra* notes 122–126 and accompanying text (discussing explicit adoption of *Loper*’s holding by numerous appellate courts).

107. 999 F.2d 699 (2d Cir. 1993).

108. *Id.* at 701.

109. See *Young*, 903 F.2d at 153–54 (stating panhandling does not possess sufficient communicative elements to warrant First Amendment protection); see also *supra* notes 102–105 and accompanying text (discussing *Young*).

110. *Loper*, 999 F.2d at 704.

111. See *supra* notes 26–30 and accompanying text (discussing charitable-solicitation cases).

112. *Loper*, 999 F.2d at 704. This sentiment is very similar to the dissent in *Young*. See *Young*, 903 F.2d at 164 (Meskill, J., dissenting) (expressing belief that there exists no “legally justifiable distinction” between solicitation for personal reasons and soliciting for charitable organizations).

113. *Loper*, 999 F.2d at 705 (“[T]otal prohibition on begging in the city streets imposed by the statute cannot be characterized as . . . merely incidental”). One argument to justify the public-forum doctrine is that it protects those who require public spaces to communicate their message because traditional means of getting public attention is prohibitively expensive. See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 *Wm. & Mary L. Rev.* 189, 219 (1983). While not explicitly mentioned in *Loper*, this argument certainly strengthens the court’s ruling.

114. *Id.* at 703–04. Regulation of free speech in public forums is subject to strict scrutiny and therefore deciding whether the forum is public is often dispositive of the outcome of an *O’Brien* balancing test. See *Police Dep’t v. Mosley*, 408 U.S. 92, 98–99 (1972) (noting careful scrutiny needed for public forums).

regulation-friendly *O'Brien* test¹¹⁵ and found the law insufficiently tailored.¹¹⁶

Academic work on panhandling supports the *Loper* court's argument that panhandling conveys a message deserving of First Amendment protection. Some commentators have pointed out that begging can have First Amendment value for both those who panhandle and for those who are on the receiving end of the solicitation: First, panhandling informs those receiving and witnessing solicitations about societal problems such as homelessness and poverty, either through the words spoken or the mere act of begging itself.¹¹⁷ This awareness takes on an added importance in a democratic society, as information about the existence and prevalence of abject poverty may inform a voter's choices come Election Day.¹¹⁸ On a deeper level, begging may encourage listeners of the speech to evaluate their own feelings about living in a society of homelessness or to fulfill spiritual obligations by giving alms to the needy.¹¹⁹ Finally, the act of begging can allow for panhandlers to achieve self-realization by giving them the freedom to express themselves and to express their values about giving to others and society in general.¹²⁰

Law professors are not the only ones convinced that constitutional protection for panhandlers is sound. Although never explicitly adopted by the Supreme Court,¹²¹ a number of jurisdictions have followed *Loper's*

115. While the Supreme Court has said there is little to no difference between the intermediate scrutiny tests, the *O'Brien* test does not have a requirement for alternative means of communication, while the time, place, and manner test does. See *supra* notes 52–55 and accompanying text (noting possible difference).

116. *Loper*, 999 F.2d at 705–06 (ruling statutes broader than necessary, thus failing *O'Brien* test).

117. See Helen Hershkoff & Adam S. Cohen, Commentary, Begging to Differ: The First Amendment and the Right to Beg, 104 Harv. L. Rev. 896, 898 (1991) (noting begging “provides information about poverty and the lives of poor people”); see also Nancy A. Millich, Compassion Fatigue and the First Amendment: Are the Homeless Constitutional Castaways?, 27 U.C. Davis L. Rev. 255, 275–81 (1994) (arguing begging contributes to public's awareness of homelessness as problem).

118. See Hershkoff & Cohen, *supra* note 117, at 901–02 (discussing democratic value of begging).

119. See *id.* at 899–901 (setting forth these arguments as part of what authors call “enlightenment value” of begging); Mark Oppenheimer, The Beggars of Lakewood, N.Y. Times Mag. (Oct. 16, 2014), <http://www.nytimes.com/2014/10/19/magazine/the-beggars-of-lakewood.html> (on file with the *Columbia Law Review*) (discussing role of begging and giving alms in ultra-Orthodox Judaism). But see Robert C. Ellickson, Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows and Public-Space Zoning, 105 Yale L.J. 1165, 1180–81 (1996) (noting while major religions encourage charity, they also discourage begging and instead emphasize self-help and work ethic).

120. See Hershkoff & Cohen, *supra* note 117, at 903–04 (discussing self-realization value of begging).

121. *Loper* has had traction with at least Justice Thomas. In a joint dissent with Justice Scalia in a campaign-finance case, *Nixon v. Shrink Missouri Government PAC*, Justice Thomas approvingly noted that appellate courts have extended the First Amendment to begging and cites *Loper*, 528 U.S. 377, 412 & n.2 (2000) (Thomas, J., dissenting).

determinations that the First Amendment protects personal solicitation. The Fourth,¹²² Sixth,¹²³ Seventh,¹²⁴ Ninth,¹²⁵ and Eleventh¹²⁶ Circuits have all explicitly adopted *Loper's* First Amendment protection for panhandling. While not adopting *Loper's* holding, the First Circuit has also implied a belief that panhandling deserves at least intermediate scrutiny.¹²⁷ The Massachusetts Supreme Court has also borrowed reasoning from *Loper* to find First Amendment protections for panhandling.¹²⁸ The *Young* argument that begging is merely conduct, while never explicitly overturned by *Loper* or any other Supreme Court case, is nonetheless extinct across jurisdictions.¹²⁹ The widespread and clear consensus among appellate courts across the country is that the First Amendment protects panhandling.

Finally, while not dispositive of a ruling on the issue, the recent decision in *Thayer v. City of Worcester*¹³⁰ heavily implies the Supreme Court also views panhandling as protected speech, as it remanded the case to be decided in accordance with *Reed v. Town of Gilbert*, a case clearly concerning speech rather than conduct.¹³¹ This further evinces that

122. See *Reynolds v. Middleton*, 779 F.3d 222, 225 (4th Cir. 2015) (“There is no question that panhandling and solicitation of charitable contributions are protected speech.”); *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 552–54 (4th Cir. 2013) (ruling “speech and expressive conduct that comprise begging” deserves First Amendment protection and invalidating statute banning panhandling on two streets in downtown Charlottesville).

123. See *Speet v. Shuette*, 726 F.3d 867, 875 (6th Cir. 2013) (striking down Michigan statute criminalizing begging and noting “begging is a form of solicitation that the First Amendment protects”).

124. See *Gresham v. Pereson*, 225 F.3d 899, 904 (7th Cir. 2000) (allowing for regulation of some panhandling activities in Indianapolis but following *Loper's* view of little difference between personal solicitation and those for charitable groups).

125. See *ACLU v. City of Las Vegas*, 466 F.3d 784, 792 (9th Cir. 2006) (“It is beyond dispute that solicitation is a form of expression entitled to the same constitutional protections as traditional speech.”).

126. See *Smith v. City of Fort Lauderdale*, 177 F.3d 954, 955–56 (11th Cir. 1999) (allowing for panhandling regulation on public beaches but noting “[l]ike other charitable solicitation, begging is speech entitled to First Amendment protection”).

127. See *Thayer v. City of Worcester*, 755 F.3d 60, 68 (1st Cir. 2014) (Souter, J.) (applying content-neutral, content-based analysis to panhandling regulation), vacated, 135 S. Ct. 2887 (2015).

128. See *Benefit v. City of Cambridge*, 679 N.E.2d 184, 188 (Mass. 1997) (invalidating law banning unlicensed begging and finding distinction between personal solicitation and solicitation for a charity “not a significant one for First Amendment purposes” (quoting *Loper v. N.Y.C. Police Dep’t*, 999 F.2d 699, 704 (2d Cir. 1993))).

129. For an argument that the Second Circuit should overturn *Young*, see Jordana Schreiber, Note, *Begging Underground? The Constitutionality of Regulations Banning Panhandling in the New York City Subway System*, 27 *Cardozo L. Rev.* 1517, 1518–19 (2006).

130. 135 S. Ct. 2887 (2015).

131. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226–27 (2015) (applying First Amendment jurisprudence concerning speech to regulation of signs).

despite the lack of an explicit ruling, it is virtually settled law that panhandling deserves at least some First Amendment protections.

3. *Justice Kennedy's Lee Approach.* — Although the First Amendment protects panhandling, it is not altogether clear that the *Loper* court's conclusion that courts should not treat panhandling differently than charitable solicitation is correct. A hybrid approach adopted by Justice Kennedy would treat panhandling as a mixture of both conduct and speech.¹³² This approach, while never adopted by the Supreme Court, remains influential, especially among judges and lawyers attempting to uphold panhandling regulation, and it is still cited by briefs and cases to this day.¹³³ As discussed in section III.A, however, the decision in *Reed* to adopt a formalist approach to content neutrality means that this approach is now untenable.¹³⁴

Justice Kennedy's approach is best encapsulated by his concurrence in *International Society for Krishna Consciousness, Inc. v. Lee*.¹³⁵ In that case, members of the Hare Krishna sect challenged a ban on charitable solicitations in and on the sidewalks of airports operated by the Port Authority of New York and New Jersey.¹³⁶

The majority opinion found the solicitation protected by the First Amendment but showed far more wariness toward personal solicitation: “[F]ace-to-face solicitation presents risks of duress that are an appropriate target of regulation.”¹³⁷ As panhandling necessarily involves such face-to-face solicitation,¹³⁸ it is impossible not to imagine such skepticism applying to panhandling as well.¹³⁹

132. See *supra* note 112 and accompanying text (discussing *Loper's* view that panhandling is no different than other charitable solicitation).

133. See, e.g., Petition for Writ of Certiorari at 16–18, *City of Springfield v. Norton*, No. 15-727, 2015 WL 7831391 (Dec. 1, 2015) (citing *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992); *United States v. Kokinda*, 497 U.S. 720 (1990) (Kennedy, J., concurring in the judgment); see also *Norton v. City of Springfield*, 768 F.3d 713, 715–16 (7th Cir. 2014) (purporting that Justice Kennedy's opinion in *Lee* is justification for treating panhandling regulation as content neutral), *rev'd*, 806 F.3d 411 (7th Cir. 2015); Brief in Opposition to the Petition for a Writ of Certiorari at 12, *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014), vacated, 135 S. Ct. 2887 (2015) (mem.) (No. 14-428), 2014 WL 6449706 (same).

134. See *infra* section III.A (discussing *Reed's* adoption of formalist approach).

135. 505 U.S. at 693 (Kennedy, J., concurring in the judgments). Justice Kennedy's approach also appears in *United States v. Kokinda*, 497 U.S. at 733–34, 736 (plurality opinion) (discussing solicitation regulation as content neutral); see also *id.* at 739 (Kennedy, J., concurring in the judgment) (reiterating that regulating in that case was content-neutral).

136. *Lee*, 505 U.S. at 674–75.

137. *Id.* at 684.

138. See *supra* notes 17–18 and accompanying text (defining panhandling).

139. Indeed, Judge Frank Easterbrook applied *Lee* when analyzing a panhandling regulation in a recent case. See *Norton v. City of Springfield*, 768 F.3d 713, 715 (7th Cir. 2014), *rev'd*, 806 F.3d 411 (7th Cir. 2015); see also *supra* note 133 (discussing citations of *Lee* in panhandling cases and briefs). It is important to note that since the Court in *Lee*

In a concurrence, Justice Kennedy took the majority's antipathy toward face-to-face regulation further. Unlike the majority, Justice Kennedy argued airports were public forums and considered the ban on solicitation a content-neutral ban subject to intermediate scrutiny.¹⁴⁰ In applying an intermediate scrutiny test,¹⁴¹ however, Justice Kennedy argued that while an ordinance banning the solicitation of all funds would be content based, the regulation in *Lee* aimed only to regulate immediate request of funds and the physical transfer of money, which he described as "an element of conduct interwoven with otherwise expressive solicitation."¹⁴² Justice Kennedy then noted the dangers of fraud and duress present with such immediate solicitation of funds, analogizing the law in *Lee* with regulations on door-to-door salesmen.¹⁴³ Justice Kennedy thus felt the banning of solicitation passed intermediate scrutiny as a closely drawn, compelling governmental interest. Justice Kennedy also believed the regulation allowed for alternative methods of communication because solicitors could request nonimmediate donations.¹⁴⁴

Thus, while Justice Kennedy might disagree with the court in *Young* that panhandling is merely conduct, he would also disagree with the court in *Loper* that there is "little difference between those who solicit for organized charities and those who solicit for themselves . . ."¹⁴⁵ Justice Kennedy views panhandling as occupying a space between protected third-party solicitation and conduct unprotected by the First Amendment.¹⁴⁶

ruled that New York airports constituted nonpublic forums, the Court employed only a reasonableness test as opposed to strict or intermediate scrutiny. See *Lee*, 505 U.S. at 684–85 (concluding ban passes reasonableness test under First Amendment); see also *supra* section I.A.3 (discussing public forum doctrine). Because of this, the effect of the majority opinion in *Lee* on panhandling in public forums is quite limited.

140. *Lee*, 505 U.S. at 698 (Kennedy, J., concurring in the judgments) ("It is of particular importance to recognize that such spaces are public forums because in these days an airport is one of the few government-owned spaces where many persons have extensive contact with other members of the public.").

141. Justice Kennedy collapsed the *O'Brien* framework and the time, place, and manner test into an intermediate scrutiny analysis. See *id.* at 704 ("The confluence of the two tests is well demonstrated by a case like this, where the government regulation at issue can be described with equal accuracy as a regulation of the manner of expression, or as a regulation of conduct with an expressive component.").

142. *Id.* at 705.

143. See *id.* at 706 (describing FTC's three-day "cooling-off period" that allows consumers to cancel door-to-door sales (internal quotation marks omitted) (quoting 16 C.F.R. § 429.1 (1992))).

144. *Id.* ("[T]he regulation is a content-neutral rule serving a significant government interest."). Justice Kennedy made a similar argument in another case involving solicitations on public sidewalks in front of U.S. post offices. See *United States v. Kokinda*, 497 U.S. 720, 739 (Kennedy, J., concurring in the judgment) (accepting Post Office's "judgment that in-person solicitation deserves different treatment from alternative forms of solicitation and expression").

145. *Loper v. N.Y.C. Police Dep't*, 999 F.2d 699, 704 (2d Cir. 1993).

146. See *supra* note 140 and accompanying text (describing Justice Kennedy's views on airports as public forums).

And because this middle ground involves conduct, regulation of panhandling is content neutral according to Justice Kennedy's approach. This Note will discuss the future of this approach with the newly adopted standard for approaching content neutrality in Part III.

So far this Note has discussed panhandling and panhandling regulations as a monolithic concept. As the next section demonstrates, nothing is further from the truth, as panhandling regulations have important differences.

B. *Categories of Panhandling Regulation*

1. *Defining Categories.* — While no panhandling regulation is identical, many share significant similarities. This Note proposes a tripartite categorization for analyzing these laws and comparing cases across jurisdictions. First, this section describes each of the three types of panhandling laws. It then discusses how appellate courts have treated each category differently.

The simplest types of panhandling laws are “blanket bans,” laws that completely outlaw panhandling in a city. This was the type of law held unconstitutional in *Loper*¹⁴⁷ and in the Sixth Circuit's recent decision in *Speet v. Schuette*.¹⁴⁸ Blanket bans would also describe a recent failed initiative from the San Antonio police chief, which would fine motorists for giving money to panhandlers.¹⁴⁹

Next are “aggressive begging” statutes, which regulate the type of begging allowed. These laws became in vogue in the 1990s, as a method for cities to control their panhandling “problems” without running afoul of potential constitutional problems.¹⁵⁰ Even more traditionally liberal institutions saw these laws as a happy medium between blanket bans and anarchy,¹⁵¹ and they became popular with many cities, including New

147. See *supra* notes 110–113 and accompanying text (discussing *Loper*).

148. 726 F.3d 867, 870 (6th Cir. 2013) (describing Michigan statute that “criminalize[d] begging”).

149. See Arthur, *supra* note 12 (noting proposal supported by San Antonio Police Chief to criminalize giving money to panhandlers failed due to lack of support from city council).

150. See, e.g., Robert Teir, *Maintaining Safety and Civility in Public Spaces: A Constitutional Approach to Aggressive Begging*, 54 La. L. Rev. 285, 333–37 (1993) (advocating for aggressive-begging laws and offering model statutes); Kent S. Scheidegger, *Criminal Justice Legal Found, A Guide to Regulating Panhandling*, 10–11 (1993), <http://www.cjlf.org/publications/RegulatePanhandling.pdf> [<http://perma.cc/NU64-QPXB>] (observing “[p]rohibition of aggressive or fraudulent panhandling easily meets [time, place, and manner] test”).

151. See Editorial, *No’ to Aggressive Panhandlers*, N.Y. Times (July 5, 1996), <http://www.nytimes.com/1996/07/05/opinion/no-to-aggressive-panhandlers.html> (on file with the *Columbia Law Review*) (expressing *New York Times* editorial board's support of New York aggressive-begging law).

York City.¹⁵² Unlike blanket bans, aggressive-begging statutes only outlaw panhandling seen as “aggressive.” But what “aggressive” means is not limited to the word’s plain meaning, and many aggressive-begging laws give panhandlers a very short leash. New York City’s statute is typical, banning aggressive behavior ranging from causing a reasonable person to fear bodily harm to a mere suffering of “unreasonable inconvenience, annoyance or alarm.”¹⁵³ Other prohibited behavior includes begging within ten feet of an ATM machine, approaching vehicles, and obstructing traffic in such a way that pedestrians or vehicles avoid the beggar.¹⁵⁴

Other aggressive-begging statutes contain even more restrictions. The City of Worcester enacted a law banning soliciting for donations after sundown and begging from those sitting at a sidewalk café or waiting in line.¹⁵⁵ Similarly, an Indianapolis law classified begging at night, using profanity, following people who walk away, or panhandling in a group of two or more persons as aggressive.¹⁵⁶

Finally, “location bans” outlaw panhandling in certain areas of the city, similar to the subway ban in *Young*.¹⁵⁷ Unlike in *Young*, most location-based bans apply not to unique transportation facilities but to commercial thoroughfares or areas known for tourism. For example, Charlottesville, Virginia, banned begging on two downtown streets,¹⁵⁸ Las Vegas outlawed panhandling in its downtown area in an effort to increase tourism,¹⁵⁹ Henrico County, Virginia, banned panhandling on its

152. See Clifford J. Levy, Council Approves Restrictions on Beggars, *N.Y. Times* (Sept. 12, 1996), <http://www.nytimes.com/1996/09/12/nyregion/council-approves-restrictions-on-beggars.html> (on file with the *Columbia Law Review*) (describing New York City Council’s decision to enact aggressive-begging law and how law was “modeled after similar measures in other cities”).

153. N.Y.C. Administrative Code § 10-136 (LEXIS through March 2015). Unsurprisingly, panhandlers are often not sure when their conduct crosses the line and could cause reasonable fear in another person. See Tatiana Schlossberg, What Elmo and Spidey Want You to Know: They Have Rights, *N.Y. Times* (Aug. 19, 2014), <http://www.nytimes.com/2014/08/20/nyregion/seeking-respect-from-police-times-square-mascots-form-alliance.html> (on file with the *Columbia Law Review*) (“The laws creating the differences between [aggressive and nonaggressive] solicitation are fuzzy at best.”). For an argument that bans on conduct that causes alarm or annoyance in others could sweep in large amounts of begging due to predisposed cognitive biases towards the indigent, see Sara K. Rankin, *The Influence of Exile*, 76 *Md. L. Rev.* (forthcoming 2016) (manuscript at 36), <http://papers.ssrn.com/abstract=2754254> (on file with the *Columbia Law Review*).

154. N.Y.C. Administrative Code § 10-136.

155. See *Thayer v. City of Worcester*, 755 F.3d 60, 64–65 (1st Cir. 2014) (Souter, J.) (describing Worcester statute), vacated, 135 S. Ct. 2887 (2015) (mem.).

156. See *Gresham v. Peterson*, 225 F.3d 899, 901–02 (7th Cir. 2000) (describing Indianapolis statute).

157. See *supra* notes 98–99 (discussing law at issue in *Young*).

158. See *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 551–52 (4th Cir. 2013) (describing relevant statute).

159. See *ACLU v. City of Las Vegas*, 466 F.3d 784, 787–89 (9th Cir. 2006) (describing Las Vegas statute and aspirations of turning relevant area into tourist destination).

roadways¹⁶⁰ and Fort Lauderdale banned panhandling on public beaches.¹⁶¹ Sometimes location-based laws regulate rather than outright ban panhandling: Springfield, Illinois, enacted such a law in its downtown¹⁶²—a center for Lincoln-related tourism¹⁶³—as did Seattle, which regulated street performers at Seattle Center, a popular park and home of the Space Needle.¹⁶⁴ Critics of location-based regulation charge that banning panhandling in well-trafficked areas is akin to banning panhandling outright, as populated public areas are the only areas where a beggar can profit from his or her solicitations.¹⁶⁵

While the categories are not rigid and many laws exhibit characteristics of multiple categories, this categorization allows for a useful framework to discuss and compare different panhandling regulations. It is especially important to distinguish different categories, because as the next section and Part III discuss, blanket and location bans historically have run afoul of intermediate scrutiny tailoring requirements, while aggressive-panhandling bans have more problems with content neutrality. As discussed in section II.C and Part III, however, under the new framework of *Reed v. Town of Gilbert*,¹⁶⁶ current doctrine treats all of these categories as content-based laws.

2. *Differing Appellate Treatment for Differing Panhandling Laws.* — Using the tripartite categorization of panhandling laws shows a pattern in how courts have treated such laws. Few cases involve blanket bans, most likely because drafters of ordinances fear such laws will not survive courtroom challenges.¹⁶⁷ It is telling that in the recent case of *Thayer v. City of Worcester*, the city's lawyers conceded that courts often find blanket bans and location bans with large areas unconstitutional, while attesting

160. See *Reynolds v. Middleton*, 779 F.3d 222, 224 (4th Cir. 2015) (describing ordinance).

161. See *Smith v. City of Fort Lauderdale*, 177 F.3d 954, 955–56 (11th Cir. 1999) (describing statute and importance of public beach to Fort Lauderdale tourism industry).

162. *Norton v. City of Springfield*, 806 F.3d 411, 412 (7th Cir. 2015) (discussing Springfield panhandling law).

163. Planning a Visit?, Abraham Lincoln Presidential Library & Museum, <http://www.lincolnlibraryandmuseum.com/lincoln-tour.htm> [<http://perma.cc/FX5A-M4DQ>] (last visited Feb. 3, 2016) (noting Lincoln Library's location in Springfield Historic District near state capitol).

164. See *Berger v. City of Seattle*, 569 F.3d 1029, 1035–37 (9th Cir. 2009) (en banc) (describing rule and Seattle Center).

165. See Nat'l Law Ctr. on Homelessness & Poverty, No Safe Place: The Criminalization of Homelessness in U.S. Cities 21 (2014), http://www.nlchp.org/documents/No_Safe_Place [<http://perma.cc/Q88T-UE63>] (noting impact of location-based bans “can be as great as that of a city-wide ban . . . because commercial and tourist districts . . . are often the only places where homeless people have regular access to passersby and potential donors”).

166. 135 S. Ct. 2218 (2015).

167. See *supra* notes 150–154 and accompanying text (noting proponents of panhandling laws advocating for more tailored statutes in order to avoid constitutional issues).

to the constitutionality of targeted location bans and aggressive-panhandling bans.¹⁶⁸

a. *Location and Blanket Bans.* — In the one federal appellate court case considering a blanket ban after *Loper*, the Sixth Circuit ruled that the ban violated the Constitution.¹⁶⁹ Because the case involved a facial challenge, the Sixth Circuit reached its conclusion using an overbreadth analysis.¹⁷⁰ The court also described the regulation as content based, because it distinguished between panhandling and other forms of solicitation.¹⁷¹ This went further than even the Second Circuit in *Loper*, which instead applied intermediate scrutiny to what that court felt was a content-neutral law.¹⁷² Curiously, the Sixth Circuit also implied a regulation of panhandling—perhaps an anti-aggressive-begging statute—might pass muster if it held “due regard” for First Amendment interests.¹⁷³ Other than a clearly unconstitutional act banning all solicitation, it is impossible to imagine a panhandling regulation that could be more content neutral.¹⁷⁴

168. See Brief in Opposition to the Petition for a Writ of Certiorari at 22–23, *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014), vacated, 135 S. Ct. 2887 (2015) (mem.) (No. 14-428), 2014 WL 6449706 (arguing “First Circuit properly determined that the Worcester Ordinances are content-neutral, as they are not a broad ban on panhandling or solicitation”).

169. See *Speet v. Schuette*, 726 F.3d 867, 870, 880 (6th Cir. 2013) (holding “anti-begging ordinance” that makes it illegal to beg in public place “violates the First Amendment”).

170. See *id.* at 872–73. The overbreadth doctrine invalidates a law that unnecessarily includes substantial amounts of legitimate protected speech in its attempt to satisfy its stated interest. See *Sullivan & Feldman*, *supra* note 32, at 1292–93 (noting relationship between facial challenges and vagueness and overbreadth). The recent case of *United States v. Stevens* illustrates this concept: The Supreme Court invalidated a law proscribing video recordings of animal cruelty because the statute could apply to videos protected by the First Amendment, such as those depicting hunting and religious ceremonies. 559 U.S. 460, 473 (2010) (describing overbreadth doctrine). Due to the overbreadth doctrine’s scope in invalidating laws, courts are cautious in its application. See *United States v. Williams*, 553 U.S. 285, 293 (2008) (noting overbreadth is “strong medicine” that is not to be “casually employed” (quoting *L.A. Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 39 (1999))).

171. See *Speet*, 726 F.3d at 870 (describing “Michigan’s anti-begging statute” as discriminating against forms of solicitation “based on content”).

172. See *supra* note 110 and accompanying text (discussing *Loper*’s treatment of panhandling ban as content neutral).

173. See *Speet*, 726 F.3d at 880 (stating “Michigan may regulate begging” but only if respecting free-speech values that begging contains).

174. See *supra* section II.C (discussing recent change in content-based determinations). It is important to note that the government would also be powerless to enact a law banning all solicitation in a public forum due to the holding in *Schaumburg*. See *supra* notes 26–28 and accompanying text (discussing charitable-solicitation cases). In one case, *United States v. Kokinda*, a plurality of the Court held a restriction on all solicitation around U.S. post offices was content neutral. 497 U.S. 720, 736–37 (1990) (plurality opinion) (O’Connor, J.). This case, like *Lee*, rested on determining the area was

The Sixth Circuit's descriptions of the ban in that case might have been dicta, but in considering location bans, other circuits have held begging bans unconstitutional for similar reasons. In considering a ban on panhandling in downtown Charlottesville, the Fourth Circuit ruled:

The Ordinance plainly distinguishes between types of solicitations on its face. Whether the Ordinance is violated turns solely on the nature or content of the solicitor's speech: it prohibits solicitations that request immediate donations of things of value, while allowing other types of solicitations, such as those that request future donations, or those that request things which may have no "value"—a signature or a kind word, perhaps.¹⁷⁵

The Court went on to invalidate the law using a strict scrutiny standard.¹⁷⁶

Similar to the Fourth Circuit, the Ninth Circuit found a location ban on panhandling in downtown Las Vegas content based because it treated solicitation for immediate funds differently.¹⁷⁷ Blanket bans and large location bans have all but disappeared after *Loper* due to their lack of tailoring.¹⁷⁸ Some more limited location bans do exist,¹⁷⁹ although *Reed* will likely change that in the future.¹⁸⁰

b. *Aggressive Panhandling Bans.* — Unlike location and blanket bans, appellate courts have not universally struck down bans on aggressive panhandling. While the Ninth Circuit has predictably¹⁸¹ struck down such bans as content based,¹⁸² the Seventh Circuit has not. In *Norton v.*

a nonpublic forum and therefore does not conflict with *Schaumburg's* holding. See *id.* at 730 (holding post offices to be nonpublic forums).

175. *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 556, 559 (4th Cir. 2013), abrogated by *Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625 (4th Cir. 2016). For more discussion of *Clatterbuck*, see *infra* notes 211–212 and accompanying text.

176. *Clatterbuck*, 708 F.3d at 560 (finding statute not “least restrictive means” and therefore failing strict scrutiny).

177. See *ACLU of Nev. v. City of Las Vegas*, 466 F.3d 784, 787–88, 794 (9th Cir. 2006) (“Even if this distinction is innocuous or eminently reasonable, it is still a content-based distinction because it ‘singles out certain speech for differential treatment based on the idea expressed.’” (quoting *Foti v. City of Menlo Park*, 146 F.3d 629, 636 n.7 (9th Cir. 1998))).

178. See *supra* section II.B.1 (defining categories of panhandling regulation).

179. See, e.g., *Smith v. City of Fort Lauderdale*, 177 F.3d 954, 956 (11th Cir. 1999) (upholding panhandling ban for Fort Lauderdale Beach).

180. See *supra* section II.A (discussing panhandling as protected speech).

181. It is predictable because the same circuit had already ruled a more content-neutral law as content based in *ACLU of Nev.*, 466 F.3d at 787–88; see also *supra* note 177 and accompanying text (discussing case).

182. See *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2008) (en banc). In that case, an ordinance in Seattle allowed for street performances next to “captive audiences” waiting in line at Seattle Center, a public park frequented by tourists, but outlawed any “active solicitation” or direct requests for funds. See *id.* at 1036–37 (describing statute and Seattle Center). Thus, a person could perform a routine with a hat on the ground for donations but could not ask for people to put money in the hat. *Id.* The Ninth Circuit ruled the ordinance content based (and that it failed strict scrutiny), as enforcement

City of Springfield, the Seventh Circuit found a ban on panhandling in downtown Springfield, Illinois, content neutral and constitutional.¹⁸³ The ban allowed silent panhandling but prevented active, verbal solicitations for immediate funds.¹⁸⁴ The ban had both elements of a location-based and aggressive-panhandling ban, albeit with a very low bar for what constituted aggressive.¹⁸⁵ Similarly, in *Thayer v. City of Worcester*, Justice Souter—sitting by designation on the First Circuit—upheld Worcester’s aggressive-begging law after applying intermediate scrutiny.¹⁸⁶ The regulation required authorities to inquire not only into whether the speech involved solicitation but also if the speech contained aggressive or violent language.¹⁸⁷ Justice Souter wrote that because the speech in question did not involve the government disagreeing with a particular message, it therefore was content neutral.¹⁸⁸

The morass of appellate cases on panhandling shows that historically, while a consensus existed that blanket bans and broad-based location bans were unconstitutional, there was disagreement concerning whether aggressive begging (often with elements of location bans)

would require inquiring into the message of the speech. *Id.* at 1052 (“How else would an officer determine whether a performer’s tip-of-the-cap was accompanied by a permissible ‘Thank you’ or a prohibited ‘Please give?’”).

183. See *supra* notes 162–163 and accompanying text (describing Springfield statute at issue in *Norton*).

184. See *Norton v. City of Springfield*, 768 F.3d 713, 714 (7th Cir. 2014) (“The ordinance defines panhandling as an oral request for an immediate donation of money. Signs requesting money are allowed; so are oral pleas to send money later.”), *rev’d*, 806 F.3d 411 (7th Cir. 2015). The statute at issue in *Norton* also contained provisions prohibiting aggressive begging, such as using foul language or following pedestrians. See Eric Feldman, *Springfield Panhandling Case Turned Away By SCOTUS*, Fox Ill., (Feb. 29, 2016), <http://foxillinois.com/news/local/springfield-panhandling-case-turned-away-by-scotus-03-01-2016> [<http://perma.cc/8ZTW-BT3P>] (discussing portions of law still in effect after case was decided, including prohibition on panhandling people “standing in line and waiting,” “using profane or abusive language,” or “panhandling in a group or two or more persons”). Since these provisions did not apply to petitioner, they were not raised in any of the *Norton* decisions. See *Norton*, 806 F.3d at 412 (“Plaintiffs contend that the ordinance’s principal rule—barring oral requests for money now but not regulating requests for money later—is a form of content discrimination”).

The Eleventh Circuit treated a location ban as content neutral, but the holding is limited as, strangely, plaintiffs conceded the point. See *Smith*, 177 F.3d at 956 (“Plaintiffs do not dispute that [the statute] is content-neutral . . .”).

185. See *Berger*, 569 F.3d at 1036–37 (describing statute); see also *id.* at 1057 (“[N]one of the rules differentiate between benign, inoffensive conduct and aggressive, unwelcome acts. They simply deter or ban all relevant speech.”).

186. 755 F.3d 60, 78 (2014) (Souter, J.) (upholding Worcester panhandling regulation), *vacated*, 135 S. Ct. 2887 (2015).

187. See *id.* at 65 (discussing Worcester statute).

188. *Id.* at 67–68, 71.

should be upheld.¹⁸⁹ But as the next section will discuss, likely no regulation of panhandling is constitutional after *Reed*.

C. *Reed v. Town of Gilbert* Fundamentally Alters the Landscape

As the above section illustrated, appellate courts have struggled with where to draw the line between content neutral and content based speech regulations. This section describes how recent Supreme Court cases have changed the doctrinal landscape with the potential to bring uniformity to the law of panhandling regulation and content-neutral determinations as a whole.

The Supreme Court provided somewhat of an answer to what makes a law content neutral in the 2014 decision of *McCullen v. Coakley*.¹⁹⁰ While not explicitly overturning the previous abortion-protest case of *Hill v. Colorado*,¹⁹¹ the Court, in a 9-0 decision, struck down a Massachusetts law banning “knowingly standing” within thirty-five feet of a reproductive-health facility, with an exemption for clinic staff.¹⁹²

Chief Justice Roberts, as well as the liberal wing of the Court, found the law to be content neutral because it would not require authorities to “examine the content of the message that is conveyed to determine whether a violation has occurred,” since the law prohibited the conduct of those standing in the buffer zone regardless of their expression.¹⁹³ Thus, to Chief Justice Roberts, because the statute in question only regulated the place and not the content of the message, it was content neutral. The Court did inquire into whether the Massachusetts legislature had a content-based motive for enacting the legislation, but the Court ultimately accepted the legislature’s stated reasons of “public safety” and congestion as satisfying a content-neutral motive.¹⁹⁴ This contrasted with the approach in several appellate courts of analyzing the governmental motive to determine if there was intent to discriminate based on content.¹⁹⁵

189. See supra notes 169–172 and accompanying text (discussing appellate courts’ rejection of blanket bans similar to *Loper*).

190. 134 S. Ct. 2518 (2014).

191. 530 U.S. 703 (2000); see also supra notes 83–84 and accompanying text (discussing *Hill*).

192. *McCullen*, 134 S. Ct. at 2522.

193. *Id.* at 2531 (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)).

194. *Id.* at 2532 (concluding legislature acted “in response to a problem that was . . . limited” to areas statute sought to cover).

195. See, e.g., *Thayer v. City of Worcester*, 755 F.3d 60, 67 (1st Cir. 2014) (Souter, J.) (“In determining whether a particular regulation is content-neutral, the principal enquiry is ‘whether the government has adopted a regulation of speech because of disagreement with the message it conveys.’” (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989))), vacated, 135 S. Ct. 2887 (2015); *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 555 (4th Cir. 2013) (“In this inquiry, ‘[t]he government’s purpose is the controlling

Justice Thomas went even further in *Reed v. Town of Gilbert* in discussing the content neutrality of a law that treated certain types of signs, such as political ones, more favorably than signs indicating the time and place of events—in this case sermons for a small local church.¹⁹⁶ Finding the law content based, Justice Thomas formulated a two-part test: Courts should inquire into governmental motive only after determining if it is “content neutral on its face.”¹⁹⁷

Justice Thomas articulated the first step of the test—determining whether a law is “content neutral on its face”—in striking terms: “Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.”¹⁹⁸ Thus, *Reed* makes *McCullen* even more explicit: Any kind of parsing of the speech’s content merits strict scrutiny.¹⁹⁹ The sole inquiry needed in separating legal from illegal speech is whether the provision prohibits speech based on its substance.²⁰⁰

It is debatable, however, whether Justice Thomas’s formulation of the content-neutrality test is a radical shift in doctrine or a regurgitation of existing doctrine. Three of the six Justices joining his opinion—Justices Kennedy, Alito, and Sotomayor—filed a separate concurring opinion noting that certain types of restrictions, such as one regulating signs for one-time events, differently than other signs, would be content neutral since they do not “discriminate based on topic or subject.”²⁰¹ This seems to water down Justice Thomas’s belief that any parsing of content is unconstitutional; under his view, whether an event is a one-time event *is* a matter of message and content and would therefore be content based.

For Justice Kagan, however, the Thomas majority opinion marked a fundamental departure from existing precedent. In her concurrence in the judgment, she forcefully denounced the consequences of subjecting more laws to strict scrutiny under Justice Thomas’s formalist approach: “As the years go by, courts will discover that thousands of towns have such

consideration.” (quoting *Ward*, 491 U.S. at 791), abrogated by *Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625 (4th Cir. 2016).

196. 135 S. Ct. 2218, 2225–26 (2015).

197. *Id.* at 2228.

198. *Id.* at 2227.

199. *Id.* (holding facial distinctions within regulation “drawn based on the message a speaker conveys” are “subject to strict scrutiny”).

200. *Id.* at 2228 (“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.” (internal quotation marks omitted) (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993))). Of course, the content neutrality of the law is a necessary but not sufficient condition; a law could still fail the second part of the test due to the enacting government having a discriminatory intent. *Id.*

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

ordinances, many of them entirely reasonable. And as the challenges to them mount, courts will have to invalidate one after the other.”²⁰²

Panhandling regulations can be classified into three distinct categories, which have often received different treatment among the appellate courts. This current state of affairs will likely change with the Supreme Court’s *Reed* decision: Under the new framework, all panhandling regulations will likely be considered content based and therefore unconstitutional. Yet, as the next Part shows, interpreting *Reed* and its effects is no simple matter.

III. A NEW PARADIGM

This Part describes how the vast majority of panhandling regulations are vulnerable to First Amendment challenges after *Reed* and offers a solution to the possibility that almost all panhandling regulation will be ruled unconstitutional. Section III.A demonstrates that nearly all existing panhandling laws are unconstitutional. Section III.B offers a possible solution that would enable courts to uphold meritorious panhandling laws: By invoking the fundamental rights invoked in the captive audience doctrine, courts could allow some regulations to pass strict scrutiny. Regardless of whether courts adopt this solution, this Part makes it clear that after *Reed*, the doctrinal status quo concerning panhandling laws is untenable.

A. *Panhandling Laws Are Likely Unconstitutional*

While the various opinions in *Reed v. Gilbert* might suggest that a majority of the Court is not ready to embrace Justice Thomas’s bright-line-rule formulation of content-based laws,²⁰³ the Court has already signaled that it envisions *Reed* overturning content-based laws. In *Thayer v. City of Worcester*, the Court remanded the decision to be considered in light of *Reed*,²⁰⁴ effectively overruling former-Justice Souter’s views that aggressive-begging statutes are content neutral.²⁰⁵ On remand, the district court predictably held that under *Reed*, Worcester’s statute was content based and failed strict scrutiny.²⁰⁶ The District of Massachusetts has also struck down an aggressive-begging statute in Lowell, Massachusetts,

202. *Id.* at 2239 (Kagan, J., concurring in the judgment) (citations omitted) (internal quotation marks omitted) (quoting *id.* at 2231 (majority opinion)).

203. See *supra* section II.C (discussing *Reed*).

204. *Thayer v. City of Worcester*, 135 S. Ct. 2887, 2887 (2015) (mem.).

205. See *supra* notes 186–188 and accompanying text (discussing Souter’s *Thayer* opinion).

206. See *Thayer v. City of Worcester*, No. 13-40057-TSH, 2015 WL 6872450, at *12–13 (D. Mass. Nov. 9, 2015) (declaring aggressive-panhandling law was content based). The District Court Judge, Timothy Hillman, originally found the law to be content neutral when the case first entered the court system, see *Thayer v. City of Worcester*, 979 F. Supp. 2d 143, 154–55 (D. Mass. 2013).

with language indicating that the court views *Reed* as holding *any* panhandling regulation to be content based by its very nature:

[T]he Ordinance distinguishes solicitations for immediate donations from all others. A person could vocally request that passersby in the Historic District make a donation tomorrow, but not today (a distinction that may be of great import to someone seeking a meal and a bed tonight). He could ask passersby to sign a petition, but not a check. The City's definition of panhandling targets a particular form of expressive speech—the solicitation of immediate charitable donations—[an]d applies its regulatory scheme only to that subject matter.²⁰⁷

Similarly, the Seventh Circuit has interpreted *Reed* as compelling the conclusion that aggressive-panhandling laws are content based. Judge Easterbrook, overturning his earlier *Norton v. City of Springfield* decision,²⁰⁸ defined the new legal landscape in stark terms: “Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification,”²⁰⁹ and the Supreme Court has denied a petition of certiorari from the City of Springfield.²¹⁰ The Fourth Circuit has also abrogated its current doctrine from *Clatterbuck v. City of Charlottesville*²¹¹ on content neutrality in panhandling laws.²¹² And the District of Colorado has held a panhandling law in Grand Junction to be content based in light of *Reed*.²¹³

207. *McLaughlin v. City of Lowell*, No. 14-10270-DPW, 2015 WL 6453144, at *4 (D. Mass. Oct. 23, 2015).

208. 768 F.3d 713 (7th Cir. 2014); see *supra* notes 183–188 and accompanying text (discussing *Norton*).

209. *Norton v. City of Springfield*, 806 F.3d 411, 412 (7th Cir. 2015). The ordinance in *Norton* had other bans on aggressive panhandling such as abusive language that seem even more content based and thus ripe for judicial challenge. See *supra* note 184 (discussing statute in greater detail).

210. *City of Springfield v. Norton*, 136 S. Ct. 1173 (2016) (mem.).

211. 708 F.3d 549 (4th Cir. 2013), abrogated by *Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625 (4th Cir. 2016). In *Clatterbuck* the Fourth Circuit held a panhandling law to be content based, see *supra* note 173 and accompanying text, but had used the government's purpose as a “controlling consideration.” *Clatterbuck*, 708 F.3d at 555; *supra* note 195 and accompanying text (discussing *Clatterbuck* and content neutrality).

212. *Cent. Radio Co.*, 811 F.3d at 632 (abrogating *Clatterbuck* because *Reed* holds any distinction based on “idea or message expressed” as content based (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015))).

213. *Browne v. City of Grand Junction*, No. 14-cv-00809-CMA-KLM, 2015 WL 5728755, at *7–11 (D. Colo. Sept. 30, 2015) (applying test in *Reed* to find panhandling regulation content based). The day after *Browne*, Denver suspended enforcement of its panhandling ordinance. See Training Bulletin, Denver Police Dep't, Colorado District Court Strikes Down Grand Junction Aggressive Panhandling Ordinance 1 (Oct. 1, 2015), <http://static.aclu-co.org/wp-content/uploads/2014/03/panhandling.DPD-Bulletin.10-1-15-2.pdf> [<http://perma.cc/CD9Z-65R8>].

Aggressive-panhandling laws—originally envisioned as a way to regulate panhandling without threatening free speech²¹⁴—are poised to be the first casualty of *Reed*'s new formulation of content neutrality. Under any formulation of Justice Thomas's opinion, it is nearly impossible to imagine them surviving constitutional challenges.

As aggressive-panhandling laws target threatening language or persistent solicitations, they clearly regulate based on the message of the speech. It is a further step still to call blanket bans on panhandling and solicitation of immediate funds content neutral. Location and blanket bans ask only whether a beggar solicited money, not how he or she did so. Under Justice Kennedy's concurrence in *Lee*, this act of requesting immediate funds is conduct as opposed to speech.²¹⁵ Under Justice Kennedy's view then, blanket and location bans discriminate only on the basis of conduct.

Yet while asking for money does contain elements of conduct it also involves at least some speech. And this speech element is all that is needed under *Reed*.²¹⁶ As the Sixth Circuit points out in *Speet v. Schuette*, blanket bans still require discerning between types of solicitation.²¹⁷ For blanket bans, it would be impossible to know if a solicitation took place or was immediate without determining the content of the solicitation. An authority must inquire whether the panhandler simply said, "Good morning" or "Good morning, can you spare some change?" By examining the content of the speech, this analysis fails Justice Thomas's content-neutrality test. And unlike Justice Kennedy's test in *Lee*, the justification or purpose for the panhandling ban would not save a facially content-based regulation after *Reed*.²¹⁸

Furthermore, even if a court viewed a blanket ban as content neutral, such regulation would still almost certainly fail intermediate scrutiny.²¹⁹ Blanket bans afford no alternative means of communication,²²⁰ thus failing any time, place, or manner standard.²²¹ Even if a

214. See *supra* notes 150–152 and accompanying text (discussing origins of aggressive-begging laws).

215. See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 705 (1992) (expressing Justice Kennedy's views that panhandling is conduct); see also *supra* note 142–144 (discussing Justice Kennedy's views on panhandling and conduct).

216. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (laying forth Justice Thomas's new content-neutrality test); see also *supra* notes 196–201 (discussing new test).

217. 726 F.3d 867, 870 (6th Cir. 2013) ("Michigan's anti-begging statute cannot withstand facial attack because it prohibits a substantial amount of solicitation, an activity that the First Amendment protects, but allows other solicitation based on content.").

218. See *Reed*, 135 S. Ct. at 2228 (noting government intent is entirely divorced from content-neutrality determinations).

219. It is important to note that the court in *Loper* evaluated a blanket ban under intermediate scrutiny but still found it to be a constitutional violation. See *supra* note 110 and accompanying text (noting *Loper* court treated regulation as content neutral).

220. See *supra* notes 114–116 and accompanying text (noting *Loper*'s ruling concerning alternative means of communication).

court applied an *O'Brien* test without an alternative means requirement, a court could not plausibly construe a broad regulation on all immediate solicitation as reasonably tailored or a closely drawn legislative solution to the problem of potential duress or threats.²²²

And in the incredibly unlikely event a blanket ban was both content neutral and narrowly tailored enough to pass intermediate scrutiny, an overbreadth challenge like that in *Speet* would likely succeed because the law would prevent First Amendment-protected solicitation in an attempt to prevent unprotected solicitation.²²³ Thus, despite the colorable argument that blanket bans are content neutral because one could conceive of them hinging only on what type of conduct is at issue, they lack the tailoring needed to pass the current consensus among appellate courts concerning tailoring of panhandling regulation.

Unlike blanket bans, location bans have a higher chance of passing intermediate scrutiny because they arguably allow for alternative methods of communication since they allow for panhandling in areas not covered by the location ban. But such a conclusion is not entirely convincing, as many location bans operate as de facto blanket bans that prohibit panhandling in the only areas of town worth begging in.²²⁴ A beggar lacking the ability to panhandle in areas with commercial or tourist traffic has no real meaningful alternative: There is good reason that beggars are not found among residential streets or industrial districts. The only location bans that would offer a meaningful alternative are those not focused on areas of commerce or foot traffic but those that protect very specific public areas where pedestrians are vulnerable.²²⁵

221. See *supra* notes 52–55 and accompanying text (discussing differences between *O'Brien* and time, place, and manner tests and noting some courts view alternative means of communication as requirement only for latter legal standard).

222. See *supra* notes 47–48 and accompanying text (discussing intermediate scrutiny requirement for closely drawn statutes). It is true that Justice Kennedy argued against this point in *Lee*, stating that seeking solicitations in the future serves as an alternative form of communication satisfying the time, place, and manner test. See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 707–08 (1992) (Kennedy, J., concurring in the judgments) (“Requests for money continue to be permitted, and in the course of requesting money solicitors may explain their cause, or the purposes of their organization, without violating the regulation. It is only if the solicitor accepts immediate payment that a violation occurs.”). While this might hold true for Hare Krishnas seeking donations, it does not hold muster for those panhandling: A beggar cannot secure future donations like an organized religion can. Finally, appellate courts have also universally adopted and embraced *Loper* and its condemnation of blanket bans on panhandling. See *supra* notes 121–128 and accompanying text (noting *Loper*'s wide adoption).

223. See *Speet v. Schuette*, 726 F.3d 867, 880 (6th Cir. 2013) (striking down statute using overbreadth doctrine).

224. See *supra* note 165 and accompanying text (discussing critiques of location bans).

225. The Fourth Circuit has recently considered a case where a Virginia county prevented panhandling on its roadways to protect pedestrian safety. See *Reynolds v. Middleton*, 779 F.3d 222, 224 (4th Cir. 2015) (describing ordinance at issue in case).

Thus like blanket bans, almost all location bans would fail intermediate scrutiny.

After *Reed*, panhandling regulations exist in a state of extreme vulnerability. Already, courts have held that under *Reed*, panhandling regulations discriminate on the basis of content.²²⁶ Aggressive-panhandling bans, which determine legality on the basis of how the speech is said, are especially vulnerable to being held content based. Location and blanket bans might have a better chance of being content neutral, but as they require examination of the expression in question, they are likely content based under *Reed* as well. And due to their lack of tailoring, intermediate scrutiny and overbreadth challenges also pose considerable danger to location and blanket bans. In the wake of *Reed*, panhandling regulation in America looks increasingly moribund.²²⁷

B. *The Captive Audience Doctrine Is the Appropriate Framework for Evaluating Such Laws*

This section proposes a possible solution to the problem of panhandling regulation in a post-*Reed* world. This section discusses whether municipalities need panhandling regulation at all. It then argues that cities can benefit from narrowly tailored regulation that protects captive audiences and proposes a framework for courts to balance the First Amendment rights of both speakers and listeners in the strict scrutiny context. Finally this section discusses how alternative doctrinal strategies to upholding panhandling laws do not sufficiently protect First Amendment interests.

Treating the regulation as content neutral, the court struck down the ordinance in part because the county did not attempt to ban panhandling only at busy intersections where there was evidence panhandling could or did create dangerous traffic situations. See *id.* at 231–32 (“That is, there is no evidence that the County ever tried to improve safety by prosecuting any roadway solicitors who actually obstructed traffic, or that it ever even considered prohibiting roadway solicitation only at those locations where it could not be done safely.”). Such a requirement of specific data would make such an ordinance far more difficult to enact and curtail its potential scope greatly. It is important to note that this case was decided several months before *Reed* and did not even address the likely possibility the ordinance would now be content based under Justice Thomas’s formulation of content neutrality.

226. See *supra* notes 204–213 and accompanying text (discussing *Reed*’s effects on panhandling laws).

227. That is not to say that municipalities have stopped trying to enact panhandling laws. See, e.g., Mid-Hudson News Network, Poughkeepsie to Crack Down on “Aggressive Panhandling,” *Daily Freeman* (Apr. 6, 2016, 6:53 AM), <http://www.dailyfreeman.com/general-news/20160406/poughkeepsie-to-crack-down-on-aggressive-panhandling> (on file with *the Columbia Law Review*) (discussing proposed Poughkeepsie, New York aggressive panhandling law). Furthermore, many panhandlers lack the means to challenge law or to vindicate their rights. See Rakin, *supra* note 153 (manuscript at 38) (noting poor have difficulty getting panhandling claims into court). But with more and more courts finding panhandling laws content based—evaporating panhandling laws—eventually cities will be deterred from enacting and enforcing panhandling regulation.

A possible solution for cities after *Reed* is to accept their inability to legislate panhandling in public forums and to rely on other laws, such as harassment, to stop the worst actors who engage in repeated following or threats.²²⁸ While laws might successfully curb some negative behavior, requirements such as intent or fear of physical injury would leave much aggressive and potentially coercive solicitation as legal.²²⁹

It is also important to note that while panhandling has positive effects on a free society,²³⁰ it also has several downsides. Panhandlers can pressure people into giving money against their will²³¹ or in some instances commit outright fraud.²³² Perhaps even more troubling is that beggars and panhandlers, some of whom suffer from mental disorders or alcohol and drug addictions, can prove dangerous to individuals' safety.²³³ Finally, the pestering nature of some panhandlers can make citizens "callous" to the plight of the homeless and perhaps less likely to give to institutional charities or support political positions that protect the needy.²³⁴

Therefore, within the realm of constitutional reason, it seems that municipalities should have some leeway to regulate *some* panhandling. While Justice Thomas's bright-line rule in *Reed* does not differentiate among panhandling laws,²³⁵ the laws themselves have very different impacts on speech: Blanket bans and location bans unjustly chill all panhandlers including those passively asking for change, while aggressive bans that are sufficiently targeted against bad actors, seem a reasonable method for cities to protect their streets when audiences are captive. Yet, such aggressive-panhandling laws are by their very definition contingent on the speech's message and therefore content based.²³⁶ This Note proposes the solution that while aggressive-begging laws might be

228. As an example, New York's harassment laws make it illegal to follow a person in public with an intent to annoy or harass, see N.Y. Penal Law § 240.26 (McKinney 2008), or harasses them in a way to make them fear physical injury, *id.* § 240.25.

229. See *id.* §§ 240.25–26.

230. See *supra* notes 117–120 (discussing beneficial aspects of panhandling).

231. See Roger Conner, *Aggressive Panhandling Laws: Do These Statutes Violate the Constitution?, No: A Solution to Intimidation*, A.B.A. J., June 1993, at 40–41 (arguing many, especially women and elderly, feel "they have narrowly escaped being mugged, assaulted, and robbed" after giving money to panhandlers).

232. See, e.g., Joseph Goldstein & Jeffrey E. Singer, *If He Walks and Talks Like a Monk, but Has His Hand Out*, N.Y. Times (July 5, 2014), <http://www.nytimes.com/2014/07/06/nyregion/panhandlers-dressed-as-monks-confound-new-yorkers.html> (on file with the *Columbia Law Review*) (discussing panhandlers in Times Square impersonating Buddhist monks in effort to receive money).

233. See Teir, *supra* note 150, at 290 & nn.14–15 (describing instances in which panhandlers posed significant safety risks).

234. See Millich, *supra* note 117, at 257, 266–69 (describing problem known as "compassion fatigue" where panhandling makes listeners of the speech less receptive to helping poor).

235. See section II.C (discussing *Reed*).

236. See *supra* section II.B.2.a (discussing aggressive-begging laws).

content based and subject to strict scrutiny, that does not mean they are necessarily unconstitutional.²³⁷

The Court has shown a willingness to uphold laws on strict scrutiny when the regulation in question protects important rights.²³⁸ For example, in *Burson v. Freeman*, a regulation on political speech around polling places passed strict scrutiny due to the importance of the fundamental right of voting in an election free of intimidation and fraud.²³⁹

Panhandling challenges should be seen as a struggle between two First Amendment rights: the right of beggars to express themselves and bystanders to remove themselves from uncomfortable speech.²⁴⁰ This approach, while never broadly advocated for, does have some support from Judge Alex Kozinski of the Ninth Circuit. In his dissent in *Berger*, Judge Kozinski argued that “[c]itizens visiting the Center also have First Amendment rights: to enjoy the arts, music and programs offered there.”²⁴¹ This captive audience approach would also yield results more in line with what one would expect and desire doctrine to produce within the categorical framework of panhandling laws:

- Aggressive-begging statutes that targeted panhandlers who make their audiences captive would possess a chance of passing strict scrutiny.
- Extremely specific location bans in places like subway cars²⁴² or lines for popular attractions where audiences cannot avoid panhandling would also stand a chance at surviving such a balancing test regardless of whether or not those venues were public or nonpublic forums. More general location bans, such as

237. See *supra* notes 35–38 and accompanying text (discussing how laws discriminating on subject matter rarely, but sometimes do, pass strict scrutiny test). It is also possible, as Justice Breyer noted in his opinion in *Reed*—concurring in the judgment and joining Justice Kagan’s opinion—that *Reed*’s new test will force courts to water down the strict scrutiny test because so many regulations will now be content based. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2235 (2015) (Breyer, J., concurring in the judgment) (“[T]he Court could escape the problem by watering down the force of the presumption against constitutionality that ‘strict scrutiny’ normally carries with it. But, in my view, doing so will weaken the First Amendment’s protection in instances where ‘strict scrutiny’ should apply in full force.”). As there is not yet evidence of dilution of the strict scrutiny test, this Note will work under the assumption that *Reed* will not alter the strict scrutiny test’s meaning.

238. See Case Comment, *McCullen*, *supra* note 39, at 228 (noting argument for passing strict scrutiny “is particularly strong when the restriction on speech serves to advance another constitutional interest”).

239. 504 U.S. 191, 211 (1992). A recent *Harvard Law Review* comment argued for a balancing of abortion rights with those of speech rights for abortion-protest cases. See Case Comment, *McCullen*, *supra* note 39, at 229 (arguing for upholding of some laws under strict scrutiny in order to “advance another constitutional interest”).

240. See *supra* section I.C (discussing captive audience doctrine).

241. *Berger v. City of Seattle*, 569 F.3d 1029, 1062 (9th Cir. 2009) (en banc) (Kozinski, J., dissenting); see also *supra* note 182 (discussing *Berger*).

242. See *supra* notes 98–99 and accompanying text (discussing ordinance in *Young*).

those in a popular area of town, would fail because it would ensnare panhandlers who did not create a captive environment.

- Blanket bans, which would prevent panhandling that did not create a captive audience, would fail constitutional challenges.

This Note is under no Pollyannaish notion that it is extremely probable courts would adopt the captive audience doctrine to rule panhandling laws constitutional. *McCullen v. Coakley* seemingly has scaled back the importance of captive audience rights. *McCullen*, however, pertained to a wide-open sidewalk where people could walk away after a short amount of time. Aggressive panhandling situations could certainly involve a more “captive audience.” Furthermore, the issue in *McCullen* was whether the protesters had the right to protest in front of the clinic at all—not whether they were prohibited from certain abusive language or scare tactics.²⁴³ And using the captive audience doctrine is more attractive when considering the alternative methods to saving panhandling regulations.

For example, some may propose that an approach to preserve regulations after *Reed* would be the so-called secondary-effects doctrine,²⁴⁴ which allows for a court to treat a regulation as content neutral if it is aimed at the secondary effects of the speech, such as increasing crime rates or other threats to public safety.²⁴⁵ This doctrine has its roots—and is almost exclusively applied—in the context of strip clubs and other adult-entertainment venues.²⁴⁶ In addition to the fact that it is unlikely the court will explicitly expand the secondary-effects doctrine beyond the purview of sexual speech, panhandling laws directly target the act and conduct of panhandling and the direct risk that the speech will involve possible fraud or duress, not incidental crimes that panhandling would encourage. Furthermore, it seems impossible to prove that panhandling is the *cause* of increased crime in an area. A large number of tourists or poor people are in conditions where both panhandling and other crimes thrive, but that does not mean that panhandling is the cause of those crimes. Finally, after *Reed* it is still an

243. See *McCullen v. Coakley*, 134 S. Ct. 2518, 2525 (2014) (discussing Massachusetts statute banning standing and therefore protesting in front of abortion clinics).

244. See William L. Mitchell II, Comment, “Secondary Effects” Analysis: A Balanced Approach to the Problem of Prohibitions on Aggressive Panhandling, 24 U. Balt. L. Rev. 291, 322–26 (1994) (arguing for using secondary-effects doctrine to justify panhandling regulation).

245. See David L. Hudson, Jr., The Secondary-Effects Doctrine: Stripping Away First Amendment Freedoms, 23 Stan. L. & Pol’y Rev. 19, 19–20 (2012) (defining doctrine).

246. See, e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–48 (applying secondary-effects doctrine to regulation of adult cinema); Mark Rienzi & Stuart Buck, Neutral No More: Secondary Effects Analysis and the Quiet Demise of the Content-Neutrality Test, 82 Fordham L. Rev. 1187, 1189 (“Modern commentary suggests most scholars agree that the secondary effects doctrine has been largely cabined to sexually explicit speech.”). But see *id.* at 1210–11 (arguing secondary-effects doctrine has seeped into (pre-*Reed*) content-neutrality determinations).

open question if the secondary-effects doctrine remains relevant in determining content-based speech regulations.

Another likely avenue cities may look to in order to continue regulating panhandling after *Reed* is that of the nonpublic forum.²⁴⁷ Unlike regulations for public forums, laws modifying nonpublic forums only need to avoid viewpoint discrimination and be reasonable.²⁴⁸ New York City's ban on begging on the subways is therefore likely constitutional, even after *Reed*.²⁴⁹ Cities may begin to adopt a strategy of using nonpublic forums, or carefully constructed designated public forums,²⁵⁰ to enforce at least some of their previously unconstitutional bans. Indeed, New York City is considering assigning large portions of Times Square as either "civic zones" or "flow zones" where panhandling is not allowed, while assigning other parts of the square as "activity zones."²⁵¹ But using nonpublic forums as a way to curb unwanted panhandling is far from an ideal solution. Not only is it difficult for a city to say that much of its public space is not a public forum, but if a city could carry out the difficult task of deeming much of its space nonpublic forums, it would have further latitude to create panhandling and other speech laws. If this were to come to pass, *Reed* would have the unintended consequences of removing public space and creating more speech regulation as cities are forced to resort to other means to pass laws on panhandling.

Unlike the secondary-effects doctrine or using nonpublic forums, the captive audience doctrine allows for transparency and honesty among the courts concerning First Amendment rights. Using such an approach will allow for normative choices about what First Amendment

247. For a definition of nonpublic forums, see *supra* notes 62–65 and accompanying text.

248. See *supra* notes 66–68 and accompanying text (discussing scrutiny for nonpublic forums).

249. This would also extend to the Port Authority's bans in the World Trade Center and the Port Authority Bus Terminal. See *supra* note 13 (discussing bans in New York City subway and other locations).

250. For a definition of designated public forums, see *supra* notes 58–61 and accompanying text.

251. See A Roadmap for a 21st Century Times Square, A Better Times Square, <http://www.abettertimesquare.org/the-plan/> [<http://perma.cc/7V58-WR6L>] (last visited Apr. 4, 2016) (outlining plan to reduce panhandling in Times Square); see also Jonathan Lemire, Times Square's Topless Women Discussed at Task Force Meeting, Associated Press (Sept. 17, 2015, 6:56 PM), <http://bigstory.ap.org/article/9eb3628be9a04a07a81cad98fb738783/task-force-meets-address-time-squares-topless-women> [<http://perma.cc/6B6S-3B8Q>]. As of the writing of this Note, the proposal had passed through the New York City Council, setting up a likely legal challenge in the future. See Emma G. Fitzsimmons, New York Moves on Restricting Costumed Characters in Times Square, N.Y. Times (Apr. 7, 2016), <http://www.nytimes.com/2016/04/08/nyregion/new-york-council-votes-to-allow-restrictions-on-times-square-performers.html> (on file with the *Columbia Law Review*) (noting City Council had allowed New York's Department of Transportation to enact new zones for Times Square and quoting one Spiderman performer as saying he would sue if he were arrested under new laws).

rights are important in our society as opposed to a bright-line rule that invalidates virtually all panhandling regulation and ignores the fact that both listeners and speakers have constitutional rights.

CONCLUSION

Panhandling, while never explicitly recognized as protected speech by the Supreme Court, has steadily gained acceptance throughout appellate courts as speech covered under the First Amendment.²⁵² The circuit courts did not agree, however, on how exactly to define those protections or whether to treat panhandling regulations as content based or content neutral. Justice Thomas's new two-step test in *Reed v. Town of Gilbert* seems to answer many of those questions, creating a definition for content-based laws that will likely result in many panhandling regulations being ruled content based and therefore struck down under the exacting requirements of strict scrutiny.²⁵³ Already, several panhandling regulations have been ruled as content based and unconstitutional under the *Reed* framework.²⁵⁴

In her *Reed v. Town of Gilbert* concurrence, Justice Kagan expressed concern about the invalidation of entirely reasonable laws under Justice Thomas's new two-step test to determine content neutrality.²⁵⁵ While certain panhandling laws are unreasonable restrictions on free speech, carefully tailored location and aggressive-panhandling bans that protect those who are captive to panhandlers seem to be the exact type of laws Justice Kagan was worried about. The solution to *Reed*'s shift in the doctrinal landscape is to analyze begging laws under strict scrutiny but also to balance the rights of those speaking with the fundamental First Amendment rights of their captive audiences. By doing this, courts can honor the listener's right not to have to endure harassing speech, value and protect the speaker's First Amendment rights, and allow for the streets of America's cities to be both pleasant thoroughfares and meaningful forums for expression.

252. See *supra* section I.A (discussing panhandling as constitutionally protected speech).

253. 135 S. Ct. 2218, 2227–28 (2015) (formulating two-part test for determining if laws discriminate based on content); see also *supra* section II.C (discussing *Reed*).

254. See *supra* notes 204–213 and accompanying text (discussing *Reed*'s effects on panhandling laws).

255. *Reed*, 135 S. Ct. at 2239 (Kagan, J., concurring in the judgment) (arguing *Reed* would have deleterious effects on First Amendment doctrine by invalidating too many laws as content based); see also *supra* note 202 and accompanying text (discussing Justice Kagan's concurrence in the judgment).