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Is Everything a Full-Blown First Amendment Case After *Becerra* and *Janus*? Sorting out Standards of Scrutiny and Untangling "Speech as Speech" Cases from Disputes Incidentally Affecting Expression

Clay Calvert

University of Florida Levin College of Law, profclaycalvert@gmail.com

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IS EVERYTHING A FULL-BLOWN FIRST
AMENDMENT CASE AFTER *BECERRA* AND
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*Clay Calvert**

2019 MICH. ST. L. REV. 73

ABSTRACT

This Article examines the U.S. Supreme Court’s 2018 First Amendment-based decisions in both National Institute of Family and Life Advocates v. Becerra and Janus v. American Federation of State, County, and Municipal Employees. The Article illustrates how the rulings in these right-not-to-speak cases deepen the divide on today’s Court over when a case affecting speech merits heightened First Amendment analysis (be it strict or intermediate scrutiny) and when it only deserves rational basis review as an economic or social regulation. The cases nudge to the breaking point a dangerous game of push-and-pull between the Court’s conservative and liberal justices over the scope of free expression that undermines any semblance of doctrinal coherence. The conservatives are turning more and more cases into First Amendment battles demanding something greater than rational basis review. This backs the liberals into a corner, forcing them to argue that heightened review only applies when “the true value of protecting freedom of speech” is at stake, such as facilitating democratic self-governance. In the process, the line between speech and conduct is blurred while outright animosity between the Court’s conservative and liberal camps percolates in opinions.

* Professor & Brechner Eminent Scholar in Mass Communication and Director of the Marion B. Brechner First Amendment Project at the University of Florida in Gainesville, Fla. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. The author thanks University of Florida students Hannah Beatty, Jessie Goodman, and Emerson Tyler for reviewing and critiquing drafts of this Article.

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INTRODUCTION

The U.S. Supreme Court today is sharply divided over when cases affecting speech trigger traditional heightened levels of First Amendment¹ scrutiny² and when, instead, they merit only minimal,³ rational basis review.⁴ Rational basis review is commonly associated

1. See U.S. CONST. amend. I. The First Amendment to the U.S. Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” *Id.* The Free Speech and Free Press Clauses were incorporated more than ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

2. See generally Matthew D. Bunker, Clay Calvert & William C. Nevin, *Strict in Theory, But Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL’Y 349, 350-60 (2011) (overviewing both strict scrutiny and intermediate scrutiny in First Amendment jurisprudence). Traditional heightened levels of First Amendment review include both strict scrutiny (for most content-based regulations) and intermediate scrutiny (for most content-neutral regulations and statutes targeting commercial speech). See *id.* at 358.

3. See Jeffrey M. Shaman, *Rules of General Applicability*, 10 FIRST AMEND. L. REV. 419, 459 (2012) (noting that “minimal scrutiny” is “also referred to as ‘rationality review’” and “functions as a rubber stamp for legislation, providing little more than a pretense of rationality”).

4. See Lynn S. Branham, *Toothless in Truth? The Ethereal Rational Basis Test and the Prison Litigation Reform Act’s Disparate Restrictions on Attorney’s Fees*, 89 CALIF. L. REV. 999, 1016 (2001). Rational basis review “requires only a rational relationship between the end (the legitimate governmental objective) and the means to that end (the statute whose constitutionality is at issue).” *Id.* Put differently, a court will declare a law unconstitutional under rational basis review “if it is not

with economic and social welfare regulations,⁵ and it typically “plays an extremely limited role in free speech cases.”⁶ Specifically, rational basis review applies when a law imposes only “incidental burdens on speech”⁷ or compels the disclosure of purely factual information in advertisements to prevent deception.⁸

This Article analyzes how the Court’s 2018 decisions in both *National Institute of Family & Life Advocates v. Becerra*⁹ and *Janus v. American Federation of State, County & Municipal Employees*¹⁰ bring this growing cleft among the justices into high relief.¹¹ The rift mirrors the perceived conservative-versus-liberal division among the

rationally related to a legitimate governmental interest.” Thomas B. Nachbar, *Rational Basis “Plus,”* 32 CONST. COMMENT. 449, 449 (2017).

5. See Erwin Chemerinsky, *The Rational Basis Test is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL’Y 401, 403 (2016) (asserting that “the Court has basically gotten it right about when to apply the rational basis test—using it to analyze government economic regulations and social welfare legislation when there is no discrimination based on a suspect classification or infringement of a fundamental right”) (emphasis added); Nicholas Walter, *The Utility of Rational Basis Review*, 63 VILL. L. REV. 79, 79 (2018) (noting that rational basis review is “typically applied to review of economic and social regulations”).

6. Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 787.

7. Christina E. Wells, *Beyond Campaign Finance: The First Amendment Implications of Nixon v. Shrink Missouri Government PAC*, 66 MO. L. REV. 141, 156 n.101 (2001).

8. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (holding “that an advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers”); see also Lili Levi, *A “Faustian Pact”? Native Advertising and the Future of the Press*, 57 ARIZ. L. REV. 647, 681 (2015) (observing that the test in *Zauderer* is “akin to rational basis review”). The Court also applies a variation of rational basis review in cases involving the speech of public-school students that is sponsored by the school or that is part of the curriculum. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 281 (1988). Specifically, the Court has held “that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” *Id.* at 273. As Dean Erwin Chemerinsky observes, this “is the classic phrasing of the rational basis review.” Erwin Chemerinsky, *The Hazelwooding of the First Amendment: The Deference to Authority*, 11 FIRST AMEND. L. REV. 291, 294 (2013).

9. See generally *Nat’l Instit. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

10. See generally *Janus v. Am. Fed’n of State, Cty. & Mun. Emps.*, 138 S. Ct. 2448 (2018).

11. See *infra* Sections III.B-C (analyzing, respectively, *Becerra* and *Janus*).

current justices.¹² Exposed earlier in *Sorrell v. IMS Health Inc.*,¹³ the conflict is highly significant. Why? Because the standard of scrutiny applied in a First Amendment case often affects its outcome.¹⁴ The outcome, in turn, frequently causes an immediate real-world impact, as it has for labor unions in the aftermath of *Janus*.¹⁵

Perhaps even more disconcerting for some First Amendment traditionalists, the current cleavage on scrutiny jeopardizes the

12. See *infra* Part II (examining decisions rendered before a successor to Justice Anthony Kennedy joined the Court). It considers Chief Justice John Roberts and Justices Clarence Thomas, Samuel Alito, and Neil Gorsuch to be conservative, and it categorizes Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan as liberals. See Adam Liptak & Alicia Parlapiano, *Conservatives in Charge: Supreme Court Moved to the Right*, N.Y. TIMES (June 28, 2018), https://www.nytimes.com/interactive/2018/06/28/us/politics/supreme-court-2017-term-moved-right.html?rref=collection%2Fbyline%2Fadam-liptak&action=click&contentCollection=undefined®ion=stream&module=stream_unit&version=latest&contentPlacement=145&pgtype=collection [https://perma.cc/7Q4V-EWHF] (describing the “four-member liberal wing” as comprised of Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan; identifying the Court’s “most conservative members” as Clarence Thomas and Samuel Alito; noting that Neil Gorsuch “returned the [C]ourt to full strength and to a conservative majority” after the death of Antonin Scalia; and adding that Chief Justice John Roberts is moving more to the Court’s ideological center); Mark Walsh, *Center Court*, A.B.A. J., Sept. 2018, at 20, <http://dashboard.mazsystems.com/webreader/57538?page=22> [https://perma.cc/M3B3-VBJ8] (suggesting that it is likely Chief Justice John Roberts will become, after the retirement of Justice Anthony Kennedy at the end of July 2018, the Court’s new “median justice” who is “at its ideological center, as measured by political scientists who study the court”).

13. See *generally* *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011); Part I (addressing *Sorrell* in detail).

14. See *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1666 (2015). For instance, the Court recently observed that “a speech restriction withstands strict scrutiny” only in “rare cases.” *Id.* Or as former Justice David Souter once put it, “strict scrutiny leaves few survivors.” *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 455 (Souter, J., dissenting); see also Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 305 (1997) (observing that “the Court’s free speech analysis has become dominated by tiers, with at least the highest and lowest tiers being largely outcome-determinative”); Clay Calvert, *Beyond Trademarks and Offense: Tam and the Justices’ Evolution on Free Speech*, 2016-2017 CATO SUP. CT. REV. 25, 48 (asserting that “a statute is more likely to be struck down under strict scrutiny than intermediate scrutiny”).

15. See Kris Maher, *Unions Take a Hit After Supreme Court Ruling*, WALL STREET J. (Aug. 6, 2018, 7:00 AM), <https://www.wsj.com/articles/unions-take-a-hit-after-supreme-court-ruling-1533466800> [https://perma.cc/JRB9-H58C] (reporting that “[p]ublic-sector unions are facing steep falls in revenue and trying to prevent the loss of members in the wake of” the Court’s ruling in *Janus* and describing “the first signs of how the high court’s decision is hitting union coffers”).

dichotomy between speech and conduct.¹⁶ Under this distinction, conduct—unless it is deemed expressive conduct or symbolic expression,¹⁷ such as burning the American flag in protest¹⁸—receives no First Amendment scrutiny.¹⁹ Put slightly differently, a contrast between speech and conduct “must be drawn under current law because the law subjects speech regulation to higher levels of scrutiny than economic regulation.”²⁰

This “fundamental distinction between speech and conduct”²¹ today is openly questioned by liberal-leaning Justice Stephen Breyer.²² He asserted in 2017 in *Expressions Hair Design v. Schneiderman*²³ that “virtually all government regulation affects speech” and that “it is often wiser not to try to distinguish between ‘speech’ and ‘conduct.’”²⁴ In stark contrast, conservative Justice Clarence Thomas²⁵ wrote in 2018 in *National Institute of Family &*

16. See Diahann Dasilva, *Playing a “Labeling Game”: Classifying Expression as Conduct as a Means of Circumventing First Amendment Analysis*, 56 B.C. L. REV. 767, 769-70 (2015) (noting “the speech versus conduct dichotomy,” and examining “the distinction between speech and conduct, the implications of that distinction, and how courts have classified various activities as speech or conduct”).

17. *Virginia v. Black*, 538 U.S. 343, 358 (2003) (“The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech.”).

18. See *Texas v. Johnson*, 491 U.S. 397, 406 (1989).

19. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 572 (1991) (Scalia, J., concurring) (noting that “a general law regulating conduct and not specifically directed at expression . . . is not subject to First Amendment scrutiny at all”).

20. Richard A. Epstein, *A Common Law for the First Amendment*, 41 HARV. J.L. & PUB. POL’Y 1, 45 (2018).

21. Martin H. Redish, *Fear, Loathing, and the First Amendment: Optimistic Skepticism and the Theory of Free Expression*, 76 OHIO ST. L.J. 691, 700 (2015).

22. See, e.g., Robert Barnes, *Trump Makes His Pick, but It’s Still Anthony Kennedy’s Supreme Court*, WASH. POST (Jan. 31, 2017), https://www.washingtonpost.com/politics/courts_law/trump-makes-his-pick-but-its-still-anthony-kennedys-supreme-court/2017/01/31/1de12472-e7e0-11e6-bf6f-01b6b443624_story.html?utm_term=.3e49a22f69a8 [https://perma.cc/7DSW-ASFK] (identifying Breyer as one “of the court’s four liberals”); see also Richard Wolf & Herb Jackson, *Supreme Court Could Make Sports-Betting Ban an Underdog*, USA TODAY (Dec. 4, 2017, 1:05 PM), <https://www.usatoday.com/story/news/politics/2017/12/04/supreme-court-could-make-sports-betting-ban-underdog/919347001/> [https://perma.cc/FBY8-Z64H] (identifying Breyer as “one of the court’s four liberals”).

23. See generally *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017).

24. *Id.* at 1152 (Breyer, J., concurring).

25. See, e.g., David G. Savage, *Supreme Court Rules for Christian Cake Baker but Voices Support for Gay Rights Too*, L.A. TIMES (June 4, 2018), <https://www.latimes.com/politics/la-na-pol-court-baker-wedding-20180604-story.html> [https://perma.cc/9QMU-GBZQ] (identifying Thomas as

Life Advocates v. Becerra that “[w]hile drawing the line between speech and conduct can be difficult, this Court’s precedents have long drawn it.”²⁶ In other words, while Breyer gives short shrift to the speech–conduct dichotomy, Thomas willingly enforces it.²⁷

The boundary is now tremendously blurred between what Thomas in *Becerra* called laws regulating “speech as speech”²⁸ and what Breyer, writing for a four-justice dissent in the same dispute, called those affecting “ordinary social and economic legislation.”²⁹ The conservative and liberal justices simply do not see eye-to-eye on the issue and therefore disagree about the constitutionality of multiple laws impacting free expression.³⁰

In *Becerra*, California’s regulation of speech at licensed crisis pregnancy centers fell into the former speech-as-speech category for the five-justice conservative majority.³¹ This, in turn, triggered heightened First Amendment review and led the majority to conclude that the petitioners attacking the law were “likely to succeed on the merits of their challenge.”³² Conversely, the four-justice liberal dissent

“[c]onservative”); see also Richard Wolf, *Justice Anthony Kennedy to Retire, Opening Supreme Court Seat for President Trump*, USA TODAY (June 27, 2018, 6:32 PM), <https://www.usatoday.com/story/news/politics/2018/06/27/justice-kennedy-retiring-opening-supreme-court-seat/952716001/> [<https://perma.cc/V4NB-4373>] (describing Thomas as “ultra-conservative”).

26. Nat’l Instit. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2373 (2018).

27. *Compare Expressions Hair Design*, 137 S. Ct. at 1152 (Breyer, J., concurring) (suggesting that the speech-conduct dichotomy should not be made), *with Becerra*, 138 S. Ct. at 2373 (supporting the speech-conduct dichotomy in a majority opinion authored by Justice Thomas).

28. *Becerra*, 138 S. Ct. at 2374.

29. *Id.* at 2381 (Breyer, J., dissenting).

30. See, e.g., *id.* (finding by the more conservative majority that the speech-conduct dichotomy should remain versus the more liberal dissenters finding that the speech-conduct dichotomy is not useful).

31. *Becerra*, 138 S. Ct. at 2374 (“The licensed notice regulates speech as speech.”); see Cal. Health & Safety Code § 123472(a)(1) (West 2016). Specifically, the California statute required such licensed facilities to post a notice stating: “California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].” *Id.*

32. *Id.* at 2376. “[T]he licensed notice cannot survive even intermediate scrutiny. California asserts a single interest to justify the licensed notice: providing low-income women with information about state-sponsored services. Assuming that this is a substantial state interest, the licensed notice is not sufficiently drawn to achieve it.” *Id.* at 2375.

found the statute fit into the latter social legislation category and thus was subject to a deferential approach of reasonableness under which it was “likely constitutional.”³³

In *Janus*, the five-justice conservative majority reasoned that “[f]undamental free speech rights”³⁴ were threatened by a state law that compelled public employees who were not union members to pay agency or fair-share fees to support the collective bargaining activities of the union that exclusively represented them.³⁵ In striking down the law, the majority flatly rejected the notion that rational basis review should apply in analyzing the statute’s constitutionality.³⁶ Justice Samuel Alito explained for the majority that “[b]ecause the compelled subsidization of private speech seriously impinge[d] on First Amendment rights, it [could not] be casually allowed.”³⁷

In contrast, the *Janus* dissenters contended that “government entities have substantial latitude to regulate their employees’ speech.”³⁸ As Justice Elena Kagan wrote for the dissent, the Court typically has an attitude “of respect—even solicitude—for the government’s prerogatives as an employer. So long as the government is acting as an employer—rather than exploiting the employment relationship for other ends—it has a wide berth, comparable to that of a private employer.”³⁹ She criticized the majority for violating the Court’s “usual deferential approach” and, in the process, “turning

33. *Id.* at 2379 (Breyer, J., dissenting); *id.* at 2382 (Breyer, J., dissenting) (noting that the Court has adopted a “respectful approach to economic and social legislation when a First Amendment claim like the claim present here is at issue”); *id.* at 2381-87 (observing that “[h]istorically, the Court has been wary of claims that regulation of business activity, particularly health-related activity, violates the Constitution”; noting that the government historically has been able to impose “reasonable requirements” and “reasonable conditions” on such activities (including those of medical professionals); and concluding that when it comes to laws requiring medical professionals to disclose factual information, “[t]here is no reason to subject such laws to heightened scrutiny”).

34. *Janus v. Am. Fed’n St., Cty. & Mun. Emps.*, 138 S. Ct. 2448, 2460 (2018).

35. *See* 5 Ill. Comp. Stat. 315/6(e) (2013) (providing that non-union employees may be required to pay “their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment”); *Janus*, 138 S. Ct. at 2489 (Kagan, J., dissenting) (noting that agency fees are “now often called fair-share fees”).

36. *Janus*, 138 S. Ct. at 2465 (majority opinion) (“This form of minimal scrutiny is foreign to our free-speech jurisprudence, and we reject it here.”).

37. *Id.* at 2464.

38. *Id.* at 2487 (Kagan, J., dissenting).

39. *Id.* at 2493.

the First Amendment into a sword” to attack “workaday economic and regulatory policy.”⁴⁰

Lurking beneath this scrutiny schism in *Becerra* and *Janus* is an effort by some liberal justices to confine the scope of heightened First Amendment protection to only cases in which, as Justice Breyer wrote in *Becerra*, certain “First Amendment goals” are served and when “the true value of protecting freedom of speech” is at stake.⁴¹ Echoing Breyer’s sentiment, Justice Kagan wrote for the dissent in *Janus* that instead of applying heightened and “aggressive” First Amendment scrutiny to “workaday economic and regulatory policy,” “[t]he First Amendment was meant for better things. It was meant not to undermine but to protect democratic governance—including over the role of public-sector unions.”⁴² Put differently, just because a law involves speech does not mean that it always triggers weighty First Amendment concerns.

In 2015 in *Reed v. Town of Gilbert*, Justice Kagan also suggested that strict scrutiny does not always apply when evaluating the constitutionality of content-based sign ordinances because “the vindication of First Amendment values” does not require usage of that level of scrutiny.⁴³ Such a values-based approach for determining scrutiny differs from the Court’s long-standing general method⁴⁴ and

40. *Id.* at 2494, 2501.

41. *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2382-83 (2018) (Breyer, J., dissenting).

42. *Janus*, 138 S. Ct. at 2501-02 (Kagan, J., dissenting).

43. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2239 (2015) (Kagan, J., concurring).

44. See Minch Minchin, *A Doctrine at Risk: Content Neutrality in a Post-Reed Landscape*, 22 COMM. L. & POL’Y 123, 125 (2017) (noting that the Court has used the distinction between “content-neutral vs. content-specific” laws “for almost half a century” in order “to assign judicial standards of review to regulations on expression”). The doctrinal roots trace back to the Court’s decision in *Police Department of City of Chicago v. Mosley*. See 408 U.S. 92, 95 (1972). In *Mosley*, the Court observed that “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Id.*; see also Daniel A. Farber, *Playing Favorites? Justice Scalia, Abortion Protests, and Judicial Impartiality*, 101 MINN. L. REV. HEADNOTES 23, 27 (2016) (“The Court applies a much more stringent test to speech restrictions that relate to content. The content distinction found its first clear expression in *Police Department of Chicago v. Mosley*.”).

“default rule”⁴⁵ of initially deciding if a law is content based or content neutral in order to then determine the correct standard of scrutiny.⁴⁶

The idea that the value of speech determines the level of scrutiny is embraced by First Amendment scholars such as former Yale Law School Dean Robert Post.⁴⁷ As Post contends, “First Amendment coverage is triggered by those forms of social interaction that realize First Amendment values.”⁴⁸ All of this harkens back to considerations of high and low-value speech embraced by the Court in *Chaplinsky v. New Hampshire* and the accompanying notion that low-value categories of speech either receive no First Amendment protection or “can be regulated on the basis of their content without having to satisfy strict scrutiny.”⁴⁹

45. David S. Han, *Transparency in First Amendment Doctrine*, 65 EMORY L.J. 359, 367-68 (2015) (observing that “First Amendment doctrine has evolved into a mix of rule-like approaches, like the default rule that content-based speech restrictions are evaluated under strict scrutiny, and standard-like approaches, like the intermediate scrutiny standard applied to content-neutral speech restrictions”).

46. As Professor Leslie Kendrick encapsulates the traditional approach: After distinguishing content-based from content-neutral laws, the Court must give each its appropriate level of review. This is the scrutiny analysis. Content-based laws receive strict scrutiny, which nearly always proves fatal. Meanwhile, content-neutral laws receive what the Court calls “intermediate scrutiny,” in practice a highly deferential form of review which virtually all laws pass.

Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 237 (2012) (emphasis omitted). Professor Genevieve Lakier echoes Kendrick’s description, putting it this way:

The distinction between content-based and content-neutral regulations of speech is one of the most important in First Amendment law. For decades now, the Supreme Court has insisted that content-based laws—laws that restrict speech because of its ideas or messages or subject matter—are presumptively unconstitutional, and will be sustained only if they can satisfy strict scrutiny. In contrast, content-neutral laws—laws that regulate speech for some reason other than its content—are reviewed under a lesser, and often quite deferential, standard.

Genevieve Lakier, *Reed v. Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233, 233 (2016).

47. Robert Post & Amanda Shanor, *Adam Smith’s First Amendment*, 128 HARV. L. REV. F. 165, 181-82 (2015) (“Different kinds of speech embody different constitutional values, and each kind of speech should receive constitutional protections appropriate to the value it embodies.”).

48. Robert Post, *Encryption Source Code and the First Amendment*, 15 BERKELEY TECH. L.J. 713, 716 (2000).

49. Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2171 (2015); see *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-73 (1942). In *Chaplinsky*, the Court wrote that some categories of speech serve “no essential part of any exposition of ideas, and are of such slight social value as a step

The subjectivity, however, of an approach limiting elevated First Amendment review to cases affecting the “true value” of free expression and confining its reach to “better things” such as “democratic governance” profoundly impacts extant First Amendment jurisprudence. For example, does this tack mean that *Brown v. Entertainment Merchants Ass’n* in 2011 was wrongly decided?⁵⁰ The Court there applied strict scrutiny to strike down a California law and, in doing so, protected the First Amendment rights of children to play violent video games.⁵¹

On its face, the “true value”—whatever that nebulous concept means—of protecting free expression seemingly has nothing to do with either shielding violent video games or safeguarding minors’ access to them.⁵² Similarly, Justice Kagan might reasonably find that “[t]he First Amendment was meant for better things” than protecting violent video games, which arguably do not serve her focus on “protect[ing] democratic governance.”⁵³ Should, then, *Brown* be overruled under this approach? It is worth recalling that Breyer, in fact, dissented in *Brown* and would have held California’s violent video game statute constitutional.⁵⁴

Likewise, would public indecency laws targeting nude dancing—a form of conduct now recognized as symbolic expression protected by the First Amendment⁵⁵—in sexually oriented businesses

to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *Chaplinsky*, 315 U.S. at 572; see also Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 194 (1983) (noting that “[t]he ‘low’ value theory first appeared in the famous dictum of *Chaplinsky v. New Hampshire*”).

50. See *Brown v. Entm’t Merchants Ass’n*, 564 U.S. 786 (2011).

51. See *id.* at 799 (“Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest.”); *id.* at 789, 794-95 (addressing the First Amendment rights of minors). The statute at issue in *Brown* banned “the sale or rental of ‘violent video games’ to minors.” *Id.* at 789.

52. *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2383 (2018) (Breyer, J., dissenting).

53. *Janus v. Am. Fed’n St., Cty. & Mun. Emps.*, 138 S. Ct. 2448, 2502 (2018) (Kagan, J., dissenting).

54. See *Brown*, 564 U.S. at 840 (Breyer, J., dissenting).

55. *Virginia v. Black*, 538 U.S. 343, 358 (2003) (“The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech.”); see *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 285 (2000) (holding nude dancing “is expressive conduct that is entitled to some quantum of protection under the First Amendment”); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (concluding

no longer be subject to intermediate scrutiny?⁵⁶ Should nude dancing regulations, instead, simply be reviewed under a rational basis standard? To the extent that such laws target only the secondary effects of nude dancing,⁵⁷ “such as the impacts on public health, safety, and welfare,”⁵⁸ they typically have been considered content-neutral regulations⁵⁹ subject to the intermediate scrutiny test of *United States v. O’Brien*.⁶⁰

But if Justice Breyer is correct that courts should not focus on the distinction between speech and conduct,⁶¹ and if public indecency statutes really amount to what he calls “ordinary social and economic regulation” rather than laws targeting free expression, and if safeguarding nude dancing does not represent what Breyer calls “the true value of protecting freedom of speech,” then it seems that rational basis review—not intermediate scrutiny—should apply.⁶² Similarly, might Justice Kagan find that regulating nude dancing to address health, safety, and welfare issues amounts to a “workaday economic

that nude dancing “is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so”).

56. See *Barnes*, 501 U.S. at 567-72 (applying the four-part test developed by the Supreme Court in *United States v. O’Brien*, 391 U.S. 367 (1968)).

57. See *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 444 (2002) (Kennedy, J., concurring) (stating that secondary effects of speech are ones “unrelated to the impact of the speech on its audience”). When it comes to the zoning of sexually oriented businesses, “secondary effects have most often included alleged increases in crime, decreases in property values, and other indicators of neighborhood deterioration in the area surrounding the adult business.” Bryant Paul, Daniel Linz & Bradley J. Shafer, *Government Regulation of “Adult” Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects*, 6 COMM. L. & POL’Y 355, 356 (2001).

58. *Pap’s A.M.*, 529 U.S. at 292.

59. Mark Rienzi & Stuart Buck, *Neutral No More: Secondary Effects Analysis and the Quiet Demise of the Content-Neutrality Test*, 82 FORDHAM L. REV. 1187, 1201 (2013) (“The development of the secondary effects doctrine . . . permits laws that are clearly content based to be treated as content neutral in certain circumstances.”).

60. See *Pap’s A.M.*, 529 U.S. at 293-99; see also John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, 292 (2009) (noting that under the secondary effects doctrine, “a regulation will be treated as content-neutral and subject to intermediate scrutiny, despite its content-discriminatory form, if the primary purpose of the regulation is to control the secondary effects rather than the primary effects of speech”).

61. See *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1152 (2017) (Breyer, J., concurring) (“[I]t is often wiser not to try to distinguish between ‘speech’ and ‘conduct.’”).

62. *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2381, 2383 (2018) (Breyer, J., dissenting).

and regulatory policy” and that “[t]he First Amendment was meant for better things” than protecting nude dancing inside of sexually oriented businesses?⁶³

Speculatively speaking, the latent political desires in 2018 of both the conservative and liberal justices pushed an already shaky and unstable First Amendment methodology over scrutiny to an exceedingly dangerous place.⁶⁴ It is a place where deciding when a case involving speech constitutes a true First Amendment-based dispute demanding heightened review and when, in contrast, it amounts to a mere economic regulation requiring only rational basis evaluation is anything but clear. More specifically—and in the starkest and, admittedly, the most stereotypical of terms—the conservative justices, in attempting to protect pro-life organizations in *Becerra* and deplete the cash coffers of unions in *Janus*, have created the potential for turning any regulation that affects a specific content category of speech into a First Amendment battle involving either strict or intermediate scrutiny review.

In a nutshell, this is what Justice Kagan meant in her *Janus* dissent when she castigated the conservative majority for “weaponizing the First Amendment.”⁶⁵ Breyer too evoked the weaponization argument in his *Becerra* dissent.⁶⁶ Furthermore, it is what concerns a bevy of legal scholars⁶⁷ who, as Professors Jane and Derek Bambauer encapsulate it, fear “a new free speech

63. *Janus v. Am. Fed’n of State, Cty. & Mun. Emps.*, 138 S. Ct. 2448, 2501, 2502 (2018) (Kagan, J., dissenting).

64. Rodney A. Smolla, *Categories, Tiers of Review, and the Roiling Sea of Free Speech Doctrine and Principle: A Methodological Critique of United States v. Alvarez*, 76 ALB. L. REV. 499, 509 (2012) (“First Amendment free speech doctrine can be mystifying because it has never really settled in on a consistent analytical methodology.”).

65. *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting).

66. *Becerra*, 138 S. Ct. at 2382 (Breyer, J., dissenting) (“Medical professionals do not, generally speaking, have a right to use the Constitution as a weapon allowing them rigorously to control the content of those reasonable conditions.”).

67. See, e.g., Tamara R. Piety, *The First Amendment and the Corporate Civil Rights Movement*, 11 J. BUS. & TECH. L. 1, 22 (2016) (“I remain concerned that this expansive First Amendment will prove to be an unworkable burden on beneficial regulation intended to protect public health, safety, and welfare.”); see also Post & Shanor, *supra* note 47, at 166-67 (“Across the country, plaintiffs are using the First Amendment to challenge commercial regulations, in matters ranging from public health to data privacy. It is no exaggeration to observe that the First Amendment has become a powerful engine of constitutional deregulation. The echoes of *Lochner* are palpable.”).

Lochnerism—an exploitation of the First Amendment to promote a broad deregulatory agenda, regardless of popular democratic will.”⁶⁸ Put differently, the worry is “that free speech claims could be launched against every conceivable governmental regulation, potentially destroying the modern regulatory state.”⁶⁹ In this critique, as Professor Margot Kaminski notes, “the First Amendment has become a blunt tool of deregulation.”⁷⁰

Much of this line of scholarly critique focuses on how, in cases such as *Sorrell*, corporations exploit the First Amendment for deregulatory ends.⁷¹ Although the results in both *Becerra* and *Janus* reflect the trend of “deregulatory First Amendment cases,”⁷² neither involved a big-business corporate plaintiff seeking to strike down a regulation directly affecting its products, services, or marketing.⁷³ In brief, the conservative justices in both *Becerra* and *Janus* extended their alleged assault on regulatory frameworks via different protagonists (or, perhaps, antagonists). That, in short, is the critique against the conservative justices.

But what about the flip side? The liberal justices, in attempting to facilitate pro-choice speech and enhance access to abortions in *Becerra* and to maintain funding for unions in *Janus*, have threatened to reduce First Amendment scrutiny to rational basis review unless the speech at issue serves a “true value” with which the First Amendment is concerned or amorphously “better things” such as “protect[ing]

68. Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CALIF. L. REV. 335, 337 (2017); see *Lochner v. New York*, 198 U.S. 45, 57 (1905) (declaring unconstitutional, as an interference with the right to contract under the Due Process Clause of the Fourteenth Amendment, a state statute limiting the number of hours that a baker could work).

69. Bambauer & Baumbauer, *supra* note 68, at 342; see also Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1393 (2017) (noting that “today litigants—often corporate litigants—increasingly use the First Amendment to prioritize new applications of the freedom of speech over regulations designed to protect consumers and citizens”).

70. Margot E. Kaminski, *Privacy and the Right to Record*, 97 B.U. L. REV. 167, 172 (2017).

71. See Piety, *supra* note 67, at 1 (“The last twenty years have seen the development of a remarkable expansion of the First Amendment to business enterprises. The First Amendment has become a powerful weapon against regulation of all kinds.”).

72. Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323, 323 (2016).

73. See generally *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018); *Janus v. Am. Fed’n of State, Cty. & Mun. Emps.*, 138 S. Ct. 2448 (2018).

democratic governance.”⁷⁴ This tack arguably reeks of subjectivity about values and supposedly better things that muddies any semblance of coherence in an already “tumultuous doctrinal sea.”⁷⁵

It all, then, amounts to a treacherous push-and-pull situation. In brief, the more the conservative justices push for applying heightened First Amendment scrutiny to regulations harming speech interests, the more the liberal justices attempt—even with little more at their disposal than the parade-of-horribles rhetoric one expects from blistering dissents⁷⁶—to pull the reins back on which regulations deserve elevated First Amendment review. It is a dangerous judicial game of chicken played by both sides, threatening a foundation of First Amendment jurisprudence. If little else, as this Article later suggests, it creates space for Justice Breyer’s desired proportionality review to eventually take root among the doctrinal ruins.⁷⁷

Part I of this Article reviews the Supreme Court’s 2011 decision in *Sorrell v. IMS Health Inc.*⁷⁸ *Sorrell* provides a crucial basis for better understanding today’s friction over when a statute affecting speech merits heightened scrutiny and when, in contrast, it deserves deferential review as an ordinary piece of economic or commercial legislation. *Sorrell*, importantly, was disparaged by Justice Sonia Sotomayor in 2018 in *Janus* for how it has been used and, arguably, abused by the Court.⁷⁹ That is especially noteworthy because Sotomayor voted with, as the lone liberal, a bloc of conservative justices in *Sorrell* to apply heightened First Amendment scrutiny in that case.⁸⁰ Colloquially put, Sotomayor in *Janus* saw the error of her

74. *Becerra*, 138 S. Ct. at 2383 (Breyer, J., dissenting); *Janus*, 138 S. Ct. at 2502 (Kagan, J., dissenting).

75. Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2355 (2000).

76. *See, e.g., Becerra*, 138 S. Ct. at 2380 (Breyer, J., dissenting). In accord with a parade-of-horribles attack, Justice Breyer asserted in his *Becerra* dissent that “the majority’s approach at the least threatens considerable litigation over the constitutional validity of much, perhaps most, government regulation.” *Id.* He added that “the majority’s view, if taken literally, could radically change prior law, perhaps placing much securities law or consumer protection law at constitutional risk, depending on how broadly its exceptions are interpreted.” *Id.*

77. *See infra* Part II (addressing Breyer’s embracement of proportionality)

78. *See infra* Part I (discussing *Sorrell v. IMS Health Inc.*); *see generally Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011).

79. *Janus*, 138 S. Ct. at 2487 (Sotomayor, J., dissenting) (“Although I joined the majority in *Sorrell v. IMS Health Inc.*, . . . I disagree with the way that this Court has since interpreted and applied that opinion.”).

80. *See Sorrell*, 564 U.S. at 556 (identifying the justices voting in the majority and dissent).

ways in *Sorrell*.⁸¹ Additionally, *Sorrell* merits special attention here because Justice Elena Kagan, in penning the dissent in *Janus*, singled it out as an example of a case in which “the Court has wielded the First Amendment in such an aggressive way.”⁸²

Part II describes Justice Breyer’s repeated denigration of the Court’s embrace of traditional First Amendment doctrines relating to standards of scrutiny, further laying the groundwork for today’s disagreement on the Court.⁸³ Part III then analyzes, in greater depth and detail, key aspects of the Court’s decisions in three very recent cases—*Expressions Hair Design*, *Becerra*, and *Janus*.⁸⁴ Viewed collectively, this trio of cases lays bare the fault line separating the justices on standards of scrutiny and when a case affecting speech merits rigorous First Amendment review. Finally, Part IV concludes by proposing and exploring several different paths that the Court could now take in determining the level of scrutiny that applies in a case implicating speech.⁸⁵

I. *SORRELL* PAVES THE PATH TOWARD TODAY’S FRICTION: LOOKING BACK AT A WEDGE-ISSUE CASE

In 2011, a fractured U.S. Supreme Court in *Sorrell v. IMS Health Inc.* declared unconstitutional a Vermont statute that banned pharmacies from selling information about the prescription practices of identifiable physicians to purchasers for use in marketing.⁸⁶ The law also barred pharmaceutical manufacturers and marketers—namely, drug salespeople known as detailers⁸⁷—from using prescriber

81. See *Janus*, 138 S. Ct. at 2487 (Sotomayor, J., dissenting). Sotomayor’s vote with the conservatives in *Sorrell* may be perceived as an outlier, as Dean Erwin Chemerinsky notes that she “has been predictably with the liberals” since joining the nation’s high court. Erwin Chemerinsky, *The Senate Can Demand Answers from Brett Kavanaugh. If He Isn’t Honest, He Shouldn’t Be Confirmed*, L.A. TIMES (July 11, 2018, 4:15 AM), <https://www.latimes.com/opinion/op-ed/la-oe-chemerinsky-kavanaugh-confirmation-questions-20180711-story.html> [https://perma.cc/NZ4D-K2NR].

82. *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting).

83. See *infra* Part II (detailing Justice Breyer’s proportionality approach).

84. See *infra* Part III (discussing the key decisions in *Expressions Hair Design*, *Becerra*, and *Janus*).

85. See *infra* Part IV (providing different options for the Court to consider).

86. See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557-63 (2011) (describing the statute, the legislative intent behind it and Vermont’s interpretation of it).

87. See *id.* at 557-58 (describing detailing and the work of detailers on behalf of pharmaceutical manufacturers).

information in marketing.⁸⁸ In a nutshell, pharmacies in Vermont could freely share information about physicians' prescribing practices "with anyone for any reason" *unless* the information was "to be used for marketing."⁸⁹

A key purpose behind the statute was "to diminish the effectiveness of marketing by manufacturers of brand-name drugs."⁹⁰ The law attempted to do this by "preventing detailers—and only detailers—from communicating with physicians in an effective and informative manner."⁹¹ Vermont asserted this was important because it ostensibly would lower costs by allowing generic alternatives to brand-name drugs to compete more fairly in the face of otherwise "expensive pharmaceutical marketing campaigns to doctors."⁹² In other words, because "detailers who use prescriber-identifying information are effective in promoting brand-name drugs," blocking this flow of information would supposedly level the playing field for less expensive alternative drugs.⁹³

Ultimately, the outcome in *Sorrell* "hinged on what level of First Amendment scrutiny the Supreme Court would apply to the Vermont law."⁹⁴ The division, in turn, among the conservative and liberal justices over the appropriate level of scrutiny to apply to that law foreshadows today's tension in cases such as *Becerra* and *Janus*.⁹⁵ Anthony Kennedy penned the six-justice majority opinion, joined by Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas, Samuel Alito and a lone liberal, Sonia Sotomayor.⁹⁶ The majority concluded the Vermont statute was subject to "heightened judicial scrutiny" under the First Amendment because it "impose[d] burdens that [were] based on the content of speech and that [were]

88. See *id.* at 563 (noting that the law "bars pharmaceutical manufacturers and detailers from using the information for marketing").

89. *Id.* at 572.

90. *Id.* at 565.

91. *Id.* at 564.

92. *Id.* at 576, 580 (quoting 2007 Vt. Laws No. 80, § 1(4)).

93. *Id.* at 578.

94. Marcia M. Boumil et al., *Prescription Data Mining, Medical Privacy and the First Amendment: The U.S. Supreme Court in Sorrell v. IMS Health Inc.*, 21 ANNALS HEALTH L. 447, 448 (2012).

95. See generally Nat'l Inst. of Family & Life Advocates v. *Becerra*, 138 S. Ct. 2361 (2018); *Janus v. Am. Fed'n State, Cty. & Mun. Emps.*, 138 S. Ct. 2448 (2018).

96. See *Sorrell*, 564 U.S. at 556.

aimed at a particular viewpoint.”⁹⁷ How did the law impose such burdens? Kennedy explained that:

[The statute] disfavor[ed] marketing, that is, speech with a particular content. More than that, the statute disfavor[ed] specific speakers, namely pharmaceutical manufacturers. As a result of th[o]se content- and speaker-based rules, detailers [could not] obtain prescriber-identifying information, even though the information [could] be purchased or acquired by other speakers with diverse purposes and viewpoints. Detailers [were] likewise barred from using the information for marketing, even though the information [could] be used by a wide range of other speakers.⁹⁸

The majority rejected Vermont’s argument that heightened scrutiny was “unwarranted because its law [was] a mere commercial regulation.”⁹⁹ Kennedy acknowledged that “the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.”¹⁰⁰ Yet he concluded that Vermont’s law “impose[d] more than an incidental burden on protected expression.”¹⁰¹ Kennedy reasoned here that the statute did not “simply have an effect on speech, but [was] directed at certain content and [was] aimed at particular speakers.”¹⁰² In brief, because the law imposes “a content- and speaker-based burden,” it “require[d] heightened judicial scrutiny.”¹⁰³

“[I]ncidental burden”¹⁰⁴—or a very close phrasing, namely “incidental effect,” which is used by the Court when sussing out whether a statute is content neutral¹⁰⁵—thus is a crucial, yet highly elastic concept.¹⁰⁶ It can be stretched or contracted to suit a desired outcome.¹⁰⁷ Indeed, as noted below,¹⁰⁸ the *Sorrell* dissent—in contrast

97. *Id.* at 565.

98. *Id.* at 564.

99. *Id.* at 566.

100. *Id.* at 567.

101. *Id.*

102. *Id.*

103. *Id.* at 570.

104. *Id.* at 567.

105. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an *incidental effect* on some speakers or messages but not others.”) (emphasis added).

106. See Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1178 (1996) (discussing laws imposing incidental burdens trigger more deferential judicial scrutiny).

107. See generally *id.* (providing a comprehensive review of the meaning and importance of the concept of incidental burdens in federal constitutional law).

108. *Infra* notes 121-144 and accompanying text (addressing the *Sorrell* dissent).

to the majority—found the burden on speech imposed by Vermont’s statute to be “indirect, *incidental*, and entirely commercial.”¹⁰⁹

Furthermore, the majority clearly disliked the fact that Vermont manipulated the marketplace of ideas¹¹⁰ for factual and truthful information about pharmaceutical products simply because the regulated speech was, in the government’s opinion, too influential and persuasive.¹¹¹ As Kennedy wrote in wrapping up the majority opinion, Vermont “burdened a form of protected expression that it found too persuasive. At the same time, the State ha[d] left unburdened those speakers whose messages [were] in accord with its own views. This the State [could not] do.”¹¹² Put differently, Vermont could not “hamstring”¹¹³ the speech of detailers when the proper remedy at its disposal was counterspeech.¹¹⁴ More specifically, the state could express “through its own speech” its displeasure “that detailers who use prescriber-identifying information are effective in promoting

109. *Sorrell*, 564 U.S. at 602 (Breyer, J., dissenting) (emphasis added).

110. See MATTHEW D. BUNKER, *CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY 2* (2001). The marketplace of ideas theory is “one of the most powerful images of free speech, both for legal thinkers and for laypersons.” See *id.* It pivots on the assumption that free speech “contributes to the promotion of truth.” Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 998 (2003). In fact, “much of First Amendment jurisprudence rests” on “[t]he hypothetical construct of a marketplace of ideas.” Catherine J. Ross, *Incredible Lies*, 89 U. COLO. L. REV. 377, 382 (2018).

111. See *Sorrell*, 564 U.S. at 570 (“Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs. There is thus a strong argument that prescriber-identifying information is speech for First Amendment purposes.”); *id.* at 579 (“The State nowhere contends that detailing is false or misleading within the meaning of this Court’s First Amendment precedents.”); *id.* at 578 (“That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers.”). The majority emphasized that the free flow of information “has great relevance in the fields of medicine and public health, where information can save lives.” *Id.* at 566.

112. *Id.* at 580.

113. *Id.* at 578.

114. Justice Louis Brandeis explained the counterspeech doctrine more than ninety years ago, contending that “[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.” *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); see also Robert D. Richards & Clay Calvert, *Counterspeech 2000: A New Look at the Old Remedy for “Bad” Speech*, 2000 BYU L. REV. 553, 553-54 (“Rather than censor allegedly harmful speech and thereby risk violating the First Amendment protection of expression, or file a lawsuit that threatens to punish speech perceived as harmful, the preferred remedy is to add more speech to the metaphorical marketplace of ideas.”).

brand-name drugs.”¹¹⁵ The majority thus found the statute violated the First Amendment,¹¹⁶ regardless of whether the intermediate scrutiny standard that typically applies in commercial speech cases¹¹⁷ or a higher standard applied.¹¹⁸

In summary, under the majority’s approach in *Sorrell*, heightened scrutiny applies when a law imposes more than an incidental burden on speech, regardless of whether the law regulates commerce. Something more than an incidental burden exists when a law “is directed at certain content and is aimed at particular speakers.”¹¹⁹ A law, in turn, is directed at certain content when it is enacted because the government disagrees with the message being conveyed.¹²⁰

In contrast, the three-justice dissent—authored by Justice Stephen Breyer and joined by fellow liberal Justices Ruth Bader Ginsburg and Elena Kagan—concluded that the statute’s “effect on expression [was] inextricably related to a lawful governmental effort to regulate a commercial enterprise. The First Amendment does *not* require courts to apply a special ‘heightened’ standard of review when

115. See *Sorrell*, 564 U.S. at 578.

116. *Id.* at 557 (“Speech in aid of pharmaceutical marketing . . . is a form of expression protected by the Free Speech Clause of the First Amendment. As a consequence, Vermont’s statute must be subjected to heightened judicial scrutiny. The law cannot satisfy that standard.”).

117. The U.S. Supreme Court has held that the government may regulate truthful and non-misleading advertisements for lawful goods and services if it has a substantial interest that is directly advanced by the law in question and if the law is narrowly tailored to serve that interest. See *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564-66 (1980). The *Central Hudson* test represents an intermediate scrutiny standard. See Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1283 (2014) (noting that “the Supreme Court differentiates between commercial speech (such as advertising) and noncommercial speech, and subjects the former to intermediate scrutiny”); Levi, *supra* note 8, at 681, n.172 (2015) (noting that in *Central Hudson*, the Court articulated “a four-pronged standard of intermediate scrutiny for commercial speech”); Paul Sherman, *Occupational Speech and the First Amendment*, 128 HARV. L. REV. F. 183, 198 (2015) (describing “the intermediate scrutiny set forth in *Central Hudson Gas & Electric Co. [sic] v. Public Service Commission*”).

118. See *Sorrell*, 564 U.S. at 571 (“As in previous cases, however, the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied.”).

119. *Id.* at 567.

120. *Id.* at 566 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (“The First Amendment requires heightened scrutiny whenever the government creates ‘a regulation of speech because of disagreement with the message it conveys.’”).

reviewing such an effort.”¹²¹ Under both this deferential tack and the intermediate scrutiny standard applicable in commercial speech cases,¹²² the dissent declared Vermont’s law constitutional.¹²³ As Breyer summed it up, “whether we apply an ordinary commercial speech standard or a less demanding standard, I believe Vermont’s law is consistent with the First Amendment.”¹²⁴

In accord with his penchant for a proportionality approach to cases affecting free speech,¹²⁵ Breyer deemed the key issue in *Sorrell* to be “whether Vermont’s regulatory provisions work[ed] harm to First Amendment interests that [was] disproportionate to their furtherance of legitimate regulatory objectives.”¹²⁶ Reflecting the deference due to the government under this methodology, Breyer wrote that he “would give significant weight to legitimate commercial regulatory objectives.”¹²⁷ In the dissent’s view, the Court should “defer significantly to legislative judgment” when “ordinary commercial or regulatory legislation . . . affects speech in less direct ways.”¹²⁸

The notion of ordinariness reflected in Breyer’s phrase “ordinary commercial or regulatory legislation” in the sentence immediately above was pivotal for framing the dissent’s analysis.¹²⁹ In fact, Breyer in *Sorrell* also used the phrases “ordinary economic regulatory

121. *Id.* at 581 (Breyer, J., dissenting) (emphasis added).

122. *Id.* (“And, in any event, the statute meets the First Amendment standard this Court has previously applied when the government seeks to regulate commercial speech.”).

123. *See id.* As Breyer wrote, “I believe that the statute before us satisfies the ‘intermediate’ standards this Court has applied to restrictions on commercial speech. *A fortiori* it satisfies less demanding standards that are more appropriately applied in this kind of commercial regulatory case.” *Id.* at 602.

124. *Id.* at 603.

125. *See, e.g.,* Jeffery C. Barnum, *Encouraging Congress to Encourage Speech: Reflections on United States v. Alvarez*, 76 ALB. L. REV. 527, 546-48 (2012) (addressing Breyer’s proportionality approach and calling it “vexing for lawmakers because it is difficult to know when the balance tips towards constitutionality”); *see also* Mark S. Kende, *Constitutional Pragmatism, the Supreme Court, and Democratic Revolution*, 89 DENV. U. L. REV. 635, 652 (2012) (noting that Breyer “advocates proportionality analysis, or balancing, as how the Court should candidly weigh state versus individual interests”); Alexander Tsesis, *The Categorical Free Speech Doctrine and Contextualization*, 65 EMORY L.J. 495, 519 (2015) (contending that proportionality review “contextualizes the relevant factors at play in the litigation to determine whether the restriction on speech outweighs the government’s important interest”).

126. *Sorrell*, 564 U.S. at 582 (Breyer, J., dissenting).

127. *Id.*

128. *Id.* at 584.

129. *Id.*

programs,” “ordinary regulatory programs” and “ordinary regulatory means.”¹³⁰ This foreshadowed his 2018 dissent in *Becerra* where, as noted in the Introduction, Breyer used the phrase “ordinary economic and social legislation,” as well as “ordinary social and economic regulation,” and “ordinary disclosure laws.”¹³¹

For the *Sorrell* dissent, the Vermont law fit cleanly within the scope of such an ordinary regulatory program.¹³² As Breyer explained, *Sorrell* was “a case where the government [sought] typical regulatory ends (lower drug prices, more balanced sales messages) through the use of ordinary regulatory means (limiting the commercial use of data gathered pursuant to a regulatory mandate). The speech-related consequences here [were] indirect, incidental, and entirely commercial.”¹³³

In addition to foreshadowing the division among the conservative and liberal justices in 2018 in *Becerra* and *Janus* on whether a statute affecting speech triggers heightened First Amendment scrutiny, *Sorrell* also presaged Breyer’s parade-of-horribles warning about a virtual deregulatory tsunami in his *Becerra* dissent.¹³⁴ Specifically, Breyer wrote in *Sorrell* that the majority’s logic at best “opens a Pandora’s Box of First Amendment challenges to many ordinary regulatory practices that may only incidentally affect a commercial message At worst, it reawakens *Lochner*’s pre-New Deal threat of substituting judicial for democratic decision making where ordinary economic regulation is at issue.”¹³⁵ In brief, the specter of returning to *Lochner v. New York* animated Breyer’s logic in *Sorrell*.¹³⁶

130. *Id.* at 584, 602.

131. *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2380-81 (2018) (Breyer, J., dissenting).

132. *See Sorrell*, 564 U.S. at 602 (Breyer, J., dissenting).

133. *Id.*

134. *See infra* notes 310-311 and accompanying text.

135. *Sorrell*, 564 U.S. at 602-03 (Breyer, J., dissenting).

136. On this point, Breyer contended in *Sorrell* that:

[G]iven the sheer quantity of regulatory initiatives that touch upon commercial messages, the Court’s vision of its reviewing task threatens to return us to a happily bygone era when judges scrutinized legislation for its interference with economic liberty. History shows that the power was much abused and resulted in the constitutionalization of economic theories preferred by individual jurists By inviting courts to scrutinize whether a State’s legitimate regulatory interests can be achieved in less restrictive ways whenever they touch (even indirectly) upon commercial speech, today’s majority risks repeating the mistakes of the past in a manner not anticipated by our precedents.

In *Becerra*, Breyer reiterated this concern about opening the floodgates of deregulation-targeted litigation.¹³⁷ He wrote that “the majority’s approach at the least threatens considerable litigation over the constitutional validity of much, perhaps most, government regulation.”¹³⁸ Breyer also came back to his *Lochner* theme in *Becerra*, opining that “[i]n the name of the First Amendment, the majority today treads into territory where the pre-New Deal, as well as the post-New Deal, Court refused to go.”¹³⁹

For the *Sorrell* dissent, then, the majority’s invocation of heightened First Amendment scrutiny in similar cases vests the judiciary with a too-powerful weapon for intruding on the regulatory province of the legislative branch in commercial and economic matters.¹⁴⁰ “Because the imposition of ‘heightened’ scrutiny in such instances would significantly change the legislative/judicial balance, in a way that would significantly weaken the legislature’s authority to regulate commerce and industry, I would not apply a ‘heightened’ First Amendment standard of review in this case,” Justice Breyer wrote.¹⁴¹ The proper remedy for those upset by laws like the one at issue in *Sorrell*—at least for the dissent—is not a heightened First Amendment challenge.¹⁴² Instead, it is either better lobbying of current legislators to change the existing laws or to vote those legislators out of office in favor of ones who will embrace different policies.¹⁴³ Courts, in the dissent’s view, should only intervene when economic-oriented statutes like those at issue in *Sorrell* lack any rationality.¹⁴⁴

Professor Tamara Piety concurs with the dissent’s analysis, contending that *Sorrell* “strikes at the heart of the government’s ability

Id. at 591-92 (citing *Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting)).

137. *See* Nat’l Inst. of Family & Life Advocates v. *Becerra*, 138 S. Ct. 2361, 2380 (2018) (Breyer, J., dissenting).

138. *Id.*

139. *Id.* at 2382.

140. *See Sorrell*, 564 U.S. at 592 (Breyer, J., dissenting).

141. *Id.*

142. *See id.*

143. *Id.* (“Nothing in Vermont’s statute undermines the ability of persons opposing the State’s policies to speak their mind or to pursue a different set of policy objectives through the democratic process.”).

144. *Id.* (“This does not mean that economic regulation having some effect on speech is always lawful. Courts typically review the lawfulness of statutes for rationality and of regulations (if federal) to make certain they are not ‘arbitrary, capricious, [or] an abuse of discretion.’”).

to regulate commerce.”¹⁴⁵ As she puts it, the majority’s approach “transforms a fairly prosaic regulation of commerce into what sounds like a civil rights case.”¹⁴⁶ Indeed, she adds that “[r]eading the opinion one might be forgiven for thinking that this was a civil rights case rather than an issue of regulated pharmaceutical sales practices.”¹⁴⁷ The implications of this approach, as Professor Charlotte Garden notes, are that it “enables new arguments that . . . heightened scrutiny should apply to regulation targeting a particular set of commercial actors who are doing business via speech.”¹⁴⁸

Read more broadly, *Sorrell* falls in line with what attorney Richard Samp calls “a remarkable trend in First Amendment jurisprudence over the past 30 years. In recent years, the Court’s conservative justices have been far more likely than its liberal ones to strike down government speech restrictions on First Amendment grounds.”¹⁴⁹ And if, as Professor Amanda Shanor notes, “the First Amendment has become the key battleground for challenging the powers of the modern administrative state,”¹⁵⁰ then *Sorrell* marks a key successful challenge that, as Part III reveals, paves that path for the 2018 decisions in both *Becerra* and *Janus*.¹⁵¹

II. TIERS OF SCRUTINY UNDER ATTACK: JUSTICE BREYER’S PROPORTIONALITY APPROACH

Adding to the confusion over when a case involving speech merits heightened scrutiny and when it entails only rational basis review is Justice Stephen Breyer’s First Amendment philosophy. Breyer, who penned both the 2011 dissent in *Sorrell* discussed above¹⁵² and the 2018 dissent in *Becerra* addressed below,¹⁵³ views

145. Tamara R. Piety, “*A Necessary Cost of Freedom?*” *The Incoherence of Sorrell v. IMS*, 64 ALA. L. REV. 1, 3 (2012).

146. *Id.* at 4-5.

147. *Id.* at 15.

148. Garden, *supra* note 72, at 337.

149. Richard Samp, *Sorrell v. IMS Health: Protecting Free Speech or Resurrecting Lochner?*, 2010-11 CATO SUP. CT. REV. 129, 129.

150. Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318, 322 (2018).

151. *See infra* Part III.

152. *See supra* notes 121-144 and accompanying text (addressing Breyer’s dissent in *Sorrell*).

153. *See infra* notes 307-327 and accompanying text (addressing Breyer’s dissent in *Becerra*).

freedom of speech as “a malleable concept.”¹⁵⁴ He perceives the First Amendment as “an elastic amendment, expanding and contracting depending on the interests that each side asserted for the dispute currently before the Court. Through proportionality testing, Breyer typically will determine if, in his estimation, the government’s ends justify the means employed to achieve these goals.”¹⁵⁵

More precisely, as Breyer defined it in a Second Amendment case,¹⁵⁶ the bottom-line question is “whether the statute imposes burdens that, when viewed in light of the statute’s legitimate objectives, are disproportionate.”¹⁵⁷ He explained in his book *Making Our Democracy Work: A Judge’s View* that “[p]roportionality involves balancing.”¹⁵⁸ He added that it “is specially designed for a context where important constitutional rights and interests conflict” and “useful when a statute restricts one constitutionally protected interest in order to further some other comparably important interest.”¹⁵⁹ For example, in a 2001 case pitting free speech interests against privacy concerns, Breyer described his proportionality of harms-benefits balancing approach as:

[A]sk[ing] whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences. Or do they instead impose restrictions on speech that are *disproportionate* when measured against their corresponding privacy and speech-related benefits, taking into account the kind, the importance, and the extent of these benefits, as well as the need for the restrictions in order to secure those benefits?¹⁶⁰

154. Benjamin Pomerance, *An Elastic Amendment: Justice Stephen G. Breyer’s Fluid Conceptions of Freedom of Speech*, 79 ALB. L. REV. 403, 507 (2016).

155. *Id.*

156. The Second Amendment to the U.S. Constitution provides that “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II. The Second Amendment has been incorporated by the Supreme Court to apply to state and local government entities and officials through the Fourteenth Amendment Due Process Clause. *See McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (holding “that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right” as recognized by the Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008)).

157. *District of Columbia v. Heller*, 554 U.S. 570, 693 (2008) (Breyer, J., dissenting).

158. STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* 164 (2010).

159. *Id.* at 163-65.

160. *Bartnicki v. Vopper*, 532 U.S. 514, 536 (2001) (Breyer, J., concurring) (emphasis added).

Proportionality is popular in other legal systems, including those of European nations,¹⁶¹ but not in U.S. Constitutional law¹⁶² or in First Amendment jurisprudence¹⁶³—unless the justice in question is named Breyer.¹⁶⁴ Or as veteran First Amendment lawyer Floyd Abrams recently put it, Breyer “has offered interpretations of the First Amendment that appear to me to be closer to those adopted in European nations in interpreting their more limited free speech protections under the European Convention on Human Rights.”¹⁶⁵

Breyer disdains a rigid categorical approach to First Amendment jurisprudence in which content-based laws typically are subject to strict scrutiny review while content-neutral laws face intermediate scrutiny.¹⁶⁶ For example, Breyer wrote in his 2015 concurrence in *Reed v. Town of Gilbert* that:

161. See Mark S. Kende, *The Unmasking of Balancing and Proportionality Review in U.S. Constitutional Law*, 25 CARDOZO J. INT’L & COMP. L. 417, 424 (2017) (noting that “proportionality review took the world by storm after World War II with many nations having a key case, except the U.S.”).

162. Vicki C. Jackson, *Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality*, 130 HARV. L. REV. 2348, 2361 (2017) (“[P]roportionality doctrine is not viewed as a general measure of rights violations in the United States, nor is proportionality treated as a general principle of U.S. constitutional law.”).

163. As Harvard Professor Vicki Jackson summarizes it, “Proportionality” is today accepted as a general principle of law by constitutional courts and international tribunals around the world. “Proportionality review,” a structured form of doctrine, now flows across national lines, a seemingly common methodology for evaluating many constitutional and human rights claims. The United States is often viewed as an outlier in this transnational embrace of proportionality in constitutional law.

Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3096 (2015).

164. See Fernanda Nicola & Bill Davies, *Judges as Diplomats in Advancing the Rule of Law: A Conversation With President Koen Lenaerts and Justice Stephen Breyer*, 66 AM. U. L. REV. 1159, 1160 (2017) (noting that “Justice Breyer has restated the case for the judge . . . to learn from foreign legal ideas, particularly the European constitutional concept of proportionality when adjudicating on the First Amendment”).

165. Floyd Abrams, Keynote Remarks, *Free Speech Under Fire: The Future of the First Amendment*, 25 J.L. & POL’Y 47, 58 (2016).

166. As Professor Dan Kozlowski tidily encapsulates it, The approach to the Free Speech Clause of the First Amendment by the Supreme Court of the United States depends heavily on categorical analysis. In its jurisprudence, the Court has recognized three categories of regulations on expression: content neutral, content based, and viewpoint based. Whether a regulation will be upheld depends in large measure on the Court’s initial determination of the category to which it belongs. The Court

The First Amendment requires greater judicial sensitivity both to the Amendment's expressive objectives and to the public's legitimate need for regulation than a simple recitation of categories, such as "content discrimination" and "strict scrutiny," would permit. In my view, the category "content discrimination" is better considered in many contexts, including here, as a rule of thumb, rather than as an automatic "strict scrutiny" trigger, leading to almost certain legal condemnation.¹⁶⁷

The same year *Reed* was decided, Breyer penned a two-sentence concurrence in the free speech case of *Williams-Yulee v. Florida Bar*.¹⁶⁸ Breyer's opinion was devoted solely to reiterating his view that "this Court's doctrine referring to tiers of scrutiny [are] guidelines informing our approach to the case at hand, not tests to be mechanically applied."¹⁶⁹ In a nutshell, as Professor Lillian R. BeVier observes, "Justice Breyer has unambiguously announced his intention to reshape First Amendment doctrine."¹⁷⁰

Breyer responds to the concern that proportionality gives judges too much discretion by pointing out that "a judge who uses such an approach must examine and explain all the factors that go into a decision. The need for that examination and explanation serves as a constraint. It means the decision must be transparent and subject to criticism."¹⁷¹

Beyond bristling against a tiers-of-scrutiny approach,¹⁷² Breyer focuses on the First Amendment's "expressive objectives" in the quotation above from *Reed*.¹⁷³ He foreshadows his remarks in *Becerra* noted above about potentially reserving heightened scrutiny for cases in which certain "First Amendment goals" and "the true value of

has devised tests to review content-based and content-neutral regulations (strict scrutiny for content-based regulations, a more lenient intermediate scrutiny for those regulations deemed content neutral), but it has said that viewpoint-based regulations are unconstitutional.

Dan V. Kozlowski, *Content and Viewpoint Discrimination: Malleable Terms Beget Malleable Doctrine*, 13 COMM. L. & POL'Y 131, 131-32 (2008).

167. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2234 (2015) (Breyer, J., concurring).

168. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1673 (2015) (Breyer, J., concurring).

169. *Id.*

170. Lillian R. BeVier, *The First Amendment on the Tracks: Should Justice Breyer be at the Switch?*, 89 MINN. L. REV. 1280, 1283 (2005).

171. BREYER, *supra* note 158, at 170.

172. *Cf.* Erika Schutzman, *We Need Professional Help: Advocating for a Consistent Standard of Review When Regulations of Professional Speech Implicate the First Amendment*, 56 B.C. L. REV. 2019, 2031 (2015) (noting that in *Reed*, "Breyer rejected a one-size-fits-all approach to First Amendment jurisprudence").

173. *Reed v. Gilbert*, 135 S. Ct. 2218, 2234 (2015) (Breyer, J., concurring).

protecting freedom of speech” are at stake.¹⁷⁴ In *Making Our Democracy Work: A Judge’s View*, Breyer elaborates that “[v]alues are the constitutional analogue of statutory purposes.”¹⁷⁵ Constitutional values, for Breyer, are neither fleeting nor ephemeral.¹⁷⁶ Instead, they are “deep, enduring,” and “change little over time.”¹⁷⁷ When it comes to free speech, he offers one example: “[T]he expressive values underlying the First Amendment’s speech protection tell us that the amendment strongly protects *political speech* over the Internet while offering little if any protection to Internet fraud schemes.”¹⁷⁸ In other words, traditional values—protecting political speech, to use Breyer’s example—can be applied to modern technologies, such as the Internet.

The bottom line is that Breyer is engaged in what Professor Mark Tushnet calls a project of the “partial de-doctrinalization of the First Amendment.”¹⁷⁹ To wit, Professors Vikram David Amar and Alan Brownstein contend that Breyer’s concurrence in the Stolen Valor Act case of *United States v. Alvarez* “was written as if there were no formal free speech doctrine currently in use that constrains judges’ assessments of free speech claims.”¹⁸⁰ Breyer’s willingness to break free from—or at least to loosen up—the chains of First Amendment doctrine thus facilitates today’s confusion about when a law affecting speech merits heightened scrutiny and when it is tested by rational basis review. Thus, it is not surprising that he wrote both the dissent in *Sorrell*¹⁸¹ and, as discussed in the next Part of this Article, the dissent in *Becerra*.¹⁸² And all of this doctrinal blurriness is compounded by the Court’s penchant under Chief Justice Roberts’s leadership for avoidance and minimalism which, “along with political partisanship,

174. Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2382-83 (2018) (Breyer, J., dissenting).

175. BREYER, *supra* note 158, at 162.

176. *Id.*

177. *Id.*

178. *Id.* at 163 (emphasis added).

179. Mark Tushnet, *Justice Breyer and the Partial De-Doctrinalization of Free Speech Law*, 128 HARV. L. REV. 508, 511 (2014).

180. Vikram David Amar & Alan Brownstein, *The Voracious First Amendment: Alvarez and Knox in the Context of 2012 and Beyond*, 46 LOY. L.A. L. REV. 491, 497 (2013). Along the lines of proportionality, Breyer reasoned in *Alvarez* that the Stolen Valor Act “works disproportionate constitutional harm.” *United States v. Alvarez*, 567 U.S. 709, 739 (2012) (Breyer, J., concurring).

181. See *supra* notes 121-144 and accompanying text (addressing Justice Breyer’s dissent in *Sorrell*).

182. See *infra* notes 307-327 and accompanying text (addressing Justice Breyer’s dissent in *Becerra*).

have detrimentally affected multiple First Amendment doctrines during the past five years.”¹⁸³

With this background in mind, the Article next turns to three Supreme Court decisions—one from 2017 and two from 2018.¹⁸⁴ They reveal, in one manner or another, the division on the Court between when and whether heightened First Amendment scrutiny is warranted for cases affecting speech.

III. TODAY’S DIVIDE ON SPEECH AND SCRUTINY: A TRIO OF KEY DECISIONS

This Part has three Sections, each of which separately examines facets of one of three recent Supreme Court rulings that reveal possible reasons for the current fracturing among the justices on standards of scrutiny in cases impacting free expression. The cases are, in the order addressed below and dating from the oldest to most recent decision, *Expressions Hair Design v. Schneiderman*,¹⁸⁵ *National Institute of Family and Life Advocates v. Becerra*¹⁸⁶ and *Janus v. American Federation of State, County, and Municipal Employees*.¹⁸⁷ Rather than analyzing all issues and aspects of this trio of cases, this Part concentrates on the justices’ battle over the appropriate level of judicial scrutiny and how much deference is due from the Court to the legislative body in scrutinizing the statutes at issue.

A. *Expressions Hair Design*

In March 2017, the Supreme Court in *Expressions Hair Design v. Schneiderman* held that a New York statute banning merchants in the Empire State from imposing surcharges on customers who pay with a credit card rather than cash raised First Amendment-based

183. Clay Calvert & Matthew D. Bunker, *Fissures, Fractures & Doctrinal Drifts: Paying the Price in First Amendment Jurisprudence for a Half Decade of Avoidance, Minimalism & Partisanship*, 24 WM. & MARY BILL OF RTS. J. 943, 990 (2016). A complete discussion of avoidance and minimalism is beyond the scope of this Article.

184. See *infra* Part III.

185. See generally *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017).

186. See generally *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

187. See generally *Janus v. Am. Fed’n of State, Cty. & Mun. Emps.*, 138 S. Ct. 2448 (2018).

speech issues.¹⁸⁸ In doing so, the Court reversed the opinion of the U.S. Court of Appeals for the Second Circuit, which had held that the statute merely regulated economic conduct, not speech.¹⁸⁹

Expressions Hair Design thus is important for purposes of this Article because it exposes the tension among the justices in separating speech cases from conduct cases and, in turn, separating statutes meriting heightened review from those deserving rational basis review. Subsection 1 concentrates on facets of the majority opinion in *Expressions Hair Design* that illustrate this strain, while Subsection 2 focuses on Justice Stephen Breyer's solo concurrence.

1. *The Majority Opinion*

Chief Justice Roberts delivered the Court's opinion and was joined by Justices Kennedy, Thomas, Ginsburg, and Kagan.¹⁹⁰ Although this clustering of justices bridged conservatives and liberals, Roberts's opinion nonetheless is important here because it demonstrates how the Court had to grapple with determining whether a statute involved speech or merely conduct.

Underlying the law at issue in *Expressions Hair Design* are the transaction fees—commonly known as swipe fees—that credit card companies charge merchants each time customers use a credit card to pay for a good or service.¹⁹¹ How do merchants deal with these fees if they want to recoup them? They have three options.¹⁹² Specifically,

188. See N.Y. Gen. Bus. Law § 518 (McKinney 2017) (providing, in pertinent part, that “[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means”); *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1147 (2017) (concluding that the New York anti-surcharge statute “does regulate speech” and remanding case the U.S. Court of Appeals for the Second to determine the statute’s constitutionality).

189. See *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 130 (2d Cir. 2015) (concluding that the statute “does not regulate speech as applied to single-sticker-price sellers”), *vacated and remanded*, 137 S. Ct. 1144 (2017).

190. *Expressions Hair Design*, 137 S. Ct. at 1146. Justice Sotomayor authored a concurring opinion that was joined by Justice Alito. See *id.* at 1153 (Sotomayor, J., concurring). A discussion of Sotomayor’s opinion, which focused on certification of the statutory question, is beyond the scope of this Article. See generally *id.* at 1153-59.

191. Clay Calvert et al., *Speech v. Conduct, Surcharges v. Discounts: Testing the Limits of the First Amendment and Statutory Construction in the Growing Credit Card Quagmire*, 20 N.Y.U. J. LEGIS. & PUB. POL’Y 149, 157 (2017) (“When merchants accept a customer’s credit card, they are contractually obligated to pay a percentage of the transaction total—a swipe fee—to the credit card company (e.g., Visa, MasterCard, or American Express).”).

192. See *id.*

they “can raise sticker prices to make up the difference; pass on some or all of the swipe fee directly to their customers via a surcharge for credit card purchases; or offer an incentive, such as a discount, to encourage customers to pay with cash.”¹⁹³

The New York statute at issue in *Expressions Hair Design*, however, banned that second option.¹⁹⁴ Specifically, it provided: “[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means.”¹⁹⁵ By its terms, the statute appears to regulate only a commercial transaction, and it leaves merchants free to give discounts to customers who choose to pay with cash.¹⁹⁶ How, then, does a possible First Amendment issue come into play? It does so when merchants attempt to communicate with or talk to customers about the difference between prices being charged.¹⁹⁷ As Professor Mark Chenoweth explains:

The problem arises when a merchant wishes to characterize the price difference as a “surcharge” for credit. Whether such a merchant wishes to explain why it charges more to its customers using credit cards, to deter credit purchases, or simply to be free from government dictates, the dilemma remains the same: Is this dispute about speech or merely conduct, and, if the former, does the First Amendment protect the merchant’s speech?¹⁹⁸

More specifically, the Supreme Court considered whether the statute raised a First Amendment-based speech issue as applied to a particular “single-sticker pricing” scenario—one in which a merchant posts a price on a product and then notes that a surcharge, either in the form of a percentage or a specific amount more than the sticker price, will be imposed for customers using a credit card.¹⁹⁹ This is distinct

193. *Id.*

194. *See generally* N.Y. Gen. Bus. Law § 518 (McKinney 2017).

195. *Id.*

196. *See id.*

197. *See Expressions Hair Design*, 137 S. Ct. at 1151 (“What the law does regulate is how sellers may communicate their prices.”).

198. Mark Chenoweth, *Expressions Hair Design: Detangling the Commercial-Free-Speech Knot*, 2017 CATO SUP. CT. REV. 227, 227-28.

199. *Expressions Hair Design*, 137 S. Ct. at 1148; *see also id.* at 1149 (“Although the merchants have presented a wide array of hypothetical pricing regimes, they have expressly identified only one pricing scheme that they seek to employ: posting a cash price and an additional credit card surcharge, expressed either as a percentage surcharge or a ‘dollars-and-cents’ additional amount.”).

from a merchant posting two separate prices—one for cash, one for credit.²⁰⁰

The Supreme Court agreed with the U.S. Court of Appeals for the Second Circuit’s determination that the New York statute banned the single-sticker pricing scenario described immediately above.²⁰¹ The Supreme Court, however, soon parted ways after that with the Second Circuit on whether this ban, in fact, affected the speech of merchants. The Second Circuit had found that the statute “posed no First Amendment problem because . . . [it] regulate[d] conduct, not speech.”²⁰² Specifically, the Second Circuit concluded that the sticker price must be the same as or equal to the price a customer would pay using a credit card and that this was “simply a conduct regulation.”²⁰³

Chief Justice Roberts and the majority, weighing into the question of whether the First Amendment was implicated, disagreed. In doing so, they delved into—just as the majority had in *Sorrell*²⁰⁴—whether any burden imposed on the speech of merchants was “incidental” to the statute’s “primary effect on conduct.”²⁰⁵ Roberts explained that the burden would be incidental if all that the statute did was “regulate the amount that a store could collect” for selling a particular item, such as specifying that “all New York delis to charge \$10 for their sandwiches.”²⁰⁶

This, the majority concluded, was not the case with New York’s anti-charge law because merchants were freely allowed to sell any item at any price.²⁰⁷ Instead, the majority found that the statute:

[Impacted] how sellers may communicate their prices. A merchant who wants to charge \$10 for cash and \$10.30 for credit may not convey that price any way he pleases. He is not free to say “\$10, with a 3% credit card surcharge” or “\$10, plus \$0.30 for credit” because both of those displays

200. See *id.* at 1149. A two-price scenario would involve a merchant posting “separate dollars-and-cents prices for cash and credit” such as “\$10 cash, \$10.30 credit.” *Id.* at 1149, n.1.

201. See *id.* at 1149-50.

202. *Id.* at 1150.

203. *Id.*

204. See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567, 570 (2011); *supra* notes 100-109 and accompanying text (addressing *Sorrell*’s consideration of whether the statute in that case imposed an incidental burden on speech or something more).

205. *Expressions Hair Design*, 137 S. Ct. at 1151.

206. *Id.* at 1150.

207. *Id.* at 1151 (“The law tells merchants nothing about the amount they are allowed to collect from a cash or credit card payer. Sellers are free to charge \$10 for cash and \$9.70, \$10, \$10.30, or any other amount for credit.”).

identify a single sticker price—\$10—that is less than the amount credit card users will be charged.²⁰⁸

While the majority thus found that speech was at issue, it did little else beyond remanding the case to the U.S. Court of Appeals for the Second Circuit to evaluate *Expressions Hair Design* as a speech case.²⁰⁹ It did not, for instance, decide what level of scrutiny should apply on remand.²¹⁰ Furthermore, as Professor Amanda Shanor points out, “the Court declined to articulate broader rules about how courts should identify ‘speech’ for constitutional purposes.”²¹¹

2. Justice Breyer’s Concurrence

While the Supreme Court’s ruling came without dissent, Justice Breyer issued a brief but important concurring opinion openly questioning the importance of separating speech from conduct and reiterating portions of his assertions in *Sorrell*.²¹² As Breyer put it, “it is often wiser not to try to distinguish between ‘speech’ and ‘conduct’” “because virtually all government regulation affects speech.”²¹³ More colloquially, Breyer was willing to stipulate that speech was involved in *Expressions Hair Design* because almost all interactions between humans involve speech at some level.²¹⁴ Thus, rather than focusing on whether speech is involved, the better approach, Breyer contended, is to ask whether the law at issue “affects an interest that the First Amendment protects.”²¹⁵

What does this mean? Breyer explained that if a law “negatively affects the processes through which political discourse or public opinion is formed or expressed (interests close to the First Amendment’s protective core), courts normally scrutinize that regulation with great care.”²¹⁶ In this statement, he avoids using the term “strict scrutiny” that typically applies in political speech cases,²¹⁷

208. *Id.*

209. *See id.*

210. *See id.*

211. Shanor, *supra* note 150, at 333.

212. *Expressions Hair Design*, 137 S. Ct. at 1152 (Breyer, J., concurring).

213. *Id.*

214. *Id.* (“Human relations take place through speech.”).

215. *Id.*

216. *Id.*

217. As Justice Anthony Kennedy explained in 2010, “political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are ‘subject to strict scrutiny,’ which requires the Government to prove that the restriction ‘furthers a compelling interest and is

thereby dodging any possible embracement of a traditional doctrinal standard and leaving one to wonder if “great care” is synonymous with strict scrutiny or if it means something else.

Importantly, and as noted in the Introduction²¹⁸ and as discussed later in *Becerra*,²¹⁹ this approach also tracks Breyer’s efforts to limit the application of heightened First Amendment scrutiny—specifically, what one typically calls strict scrutiny—to cases only in which the regulated speech directly serves certain values, such as facilitating “the processes through which political discourse or public opinion is formed or expressed.”²²⁰ In other words, Breyer intimates that the benchmark for determining when strict scrutiny applies is not to see if the law in question is content based, but instead to determine if the law affects some important value residing at “the First Amendment’s protective core.”²²¹ This values-based approach later blossoms in *Becerra* in 2018. There, Breyer suggests that heightened scrutiny should come into play only when the “true value of protecting freedom of speech” is at stake, such as safeguarding unpopular views and facilitating the truth-seeking function of speech in the marketplace of ideas but not when speech is impacted by “economic and social laws that legislatures long would have thought themselves free to enact.”²²²

Next, Breyer added that “[i]f the challenged regulation restricts the ‘informational function’ provided by truthful commercial speech, courts will apply a ‘lesser’ (but still elevated) form of scrutiny.”²²³ Just as he stopped short of using the term “strict scrutiny” when it came to speech affecting political discourse, here too Breyer avoided using the term “intermediate scrutiny”—the traditional doctrinal classification for speech regulated under the commercial speech doctrine.²²⁴

Breyer then wrote that “a more permissive standard of review” applies when the government compels commercial speakers to disclose factual and uncontroversial information because such

narrowly tailored to achieve that interest.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010) (quoting *Fed. Election Comm’n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007)).

218. *See supra* note 41 and accompanying text.

219. *See infra* notes 312, 316 and accompanying text.

220. *See Expressions Hair Design*, 137 S. Ct. at 1152 (Breyer, J., concurring).

221. *Id.*

222. *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2382-83 (Breyer, J., dissenting).

223. *Expressions Hair Design*, 137 S. Ct. at 1152 (Breyer, J., concurring).

224. *See supra* note 117 and accompanying text (addressing the commercial speech doctrine).

regulations have “only a ‘minimal’ effect on First Amendment interests.”²²⁵ This permissive standard, he added, is one of reasonableness.²²⁶ Finally, Breyer opined that “a similarly permissive standard of review” of rational basis review applies to laws targeting “ordinary commercial transactions” because such “legislation normally does not significantly affect the interests that the First Amendment protects.”²²⁷

Citing his own dissent in *Sorrell* for support, Breyer resolved that determining which one of the above standards was “the proper approach is typically more important than trying to distinguish ‘speech’ from ‘conduct.’”²²⁸ *Expressions Hair Design* afforded Breyer the opportunity to make this point because it was “not clear just what New York’s law [did].”²²⁹ He ultimately passed on choosing what standard should apply, however, because the statute’s interpretation was properly “a matter of state law.”²³⁰

Ultimately, Breyer’s approach to resolving the appropriate level of scrutiny concentrates “on the communicative interest at stake, on a sliding scale of the speech’s importance, with political speech receiving high protections and speech in ‘ordinary’ business transactions very little.”²³¹ Just as *Sorrell* did, *Expressions Hair Design* afforded Breyer the chance to voice “his view that the Supreme Court has entered dangerous territory in subjecting laws regulating economic matters to heightened First Amendment scrutiny.”²³²

For Breyer, then, the key question is not whether speech is involved in any given case because speech almost inevitably is involved.²³³ Therefore, exerting time and effort sorting out speech

225. *Expressions Hair Design*, 137 S. Ct. at 1152 (Breyer, J., concurring).

226. *Id.*

227. *Id.* (quoting *United States v. Caroline Products Co.*, 304 U.S. 144, 152 (1938)).

228. *Id.* (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 582 (2011) (Breyer, J., dissenting)).

229. *Id.* at 1153.

230. *Id.*

231. Matthew Moloshok, *Fuzzy Rules*, *Expressions Hair Design v. Schneiderman*, and *Ohio v. American Express*, A.B.A. ANTITRUST SOURCE, Feb. 2018, at 1-3.

232. Adam Liptak, *Justices Side with Free-Speech Challenge to Credit Card Fees*, N.Y. TIMES (Mar. 29, 2017), <https://www.nytimes.com/2017/03/29/business/supreme-court-credit-card-fees.html> [<https://perma.cc/WKY2-4LWZ>].

233. See, e.g., *Expressions Hair Design*, 137 S. Ct. at 1152 (Breyer, J., concurring).

from conduct is a waste of judicial time.²³⁴ The weightier issue, instead, is determining what value the speech serves, as measured against a hierarchy of First Amendment reasons for protecting speech from government control.²³⁵ If, in other words, one determines that safeguarding the speech at issue would serve or facilitate a core First Amendment value, then either a more rigorous standard of scrutiny or a more searching analysis should apply to better protect it against unnecessary government control or censorship.²³⁶

And by not affixing labels like strict scrutiny or intermediate scrutiny in *Expressions Hair Design* to the top two levels of review, Breyer intimates a more fluid approach akin to proportionality.²³⁷ It is a tack under which the focus is not so much on whether the government has a compelling²³⁸ or a significant²³⁹ interest in regulating the speech or whether the law regulating is content based²⁴⁰ or content neutral²⁴¹ but instead on whether the speech being regulated serves a sufficiently high value on the First Amendment totem to warrant a law undergoing a more rigorous review.²⁴² The starting point of analysis thus is not necessarily whether a law serves a particular *government*

234. *See id.*

235. *See id.*

236. *See id.*

237. *See supra* notes 125-126 and accompanying text; *see also supra* Part II (addressing proportionality as conceptualized by Justice Breyer).

238. *See Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (explaining a statute must be “justified by a compelling government interest” under strict scrutiny).

239. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (explaining that under intermediate scrutiny the government typically must prove that it has a significant interest).

240. Under traditional principles of First Amendment law, “[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 115, 118 (1991)).

241. *See McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (observing that the government is afforded “somewhat wider leeway to regulate features of speech unrelated to its content,” and explaining that the government must prove that a content-neutral regulation of speech is narrowly tailored to serve a significant interest and that the regulation leaves open ample alternative means for communicating the information in question).

242. *See Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1152 (2017) (Breyer, J., concurring).

interest but whether the speech serves a particular *First Amendment value*.²⁴³

B. *Becerra*

In June 2018, the U.S. Supreme Court in *Becerra* held that two parts of the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act) codified in the state's Health and Safety Code likely violated the First Amendment.²⁴⁴ One part²⁴⁵ applied to licensed crisis pregnancy centers.²⁴⁶ The other²⁴⁷ affected unlicensed crisis pregnancy centers.²⁴⁸ Both facets, however, mandated the communication of government messages.²⁴⁹

The centers to which these provisions applied advocated against abortion²⁵⁰ and were “often affiliated with religious groups.”²⁵¹ More

243. *See id.*

244. Nat'l Inst. of Family & Life Advocates v. *Becerra*, 138 S. Ct. 2361, 2378 (2018) (“We hold that petitioners are likely to succeed on the merits of their claim that the FACT Act violates the First Amendment.”); *see* Cal. Health & Safety Code § 123472 (2016) (providing the two aspects of the FACT Act at issue and struck down by the Supreme Court in *Becerra*).

245. *See* § 123472(a).

246. *See* Cal. Health & Safety Code § 123471(a) (2016) (providing the criteria for defining a licensed center).

247. § 123472(b) (2016).

248. *See id.* (providing the criteria for defining an unlicensed center).

249. *See* §§ 123471(a)-(b).

250. *See* Robert Barnes, *Supreme Court Takes Case on Free Speech Rights of Antiabortion Counseling Centers*, WASH. POST (Nov. 13, 2017), https://www.washingtonpost.com/politics/courts_law/supreme-court-takes-case-on-free-speech-rights-of-antiabortion-counseling-centers/2017/11/13/cd2003f8-c882-11e7-aa96-54417592cf72_story.html?utm_term=.7c1e267f7d15 [<https://perma.cc/YU6W-3ESQ>] (reporting that crisis pregnancy centers “counsel against abortion” and “provide services for pregnant women and try to persuade them not to end their pregnancies”); Adam Liptak, *Justices Take Cases on Free Speech at Pregnancy Centers and Polling Places*, N.Y. TIMES (Nov. 13, 2017), <https://www.nytimes.com/2017/11/13/us/politics/supreme-court-first-amendment-pregnancy-voting.html> [<https://perma.cc/8N2X-EJFA>] (“The centers seek to persuade women to choose parenting or adoption.”).

251. Adam Liptak, *Supreme Court Warily Eyes California Law Involving Abortion and Free Speech*, N.Y. TIMES (Mar. 20, 2018), <https://www.nytimes.com/2018/03/20/us/politics/supreme-court-abortion-free-speech-crisis-pregnancy-centers.html> [<https://perma.cc/J5GK-V9UK>].

provocatively parsed by one critic, the centers “spew[ed] misinformation, if not downright lies.”²⁵²

Under California law, licensed crisis pregnancy centers must disseminate to clients on their premises the following message: “California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].”²⁵³ Unlicensed centers are compelled to post a message on their premises explaining they are not licensed as medical facilities by California and do not have licensed medical providers.²⁵⁴ Additionally, unlicensed facilities are required to publish that same information “in any print and digital advertising materials including Internet Web sites” in both English and other languages.²⁵⁵

As framed by Justice Clarence Thomas in the majority opinion, the issue was whether the “notice requirements violate[d] the First Amendment.”²⁵⁶ The centers objected to the law primarily because, as the National Institute of Family and Life Advocates (NIFLA) asserted, California’s “compelled speech requirement drown[ed] out the centers’ pro-life messages.”²⁵⁷ NIFLA also complained because “California impose[d] this compelled speech only on centers that oppose[d] abortion.”²⁵⁸ Put more emphatically in a later NIFLA brief, the organization argued that “California forces pro-life licensed centers to point the way to free or low-cost abortions, making those centers complicit in facilitating an act they believe hurts women and destroys innocent lives.”²⁵⁹

252. Robin Abcarian, *The Supreme Court Puts Religion-Based Dishonesty Above the Health and Welfare of Vulnerable Pregnant Women*, L.A. TIMES (June 29, 2018, 3:00 AM), <https://www.latimes.com/local/la-me-abcarian-abortion-scotus-20180629-story.html> [<https://perma.cc/98VC-VX99>].

253. Cal. Health & Safety Code § 123472(a)(1) (2016).

254. § 123472(b)(1) (“The notice shall state: ‘This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.’”).

255. § 123472(b). The specific other languages were based upon “the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located.” § 123472(a).

256. See Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2368 (2018).

257. See Petition for Writ of Certiorari at 1, *Becerra*, 138 S. Ct. 2361 (No. 16-1140).

258. See *id.* at 2.

259. Reply Brief for Petitioners at 1, *Becerra*, 138 S. Ct. 236 (No. 16-1140).

In short, NIFLA asserted that both requirements violated the unenumerated First Amendment right not to speak.²⁶⁰ That right was established more than seventy-five years ago in *West Virginia State Board of Education v. Barnette*.²⁶¹ The Court held there that public-school students could not be compelled either to pledge allegiance to the United States or to engage in the symbolic expression of saluting the American flag.²⁶²

This implied First Amendment right was later developed in cases such as *Wooley v. Maynard*,²⁶³ *Miami Herald Publishing Co. v. Tornillo*²⁶⁴ and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*.²⁶⁵ However, the parameters of the right not to speak remain ambiguous. As Professor Nat Stern asserts, “the right to resist

260. Jonathan H. Adler, *Compelled Commercial Speech and the Consumer “Right to Know”*, 58 ARIZ. L. REV. 421, 432 (2016) (“The right to speak and the right not to speak are ‘complementary.’”); see Petition for Writ of Certiorari, *supra* note 257, at 15-17.

261. See generally *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (establishing the right not to speak).

262. *Id.* at 642 (“We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”). The Court explained in *Barnette*: “There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind.” *Id.* at 632.

263. See generally *Wooley v. Maynard*, 430 U.S. 705 (1977) (describing further the right not to speak). In *Wooley*, the Court held that a state cannot force individuals to display a motto on government-required license plates that “is repugnant to their moral and religious beliefs.” *Id.* at 707.

264. See generally *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974) (providing further clarification on the right not to speak). In *Tornillo*, the Court struck down a Florida right-of-reply statute that compelled newspapers in the Sunshine State to give free space in their pages to political candidates who had either their personal character or official record assailed by those newspapers. See *id.* at 243-44. The Court reasoned that “[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.” *Id.* at 258.

265. See generally *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557 (1995) (discussing the “right to speak” in a contemporary context). In *Hurley*, the Court held that private citizens who organize a parade cannot be compelled by the government to include in that parade “a group imparting a message the organizers do not wish to convey.” *Id.* at 559.

governmentally imposed expressive activities has evolved into a sprawling and ungainly doctrine.”²⁶⁶

In *Becerra*, and regarding the notice requirement at licensed facilities, NIFLA argued that:

California now forces licensed centers to communicate the government’s message about state-funded abortions to everyone who walks in the door. The State, rather than using countless alternative ways to communicate its message, including its own powerful voice, instead compels only licensed facilities that help women consider alternatives to abortion to express the government’s message regarding how to obtain abortions paid for by the State.²⁶⁷

As for the requirement that unlicensed centers include disclaimers in all advertisements and in different languages that they are not licensed medical facilities, NIFLA averred that the mandate “ma[de] ads so long that it [was] difficult, if not impossible, for unlicensed centers to advocate their own pro-life message in most media, like bus or newspaper ads.”²⁶⁸ NIFLA also contended that the “disclaimers force[d] the unlicensed centers to begin their expressive relationship with an immediate unwanted or negative message that crowd[ed] out and confuse[d] their intended message. The law effectively suppress[e]d their speech based on its viewpoint opposing abortion.”²⁶⁹

California and its attorney general, Xavier Becerra, countered that the compelled speech obligation at licensed centers educated women about the availability of free or low-cost abortion services.²⁷⁰ This, in turn, would allow them to make informed choices concerning their pregnancy options.²⁷¹ As California’s initial brief to the Court put it:

[The notice requirement] ensures that low-income women who are or may be pregnant have the information they need in order to seek, if they wish, the time-sensitive comprehensive medical care that is available through

266. See Nat Stern, *The Subordinate Status of Negative Speech Rights*, 59 BUFF. L. REV. 847, 849 (2011).

267. Petition for Writ of Certiorari, *supra* note 257, at 16.

268. *Id.* at 16-17.

269. *Id.* at 17.

270. See Brief for State Respondents at 5-6, Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018) (No. 16-1140).

271. See *id.* (asserting that “each year thousands of women are unaware of relevant public health programs when they learn that they are pregnant,” and adding that “[a] woman’s ability to learn about and obtain needed medical services in such circumstances may be especially limited if she is low-income”).

public programs. The statute is designed to reach an audience in need of such information at a critical moment.²⁷²

In terms of requiring disclaimers in ads for (and on the premises of) unlicensed clinics that they had no license to provide medical services, California argued that women should be able to know what kind of services a center does or does not offer.²⁷³ Additionally, California contended that “[t]he First Amendment does not bar States from advancing that interest by requiring service providers to disclose a neutral statement of fact regarding the existence or not of a governmental license.”²⁷⁴

The big-picture issue facing the Supreme Court was whether the compelled speech obligations imposed on both licensed and unlicensed facilities violated the First Amendment right not to speak.²⁷⁵ Yet, the critical underlying issue—the one of particular importance for this Article—was the level of scrutiny against which the FACT Act’s provisions should be measured. The U.S. Court of Appeals for the Ninth Circuit in 2016 upheld both parts in a unanimous three-judge decision.²⁷⁶ It concluded that intermediate scrutiny supplied the appropriate test for the provision affecting licensed clinics.²⁷⁷ It reasoned that intermediate scrutiny applied to the notice requirement at licensed centers because the statute affected so-called professional speech.²⁷⁸ This, as the Ninth Circuit defined it, is “speech that occurs between professionals and their clients in the context of their professional relationship.”²⁷⁹ In *Becerra*, the court specified that “the Licensed Notice regulates the clinics’ speech in the context of medical treatment, counseling, or advertising.”²⁸⁰ The Ninth Circuit

272. *Id.* at 15.

273. *See id.*

274. *Id.*

275. Nat’l Inst. of Family & Life Advocates v. *Becerra*, 138 S. Ct. 2361, 2368 (2018) (“The question in this case is whether these notice requirements violate the First Amendment.”).

276. *See* Nat’l Inst. of Family & Life Advocates v. *Harris*, 839 F.3d 823, 845 (9th Cir. 2016), *rev’d sub nom* Nat’l Inst. of Family & Life Advocates v. *Becerra*, 138 S. Ct. 2361 (2018).

277. *Id.* at 829 (“For the free speech claim, we conclude that the proper level of scrutiny to apply to the Act’s regulation of licensed clinics is intermediate scrutiny, which it survives.”).

278. *Id.* at 840 (“Because licensed clinics offer medical and clinical services in a professional context, the speech within their walls related to their professional services is professional speech.”).

279. *Id.* at 839.

280. *Id.* at 840.

found that strict scrutiny was inappropriate because the speech affected by the law was not part of a larger “public dialogue.”²⁸¹

In terms of the required notice provision affecting unlicensed clinics, the Ninth Circuit did not resolve what level of scrutiny was appropriate.²⁸² Instead, it held that the provision would pass constitutional muster even under the most rigorous level of review, strict scrutiny.²⁸³

The U.S. Supreme Court, however, reversed the Ninth Circuit’s ruling on both provisions.²⁸⁴ It held that “petitioners [were] likely to succeed on the merits of their claim that the FACT Act violates the First Amendment.”²⁸⁵ Yet in doing so, the justices divided five to four—along perceived conservative and liberal lines—on the applicable level of scrutiny and, importantly, on how that level of scrutiny should be determined.²⁸⁶

This Article concentrates on the battle over scrutiny regarding the licensed-centers mandate. Why? First, that fight provides a clear window into the contrasting approaches for determining scrutiny, thereby rendering analysis of the unlicensed-centers requirement unnecessary for this Article’s focus, which is on the conflicting approaches for determining when heightened scrutiny is warranted. Second, and more importantly, the *Becerra* majority punted on the level of scrutiny question as applied to the unlicensed-centers provision.²⁸⁷ It simply held that California’s mandate for those facilities could not survive even under a deferential rational basis approach.²⁸⁸

When it came to the compelled-notice requirement for licensed centers, the five-justice majority, in an opinion authored by Justice Thomas:

281. *Id.*

282. *Id.* at 844 n.10 (“To be clear, we do not conclude that strict scrutiny is the correct level of scrutiny to apply to the Unlicensed Notice. We only conclude that it can survive strict scrutiny.”).

283. *See id.* at 843.

284. *See Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2378 (2018).

285. *Id.*

286. *See id.* at 2361-62.

287. *See id.* at 2376-77.

288. *Id.* (“The parties dispute whether the unlicensed notice is subject to deferential review under *Zauderer*. We need not decide whether the *Zauderer* standard applies to the unlicensed notice.”).

- 1) Held that the provision “regulate[d] speech as speech,” was “a content-based regulation” and therefore was presumptively unconstitutional and typically would be subject to a “stringent standard” of review tantamount to strict scrutiny;²⁸⁹
- 2) Found it unnecessary, however, to apply strict scrutiny because the notice requirement could not “survive even intermediate scrutiny;”²⁹⁰
- 3) Reasoned that the requirement could not surmount intermediate scrutiny because, even assuming that California had a substantial interest in educating low-income women about the availability of free or low-cost abortion services, the requirement was “not sufficiently drawn to achieve it” due to its underinclusiveness;²⁹¹
- 4) Rejected the Ninth Circuit’s conclusion that the requirement should be treated as a regulation of “professional speech” and thereby afforded more deferential review;²⁹²
- 5) Rebuffed the argument that the requirement should be reviewed under the “lower level of scrutiny” established in *Zauderer v. Office of Disciplinary Counsel*, which involved a rule compelling attorneys to disclose “purely factual and uncontroversial information” about contingency fee arrangements in their advertisements;²⁹³ and lastly

289. *Id.* at 2371, 2374.

290. *Id.* at 2375.

291. *Id.* at 2375-76. See generally Clay Calvert, *Underinclusivity and the First Amendment: The Legislative Right to Nibble at Problems After Williams-Yulee*, 48 ARIZ. ST. L.J. 525, 525 (2016) (providing an overview of the underinclusiveness doctrine in First Amendment jurisprudence).

292. *Becerra*, 138 S. Ct. at 2371-72. The majority added that “neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles.” *Id.* at 2375.

293. *Id.* at 2375; *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637, 651 (1985). The Court in *Zauderer* held that “that an advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.” *Id.* at 651. In adopting this relaxed standard of review, the Court explained that “the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed.” *Id.* at 651 n.14. The majority in *Becerra* bluntly rejected *Zauderer*’s applicability, writing that “[t]he *Zauderer* standard does not apply here.” *Becerra*, 138 S. Ct. at 2372.

- 6) Rejected the notion that the requirement was simply a regulation of professional conduct that only incidentally affected speech.²⁹⁴

In summary, the majority applied a heightened level of inquiry—intermediate scrutiny—greater than rational basis review to strike down the notice requirement for licensed centers.²⁹⁵ In reaching that result, the majority’s analysis focused heavily on whether the provision was content based (yes, it concluded) and whether, in turn, any exception—be it a professional speech exception, a professional conduct exception, or *Zauderer’s* compelled-disclosure exception—applied to exempt the provision from analysis under strict scrutiny that typically applies to content-based laws (no, it concluded).²⁹⁶

The majority tossed California (and, by extension, the liberal justices) a tiny legal bone by not shutting the door on the possibility that a persuasive reason may, under some scenario, exist “for treating professional speech as a unique category that is exempt from ordinary First Amendment principles.”²⁹⁷ One of those ordinary principles, of course, is that whether a law is content based or content neutral is key for determining the level of scrutiny.²⁹⁸ Another is that content-based laws are presumptively unconstitutional and typically subject to a “stringent standard” of review akin to strict scrutiny.²⁹⁹

The majority, however, quickly yanked that bone away. It held not only that California failed to prove such a reason in *Becerra*, but that even if it had done so, it would not have mattered because the

294. *Becerra*, 138 S. Ct. at 2373 (“The licensed notice at issue here is not an informed-consent requirement or any other regulation of professional conduct.”).

295. *See supra* notes 5-8 and accompanying text (explaining when rational basis review typically applies).

296. *See Becerra*, 138 S. Ct. at 2371-72.

297. *Id.* at 2375.

298. *Id.* at 2371 (“The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws that abridge the freedom of speech. When enforcing this prohibition, our precedents distinguish between content-based and content-neutral regulations of speech.”).

299. *Id.* Justice Thomas’s description in *Becerra* of this stringent standard as requiring a “compelling” government interest and a narrowly tailored statute to serve it was drawn from his own description of strict scrutiny in *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226-27 (2015). *Id.* In *Reed*, Justice Thomas wrote for the Court that “[a] law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.” *See Reed*, 135 S. Ct. at 2228 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)).

compelled-notice requirement for licensed centers failed the more permissive, yet still heightened, intermediate scrutiny test.³⁰⁰

Finally, it is important to note how Justice Thomas used *Sorrell* in *Becerra*.³⁰¹ Specifically, he cited it to support the proposition that content-based regulations of speech affecting the fields of health and medicine are dangerous and thus should be analyzed under strict scrutiny.³⁰² Additionally, Thomas deployed *Sorrell* to seemingly rebut the notion espoused by Justice Breyer in *Expressions Hair Design*³⁰³ and in his *Becerra* dissent³⁰⁴ that drawing a line between speech and conduct was no longer important.³⁰⁵ Finally, the majority cited *Sorrell* to support the idea that laws that distinguish between speakers merit heightened First Amendment scrutiny.³⁰⁶ In a nutshell, then, *Sorrell* became a vehicle for turning *Becerra* into a full-blown First Amendment case demanding heightened scrutiny.

Justice Breyer, joined in dissent by fellow liberal Justices Ginsburg, Sotomayor, and Kagan, held that both provisions of the FACT Act were “likely constitutional.”³⁰⁷ In doing so, Breyer:

- 1) Blasted the majority’s approach for determining the appropriate level of scrutiny, claiming it “threatens to create serious problems;”³⁰⁸
- 2) Objected to the majority’s application of what Breyer called “heightened scrutiny” to the mandate affecting licensed centers simply because the FACT Act was a content-based restriction of speech, with Breyer emphasizing that “[v]irtually every disclosure law could be considered ‘content based;’”³⁰⁹

300. See *Becerra*, 138 S. Ct. at 2375.

301. See *id.* at 2374.

302. See *id.*

303. See *supra* notes 21-24, 228 and accompanying text (describing Breyer’s views in *Expressions Hair Design* on the relationship between speech and conduct).

304. See *infra* note 346 and accompanying text (describing Breyer’s views in *Becerra* on the relationship between speech and conduct).

305. See generally *Becerra*, 138 S. Ct. 2361; *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 553 (2011) (explaining that while drawing the line between speech and conduct can be difficult, this Court’s precedents have long drawn it).

306. See *Becerra*, 138 S. Ct. at 2367.

307. See *id.* at 2379 (Breyer, J., dissenting).

308. *Id.* at 2380.

309. *Id.*

- 3) Spelled out a virtual parade of horrors, just as he had done in dissent in *Sorrell*,³¹⁰ regarding “the constitutional validity of much, perhaps most, government regulation” involving compelled disclosures;³¹¹ and
- 4) Rebuked the majority both for “suggesting that heightened scrutiny applies to much economic and social legislation” and for causing “serious disservice” to traditional First Amendment goals, such as discovering truth in the marketplace of ideas and protecting unpopular ideas, by invoking them in the name of applying heightened scrutiny in *Becerra*.³¹²

Just as he did in dissent in *Sorrell*,³¹³ Breyer raised the possibility that the majority’s nondeferential approach in *Becerra* represented a return to the *Lochner* era.³¹⁴ For the dissent, applying heightened scrutiny in *Becerra* contradicts the traditional deference and “respectful approach” due to legislative bodies when regulating “ordinary economic and social legislation” and the medical profession.³¹⁵ Ramping up First Amendment scrutiny when it is unnecessary to do so ultimately causes long-term harm by clouding what Breyer called “the true value of protecting freedom of speech.”³¹⁶

In other words, and as suggested earlier, Breyer and the dissent intimated that a values-based approach—rather than a content-based-versus-content-neutral methodology—provides the better technique for deciding when heightened scrutiny applies in a case involving speech.³¹⁷ Only when a value residing at the core of the First Amendment is jeopardized is heightened scrutiny warranted. In other words, as Justice Kagan wrote for the same bloc of four justices in

310. See *Sorrell*, 564 U.S. at 602–03 (Breyer, J., dissenting).

311. *Becerra*, 138 S. Ct. at 2380 (Breyer, J., dissenting) (opining that “the majority’s view, if taken literally, could radically change prior law, perhaps placing much securities law or consumer protection law at constitutional risk”).

312. *Id.* at 2382–83.

313. See *supra* notes 135–136 and accompanying text.

314. See *Becerra*, 138 S. Ct. at 2382 (Breyer, J., dissenting) (asserting that “[e]ven during the *Lochner* era, when this Court struck down numerous economic regulations concerning industry, this Court was careful to defer to state legislative judgments concerning the medical profession,” and adding that “[i]n the name of the First Amendment, the majority today treads into territory where the pre-New Deal, as well as the post-New Deal, Court refused to go”).

315. *Id.* at 2381–82.

316. *Id.* at 2383.

317. See *id.* at 2382–83 (addressing this values-based approach to scrutiny).

dissent in *Janus* just one day after *Becerra*, “[t]he First Amendment was meant for better things” than being used as a scalpel to cut and carve away at “workaday economic and regulatory policy.”³¹⁸ More bluntly stated, there is a certain amount of constitutional disingenuousness involved that degrades the real reasons for having a First Amendment Free Speech Clause when any content-based law affecting speech triggers heightened scrutiny, be it strict or intermediate.

Breyer explained why the “majority’s general broad ‘content-based’ test” for determining the appropriate level of scrutiny is misguided when it comes to disclosure laws.³¹⁹ He wrote that this “test invites courts around the Nation to apply an unpredictable First Amendment to ordinary social and economic regulation, striking down disclosure laws that judges may disfavor, while upholding others, all without grounding their decisions in reasoned principle.”³²⁰ A reasoned principle, Breyer suggested, for applying a rigorous level of review to disclosure laws would be if they were viewpoint based.³²¹

For the dissent, the level of scrutiny that should have been applied to the compelled-disclosure requirements for licensed crisis pregnancy centers was the version of rational basis review articulated by the Court in *Zauderer v. Office of Disciplinary Counsel*.³²² Under that test, compelled disclosure of information is permissible under the First Amendment if the government’s reason for compelling speech is “reasonably related to the State’s interest in preventing deception.”³²³ This test amounts to rational basis review.³²⁴ Breyer thus wrote that

318. *Janus v. Am. Fed’n State, Cty. & Mun. Emps.*, 138 S. Ct. 2448, 2501-02 (2018) (Kagan, J., dissenting).

319. *Becerra*, 138 S. Ct. at 2381 (Breyer, J., dissenting).

320. *Id.*

321. *Id.* (“Notably, the majority says nothing about limiting its language to the kind of instance where the Court has traditionally found the First Amendment way of content-based laws, namely, in cases of viewpoint discrimination.”)

322. *See id.* at 2386-87; *see generally* *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

323. *Zauderer*, 471 U.S. at 651.

324. Ellen P. Goodman, *Visual Gut Punch: Persuasion, Emotion, and the Constitutional Meaning of Graphic Disclosure*, 99 CORNELL L. REV. 513, 521 (2014) (emphasis added) (“*Zauderer* has led to considerable confusion in the lower courts about what sorts of commercial speech disclosure requirements are covered by *its* rational basis standard of review.”); Shannon M. Roesler, *Evaluating Corporate Speech About Science*, 106 GEO. L.J. 447, 505 (2018) (“Many courts and commentators have treated the *Zauderer* ‘reasonable relationship’ test as a highly deferential test similar to rational basis review.”); *see also* Danielle Weatherby & Terri R. Day, *The Butt Stops Here: The Tobacco Control Act’s Anti-Smoking*

“finding no First Amendment infirmity in the licensed notice is consistent with earlier Court rulings. For instance, in *Zauderer* we upheld a requirement that attorneys disclose in their advertisements that clients might be liable for significant litigation costs even if their lawsuits were unsuccessful.”³²⁵

More broadly extrapolated, the dissent suggests that when a professional or a business is compelled by the government to reveal facts that possess “informational value” to patients or consumers, and when the government “expresses no official preference” about the choice or the option that patients or consumers should make with that information, then “[t]here is no reason to subject such laws to heightened scrutiny.”³²⁶ More colloquially put, a little bit of government intervention in the factual marketplace of ideas—intervention in the interest of helping an audience that is confronted with important choices by expanding its knowledge—should not be measured against a heightened test. Or phrased in terms more akin to Breyer’s preferred proportionality method, the informational benefits to the audience of receiving such compelled speech are major while the harms to the speakers that result from being compelled to convey that information are minor.³²⁷

In contrast and as noted earlier, the *Becerra* majority refused to apply *Zauderer*.³²⁸ Why? Because, as Justice Thomas explained by quoting directly from *Zauderer*, that test applies only to cases involving disclosure of “purely factual and uncontroversial information about the terms under which . . . services will be available.”³²⁹ Specifically, *Zauderer* addressed the constitutionality of a state disciplinary rule compelling Ohio attorneys to reveal in their

Regulations Run Afoul of the First Amendment, 76 ALB. L. REV. 121, 138 (2012) (writing that the Court in *Zauderer* “articulated a rational basis standard of review”).

325. *Becerra*, 138 S. Ct. at 2386–87 (Breyer, J., dissenting).

326. *Id.* at 2387–88.

327. *Id.* at 2387 (“Whether the context is advertising the professional’s own services or other commercial speech, a doctor’s First Amendment interest in not providing factual information to patients is the same: minimal, because his professional speech is protected precisely because of its informational value to patients.”).

328. See *supra* note 293 and accompanying text (addressing the majority’s treatment of *Zauderer*).

329. See *Becerra*, 138 S. Ct. at 2372 (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)).

advertisements certain information about their contingency fee arrangements.³³⁰

Thomas distinguished that factual setting from *Becerra* in two principal ways. First, he called abortion “anything but an ‘uncontroversial’ topic.”³³¹ While he may be correct that abortion is controversial, Thomas here slightly distorts or twists *Zauderer*’s language—language that focuses not on whether the underlying *topic* is uncontroversial, but on whether the *information* is uncontroversial.³³² In other words, while abortion may be a controversial topic in some quarters, purely factual information regarding the price of an abortion for low-income women is arguably a very different matter. As Justice Breyer put it, “[a]bortion is a controversial topic and a source of normative debate, but the availability of state resources is not a normative statement or a fact of debatable truth.”³³³

The second factual distinction Justice Thomas drew in order to cabin *Zauderer*’s reach to the circumstances of that case pivoted on who provides the *services* about which information must be disclosed.³³⁴ In *Zauderer*, attorneys had to disclose information about the contingency fee arrangements under which they would perform *their own* services for clients.³³⁵ In *Becerra*, however, licensed crisis pregnancy centers had to provide information about abortion services *provided by others*, given that the centers do not perform abortions.³³⁶ These two factual distinctions proved pivotal for Thomas and the conservative majority in holding that the rational basis test created in

330. See *Zauderer*, 471 U.S. at 629 (framing a key issue in the case as “whether a State may seek to prevent potential deception of the public by requiring attorneys to disclose in their advertising certain information regarding fee arrangements”).

331. *Becerra*, 138 S. Ct. at 2372.

332. See *Zauderer*, 471 U.S. at 651 (emphasis added) (opining that Ohio’s “prescription has taken the form of a requirement that appellant include in his advertising purely factual and *uncontroversial information* about the terms under which his services will be available”).

333. *Becerra*, 138 S. Ct. at 2388 (Breyer, J., dissenting).

334. See *id.* at 2372.

335. See *id.* (emphasis added) (where Justice Thomas wrote that the compelled-disclosure mandate in *Zauderer* applied to “lawyers who advertised *their services* on a contingency-fee basis”).

336. See *id.* at 2371-72 (observing that California’s compelled speech obligation regarding the availability of free or low-cost abortion services “in no way relates to the services that licensed clinics provide. Instead, it requires these clinics to disclose information about *state-sponsored services*”).

Zauderer was inapplicable to measure the validity of California’s law targeting licensed centers.³³⁷

Breyer and the dissent, however, disagreed with the majority on its who-performs-the-services logic in distinguishing *Zauderer*.³³⁸ For Breyer, the key was not who directly performed the specific service in question (abortion).³³⁹ Instead, it was whether that service was “related to” a larger constellation of services and activities encompassing it (pregnancy counseling and other pregnancy services).³⁴⁰ As Breyer wrote, “information about state resources for family planning, prenatal care, and abortion *is* related to the services that licensed clinics provide. These clinics provide counseling about contraception (which is a family-planning service), ultrasounds or pregnancy testing (which is prenatal care), or abortion.”³⁴¹

In brief, the majority fought hard, by raising purported factual differences with *Becerra*, to hold inapplicable *Zauderer*’s rational-basis exception to the general rule that content-based regulations of speech face heightened scrutiny.³⁴² The dissent, in contrast, embraced *Zauderer* as a much more general rule—one *not* tightly tethered to the facts of that case—applicable to compelled-disclosure cases involving factual information.³⁴³

The bottom line for the dissent in *Becerra* was that heightened First Amendment scrutiny was not warranted simply because speech was involved or because the regulations were content based.³⁴⁴ As Breyer put it in returning to his logic about the substantial overlap between speech and conduct from *Expressions Hair Design*,³⁴⁵ “much, perhaps most, human behavior takes place through speech.”³⁴⁶ *Becerra*

337. See *id.* at 2372-73 (discussing prior precedents allowing lower levels of scrutiny and noting why these precedents do not apply in this case).

338. See *id.* at 2387 (Breyer, J., dissenting) (arguing the majority misapplies relevant precedent on compelled notices).

339. See *id.* at 2387 (arguing that disclosures requirements should not trigger heightened scrutiny because such requirements do not prevent individuals from communicating their ideas).

340. *Id.* (emphasis omitted) (discussing the wider range of services that the clinic disclosure requirements relate to).

341. *Id.*

342. See *id.* at 2372-75 (majority opinion) (discussing why related First Amendment cases are inapplicable to this case).

343. See *id.* at 2387 (Breyer, J., dissenting) (asserting that “*Zauderer* is not so limited” as the majority would have it).

344. See *id.* (arguing that notice requirements alone should not trigger higher First Amendment protections).

345. See *supra* note 212 and accompanying text.

346. *Becerra*, 138 S. Ct. at 2380 (Breyer, J., dissenting).

was not, as the majority dubbed it, a “speech as speech” case.³⁴⁷ Rather, it was a case involving “ordinary social and economic legislation”—more specifically, “ordinary disclosure laws” applicable, at least in the context of licensed centers, to medical professionals performing in their professional capacities.³⁴⁸ As such, the deferential standard of rational basis review embodied in *Zauderer*—a case in which, as Breyer explained in *Becerra*, the Court “refused to apply heightened scrutiny”³⁴⁹—was appropriate. Furthermore, because a core First Amendment value such as truth seeking in the marketplace of ideas was not jeopardized by the legislation—in fact, Breyer argued that California’s law enhanced and enriched the factual marketplace of ideas³⁵⁰—there was no reason to ratchet up the standard of review above rational basis.³⁵¹

Lurking beneath this battle over First Amendment scrutiny was the subtext that *Becerra* was as much a proxy fight over access to abortion procedures as it was a skirmish over the right not to be compelled by the government to speak. As Adam Liptak wrote for the *New York Times*, “[w]hile the decision’s legal analysis turned on the First Amendment, it was lost on no one that the justices most committed to defending abortion rights were all in dissent.”³⁵² Put differently, the dispute over speech was a surrogate for a larger political and legal battle over abortion rights.³⁵³

Only two years prior to *Becerra*, the Court’s liberal members (Justices Stephen Breyer, Ruth Bader Ginsburg, Elena Kagan and Sonia Sotomayor), along with Justice Kennedy, declared unconstitutional in *Whole Women’s Health v. Hellerstedt* two Texas regulations limiting access to abortions in the Lone Star State.³⁵⁴ In contrast, conservative Justice Clarence Thomas filed a solo dissent and

347. *Id.* at 2374 (majority opinion).

348. *Id.* at 2380-82 (Breyer, J., dissenting).

349. *Id.* at 2386-87.

350. *See id.* at 2388 (contending that the marketplace of ideas “is fostered, not hindered, by providing information to patients to enable them to make fully informed medical decisions in respect to their pregnancies”).

351. *See id.* at 2387-88 (discussing the importance of the different ideas and viewpoints to First Amendment analysis and arguing that rational basis review should have been applied in this case).

352. Adam Liptak, *Supreme Court Backs Anti-Abortion Pregnancy Centers in Free Speech Case*, N.Y. TIMES (June 26, 2018), <https://www.nytimes.com/2018/06/26/us/politics/supreme-court-crisis-pregnancy-center-abortion.html> [<https://perma.cc/29HS-2MBF>].

353. *See id.* (noting the political debate present in this case).

354. *Whole Women’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2299-300 (2016).

conservative Justice Samuel Alito, joined by conservative Chief Justice John Roberts and Justice Clarence Thomas, also penned a dissent.³⁵⁵ The conservatives were caught shorthanded in *Hellerstedt*. That's because Justice Antonin Scalia—a vehement opponent of the federal constitutional right of a woman to have an abortion³⁵⁶—had died in February 2016 and was not replaced until April 2017 by conservative Justice Neil Gorsuch.³⁵⁷

The contrasting views on scrutiny in *Becerra* were thus arguably part of a larger battle over abortion rights. The conservatives prevailed this time in a ruling favoring pro-life organizations (the operators of crisis pregnancy centers).³⁵⁸ Kennedy voted with the liberals in *Hellerstedt* where no First Amendment issue was involved.³⁵⁹ He came back, however, to join the conservative bloc in *Becerra* in which he perceived California, via its own speech, was taking sides on abortion.³⁶⁰ As Kennedy explained in a concurrence joined by Roberts, Alito, and Gorsuch:

[California] requires primarily pro-life pregnancy centers to promote the State's own preferred message advertising abortions. This compels individuals to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts, or all of these. And the history of the Act's passage and its underinclusive application suggest a real possibility that these individuals were targeted because of their beliefs.³⁶¹

The fact that abortion was the subject matter about which the regulated speech dealt clearly made a difference for the majority.³⁶² To wit, Justice Thomas, in writing for the majority, focused on the fact that abortion is “anything but an ‘uncontroversial’ topic” when rebuffing the argument that *Zauderer's* rational basis test should

355. See *id.* at 2321 (Thomas, J., dissenting); *id.* at 2330 (Alito, J., dissenting).

356. See Lyle Denniston, *Rehnquist to Roberts: The “Reagan Revolution” Fulfilled?*, 155 U. PA. L. REV. 63, 69 (2006) (identifying Justices Scalia and Thomas as “implacable foes of abortion”).

357. See Benjamin Pomerance, *Inside a House Divided: Recent Alliances on the United States Supreme Court*, 81 ALB. L. REV. 361, 361, 364 (2017) (noting Scalia's death and Gorsuch's confirmation).

358. See *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2378 (2018) (Kennedy, J., concurring) (agreeing that the compelled notices violated freedom of speech).

359. See *Hellerstedt*, 136 S. Ct. at 2299-300 (holding Texas laws unconstitutional because they are undue burdens on abortion).

360. See *Becerra*, 138 S. Ct. at 2378-79 (Kennedy, J., concurring) (viewing the law as impermissible viewpoint-based discrimination).

361. *Id.* at 2379

362. See *id.* at 2375 (majority opinion) (discussing how the California's license requirement infringes freedom of speech).

apply.³⁶³ He also invoked the marketplace of ideas metaphor.³⁶⁴ Thomas even went so far as to quote Justice Oliver Wendell Holmes's nearly century-old, seminal articulation of it in *Abrams v. United States*.³⁶⁵ Thomas did so to make it clear that California had no right to intervene and manipulate the speech market on a topic such as abortion where "[p]rofessionals might have a host of good-faith disagreements, both with each other and with the government."³⁶⁶ In brief, as Thomas wrote, "California cannot co-opt the licensed facilities to deliver its message for it."³⁶⁷ Yet, as if tipping his hand that the underlying subject matter of abortion made a key difference in ramping up scrutiny to stop California from delivering its message, Thomas added that "we do not question the legality of health and safety warnings long considered permissible."³⁶⁸

For the dissent, abortion also made a difference.³⁶⁹ That's because, as Justice Breyer explained, it simply was not fair for the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* to allow the government to mandate that doctors discuss adoption options while, in *Becerra*, not allowing California to provide information about free and low-cost abortion services.³⁷⁰ As Breyer wrote:

If a State can lawfully require a doctor to tell a woman seeking an abortion about adoption services, why should it not be able, as here, to require a medical counselor to tell a woman seeking prenatal care or other

363. *Id.* at 2372.

364. *See id.* at 2374-75.

365. *See id.* at 2375; *see generally* *Abrams v. United States*, 250 U.S. 616 (1919). Holmes wrote in dissent in *Abrams* that:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

Id. at 630 (Holmes, J., dissenting). Professor Howard Wasserman encapsulates the importance of this language, writing that "Holmes arguably invented modern freedom of speech in his *Abrams* dissent, promoting constitutional primacy for speech in matters of public concern and protection for dissenting ideas so they can be tested and seek to prevail in the marketplace of ideas." Howard M. Wasserman, *Holmes and Brennan*, 67 ALA. L. REV. 797, 798 (2016).

366. *Becerra*, 138 S. Ct. at 2374-75.

367. *Id.* at 2376.

368. *Id.*

369. *See id.* at 2385. (Breyer, J., dissenting).

370. *See id.* at 2385 (Breyer, J., dissenting); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 884 (1992).

reproductive healthcare about childbirth and abortion services? As the question suggests, there is no convincing reason to distinguish between information about adoption and information about abortion in this context. After all, the rule of law embodies evenhandedness³⁷¹

In summary, the *Becerra* majority applied its content-based-versus-content-neutral framework to hold that heightened First Amendment scrutiny applied to measure the validity of the FACT Act's compelled speech provision affecting licensed clinics.³⁷² The majority rebutted arguments that any exception to that general rule—namely, that content-based laws trigger heightened scrutiny—applied.³⁷³ For the dissent, the compelled disclosure by a professional acting in his or her professional capacity of purely factual information that can help a person make a better-informed choice about an important matter merited only rational basis review.³⁷⁴ In the dissent's estimation, no First Amendment value was sufficiently endangered by California's law to justify a more intense level of scrutiny.³⁷⁵

C. Janus

The day after the Court ruled in *Becerra*, it handed down another five-to-four decision in *Janus v. American Federation of State, County, & Municipal Employees*, with the justices again clustering into conservative and liberal camps.³⁷⁶ Of central importance for this Article, the justices disagreed over whether the law at issue—an Illinois statute compelling public employees who are not members of the union that exclusively represents them in collective bargaining to pay agency fees to that union—merited heightened First Amendment review.³⁷⁷

In concluding both that heightened scrutiny applied and that the law violated the First Amendment, Justice Alito reasoned for the

371. *Becerra*, 138 S. Ct. at 2385 (Breyer, J., dissenting).

372. *See id.* at 2371 (majority opinion).

373. *See id.* at 2371-72.

374. *See id.* at 2387 (Breyer, J., dissenting).

375. *See id.*

376. *See generally* *Janus v. Am. Fed'n St., Cty. & Mun. Emps.*, 138 S. Ct. 2448 (2018).

377. *See* 5 Ill. Comp. Stat. 315/6(e) (2013). An agency fee "amounts to a percentage of the union dues." *Janus*, 138 S. Ct. at 2460. Under the Illinois statute at issue in the case, agency fees were chargeable to nonunion members for union activities including "the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment." 315/6(e).

conservative majority that “[f]undamental free speech rights are at stake” and that “the compelled subsidization of private speech seriously impinges on First Amendment rights.”³⁷⁸ That logic simultaneously gave life to the heart of petitioner Mark Janus’s central argument—that he should not be compelled to pay, via agency fees, for the union’s speech activities with which he disagreed, “including the positions it takes in collective bargaining”³⁷⁹—and dealt a death blow to the Court’s precedent in *Abood v. Detroit Board of Education*.³⁸⁰ In *Abood*, the Court held that a non-union member could be compelled to pay a fee for collective-bargaining activities but not for “ideological activities unrelated to collective bargaining.”³⁸¹

In explaining the need for heightened scrutiny in *Janus*, Alito went so far as to suggest that laws compelling speech—or, more precisely in this instance, compelling the subsidization of speech—are actually more dangerous than laws stopping one from speaking.³⁸² “When speech is compelled . . . additional damage is done. In that situation, individuals are coerced into betraying their convictions,” Alito wrote.³⁸³ He added that “[c]ompelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns.”³⁸⁴

Alito also rebuffed the AFSCME’s argument that rational basis supplied the appropriate level of scrutiny.³⁸⁵ He derided that standard as a “form of minimal scrutiny . . . foreign to our free-speech jurisprudence, and we reject it here.”³⁸⁶ Put differently, some form of heightened First Amendment scrutiny was required in *Janus*. The question therefore became what heightened standard should apply.

Much as the conservative majority did in *Becerra* where it found it unnecessary to apply strict scrutiny because the law there could not pass muster under the laxer intermediate scrutiny test,³⁸⁷ the majority in *Janus* said it did not need to use strict scrutiny because the agency-

378. *Janus*, 138 S. Ct. at 2460, 2464.

379. *Id.* at 2461-62 (“The amended complaint claims that all ‘nonmember fee deductions are coerced political speech’ and that ‘the First Amendment forbids coercing any money from the nonmembers.’”).

380. *See generally* *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

381. *Id.* at 236.

382. *See Janus*, 138 S. Ct. at 2464.

383. *Id.*

384. *Id.* (emphasis in original).

385. *See id.* at 2465.

386. *Id.*

387. *See Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2378 (2018)

fee requirement could not survive what Alito called a “more permissive standard.”³⁸⁸ That standard was what Alito called exacting scrutiny.³⁸⁹ Under it, the government must prove that: 1) it has a compelling interest in mandating the subsidization of private speech; and 2) alternative means of serving that interest do not exist that are “significantly less restrictive of associational freedoms.”³⁹⁰

The first prong of this test mirrors strict scrutiny, as it requires the government to prove a compelling interest.³⁹¹ The second prong, however, is slightly more relaxed than strict scrutiny, which requires the government to adopt “the *least restrictive means* of achieving a compelling state interest.”³⁹² Exacting scrutiny therefore appears to fall somewhere between strict and intermediate scrutiny,³⁹³ with the latter typically requiring only a significant government interest rather than a compelling one.³⁹⁴

Unfortunately, the Court sometimes uses the phrase exacting scrutiny synonymously with strict scrutiny, as the plurality did in *United States v. Alvarez*, thereby muddling the precise nature of exacting scrutiny.³⁹⁵ Indeed, as Professor David Han recently wrote,

388. *Janus*, 138 S. Ct. at 2465.

389. *See id.*

390. *Id.* (quoting *Knox v. Serv. Emps. Int’l Union*, 567 U.S. 298, 310 (2012)).

391. *See* *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011) (emphasis added) (noting that a law is invalid under strict scrutiny unless “it is justified by a *compelling government interest* and is narrowly drawn to serve that interest”).

392. *McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014) (emphasis added).

393. *See* R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 UMKC L. REV. 207, 210 (2016) (describing an “understandable temptation to think of exacting scrutiny, as formulated above, as occupying a position between strict scrutiny and either intermediate or minimum scrutiny”).

394. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (“In order to survive intermediate scrutiny, a law must be ‘narrowly tailored to serve a significant governmental interest.’” (quoting *McCullen*, 134 S. Ct. at 2529))).

395. *See* *United States v. Alvarez*, 567 U.S. 709, 711 (2012). Writing for the plurality in *Alvarez*, Justice Anthony Kennedy concluded that the Stolen Valor Act was a content-based restriction of speech and thus was subject to review under “exacting scrutiny.” *Id.* at 715. In applying that level of scrutiny, however, the majority used language closely linked with strict scrutiny. *See id.* at 711. It wrote, for example, that “to recite the Government’s *compelling interests* is not to end the matter.” *Id.* at 725 (emphasis added). It also observed that “when the Government seeks to regulate protected speech, the restriction must be the ‘least restrictive means among available, effective alternatives.’” *Id.* at 729 (quoting *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004)). The blurring of the line between strict and exacting scrutiny in *Alvarez* has been recognized by other scholars. *See, e.g.,* Larissa U. Liebmann, *Fraud and First Amendment Protections of False Speech: How United States v. Alvarez Impacts Constitutional Challenges to Ag-Gag Laws*, 31 PACE ENVTL. L.

the Court's use of the term exacting scrutiny is "opaque and inconsistent."³⁹⁶ Using exacting scrutiny as a fourth level of scrutiny—one in addition to strict scrutiny, intermediate scrutiny, and rational basis review—thus contributes to the scrutiny commotion at the heart of this Article. Regardless of the precise contours of exacting scrutiny, however, the *Janus* majority was clear that the Illinois statute could not surmount them.³⁹⁷

The *Janus* dissent objected to the majority's application of exacting scrutiny.³⁹⁸ In doing so and as described below, it focused less on the First Amendment speech rights of public employees like Mark Janus and more on the government's interest in effectively and efficiently managing those employees in the name of workplace operations.³⁹⁹

Justice Kagan, writing on behalf of herself and Justices Ginsburg, Breyer, and Sotomayor, asserted that the Court's precedents provide government entities with "substantial latitude to regulate their employees' speech—especially about terms of employment—in the interest of operating their workplaces effectively."⁴⁰⁰ Therefore, rather than deploying a heightened level of scrutiny when the government plays the role of employer and regulates its employees' speech to facilitate "workplace operations" and to "protect its managerial interests," the Court owes the government "great deference."⁴⁰¹ As Kagan wrote:

So long as the government is acting as an employer—rather than exploiting the employment relationship for other ends—it has a wide berth, comparable to that of a private employer. And when the regulated expression concerns the terms and conditions of employment—the very stuff of the employment relationship—the government really cannot lose.⁴⁰²

REV. 566, 588-89 (2014) ("In *Alvarez*, once the Court found that the Stolen Valor Act was a content-based restriction on speech, it was subjected to 'exacting scrutiny,' which functionally appears to be similar to strict scrutiny."); see also John D. Moore, *The Closed and Shrinking Frontier of Unprotected Speech*, 36 WHITTIER L. REV. 1, 33 n.203 (2014) (observing that in *Alvarez*, Justice Kennedy's use of "exacting scrutiny" seems to bear the hallmarks of strict scrutiny").

396. David S. Han, *Categorizing Lies*, 89 U. COLO. L. REV. 613, 635 (2018).

397. See *Janus v. Am. Fed'n of State, Cty. & Mun. Emps.*, 138 S. Ct. 2448, 2465 (2018) (holding that "the Illinois scheme cannot survive under even the more permissive standard" of exacting scrutiny).

398. See *id.* at 2487 (Kagan, J., dissenting).

399. See *id.*

400. *Id.*

401. *Id.* at 2492-93, 2493 n.2.

402. *Id.* at 2493.

In brief, the law affecting speech in *Janus* was simply an example of “workaday economic and regulatory policy.”⁴⁰³ *Janus* was not a speech-as-speech case because—and in accord with Justice Breyer’s observations in both *Expressions Hair Design*⁴⁰⁴ and *Becerra*⁴⁰⁵ about the blurring of the line between speech and conduct— “[s]peech is everywhere” and therefore “almost all economic and regulatory policy affects or touches speech,” Kagan opined.⁴⁰⁶

The proper standard of review, at least for the dissent, was that developed in a line of public-employee workplace speech cases.⁴⁰⁷ This standard is deferential to the government⁴⁰⁸ and sometimes is seen as akin to rational basis review.⁴⁰⁹ The three key cases are *Pickering v. Board of Education*,⁴¹⁰ *Connick v. Myers*,⁴¹¹ and *Garcetti v. Ceballos*.⁴¹² As clarified in *Garcetti*, it is a two-part test that first asks if a public employee is speaking out in his or her role as a citizen on a matter of public concern.⁴¹³ If the answer is no, then the government wins and censorship of the employee’s speech does not raise any First Amendment issues.⁴¹⁴ If the answer is yes, then the public employee’s speech can still be censored, but the government must prove that its

403. *Id.* at 2501.

404. *See* Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2380 (2018) (Breyer, J., dissenting) (“[M]uch, perhaps most, human behavior takes place through speech.”); *supra* notes 21-24 and accompanying text.

405. *See* *Becerra*, 138 S. Ct. at 2380 (Breyer, J., dissenting) (“[M]uch, perhaps most, human behavior takes place through speech.”).

406. *Janus*, 138 S. Ct. at 2502 (Kagan, J., dissenting).

407. *See id.* at 2491-93.

408. *See* Erin Daly, *Garcetti in Delaware: New Limits on Public Employees’ Speech*, 11 DEL. L. REV. 23, 23 (2009). As Professor Erin Daly succinctly explains it: In balancing the free speech rights of individuals against the ability of a government employer to control the workplace, the United States Supreme Court, under Chief Justice Roberts, has come down squarely on the side of the government. *Garcetti v. Ceballos* is the most recent salvo in a spate of cases spanning 40 years that has addressed this issue, and it is the most restrictive of the speech of public employees and the most deferential of employers.

Id.

409. Ivan E. Bodensteiner, *Scope of the Second Amendment Right—Post-Heller Standard of Review*, 41 U. TOL. L. REV. 43, 48 (2009) (“In *Garcetti v. Ceballos*, without explicitly saying so, the Court applied rational basis to reject a government employee’s free-speech claim where the speech was made in furtherance of the employee’s official duties.”).

410. *See generally* *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

411. *See generally* *Connick v. Myers*, 461 U.S. 138 (1983).

412. *See generally* *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

413. *See id.* at 418.

414. *See id.*

ensorship is “directed at speech *that* has some potential to affect [the government entity’s] operations.”⁴¹⁵ As interpreted by Justice Kagan in *Janus*, this last requirement simply means that the government “needs to show that legitimate workplace interests lay behind the speech regulation.”⁴¹⁶

Applying this test to the facts of *Janus*, Kagan and the dissent had no problem finding that speech about collective bargaining and the terms and conditions of employment—the same topics about which Illinois compelled nonunion members such as Mark Janus to subsidize speech—are not matters of public concern.⁴¹⁷ Instead, such expression is “about and directed to the workplace.”⁴¹⁸ As Kagan summed it up, “[i]f an employee’s speech is about, in, and directed to the workplace, she has no ‘possibility of a First Amendment claim.’”⁴¹⁹ In brief, Mark Janus loses his case under this form of scrutiny.

The dissent’s anger at the majority’s sharpening of the scrutiny scalpel to strike down decisions affecting workplace operations made by duly elected legislative bodies like the ones in Illinois was palpable in *Janus*. As Kagan bluntly put it, the majority had turned “the First Amendment into a sword,” “weaponizing” it to use in “such an aggressive way” that the justices are being transformed into “black-robed rulers overriding citizens’ choices” as they “intervene in economic and regulatory policy.”⁴²⁰ In other words, an unelected judiciary is unnecessarily intruding into the province of the legislature, disturbing the balance of powers between those two branches of government and ignoring traditional principles of deference in the process.⁴²¹

Kagan also criticized the majority’s argument that heightened scrutiny was warranted because laws compelling speech are somehow more harmful than laws censoring speech.⁴²² The majority’s contention “lack[ed] force,”⁴²³ Kagan explained, because it relied on an anomalous case with a radically different set of facts—namely,

415. *Id.* at 411, 418.

416. *Janus v. Am. Fed’n of State, Cty. & Mun. Emps.*, 138 S. Ct. 2448, 2492 (2018) (Kagan, J., dissenting)

417. *See id.* at 2495-96.

418. *Id.* at 2495.

419. *Id.* at 2496 (quoting *Garcetti*, 547 U.S. at 418).

420. *Id.* at 2501-02.

421. *See id.*

422. *See id.* at 2464 (majority opinion); *id.* at 2494 (Kagan, J., dissenting).

423. *Id.* at 2494 (Kagan, J., dissenting).

West Virginia State Board of Education v. Barnette,⁴²⁴ and a law requiring public school children to salute the American flag and recite the pledge of allegiance.⁴²⁵ *Janus*, instead, was about the compelled subsidization of the speech of others in an employment context and thus actually merited a lower level of scrutiny.⁴²⁶

In addition to Justice Kagan's dissent on behalf of all of the liberal justices, Justice Sotomayor issued a brief solo dissent in *Janus*.⁴²⁷ In it, she objected to how the Court's decision in *Sorrell* was being used aggressively in cases such as *Becerra*.⁴²⁸ As described earlier, Sotomayor had joined—as the lone liberal—with the conservatives in the majority in *Sorrell*.⁴²⁹

CONCLUSION

Professor Leslie Kendrick recently asserted that “the fact that a law implicates ‘speech’ does not mean that it implicates ‘the freedom of speech.’”⁴³⁰ Her observation crisply captures the fissure between the conservative majorities and liberal dissents in 2018 in *Becerra* and *Janus*.⁴³¹

For the conservatives, both cases directly implicated the First Amendment freedom of speech and thus required a level of scrutiny greater than rational basis review. For the liberals, both cases also involved speech, but only within the context of workaday economic and social regulations, thereby not warranting heightened review. Although all of the justices seemingly agree today that heightened First Amendment scrutiny applies when a statute affecting

424. See generally *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

425. See *id.* at 626.

426. *Janus*, 138 S. Ct. at 2494 (Kagan, J., dissenting) (“And if anything, the First Amendment scales tip the opposite way when (as here) the government is not compelling actual speech, but instead compelling a subsidy that others will use for expression.”).

427. See *id.* at 2487 (Sotomayor, J., dissenting).

428. See *id.*

429. See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2658-59 (identifying the justices in the majority in *Sorrell*).

430. Leslie Kendrick, *Use Your Words: On the “Speech” in “Freedom of Speech”* 116 MICH. L. REV. 667, 676 (2018).

431. See *id.*

nongovernmental speech⁴³² is viewpoint based,⁴³³ everything else is much more fluid. Justice Breyer's bendable proportionality approach greases the skids for intensified ambiguity,⁴³⁴ while *Sorrell* provides a wrecking ball for conservatives to destroy the walls separating customary levels of scrutiny.⁴³⁵

Viewed at a macro level, the conservatives generally focus on whether a statute is content based, content neutral, or targets specific speakers to determine the appropriate level of scrutiny.⁴³⁶ The liberals,

432. The government speech doctrine, which applies when the government—not a private person or private entity—is the speaker, provides an exception to the rule that viewpoint-based restrictions on speech are subject to strict scrutiny review. That is because the Free Speech Clause of the First Amendment only “restricts government regulation of private speech; it does not regulate government speech.” *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009); *see also Walker v. Texas Div., Sons of Confederate Veterans*, 135 S. Ct. 2239, 2245 (2015) (“When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.”). The Court explained in 2017 that:

[I]mposing a requirement of viewpoint-neutrality on government speech would be paralyzing. When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others. The Free Speech Clause does not require government to maintain viewpoint neutrality when its officers and employees speak about that venture.

Matal v. Tam, 137 S. Ct. 1744, 1757 (2017).

433. *See Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2381 (2018) (Breyer, J., dissenting) (rebuking the majority opinion in *Becerra* for saying “nothing about limiting its language to the kind of instance where the Court has traditionally found the First Amendment wary of content-based laws, namely, in cases of viewpoint discrimination”); *Matal*, 137 S. Ct. at 1765 (Kennedy, J., concurring) (asserting, in a concurrence joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan, that viewpoint discrimination constitutes “a form of speech suppression so potent that it must be subject to rigorous constitutional scrutiny”); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2237 (2015) (Kagan, J., concurring) (opining that strict scrutiny always applies when a “regulation facially differentiates on the basis of viewpoint”); *Walker*, 135 S. Ct. at 2256-63 (2015) (Alito, J., dissenting) (asserting, in a dissent joined by Chief Justice John Roberts and Justices Antonin Scalia and Anthony Kennedy, that a Texas statute affecting specialty license plates allowed the state to engage in “blatant viewpoint discrimination,” noting that Texas’s rationale for the statute “cannot withstand strict scrutiny,” and adding that “Texas cannot forbid private speech based on its viewpoint”).

434. *See supra* Part II (discussing Breyer’s proportionality approach).

435. For instance, Justice Kagan wrote in 2018 in *Janus* that the Court in *Sorrell* “wielded the First Amendment in . . . an aggressive way.” *Janus v. Am. Fed’n State, Cty. & Mun. Emps.*, 138 S. Ct. 2448, 2501-02 (2018) (Kagan, J., dissenting). Justice Sotomayor wrote separately in *Janus* to express her agreement with Kagan’s sentiment about *Sorrell*, adding that “I disagree with the way that this Court has since interpreted and applied that opinion.” *Id.* at 2487 (Sotomayor, J., dissenting).

436. *See Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010) (noting that “[s]peech restrictions based on the identity of the speaker are all too often

on the other hand, increasingly concentrate on whether the regulated speech serves an important value or purpose for which the First Amendment exists in order to decide the correct standard of judicial review.⁴³⁷

Along the way, questions of whether a law's impact on speech is something more than "incidental" come into play for the Court's conservative justices.⁴³⁸ The liberal justices, especially Breyer, place less emphasis on the speech-versus-conduct dichotomy.⁴³⁹ They assume speech is inextricably bound up in most types of conduct,⁴⁴⁰ and therefore judicial effort is better expended ferreting out whether the speech serves a vital First Amendment value.⁴⁴¹ If for the conservatives "incidental" is an elastic term to exploit as needed, then for the liberals the concept of the "true value" of protecting speech, along with reserving elevated First Amendment review only for "better things," play equally flexible roles.⁴⁴²

Free speech jurisprudence regarding the applicable level of scrutiny in any given case sits at a crossroads after *Becerra* and *Janus*. The justices, of course, have options about which direction to take. For instance, should they continue to use the content-based law versus content-neutral law formula for determining the appropriate level of scrutiny?⁴⁴³ It is an imperfect approach that, as the Court observed

simply a means to control content," and adding that "[q]uite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers").

437. See *supra* notes 216-224 and accompanying text.

438. See *supra* notes 100-109 and accompanying text (addressing the consideration of whether a burden imposed on speech is incidental).

439. See *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1152 (2017) (Breyer, J., concurring) (asserting that "it is often wiser not to try to distinguish between 'speech' and 'conduct'").

440. See *id.* (asserting that "virtually all government regulation affects speech. Human relations take place through speech. And human relations include community activities of all kinds—commercial and otherwise"); see also *Janus*, 138 S. Ct. at 2502 (Kagan, J., dissenting) ("Speech is everywhere—a part of every human activity (employment, health care, securities trading, you name it)."); *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2380 (2018) (Breyer, J., dissenting) (contending that "much, perhaps most, human behavior takes place through speech").

441. See *Expressions Hair Design*, 137 S. Ct. at 1152 (Breyer, J., concurring).

442. *Becerra*, 138 S. Ct. at 2383 (Breyer, J., dissenting); *Janus*, 138 S. Ct. at 2502 (Kagan, J., dissenting).

443. See *supra* notes 44-46 and accompanying text (addressing the content-based versus content neutral law approach).

twenty-five years ago, is not always simple.⁴⁴⁴ What’s more, the Court has long carved out exceptions, via tools such as the commercial speech doctrine⁴⁴⁵ and the secondary effects doctrine, from the general rule that content-based laws are evaluated under strict scrutiny.⁴⁴⁶ Furthermore, legal scholars over the years have identified a “broad range of problems associated with the distinction between content-based and content-neutral speech regulations.”⁴⁴⁷

A second option is to let the value served by the speech in question—facilitating democratic self-governance,⁴⁴⁸ discovering the truth about matters of public concern,⁴⁴⁹ or perhaps advancing some other value⁴⁵⁰—determine the level of scrutiny. This approach is

444. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (“Deciding whether a particular regulation is content based or content neutral is not always a simple task.”).

445. *See supra* note 117 (noting that laws targeting commercial speech are subject to intermediate scrutiny review).

446. *See Fee, supra* note 60, at 292 (noting that the secondary effects doctrine “provides that a regulation will be treated as content-neutral and subject to intermediate scrutiny, despite its content-discriminatory form, if the primary purpose of the regulation is to control the secondary effects rather than the primary effects of speech”); *see also* Leslie Gielow Jacobs, *Making Sense of Secondary Effects Analysis After Reed v. Town of Gilbert*, 57 SANTA CLARA L. REV. 385, 386 (2017) (noting that “facially content-sensitive government actions” targeting sexually oriented businesses are treated under a secondary effects analysis with a more deferential level of review under intermediate scrutiny).

447. R. George Wright, *Content-Neutral and Content-Based Regulations of Speech: A Distinction That is No Longer Worth the Fuss*, 67 FLA. L. REV. 2081, 2085 (2015).

448. *See* Robert C. Post, *Free Speech and Community: Reply to Bender*, 29 ARIZ. ST. L.J. 495, 495 (1997) (asserting “that the value of democratic self-governance is the most powerful explanation of the general pattern of First Amendment decisions . . . [and] democratic self-governance is the only value that can convincingly account for the specific set of decisions protecting the abusive, outrageous and indecent speech”); *see also* Eugene Volokh, *Response: In Defense of the Marketplace of Ideas/Search for Truth as a Theory of Free Speech Protection*, 97 VA. L. REV. 595, 595 (2011) (writing that “a broad vision of democratic self-government is one important justification for free speech”).

449. *See* Post, *supra* note 75, at 2363 (“The theory of the marketplace of ideas focuses on ‘the truth-seeking function’ of the First Amendment.”).

450. Scholars have offered many reasons over the years why it is important to protect expression under the First Amendment. Clay Calvert, *The Voyeurism Value in First Amendment Jurisprudence*, 17 CARDOZO ARTS & ENT. L.J. 273, 274 (1999) (“The freedoms of speech and press . . . are said to promote and to protect discovery of truth, democratic self-governance, self-realization, dissent, tolerance, and honest government.”).

intimated by the dissents in both *Becerra*⁴⁵¹ and *Janus*.⁴⁵² It also reverberates in former Yale Law School Dean Robert Post's observation that "First Amendment analysis is relevant only when the values served by the First Amendment are implicated."⁴⁵³

Under this methodology, heightened First Amendment scrutiny—be it strict or intermediate—would only apply when some higher-level value (on a First Amendment hierarchy of values) is served by the speech being regulated. Thus, the justices would need to agree on and establish a clear hierarchy of First Amendment values for this approach to function in a consistent and coherent manner. Without an agreed-upon hierarchy of values, the subjectivity of this approach would undermine confidence in its application.

A pure values-based approach would also call into question—or at least call for revisiting—a host of cases where some level of heightened scrutiny was applied but where the value of the speech seemingly had nothing to do with lofty ideals such as truth discovery or voting wisely in a self-governing democracy.⁴⁵⁴ As noted in the Introduction, the Supreme Court applied strict scrutiny to protect minors' access to violent video games⁴⁵⁵ and it applies intermediate scrutiny to judge the constitutionality of laws regulating sexually oriented businesses.⁴⁵⁶ Under a value-based methodology for discerning the correct level of scrutiny in these scenarios, it seems that rational basis review might be more appropriate.

A third route is to jettison a distinct levels-of-scrutiny approach and instead apply Justice Breyer's proportionality approach in all cases affecting speech.⁴⁵⁷ Under this tack, which is embraced in many

451. See *supra* note 316 and accompanying text.

452. See *supra* note 42 and accompanying text.

453. Robert C. Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1255 (1995).

454. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25 (The Lawbook Exchange, Ltd. 2004) (1948) (suggesting that the ultimate aim of free speech "is the voting of wise decisions," and contending that voters "must be made as wise as possible").

455. See *supra* notes 50-51 and accompanying text (addressing the Supreme Court's deployment of strict scrutiny in *Brown v. Entn't Merchs. Ass'n*, 564 U.S. 786 (2011)).

456. See *supra* notes 55-60 and accompanying text (addressing the use of intermediate scrutiny in cases involving the zoning of sexually oriented businesses).

457. See *supra* Part II (discussing Breyer's proportionality approach).

countries,⁴⁵⁸ the Court would use a balancing methodology.⁴⁵⁹ It would weigh anew in each case whether the burdens imposed on speech are disproportionate to the beneficial consequences of regulating it.⁴⁶⁰ Gone would be the separate tests of strict scrutiny, intermediate scrutiny, and rational basis review in cases affecting speech. Such tests, if they had use at all, would become, in Breyer's judicial world, merely "guidelines."⁴⁶¹ Yet proportionality itself is subject to criticism.⁴⁶² Additionally, whether four other justices would go along with a proportionality framework remains to be seen, although Justice Kagan's concurrence in *Reed v. Town of Gilbert*—a concurrence joined by Justice Breyer—intimates that she too might embrace it.⁴⁶³ Kagan also joined Breyer's concurrence attacking a rigid levels-of-scrutiny approach in *United States v. Alvarez*.⁴⁶⁴

A fourth possibility is for the Court to develop well-defined tests for determining what constitutes both an "incidental" burden on speech⁴⁶⁵ and an instance of ordinary or workaday economic and social

458. Grant Huscroft, *Proportionality and Pretense*, 29 CONST. COMMENTARY 229, 229 (2014) (reviewing Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (2012)) ("Proportionality is an analytical framework used by courts in many countries in determining whether or not limitations on the exercise of rights are justified, and therefore constitutional.").

459. See Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 799 (2011) (observing that proportionality is "an analytical procedure with balancing at its core").

460. See *id.* at 802.

461. See *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1673 (2015) (Breyer, J., concurring).

462. For example, Professor Bernhard Schlink notes that a major problem with proportionality is that "balancing of rights, interests, and values entailed in the analysis of appropriateness is unavoidably subjective. There is no objective standard for measuring and weighing free speech vs. privacy, freedom vs. safety, privacy vs. public health, or the protection of an endangered species vs. the creation of badly needed jobs." Bernhard Schlink, *Proportionality in Constitutional Law: Why Everywhere but Here?*, 22 DUKE J. COMP. & INT'L L. 291, 299 (2012).

463. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2236, 2238-39 (Kagan, J., concurring) (2015) (observing that "[o]ur cases have been far less rigid than the majority admits in applying strict scrutiny to facially content-based laws," contending that "we may do well to relax our guard so that 'entirely reasonable' laws imperiled by strict scrutiny can survive," and concluding that "there is no need to decide in this case whether strict scrutiny applies to every sign ordinance in every town across this country containing a subject-matter exemption").

464. See *United States v. Alvarez*, 567 U.S. 709, 730-31 (2012) (Breyer, J., concurring).

465. See *supra* notes 100-109 and accompanying text (addressing the incidental burden issue).

regulation.⁴⁶⁶ As addressed above, the incidental burden standard is pivotal for some justices in deciding whether something greater than rational basis review applies to a regulation of speech.⁴⁶⁷ Similarly, the dissents in both *Becerra* and *Janus* make it evident that rational basis review applies to ordinary economic and social regulations that involve speech.⁴⁶⁸ If the concepts of an incidental burden and ordinary economic and social regulation provide the pivotal yardsticks for determining when rational basis review is relevant, then those concepts must be better defined. Furthermore, accompanying tests for determining when a burden is incidental and when a law is ordinary economic and social regulation must be articulated.

As for now, however, it is clear from *Sorrell*, *Becerra*, and *Janus* that the justices simply cannot always agree when a heightened standard of scrutiny applies in a case involving expression.⁴⁶⁹ If, to use

466. See *supra* notes 29, 40, 42, 62-63, 128-135, 318, 403 and accompanying text (discussing the concepts of ordinary and/or workaday economic and social legislation).

467. See *supra* notes 100-109 and accompanying text (addressing the incidental burden issue). Writing more than thirty years ago, Professor Geoffrey Stone explained the Court's general methodology regarding incidental burdens. As he put it:

[T]he Court's approach to incidental restrictions reflects an effort to avoid endless inquiries into incidental effect while at the same time invalidating those restrictions that most seriously threaten free expression. The general presumption is that incidental restrictions do not raise a question of First Amendment review. The presumption is waived, however, whenever an incidental restriction either has a highly disproportionate impact on free expression or directly penalizes expressive activity. And the latter exception is applied quite liberally whenever the challenged restriction significantly limits the opportunities for free expression. It is an uneasy but not unprincipled compromise.

Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 114 (1987).

468. See *supra* notes 29, 40, 42, 62, 128-135 and accompanying text (discussing the concept of ordinary economic and social legislation).

469. This Article focuses on cases in which the justices could not agree on whether some level of heightened First Amendment scrutiny—be it a variation of either strict or intermediate scrutiny—applies or whether only rational basis review is appropriate. There are, of course, other relatively recent First Amendment speech cases in which the justices also could not agree on the correct standard of scrutiny. See *generally* *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) (holding that a content-based sign ordinance was unconstitutional because it could not survive strict scrutiny but including concurring opinions penned by Justice Breyer and Justice Kagan that openly questioned the merits of applying strict scrutiny and suggesting it was unnecessary to apply that rigorous level of review); *McCullen v. Coakley*, 134 S. Ct. 2518 (2014) (involving the constitutionality of a statute restricting speech outside of facilities that perform abortions and featuring the Court fracturing over scrutiny, with five justices finding the statute was content neutral and therefore applying

Justice Kagan's provocative phrasing, the conservatives are "weaponizing the First Amendment"⁴⁷⁰ by needlessly—and harmfully—ratcheting up the level of scrutiny in these cases and using the amendment as what Professor Stanley Fish once called "a political instrument,"⁴⁷¹ then perhaps the liberals may be seen (equally as provocative) as trying to neuter the First Amendment by only elevating scrutiny in cases where core free-speech values are jeopardized. Regardless of which side is right, today's conflict over scrutiny and what constitutes a true speech-as-speech case meriting heightened review leaves First Amendment jurisprudence in even greater disarray than it was before.⁴⁷² The justices now dial up or dial down the level of scrutiny almost at will, deciding on and picking a specific level that allows them to uphold or strike down a law as they so desire.

intermediate scrutiny, three justices finding it was content based and thus applying strict scrutiny, and one justice finding the law was viewpoint based and therefore automatically unconstitutional).

470. *Janus v. Am. Fed'n State, Cty. & Mun. Emps.*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).

471. Stanley Fish, *Colloquy: Children and the First Amendment*, 29 *CONN. L. REV.* 883, 891 (1997) ("This brings me to a final point, one I have made in other venues: the First Amendment is a political instrument; not an apolitical principle to which you can be faithful or unfaithful.").

472. See Joshua P. Davis & Joshua D. Rosenberg, *The Inherent Structure of Free Speech Law*, 19 *WM. & MARY BILL OF RTS. J.* 131, 133 (2010) (contending that "many free speech doctrines appear incoherent"); Post, *supra* note 453, at 1249-50 (asserting that "contemporary First Amendment doctrine is . . . striking chiefly for its superficiality, its internal incoherence, its distressing failure to facilitate constructive judicial engagement with significant contemporary social issues connected with freedom of speech").