

*First Amendment — Freedom of Speech — Social Media —*  
TikTok Inc. v. Garland

Since it burst into American public consciousness in 2018, TikTok has amassed roughly 170 million monthly U.S. users and more than one billion worldwide users.<sup>1</sup> But with success came scrutiny. Amidst rising great-power competition between the United States and China,<sup>2</sup> U.S. policymakers sounded alarms over Chinese corporation ByteDance Ltd.’s ownership of TikTok Inc. and the resulting risk of data harvesting and content manipulation by the Chinese government.<sup>3</sup> In response, Congress passed a law banning TikTok in the United States unless ByteDance sold its ownership stake.<sup>4</sup> In *TikTok v. Garland*,<sup>5</sup> the Supreme Court affirmed the TikTok ban’s constitutionality.<sup>6</sup> Charting new ground in First Amendment doctrine, the Court held that a law enacted for a content-based purpose may nonetheless receive intermediate scrutiny if the government would have taken the same action anyway for a content-neutral purpose.<sup>7</sup> Flouting First Amendment principles, this doctrinal loophole grants judicial approval to government suppression of speech. Instead, the Court should have applied strict scrutiny, as it would have for any other content-based regulation.<sup>8</sup> Rather than eroding core First Amendment protections, the Court ought to have answered the difficult question of whether the TikTok ban satisfied strict scrutiny.

The TikTok ban emerged from a striking bipartisan consensus.<sup>9</sup> After both the first Trump Administration and the Biden Administration identified ByteDance’s ownership of TikTok as a national security threat,<sup>10</sup> Congress passed the Protecting Americans from Foreign

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<sup>1</sup> *TikTok Inc. v. Garland*, 122 F.4th 930, 940, 942 (D.C. Cir. 2024); Sapna Maheshwari, *Introduction, in An Incomplete Guide: Love, Hate or Fear It, TikTok Has Changed America*, N.Y. TIMES (Apr. 19, 2024), <https://www.nytimes.com/interactive/2024/04/18/business/media/tiktok-ban-american-culture.html> [<https://perma.cc/FDN9-LYWS>]; see also John Herrman, *How TikTok Is Rewriting the World*, N.Y. TIMES (Mar. 10, 2019), <https://www.nytimes.com/2019/03/10/style/what-is-tik-tok.html> [<https://perma.cc/6FD4-3QYV>] (describing the TikTok application and its popularity).

<sup>2</sup> See Simina Mistreanu, *A Timeline of US-China Tit-for-Tat Tariffs Since Trump’s First Term*, AP NEWS (Apr. 5, 2025, at 05:04 ET), <https://apnews.com/article/china-us-tariffs-timeline-trump-xi-1eed2865dc7b14e23d7eb8069ba41ea> [<https://perma.cc/K3QV-LW3Z>].

<sup>3</sup> *TikTok*, 122 F.4th at 941–42, 944.

<sup>4</sup> See *id.* at 939, 944.

<sup>5</sup> 145 S. Ct. 57 (2025) (per curiam).

<sup>6</sup> *Id.* at 72.

<sup>7</sup> See *TikTok*, 145 S. Ct. at 72.

<sup>8</sup> See *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015).

<sup>9</sup> See ChinaFile Contributors, *Is TikTok’s Time Finally Up?*, FOREIGN POL’Y (Mar. 19, 2024, 14:43 ET), <https://foreignpolicy.com/2024/03/19/tiktok-ban-united-states-china-house-data-cybersecurity> [<https://perma.cc/KD7S-D68C>].

<sup>10</sup> *TikTok Inc. v. Garland*, 122 F.4th 930, 942 (D.C. Cir. 2024) (quoting *Regarding the Acquisition of Musical.ly by ByteDance Ltd.*, 2020 DAILY COMP. PRES. DOC. 1 (Aug. 14, 2020); Exec. Order No. 13,942, 85 Fed. Reg. 48637, 48637 (Aug. 6, 2020); Exec. Order No. 14,034, 86 Fed. Reg. 31423, 31423 (June 9, 2021)).

Adversary Controlled Applications Act.<sup>11</sup> The legislation set general terms identifying foreign adversary-controlled applications and designated TikTok by name as such an application.<sup>12</sup> The Act “bar[red] other[ entities] from providing critical support in the United States”<sup>13</sup> to TikTok, such as “distribut[ing], maintain[ing], or updat[ing]” the application.<sup>14</sup> However, the Act exempted TikTok if ByteDance sold its ownership stake.<sup>15</sup>

Petitioners ByteDance Ltd., TikTok Inc., Based Politics Inc., and eight TikTok users challenged the Act’s constitutionality in the D.C. Circuit.<sup>16</sup> The court consolidated the three petitions and expedited the cases.<sup>17</sup> Seeking a declaratory judgment and an injunction against enforcement, the petitioners argued that the law burdened their speech in violation of the First Amendment, ran afoul of the Fifth Amendment’s Equal Protection principle and Takings Clause, and amounted to an unconstitutional bill of attainder.<sup>18</sup>

Writing for the panel, Judge Ginsburg first held that TikTok’s pre-enforcement claims met ripeness and standing requirements as applied to the Act’s TikTok-specific provisions.<sup>19</sup> Next, Judge Ginsburg explained that “the Act implicate[d] the First Amendment and [was] subject to heightened scrutiny.”<sup>20</sup> The court “assume[d] without deciding”<sup>21</sup> that strict scrutiny applied and concluded that the law survived.<sup>22</sup> Judge Ginsburg determined that the government’s interests in “counter[ing] (1) the PRC’s efforts to collect data of and about persons in the United States, and (2) the risk of the PRC covertly manipulating content on TikTok” were each “independently compelling national security interest[s].”<sup>23</sup> The Act was narrowly tailored to serve those interests, as it was limited to TikTok’s unique threat and allowed ByteDance to sell the application.<sup>24</sup> Judge Ginsburg rejected TikTok’s argument that less restrictive alternatives existed and held that the Act was neither over-

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<sup>11</sup> Pub. L. No. 118–50, 138 Stat. 955 (2024).

<sup>12</sup> *TikTok*, 122 F.4th at 944 (quoting § 2(g)(3)).

<sup>13</sup> *Id.* at 945.

<sup>14</sup> *Id.* (quoting § 2(a)(1)(A)).

<sup>15</sup> *Id.* (quoting § 2(c)(1)(A)). The Act set an enforcement date of January 19, 2025. *Id.*

<sup>16</sup> *Id.* at 941.

<sup>17</sup> *See id.* at 946.

<sup>18</sup> *See id.* at 946–47.

<sup>19</sup> *Id.* at 947–48.

<sup>20</sup> *Id.* at 948.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 948–49 (quoting *FEC v. Int’l Funding Inst., Inc.*, 969 F.2d 1110, 1116 (D.C. Cir. 1992)).

As discussed below, Judge Ginsburg emphasized that the level-of-scrutiny question was difficult because the law is “facially content neutral,” *id.* at 949, — “[it] do[es] not target speech based upon its communicative content,” *id.* at 950, — but “the Government justify[d] the Act . . . by reference to a foreign adversary’s ability to manipulate content,” *id.* at 949.

<sup>23</sup> *Id.* at 953.

<sup>24</sup> *Id.* at 961.

nor underinclusive.<sup>25</sup> He also disposed of petitioners' equal protection,<sup>26</sup> bill of attainder,<sup>27</sup> and Takings Clause<sup>28</sup> arguments and upheld the Act.<sup>29</sup>

Chief Judge Srinivasan, concurring in part and concurring in the judgment, argued that the law required only intermediate scrutiny, which it would survive.<sup>30</sup> He reasoned that the Act comported with a long history of laws restricting "foreign control of mass communications channels,"<sup>31</sup> and that it was enacted for the content-neutral purpose of data security.<sup>32</sup> As the Act lay "outside the First Amendment's heartland," strict scrutiny was unnecessary.<sup>33</sup>

The Supreme Court affirmed.<sup>34</sup> In a per curiam opinion, the Court, cautioning readers to interpret its holding narrowly,<sup>35</sup> upheld the Act under intermediate scrutiny.<sup>36</sup> First, the Court asserted that it was unclear whether the Act implicated the First Amendment, as the law did not directly regulate TikTok creators and regulated ByteDance and TikTok "only through the divestiture requirement."<sup>37</sup> The Court nevertheless "assume[d] without deciding" that the Act burdened expressive activity, thus warranting heightened scrutiny.<sup>38</sup> The Court then explained that strict scrutiny applies to facially content-based regulations that regulate "particular speech because of the topic discussed or the idea or message expressed."<sup>39</sup> If a law is facially content neutral, it may nevertheless be content based if it "cannot be 'justified without reference to the content of the regulated speech' or was 'adopted by the government because of disagreement with the message the speech conveys.'"<sup>40</sup> If either element is present, the law is content based and strict scrutiny applies.<sup>41</sup> If neither prong is true, the law is content neutral and merits only intermediate scrutiny.<sup>42</sup>

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<sup>25</sup> *Id.* at 961, 965.

<sup>26</sup> *Id.* at 965–67.

<sup>27</sup> *Id.* at 967–69.

<sup>28</sup> *Id.* at 969.

<sup>29</sup> *Id.* at 970.

<sup>30</sup> *Id.* (Srinivasan, C.J., concurring in part and concurring in the judgment).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 976.

<sup>33</sup> *Id.* at 970.

<sup>34</sup> *TikTok*, 145 S. Ct. at 72.

<sup>35</sup> *Id.* at 62–63.

<sup>36</sup> *Id.* at 69.

<sup>37</sup> *Id.* at 65.

<sup>38</sup> *Id.* at 66.

<sup>39</sup> *Id.* at 67 (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)).

<sup>40</sup> *Id.* (quoting *Reed*, 576 U.S. at 164); accord Genevieve Lakier, *Reed v. Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233, 235 (2017).

<sup>41</sup> See *TikTok*, 145 S. Ct. at 67; Lakier, *supra* note 40, at 233.

<sup>42</sup> *TikTok*, 145 S. Ct. at 67.

Here, the per curiam held that the Act was content neutral.<sup>43</sup> The Court explained that the Act was facially content neutral because it targeted TikTok “due to a foreign adversary’s control,” not “its content.”<sup>44</sup> TikTok argued that the exclusion of product, business, and travel review services from the Act’s purview was a facially content-based distinction.<sup>45</sup> But the Court responded that because the exclusions pertained to the Act’s general provisions — in other words, because TikTok would still be targeted if the Court struck those provisions — they were beyond the scope of TikTok’s as-applied challenge.<sup>46</sup> The Court then looked to the Act’s justifications.<sup>47</sup> It concluded that the Act had a content-neutral purpose, as its data security justification “neither reference[d] the content of speech on TikTok nor reflect[ed] disagreement with the message such speech conveys.”<sup>48</sup>

The Court further held that the Act’s direct focus on TikTok did not warrant heightened scrutiny.<sup>49</sup> The Court typically applies strict scrutiny to laws that burden speech on account of the identity of the speaker.<sup>50</sup> Yet the Court has sometimes made an exception when the speaker has “some special characteristic” that justifies “differential treatment.”<sup>51</sup> Here, the law singled out TikTok for a “special characteristic[]”: a “foreign adversary’s ability to leverage its control over the platform to collect vast amounts of personal data from 170 million U.S. users.”<sup>52</sup>

Having determined that intermediate scrutiny was appropriate, the per curiam held that the Act “further[ed] an important Government interest unrelated to the suppression of free expression.”<sup>53</sup> While China may not have used TikTok to access Americans’ data thus far, the Government’s worry was reasonable, and national security concerns garner “substantial respect.”<sup>54</sup> Although less restrictive alternatives existed, the Court held that the ban on TikTok was justified: The very fact of TikTok’s Chinese ownership implicated data protection concerns, and the inclusion of the option to sell TikTok was narrower than a full prohibition.<sup>55</sup> The Court also indicated in a footnote that its decision was based

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* (quoting Pub. L. No. 118–50, § 2(g)(2)(B), 138 Stat. 955, 958 (2024)).

<sup>46</sup> *Id.* at 68 (quoting §§ 2(g)(3)(A)–(B)).

<sup>47</sup> *See id.*

<sup>48</sup> *Id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 792–93 (1989)).

<sup>49</sup> *Id.*

<sup>50</sup> *See Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

<sup>51</sup> *TikTok*, 145 S. Ct. at 68 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 660–61 (1994)).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 69.

<sup>54</sup> *Id.* at 70.

<sup>55</sup> *Id.* at 71.

on the public record alone without considering the classified information that the Government filed.<sup>56</sup>

Finally, the Court reasoned that the existence of an impermissible content-based motive should not mandate strict scrutiny if the legislature would have passed the law solely to achieve an independent, content-neutral end.<sup>57</sup> The Court found two interests sufficient to justify passage of the Act: (1) safeguarding American users' data, and (2) preventing the Chinese government from manipulating TikTok's algorithm.<sup>58</sup> Declining to designate the proper standard under which to evaluate "mixed-justification" cases with both content-based and content-neutral rationales, the Court assumed without deciding that the "foreign adversary control justification" was content based.<sup>59</sup> The Court then discounted the content-based purpose, as its "counterfactual analysis" found sufficient evidence in the record that Congress would have passed the Act solely to address the data collection concerns.<sup>60</sup> Therefore, the content-based purpose did not taint the Act.<sup>61</sup> Further, the Court credited the Act's "striking bipartisan support" as reason to avoid "parsing Congress's motives."<sup>62</sup>

Justice Sotomayor, who concurred in part and concurred in the judgment, joined all but the per curiam's suggestion that the Act may not have implicated the First Amendment.<sup>63</sup> She asserted that under *Moody v. NetChoice, LLC*,<sup>64</sup> social media content curation is protected expression.<sup>65</sup> Thus, "our precedent [left] no doubt that" both free speech and expressive association were at issue.<sup>66</sup>

Justice Gorsuch concurred in the judgment.<sup>67</sup> First, he approved of the per curiam's decision not to endorse the prevention of "covert manipulation of content" as a compelling government interest because "[o]ne man's 'covert content manipulation' is another's 'editorial discretion.'"<sup>68</sup> Second, he approved on fairness grounds of the Court's disregard of the Government's classified evidence.<sup>69</sup> Third, while he "harbor[ed] serious reservations" about the Court's declaration that the Act was content neutral,<sup>70</sup> he questioned whether tiers of scrutiny were

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<sup>56</sup> *Id.* at 69 n.3.

<sup>57</sup> *Id.* at 72.

<sup>58</sup> *Id.* at 71.

<sup>59</sup> *Id.* at 72.

<sup>60</sup> *Id.*

<sup>61</sup> *See id.* at 71–72.

<sup>62</sup> *Id.* at 72.

<sup>63</sup> *Id.* at 73 (Sotomayor, J., concurring in part and concurring in the judgment).

<sup>64</sup> 144 S. Ct. 2383 (2024).

<sup>65</sup> *TikTok*, 145 S. Ct. at 73 (Sotomayor, J., concurring in part and concurring in the judgment) (quoting *Moody*, 144 S. Ct. at 2401).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* (Gorsuch, J., concurring in the judgment).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 74.

<sup>70</sup> *Id.*

the appropriate framework at all.<sup>71</sup> Nevertheless, he was convinced that the Act passed constitutional muster.<sup>72</sup> In his view, the Act was narrowly tailored to serve a compelling interest,<sup>73</sup> and thus, he rejected TikTok’s proposed alternatives.<sup>74</sup> Acknowledging the holding’s tension with First Amendment theories laid out in *Whitney v. California*<sup>75</sup> and *Abrams v. United States*,<sup>76</sup> he concluded: “[A]t this time and under these constraints, the problem appears real and the response to it not unconstitutional.”<sup>77</sup>

The *TikTok* Court’s refusal to apply strict scrutiny to the Act threatens core First Amendment protections. Generally, the existence of any content-based rationale calls for strict scrutiny.<sup>78</sup> Here, the Court found that two separate justifications motivated the passage of the Act: (1) Congress’s content-neutral interest in preventing the Chinese government from collecting American users’ data, and (2) its assumedly content-based interest in avoiding Chinese government manipulation of social media content in the United States.<sup>79</sup> Despite the presence of a content-based rationale, the Court deemed strict scrutiny unnecessary because “Congress would have passed [the Act] based on the data collection justification alone.”<sup>80</sup> To be sure, the Court correctly noted that TikTok did not identify any cases with both content-based and content-neutral rationales.<sup>81</sup> Yet First Amendment precedent and principles are clear: A content-based justification taints a facially neutral law and

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<sup>71</sup> *Id.* (quoting *Riddle v. Hickenlooper*, 742 F.3d 922, 932 (10th Cir. 2014) (Gorsuch, J., concurring)).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 75.

<sup>75</sup> 274 U.S. 357 (1927).

<sup>76</sup> 250 U.S. 616 (1919).

<sup>77</sup> *TikTok*, 145 S. Ct. at 75 (Gorsuch, J., concurring in the judgment).

<sup>78</sup> See Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court’s Application*, 74 S. CAL. L. REV. 49, 55 (2000) (“[T]he general rule is that content-based restrictions on speech must meet strict scrutiny . . . .”); cf. Genevieve Lakier, *A Counter-History of First Amendment Neutrality*, 131 YALE L.J.F. 873, 874 & n.3 (2022) (citing a 1959 case for the proposition that courts have long asked whether a law involved “suppression of dangerous ideas” in evaluating the constitutionality of speech burdens (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959))).

<sup>79</sup> See *TikTok*, 145 S. Ct. at 71–72. Some commentators dispute the notion that the data collection rationale meaningfully motivated the Act’s passage. See Anupam Chander, G.S. Hans & Edward Lee, *TikTok v. Garland Opens the Door to Global Censorship*, LAWFARE (Feb. 6, 2025, at 13:00 ET), <https://www.lawfaremedia.org/article/tiktok-v-garland-opens-the-door-to-global-censorship> [<https://perma.cc/3THW-WHAV>]. There may have also been an additional content-based rationale of suppressing pro-Palestinian speech. See Muhammed Enes Calli, *TikTok Ban Fueled by Hamas Attack on Israel: Former US Congressman*, ANADOLU AGENCY (Feb. 17, 2025), <https://www.aa.com.tr/en/americas/tiktok-ban-fueled-by-amas-attack-on-israel-former-us-congressman/3484104> [<https://perma.cc/K9BV-247W>] (quoting former Congressman Mike Gallagher, who said the “bill had legs again” after the October Seventh attack).

<sup>80</sup> *TikTok*, 145 S. Ct. at 72; cf. Chemerinsky, *supra* note 78, at 64 (predicting that the high bar of strict scrutiny would entice judges to find ways to declare laws content neutral).

<sup>81</sup> *TikTok*, 145 S. Ct. at 71–72.

demands strict scrutiny notwithstanding the existence of another permissible purpose.<sup>82</sup> Regardless of the Act's political or practical merits, the *TikTok* Court's reasoning permits future governments to capitalize on the erosion of free speech protections.

While the doctrine does not directly prescribe the tier of scrutiny that applies to a statute with independent content-neutral and content-based purposes,<sup>83</sup> the case law points to strict scrutiny.<sup>84</sup> The Court has never implied that a content-neutral counterfactual might cure a content-based justification.<sup>85</sup> Indeed, the Court has repeatedly held in free exercise cases that innocent justifications cannot rescue constitutionally suspect laws.<sup>86</sup> Regarding free speech, the Court has long maintained that laws adopted "because of disagreement with [a] message" are inherently suspect, even if supported by actual or hypothesized content-neutral justifications.<sup>87</sup> Therefore, when the *TikTok* Court identified a content-based justification, it should have applied the First Amendment's most rigorous inquiry.

Instead, the Court selectively interpreted precedent to support its intermediate scrutiny holding. When the *TikTok* Court referenced *Ward v. Rock Against Racism*,<sup>88</sup> it misread that case, which emphasized the government's purpose.<sup>89</sup> The *Ward* Court explained that "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration."<sup>90</sup> The *TikTok* per curiam, underplaying *Ward*'s focus on motive in the content-based inquiry, omitted both the "principal inquiry"

<sup>82</sup> See Lakier, *supra* note 40, at 233–35; Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 197, 230 (1983); see also Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 769 (2001) (arguing that First Amendment analysis should focus on the government's purpose).

<sup>83</sup> See *TikTok*, 145 S. Ct. at 72.

<sup>84</sup> See, e.g., *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968) (creating a test that includes asking "if the governmental interest is unrelated to the suppression of free expression," *id.* at 377); Rubenfeld, *supra* note 82, at 776, 785–86 ("[T]he ultimate question . . . is whether the statute in question was 'aimed' at punishing dissent . . ." *Id.* at 776.).

<sup>85</sup> Cf. *Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015).

<sup>86</sup> See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1723–24, 1729 (2018) (holding that an antidiscrimination law's application was invalid because the Colorado Civil Rights Commission displayed antireligious animus); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) ("Facial neutrality is not determinative. . . . The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances.").

<sup>87</sup> *Reed*, 576 U.S. at 164 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)); accord *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 645 (1994); *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1475 (2022); see also Rubenfeld, *supra* note 82, at 769 ("[W]hen an actor has not been singled out because of his expression, the actor has no free speech claim.").

<sup>88</sup> 491 U.S. 781 (1989).

<sup>89</sup> See *TikTok*, 145 S. Ct. at 67 (quoting *Reed*, 576 U.S. at 164).

<sup>90</sup> *Ward*, 491 U.S. at 791 (citation omitted) (emphasis added). *But cf.* Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 236 (2021) ("A model of doctrinal clarity this is not.").

and “controlling consideration” language.<sup>91</sup> Other cases seem to have interpreted *Ward* to mean that every governmental purpose must be “unrelated to the content of the [petitioners’] speech” for a law to maintain content neutrality.<sup>92</sup>

The rift over a potentially content-based purpose in *Turner Broadcasting Systems, Inc. v. FCC*<sup>93</sup> — a case that the *TikTok* per curiam cited several times<sup>94</sup> — illustrates broad agreement regarding the level of scrutiny applied in mixed-justification cases. In that case, the Court made clear that “even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys.”<sup>95</sup> Every Justice agreed that a law requiring cable broadcasters to carry local programming had an “overriding objective” that was content neutral.<sup>96</sup> The majority held that the law’s passing reference to “the value of broadcast programming” did not signal an underlying purpose “to force programming of a ‘local’ or ‘educational’ content on cable subscribers,”<sup>97</sup> which would have rendered the law content based.<sup>98</sup> In *Turner*, the majority held that the law could maintain its “content-neutral character” because “[a]ppellants’ ability to hypothesize a content-based purpose for these provisions rest[ed] on little more than speculation.”<sup>99</sup> Yet several Justices diverged on whether the law’s content-based purpose was more than speculative.<sup>100</sup> Justice O’Connor, joined by Justices Scalia, Ginsburg, and Thomas, answered the question of “mixed-justification cases”<sup>101</sup> directly in concurrence: “It may well be that Congress also had other, content-neutral, purposes in mind when enacting the statute. But we have never held that the presence of a permissible justification lessens the impropriety of relying in part on an

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<sup>91</sup> Compare *id.*, with *TikTok*, 145 S. Ct. at 67 (quoting *Reed*, 576 U.S. at 164). Admittedly, the portion of *Reed* that is quoted in *TikTok* and that quotes *Ward* itself also omits the “principal inquiry” and “controlling consideration” language. See *Reed*, 576 U.S. at 164 (quoting *Ward*, 491 U.S. at 791).

<sup>92</sup> *Hill v. Colorado*, 530 U.S. 703, 720 (2000); see also, e.g., *City of Austin*, 142 S. Ct. at 1475 (“If there is evidence that an impermissible purpose or justification underpins a facially content-neutral restriction, for instance, that restriction may be content based.” (citing *Reed*, 576 U.S. at 164)); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984) (holding a law to be “clearly” content neutral because the law “[was] content-neutral and [was] not being applied because of disagreement with the message presented” (footnote omitted)); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) (“Even if the hypothetical measure on its face appeared neutral as to content and speaker, its purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional.”).

<sup>93</sup> 512 U.S. 622 (1994).

<sup>94</sup> See, e.g., *TikTok*, 145 S. Ct. at 66–69 (quoting *Turner* on eight occasions).

<sup>95</sup> *Turner*, 512 U.S. at 645.

<sup>96</sup> *Id.* at 630, 646.

<sup>97</sup> *Id.* at 648.

<sup>98</sup> See *id.*

<sup>99</sup> *Id.* at 652.

<sup>100</sup> See *id.* at 685–86 (Ginsburg, J., concurring in part and dissenting in part); *id.* at 679 (O’Connor, J., concurring in part and dissenting in part).

<sup>101</sup> *TikTok*, 145 S. Ct. at 72.

impermissible justification.”<sup>102</sup> “In fact, [the Court has] often struck down statutes as being impermissibly content based even though their primary purpose was indubitably content neutral.”<sup>103</sup> The fight in *Turner* was about whether a content-based justification existed at all.<sup>104</sup> If such a motive were present, all Justices seemed to agree that strict scrutiny would apply.<sup>105</sup>

First Amendment theory also counsels against the Court’s holding. In his concurrence, Justice Gorsuch acknowledged that the Court’s *TikTok* holding may contradict “the wisdom of Justice Brandeis in *Whitney* and Justice Holmes in *Abrams*,”<sup>106</sup> opinions that respectively form the urtexts of two leading strands of First Amendment theory.<sup>107</sup> In Justice Holmes’s view, the First Amendment protects testing ideas “in the competition of the market” via public discussion.<sup>108</sup> Under this marketplace theory<sup>109</sup> of the First Amendment, “content-based burdens on speech raise[] the specter that the government may effectively drive certain ideas or viewpoints from the marketplace,”<sup>110</sup> thus meriting strict scrutiny.<sup>111</sup>

Justice Brandeis, in a similar vein, understood the First Amendment as an instrument to facilitate democratic engagement by broadly protecting political speech.<sup>112</sup> Thus, under this theory, the existence of a “counterfactual”<sup>113</sup> content-neutral purpose does not defeat the government’s actual restriction of an active political forum adverse to its interests, “undercut[ing] the ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and

<sup>102</sup> *Turner*, 512 U.S. at 679 (O’Connor, J., concurring in part and dissenting in part).

<sup>103</sup> *Id.* (collecting cases).

<sup>104</sup> *See id.* at 678 (“This is why the Court is mistaken in concluding that the interest in diversity . . . is content neutral.”); *see also id.* at 685 (Ginsburg, J., concurring in part and dissenting in part) (“I conclude that Congress’ ‘must-carry’ regime . . . reflects an unwarranted content-based preference . . .”).

<sup>105</sup> *See id.* at 679 (O’Connor, J., concurring in part and dissenting in part). This agreement is also reflected in *United States v. Eichman*, 496 U.S. 310 (1990), which analyzed a law that banned flag burning. *Id.* at 312. The statute in *Eichman* was facially content neutral and motivated by both content-based and content-neutral purposes. *Id.* at 315–16. Although the Court noted the law had “a legitimate nonspeech-related interest,” *id.* at 316 n.6, it applied strict scrutiny and invalidated the law, *see id.* at 318–19.

<sup>106</sup> *TikTok*, 145 S. Ct. at 75 (Gorsuch, J., concurring in the judgment).

<sup>107</sup> *See* Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 130 & nn.25–26 (1989); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 968 & nn.11–12 (1978).

<sup>108</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>109</sup> Baker, *supra* note 107, at 968.

<sup>110</sup> *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

<sup>111</sup> *See id.* at 118 (quoting *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987)).

<sup>112</sup> *See* Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 675, 679–80, 695 (1988).

<sup>113</sup> *TikTok*, 145 S. Ct. at 72.

wide-open.”<sup>114</sup> And, even when the government possesses a genuine, content-neutral interest, the existence of a concurrent content-based justification poses too great a risk that the government’s true goal is to suppress unpopular speech.<sup>115</sup> Such suppression contravenes the fundamental idea that “the Constitution leaves matters of taste and style . . . to the individual.”<sup>116</sup>

If *TikTok*’s logic stands, it could usher in an era of unchecked government suppression of speech. So long as the government proffers a sufficient content-neutral purpose, *TikTok* instructs that courts may discount content-based motives.<sup>117</sup> Recent executive actions targeting political opponents of the President have raised core First Amendment questions, such as: Can the government use facially neutral means to target actors because it disagrees with their viewpoints?<sup>118</sup> After *TikTok*, the answer may be yes. A future Democratic administration could shutter a platform like 4chan, ostensibly to combat illegal activity but also to suppress disfavored speech.<sup>119</sup> This result should trouble everyone, regardless of one’s view of TikTok as a platform. While the Court insisted on a narrow holding,<sup>120</sup> *TikTok* fits into a broader retreat from strong First Amendment speech protections.<sup>121</sup> The Court has historically treated “[c]ontent-based regulations [as] presumptively invalid”<sup>122</sup> to guard against viewpoint discrimination and state

<sup>114</sup> *Police Dep’t v. Mosley*, 408 U.S. 92, 96 (1972) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)); *accord* *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (“[P]ublic discussion is a political duty.”); Evelyn Douek & Genevieve Lakier, *The Supreme Court, 2023 Term — Comment: Lochner.com?*, 138 HARV. L. REV. 100, 101 (2024) (“[C]ourts have come to believe that the most reliable means of safeguarding freedom of speech is to stringently prohibit government interference with the expressive autonomy of the newspapers and television providers and parade organizers (and, now, social media platforms) . . . , even when those providers exercise that autonomy to suppress other people’s speech.”).

<sup>115</sup> *Cf.* *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (warning that content-based regulations create “the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information”); *see also* Jud Campbell, *The Emergence of Neutrality*, 131 YALE L.J. 861, 865 (2022) (“[M]odern doctrine circumscribes not only the types of rules that the government can use when restricting speech but also the interests that it may pursue.”).

<sup>116</sup> *Cohen v. California*, 403 U.S. 15, 25 (1971); *see* Rubinfeld, *supra* note 82, at 770 (“[N]o one can be punished for expressing himself on a matter of opinion.”).

<sup>117</sup> *See TikTok*, 145 S. Ct. at 72.

<sup>118</sup> *See* Complaint for Declaratory and Injunctive Relief ¶¶ 94–106, *Wilmer Cutler Pickering Hale & Dorr LLP v. Trump*, No. 25-cv-00917 (D.D.C. filed Mar. 28, 2025) (narrating the Trump Administration’s actions against law firms with which he has political disagreements); Alan Blinder, *As Trump Attacks Universities, Some Are Agreeing to Negotiate*, N.Y. TIMES (Aug 1, 2025), <https://www.nytimes.com/article/trump-university-college.html> [<https://perma.cc/8CKR-8C5E>] (detailing the Trump Administration’s actions against universities and the Administration’s justifications).

<sup>119</sup> *See* Thomas Colley & Martin Moore, *The Challenges of Studying 4chan and the Alt-Right: “Come on in the Water’s Fine,”* 24 NEW MEDIA & SOC’Y 5, 5–6 (2022) (noting 4chan’s role in the cultivation of right-wing extremism worldwide and referencing “abusive, manipulative, and transgressive,” *id.* at 6, activities associated with 4chan and similar websites).

<sup>120</sup> *TikTok*, 145 S. Ct. at 62–63.

<sup>121</sup> *See* *Free Speech Coal. v. Paxton*, 145 S. Ct. 2291, 2306 (2025).

<sup>122</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

ensorship,<sup>123</sup> but, in applying intermediate scrutiny to a content-based law targeting a controversial platform, it has weakened protections against those very evils. How will the government wield its newfound powers? Only time, which “has upset many fighting faiths,”<sup>124</sup> will tell.

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<sup>123</sup> See Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414, 418 n.14, 460–61, 460 & n.129 (1996) (arguing that First Amendment law’s primary inquiry is uncovering illicit government objectives, including viewpoint discrimination and censorship); see also Gerald Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (using the phrase “strict’ in theory and fatal in fact” to describe the Court’s approach to suspect classifications). *But see generally* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006) (arguing that strict scrutiny is not as “fatal” as once thought to be through empirical analysis of case outcomes).

<sup>124</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).