

9-2022

Weaponizing Proof of Harm in First Amendment Cases: When Scientific Evidence and Deference to the Views of Professional Associations Collide in the Battle Against Conversion Therapy

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Recommended Citation

2021 Mich. St. L. Rev. 765

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WEAPONIZING PROOF OF HARM IN FIRST
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WHEN SCIENTIFIC EVIDENCE AND
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THE BATTLE AGAINST CONVERSION
THERAPY

*Clay Calvert**

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ABSTRACT

This Article uses the U.S. Court of Appeals for the Eleventh Circuit’s divided decision in Otto v. City of Boca Raton in late 2020 as a springboard for examining battles in First Amendment jurisprudence over proof of causation of harm and the level of deference owed to the judgments of learned societies. A two-judge majority held in Otto that a pair of local ordinances banning speech-based conversion therapy on minors violated the First Amendment, with those measures failing the rigorous strict scrutiny standard of review. Crucial to the majority’s ruling was its conclusion that insufficient evidence exists that conversion therapy—also known as sexual orientation change efforts (SOCE)—harms minors. Conversely, the Otto dissent found “strong evidence” of injury and, in so doing, afforded significant deference to the views of several learned organizations such as the American Academy of Pediatrics. The dissent, in turn, would have upheld the measures under strict scrutiny. This Article explores how this cleft in Otto regarding proof of causation of harm and the deference due to learned organizations, particularly when conducting scientific experiments is impossible because of ethical concerns, reflects the U.S. Supreme Court’s

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disagreement over those issues a decade ago in the violent video game case of Brown v. Entertainment Merchants Association. This Article contends that Brown’s stringent mandate of proving a direct causal link between regulated speech and the harm attributed to it allows conservative-leaning judges, including the ones in the Otto majority who were appointed by former President Donald J. Trump, to weaponize the First Amendment in the clash over conversion therapy. The legacy of Justice Antonin Scalia’s majority opinion in Brown thus stretches beyond regulating entertainment-oriented media products, such as video games, to fundamentally impact larger cultural and legal battles over sexual orientation and the dignity of LGBTQ minors.

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INTRODUCTION

In November 2020, a fractured three-judge panel of the U.S. Court of Appeals for the Eleventh Circuit in *Otto v. City of Boca Raton* struck down, for violating the First Amendment guarantee of free expression, two local ordinances prohibiting Florida-licensed therapists from performing sexual orientation change efforts (SOCE) on minors.¹ The decision stands in stark contrast to—and, more significantly, creates a split of authority ripe for U.S. Supreme Court

1. 981 F.3d 854, 859 (11th Cir. 2020) (“We hold that the challenged ordinances violate the First Amendment because they are content-based regulations of speech that cannot survive strict scrutiny.”). The First Amendment to the U.S. Constitution provides, in relevant part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated nearly 100 years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties applicable for governing the actions of state and local government entities and officials. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). See generally *infra* notes 3–7 and accompanying text and Part I (providing an overview of SOCE and controversies relating to SOCE).

review with—earlier rulings by both the Third and Ninth Circuits that had rejected First Amendment challenges to similar anti-SOCE laws in New Jersey and California, respectively.²

SOCE, also known as reparative or conversion therapy, are intended to transform homosexual or bisexual individuals into heterosexuals.³ They are highly controversial.⁴ To wit, a task force of the American Psychological Association (APA) concluded in 2009 that SOCE “are unlikely to be successful and involve some risk of harm, contrary to the claims of SOCE practitioners and advocates.”⁵ Furthermore, a 2019 survey of more than 34,000 LGBTQ youth found that those who had undergone conversion therapy were twice as likely to have attempted suicide than those who did not.⁶ Additionally, today there is “a virtual medical consensus on the psychological ill effects of conversion therapy.”⁷

2. See *King v. Governor of New Jersey*, 767 F.3d 216, 232 (3d Cir. 2014); *Pickup v. Brown*, 740 F.3d 1208, 1228 (9th Cir. 2014). See also Clay Calvert, *Testing the First Amendment Validity of Laws Banning Sexual Orientation Change Efforts on Minors: What Level of Scrutiny Applies After Becerra and Does a Proportionality Approach Provide a Solution?*, 47 PEPP. L. REV. 1, 21 (2019) (providing an overview of the rulings by both the Third Circuit in *King*, 767 F.3d 216, and the Ninth Circuit in *Pickup*, 740 F.3d 1208).

3. See Madison Higbee et al., *Conversion Therapy in the Southern United States: Prevalence and Experiences of the Survivors*, J. HOMOSEXUALITY 1, 1 (2020) (noting that conversion therapy is also known “as reparative therapy, sexual reorientation therapy [SRT], sexual orientation change efforts [SOCE], ex-gay therapy, or gender identity change efforts [GICE] when directed toward gender minority individuals”). This Article uses the terms conversion therapy and SOCE interchangeably. See also Casey Gamboni et al., *Prohibiting Versus Discouraging: Exploring Mental Health Organizations Varied Stances on Sexual Orientation Change Efforts (SOCE)*, 46 AM. J. FAM. THERAPY 96, 96–97 (2018).

4. See Kate Bradshaw et al., *Sexual Orientation Change Efforts Through Psychotherapy for LGBQ Individuals Affiliated with the Church of Jesus Christ of Latter-day Saints*, 41 J. SEX & MARITAL THERAPY 391, 392 (2015) (describing the promotion of SOCE as “controversial”); cf. John R. Blosnich et al., *Sexual Orientation Change Efforts, Adverse Childhood Experiences, and Suicide Ideation and Attempt Among Sexual Minority Adults, United States, 2016–2018*, 110 AM. J. PUB. HEALTH 1024, 1029 (2020) (“Major professional medical and health services organizations condemn the practice of SOCE.”).

5. Am. Psych. Ass’n, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, at v (2009) [hereinafter APA REPORT].

6. See THE TREVOR PROJECT, *NATIONAL SURVEY ON LGBTQ YOUTH MENTAL HEALTH* 2019, 1 (2019).

7. Sacha M. Coupet, *Valuing All Identities Beyond the Schoolhouse Gate: The Case for Inclusivity as a Civic Virtue in K-12*, 27 MICH. J. GENDER & L. 1, 63 (2020). See also Nancy J. Knauer, *The Politics of Eradication and the Future of LGBT Rights*, 21 GEO. J. GENDER & L. 615, 633 (2020) (“All major medical

Yet, in the face of such grave reservations about SOCE's apparent lack of efficacy and its alleged harms, a two-judge majority in *Otto* concluded that the anti-SOCE ordinances adopted by Palm Beach County, Florida and the city of Boca Raton, which is situated in Palm Beach County, breached therapists Robert Otto and Julie Hamilton's First Amendment speech rights.⁸ The pair engage in "talk therapy" with "minors who have unwanted same-sex attraction or unwanted gender identity issues."⁹ Although denying the power to actually alter minors' sexual orientation through such speech-based efforts, Otto and Hamilton contend their methods can "reduce same-sex behavior and attraction and eliminate . . . confusion over gender identity."¹⁰

Crucial to the *Otto* majority's conclusion in the therapists' favor—a ruling that immediately drew the APA's wrath¹¹—were its sequential findings that the anti-SOCE ordinances:

- (1) regulated speech, not conduct, and thus implicated the First Amendment;¹²

associations have rejected the practice of attempting to 'change' sexual orientation.").

8. See *Otto v. City of Boca Raton*, 981 F.3d 854, 859 (11th Cir. 2020).

9. *Id.* at 860.

10. See *id.*

11. APA President Sandra L. Shullman declared the ruling "wrong-headed," asserting that it "may well result in harm to patients, especially minors who are often subjected to this type of therapy against their will." Press Release, Am. Psych. Ass'n, APA Criticizes Appeals Court Ruling Overturning Local Ban on So-Called Conversion Therapy (Nov. 22, 2020), <https://www.apa.org/news/press/releases/2020/11/conversion-therapy-ban-ruling> [<https://perma.cc/Z89P-ZVDF>].

12. See *Otto*, 981 F.3d at 861 ("Nor can the local governments evade the First Amendment's ordinary presumption against content-based speech restrictions by saying that the plaintiffs' speech is actually conduct."). This conclusion was vital for allowing Otto and Hamilton's case to proceed because there is a pivotal dichotomy separating First Amendment protected speech from unprotected conduct. 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"); see also R. Randall Kelso, *Clarifying Viewpoint Discrimination in Free Speech Doctrine*, 52 *Ind. L. Rev.* 355, 356 (2019) ("By its terms, the First Amendment proscribes only government action 'abridging the freedom of speech,' not conduct. Governmental regulations of conduct, therefore, are outside of the ambit of the First Amendment."). In brief, "[t]he function of the conduct/speech inquiry requires courts to initially decide whether the First Amendment is implicated at all." John G. Wrench & Arif Panju, *A Counter-Majoritarian Bulwark: The First Amendment and*

- (2) imposed content-based regulations on speech and thereby necessitated examination under the often-fatal strict scrutiny standard of review in order to pass constitutional muster;¹³ and
- (3) failed to survive strict scrutiny not only because there was insufficient scientific evidence of harm caused by purely speech based SOCE, but also because the opinions and conclusions of multiple professional organizations, including

Professional Speech in the Wake of NIFLA v. Becerra, 24 TEX. REV. L. & POL. 453, 471 (2020).

Indeed, in considering a First Amendment free-speech challenge to California's anti-SOCE statute, the U.S. Court of Appeals for the Ninth Circuit in 2014 concluded that SOCE constitute conduct—a form of professional practice and treatment—and not speech and thus they do “not implicate the First Amendment.” *Pickup v. Brown*, 740 F.3d 1208, 1230 (9th Cir. 2014). The Ninth Circuit reasoned that “the fact that speech may be used to carry out those therapies does not turn the regulation of conduct into a regulation of speech.” *Id.* at 1229. The Ninth Circuit’s resolution of the threshold speech-versus-conduct question in *Pickup* thus stands in direct opposition to the Eleventh Circuit’s conclusion in *Otto*.

It should be noted, for purposes of clarity, that in some instances conduct is treated as speech for purposes of the First Amendment. *See 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.”). For example, burning the American flag as a form of symbolic protest is protected by the First Amendment. *See Texas v. Johnson*, 491 U.S. 397, 406 (1989) (concluding that Gregory Lee Johnson’s burning of an American flag during a political demonstration while the Republican National Convention was taking place in Dallas in 1984 “was conduct ‘sufficiently imbued with elements of communication’ . . . to implicate the First Amendment”) (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)).

13. A statute regulating speech is content based if it “applies to particular speech because of the topic discussed or the idea or message expressed.” *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). Statutes can be content based either on their face—by their terms—or, even if facially neutral, if they were adopted because the government disagreed with the message being conveyed. *See id.* at 163–64. To survive strict scrutiny, the government must demonstrate two points: first, that it possesses a compelling interest in regulating the speech in question and, second, that the statute under review is so narrowly tailored that it restricts no more speech than is necessary to serve the compelling interest. *See Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 799 (2011); *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 813 (2000). The term “often-fatal” is appropriate because strict scrutiny leads “to almost certain legal condemnation” of a statute. *Reed*, 576 U.S. at 174 (Breyer, J., concurring). *See Otto*, 981 F.3d at 867–68 (“These ordinances are content-based regulations of speech and must satisfy strict scrutiny.”). This part of the *Otto* ruling fully comports with the U.S. Supreme Court’s recently reiterated principle that “[c]ontent-based laws are subject to strict scrutiny.” *Barr v. Am. Ass’n of Pol. Consultants*, 140 S. Ct. 2335, 2346 (2020).

the APA, against SOCE were inadequate substitutes for scientific research proving that SOCE are injurious.¹⁴

Regarding the pivotal third finding about the lack of scientific evidence of SOCE-induced harm, Judge Britt Grant, a 2018 President Donald J. Trump appointee, writing on behalf of herself and Judge Barbara Lagoa, a 2019 Trump appointee, focused on the APA task force report noted earlier in this Article.¹⁵ Specifically, Judge Grant emphasized that the report “concedes that ‘nonaversive and recent approaches to SOCE have not been rigorously evaluated.’ In fact, it found a ‘complete lack’ of ‘rigorous recent prospective research’ on SOCE.”¹⁶ Indeed, the APA task force’s report states that “recent studies do not provide valid causal evidence of the efficacy of SOCE *or of its harm*.”¹⁷ The report adds that “we cannot conclude how likely it is that harm will occur from SOCE.”¹⁸ Judge Grant thus reasoned that “such equivocal conclusions” fail to meet the demands of strict scrutiny.¹⁹ Furthermore, she opined that this stringent standard of review “cannot be satisfied by professional societies’ opposition to speech.”²⁰

In other words, the opinions and judgments of learned societies and professional organizations about harm purportedly wrought by speech cannot serve, at least under the First Amendment, as evidentiary proxies or surrogates for rigorous studies demonstrating

14. See *Otto*, 981 F.3d at 868–70.

15. See *Hon. Britt C. Grant*, U.S. CT. OF APPEALS FOR THE ELEVENTH CIR., <https://www.ca11.uscourts.gov/judges/hon-britt-c-grant> [<https://perma.cc/A5TR-BKCH>] (last visited Oct 11, 2021); *Hon. Barbara Lagoa*, U.S. CT. OF APPEALS FOR THE ELEVENTH CIR., <https://www.ca11.uscourts.gov/hon-barbara-lagoa> [<https://perma.cc/SX9L-48U5>] (last visited Oct. 11, 2021); *Otto*, 981 F.3d at 868–69. Judge Grant explained why she concentrated on this report:

We focus our attention on the APA’s 2009 task force report because it “performed a systematic review of the peer-reviewed literature” to assess SOCE. Many of the other reports cited by the dissent—including those from the World Health Organization and the U.S. Department of Health and Human Services—primarily rely on the APA’s task force report to draw their own conclusions about SOCE. So we choose instead to discuss the APA’s report directly.

Id. at 869 n.8.

16. *Id.* at 868.

17. See APA REPORT, *supra* note 5, at 42 (emphasis added).

18. *Id.*

19. *Otto*, 981 F.3d at 869.

20. *Id.*

injury.²¹ The end result of the majority's approach to the proof-of-harm issue was that while Palm Beach County and Boca Raton had identified an ostensibly compelling interest—the level of governmental interest required under strict scrutiny—in protecting minors from harm, they had failed to prove that there was, in fact, a compelling interest in shielding minors from SOCE.²²

Importantly for purpose of this Article, in articulating the evidentiary demands imposed by the strict scrutiny test, Judges Grant and Lagoa relied partly on the U.S. Supreme Court's 2011 ruling in *Brown v. Entertainment Merchants Ass'n*.²³ In *Brown*, the Court applied strict scrutiny and struck down a California statute restricting minors' access to rent and purchase violent video games.²⁴ The Court concluded that California failed to demonstrate the "high degree of necessity we have described as a compelling state interest" in protecting minors from such media artifacts.²⁵ In reaching this result, Justice Antonin Scalia reasoned for the majority that the social science evidence offered by California did not "show a direct causal link between violent video games and harm to minors."²⁶ Justice Scalia drew a vital distinction between the concepts of correlation and causation.²⁷ He stressed that the studies relied on by the state "show[ed] at best some *correlation* between exposure to violent

21. See *id.* at 869–70.

22. See *id.* at 868–69 ("[I]t is not enough for the defendants to identify a compelling interest."). See also *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) (noting that strict scrutiny requires the government to prove that there is a compelling interest in restricting the speech in question).

23. See *Otto*, 981 F.3d at 868 (citing *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 794–95 (2011)).

24. See *Brown*, 564 U.S. at 789, 805 (noting that the statute banned the sale or rental to minors of "violent video games" and concluding that it "cannot survive strict scrutiny").

25. See *id.* at 804.

26. See *id.* at 799.

27. See *id.* at 800. A correlation is:

[a]n empirical relationship between two variables such that (1) changes in one are associated with changes in the other, or (2) particular attributes of one variable are associated with particular attributes of the other. . . . Correlation in and of itself does not constitute a causal relationship between the two variables, but it is one criterion of causality.

EARL BABBIE, *THE PRACTICE OF SOCIAL RESEARCH* 94 (15th ed. 2020). A causal relationship, in contrast, not only requires that the variables be correlated, but that the cause occurs in time prior to the effect and "the effect cannot be explained in terms of some third variable" that would otherwise render the relationship spurious. *Id.*

entertainment and minuscule real-world effects.”²⁸ In other words, the studies did “not prove that violent video games *cause* minors to *act* aggressively.”²⁹ The year after *Brown*, the Supreme Court reinforced the principle that strict scrutiny requires “a direct causal link between the restriction imposed and the injury to be prevented.”³⁰ The majority in *Otto*, in turn, cited *Brown* for dual propositions: (1) content-based regulations of speech are rarely permissible,³¹ and (2) “[t]he government carries the burden of proof and, ‘because it bears the risk of uncertainty, ambiguous proof will not’ satisfy the ‘demanding standard’ it must meet.”³² As the *Otto* majority interpreted this latter command from *Brown*, “[p]ermitt[ing] uncertain evidence to satisfy strict scrutiny would blur the lines that separate it from lesser tiers of scrutiny—that is, intermediate scrutiny and rational basis review.”³³

The alleged absence of thorough research demonstrating that SOCE cause harm signaled to Judges Grant and Lagoa that the only possible remaining government justification for barring SOCE was that the practice embodies offensive and disagreeable viewpoints about sexual orientation and gender.³⁴ Quoting a U.S. Supreme Court decision that safeguarded the right to burn the American flag as a form of symbolic political protest, the *Otto* majority explained that the First Amendment flatly forbids such an offensive-conveyance-of-ideas rationale for censoring speech.³⁵ This sealed the unconstitutional fate of the Palm Beach County and Boca Raton ordinances.³⁶

Judge Beverly Martin, who was appointed to the Eleventh Circuit in 2010 by President Barack Obama and retired from her

28. See *Brown*, 564 U.S. at 800 (emphasis added).

29. See *id.*

30. See *United States v. Alvarez*, 567 U.S. 709, 725 (2012).

31. See *Otto v. City of Boca Raton*, 981 F.3d 854, 868 (11th Cir. 2020).

32. *Id.* (quoting *Brown*, 564 U.S. at 799–800).

33. *Id.* at 869 n.9.

34. See *id.* at 872 (discussing the principle that the expression of an idea cannot be prohibited only because the idea is offensive).

35. See *id.* (concluding that “[t]he challenged ordinances violate [the] principle” from *Texas v. Johnson*, 491 U.S. 397, 414 (1989), that the government has no power to bar the expression of ideas because society deems them offensive or disagreeable); *Texas v. Johnson*, 491 U.S. at 414 (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); see also discussion *supra* note 12 (addressing *Johnson*).

36. See *Otto*, 981 F.3d. at 872 (“The challenged ordinances violate that principle, and the district court should have enjoined their enforcement.”).

judgeship in late 2021, penned a dissent.³⁷ As with the majority, Judge Martin applied strict scrutiny to test the ordinances' validity.³⁸ Unlike the majority, however, she concluded the measures survived that standard of review.³⁹ In doing so, Judge Martin also embraced a very different approach to the evidentiary question regarding harm caused by SOCE and, in the process, deemed the evidence sufficient under strict scrutiny.⁴⁰ Specifically, she did more than simply rely on the APA task force report, although she did focus on aspects of it indicating harms caused by SOCE that the *Otto* majority ignored.⁴¹ Judge Martin also turned to the opinions of other professional associations.⁴² Judge Martin both: (1) recognized the ethical impossibility of conducting controlled experiments on minors involving SOCE,⁴³ and (2) was willing, unlike the majority, to defer to the conclusions of multiple professional associations regarding the negative effects of SOCE.⁴⁴

37. See *id.* (Martin, J., dissenting). See also *Martin, Beverly Baldwin*, FED. JUD. CTR. <https://www.fjc.gov/history/judges/martin-beverly-baldwin> [<https://perma.cc/2Q5H-T3YM>] (last visited Oct. 11, 2021). After retiring from the Eleventh Circuit in September 2021, Judge Martin became executive director of the New York University School of Law's Center on Civil Justice. See Press Release, NYU Law News, Judge Beverly Martin to Join Center on Civil Justice as Executive Director (Oct. 4, 2021), <https://www.law.nyu.edu/news/judge-beverly-martin-joins-center-civil-justice> [<https://perma.cc/R3XW-VLSA>].

38. See *Otto*, 981 F.3d. at 873 (Martin, J., dissenting) (stating that the strict scrutiny test was applied to the ordinances).

39. See *id.* (holding that the ordinances satisfied strict scrutiny).

40. See *id.* at 875 (“As the majority views it, there is ‘insufficient evidence’ that makes it impossible to conclude that SOCE is so harmful as to merit regulation. . . . I disagree.”) (citation omitted).

41. As Judge Martin wrote:

Despite these findings about the harm caused by SOCE, the majority opinion relies instead on a single statement in the Task Force Report that “rigorous recent prospective research” on SOCE has not been done. . . . But what studies *have* been done “show that enduring change to an individual’s sexual orientation is uncommon,” and that there is, in fact, already “evidence to indicate that individuals experience harm from SOCE.”

Id. at 876 (citations omitted).

42. See *id.* (noting findings by American Academy of Pediatrics, an office of the World Health Organization, and the U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration).

43. See *id.* at 877 (“To be clear, the very research the majority opinion seems to demand is ‘not ethically permissible’ to conduct.”).

44. See *id.* at 878 (“When it comes to regulation of allegedly harmful medical practices, the judgment of professional organizations strikes me as quite relevant.”).

In brief, the *Otto* majority and dissent not only adopted different tacks when addressing the question of harm caused by SOCE and whether there was sufficient evidence of it to prove a compelling governmental interest, but they also dissimilarly treated the opinions and judgments about SOCE of learned professional groups.⁴⁵ This Article illustrates how the Eleventh Circuit's divided decision in *Otto* reveals lingering problems stemming from the U.S. Supreme Court's treatment of social science evidence and the judgments of professional organizations on the question of speech-caused harms a decade ago in *Brown v. Entertainment Merchants Ass'n*.⁴⁶ This Article addresses how the Justices in *Brown*, in fact, fractured over these very same issues.⁴⁷

Furthermore, this Article later takes a critical turn. It asserts that the true legacy of Justice Scalia's decidedly rigid and challenging standard regarding proof of direct causation of harm via scientific evidence now plays out far beyond the make-believe, entertainment-driven world of the video games that were at issue in *Brown*.⁴⁸ Specifically, the decision now thwarts legislative efforts, such as those in Palm Beach County and Boca Raton, to squelch speech that arguably attacks the core human dignity of children by making them question and doubt the veracity of their own sexual orientation.⁴⁹ Conservative-leaning jurists now can wield Justice Scalia's opinion as a weapon to destroy legislation designed to shield LGBTQ minors from injury, thereby transforming *Brown* from a decision ostensibly about standards for the neutral and detached evaluation of scientific evidence into one that powerfully plays a deregulatory role in the cultural wars over sexual orientation.⁵⁰

Part I of this Article initially provides a primer on conversion therapy, including an overview of the spate of legislative efforts during the past ten years to bar licensed therapists from practicing it on minors.⁵¹ Part I also summarizes two key federal appellate court rulings about such measures prior to the Eleventh Circuit's 2020

45. See *supra* notes 31–42 and accompanying text.

46. See *supra* notes 24–28 and accompanying text and see *infra* Part II (addressing *Brown*).

47. See *infra* Part II (addressing the disagreements among the Justices in *Brown*).

48. See *infra* Part III.

49. See *infra* Part III.

50. See *infra* Part III.

51. See *infra* Part I.

decision in *Otto*.⁵² Part II analyzes the U.S. Supreme Court's 2011 decision in *Brown v. Entertainment Merchants Ass'n*.⁵³ Specifically, it focuses on the *Brown* Court's articulation of the strict scrutiny test, including the Court's rigorous threshold for proving a compelling governmental interest when using social science evidence.⁵⁴ Part II also addresses Justice Stephen Breyer's dissent in *Brown*, describing his much more flexible, holistic approach to scientific evidence and the deference Breyer afforded to the opinions of both learned professional organizations and lawmakers when it came to whether the regulated speech caused harm.⁵⁵

Part III delves deeper and more critically into the use of *Brown*'s evidentiary standard in First Amendment cases such as *Otto*, exploring how it can become a potent deregulatory tool for conservative-leaning jurists.⁵⁶ Part III also situates *Otto* firmly within the larger context of ideological friction today among the Justices of the U.S. Supreme Court over the use of heightened scrutiny in First Amendment cases pivoting on the often divisive topics of abortion and labor unions.⁵⁷ Finally, Part IV concludes by contending that the deployment of *Brown*'s standard in cases such as *Otto*, where conducting causal-attribution experiments on minors is unfeasible, must be adjusted to account for this predicament, and that greater deference is due to the conclusions of learned professional organizations.⁵⁸

I. Conversion Therapy and Legislative Efforts to Thwart It: A Brief Overview of the Landscape Prior to *Otto*

Homosexuality is no longer considered a mental illness.⁵⁹ However, the core belief underlying conversion therapy "is that same-sex attractions are pathological and demand reorientation back

52. See *infra* Part I.

53. See *infra* Part II.

54. See *infra* Part II.

55. See *infra* Part II.

56. See *infra* Part III.

57. See *infra* Part III.

58. See *infra* Part IV.

59. See Tia Powell & Edward Stein, *Legal and Ethical Concerns about Sexual Orientation Change Efforts*, HASTINGS CTR. REP., Sept.–Oct. 2014, at 33 (noting that in 1973, "homosexuality was eliminated from the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM), the authoritative catalogue of mental illnesses used in the United States and throughout much of the world").

to heteronormative expectations of sexuality.”⁶⁰ Conversion therapy has been practiced in various forms for more than 100 years, but the most common method today is talk therapy—a speech-based treatment that raises First Amendment concerns regarding freedom of expression when the government restricts it in cases such as in *Otto*—rather than some form of behavioral or physical treatment.⁶¹ Behavioral and physical methods, sometimes known as aversion therapy, included “shocking the patient when viewing images of a same-sex person, hypnosis, and orgasmic reconditioning.”⁶²

Conversion therapy’s proponents anecdotally extol its effectiveness.⁶³ A 2020 comprehensive review of the scholarly literature published in *Clinical Psychology: Science and Practice*, however, roundly disputes its efficacy.⁶⁴ This assessment, in fact, points out that “[p]articipation in SOCE is associated with numerous negative effects, including depression, suicidality, decreased self-esteem, and self-hatred.”⁶⁵ The same review concludes that “a significant body of research identifies the negative outcomes of SOCE.”⁶⁶ Conversely, “there [is] insufficient evidence to deem SOCE effective.”⁶⁷

60. Steven P. Meanley et al., *Characterizing Experiences of Conversion Therapy Among Middle-Aged and Older Men Who Have Sex with Men from the Multicenter AIDS Cohort Study (MACS)*, 17 *SEXUALITY RSCH. & SOC. POL’Y* 334, 334 (2020).

61. See Christy Mallory et al., *Conversion Therapy and LGBT Youth: Update*, *WM. INST.* 2 (2019).

62. Nick Clair, “*Gay Conversion Therapy*” *Ban: Protecting Children or Infringing Rights?*, 44 *MCGEORGE L. REV.* 550, 555 (2013).

63. See Ian Moss, *Ending Reparative Therapy in Minors: An Appropriate Legislative Response*, 52 *FAM. CT. REV.* 316, 318 (2014) (noting that supporters of conversion therapy “frequently point to individual stories as evidence of efficacy”).

64. The authors of the literature review observe that: SOCE do not meet the criteria to be deemed efficacious or well-established. The few studies that assert the efficacy of SOCE demonstrate limited success. Further, they are fraught with methodological flaws that call their validity into question and prevent the generalizability of the results. Meanwhile, there are many contrasting studies that detail the numerous harms and negative outcomes associated with SOCE.

Amy Przeworski et al., *A Systematic Review of the Efficacy, Harmful Effects, and Ethical Issues Related to Sexual Orientation Change Efforts*, *CLINICAL PSYCH.: SCI. & PRAC.* 81, 94 (2020) (advance online publication ahead of print edition), <https://doi.org/10.1111/cpsp.12377> [<https://perma.cc/HC9Y-EXVX>].

65. *Id.* at 90.

66. *Id.* at 95.

67. *Id.*

These findings are thoroughly unsurprising. To wit, the 2009 APA task force report noted earlier concluded that “the peer-refereed empirical research on the outcomes of efforts to alter sexual orientation provides little evidence of efficacy and some evidence of harm.”⁶⁸ In light of that report, the APA issued a resolution that same year concluding “there is insufficient evidence to support the use of psychological interventions to change sexual orientation,” and “encourag[ing] mental health professionals to avoid misrepresenting the efficacy of sexual orientation change efforts.”⁶⁹

Another learned professional group, the American Psychiatric Association, issued a statement in 2018 reaffirming its longstanding stance against conversion therapy, deeming it a “harmful and discriminatory practice.”⁷⁰ In fact, conversion therapy is so widely condemned—either as ineffective or harmful—that by 2019, not a single major healthcare professional association supported its usage.⁷¹ The practice of conversion therapy is now left mainly to religious practitioners and a few dissenting therapists.⁷² The 2020 literature review, referred to earlier in this Part, points out that the studies that have found SOCE to be effective are problematic in their designs and methodologies.⁷³ Troubles include “biased recruitment, retrospective study designs, lack of generalizability, reliance on samples of bisexual individuals rather than those who are predominantly homosexual, and the use of sexual or social behavior . . . as the outcome instead of sexual orientation.”⁷⁴

Despite condemnation from the professional healthcare community, conversion therapy remains a hotly contested political

68. APA Report, *supra* note 5, at 35.

69. *Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts*, AM. PSYCH. ASS'N, 31 (Aug. 5, 2009).

70. Press Release, Am. Psychiatric Ass'n, APA Reiterates Strong Opposition to Conversion Therapy (Nov. 15, 2018), <https://www.psychiatry.org/newsroom/news-releases/apa-reiterates-strong-opposition-to-conversion-therapy> [<https://perma.cc/7KTA-9ZUG>].

71. See Tiffany C. Graham, *Conversion Therapy: A Brief Reflection on the History of the Practice and Contemporary Regulatory Efforts*, 52 CREIGHTON L. REV. 419, 423 (2019) (“Today, there are no longer any major healthcare professional associations which support the practice of conversion therapy.”).

72. See Marie-Amélie George, *Expressive Ends: Understanding Conversion Therapy Bans*, 68 ALA. L. REV. 793, 810 (2017).

73. See Przeworski et al., *supra* note 64, at 82.

74. *Id.*

issue.⁷⁵ For example, the Republican Party's 2020 platform included language supporting the right of parents to place their children in conversion therapy.⁷⁶ In contrast, a leading LGBTQ organization in November 2020 asked then President-elect Joseph Biden to place banning conversion therapy on his agenda.⁷⁷ The administration of former President Barack Obama had also opposed conversion therapy and called for its termination.⁷⁸

Efforts to ban SOCE in the United States are relatively recent.⁷⁹ In 2012, California became the first state to prohibit conversion therapy on minors.⁸⁰ Its statute bluntly provides that “[u]nder no circumstances shall a mental health provider engage in sexual orientation change efforts with a patient under 18 years of age.”⁸¹ In 2013, New Jersey became the second state to bar SOCE on minors.⁸² Similar to California's law restricting minors' access to SOCE, that law forbids state-licensed counselors from “engag[ing] in sexual orientation change efforts with a person under 18 years of age.”⁸³

75. See Reid J. Epstein, *The G.O.P. Delivers Its 2020 Platform. It's From 2016.*, N.Y. TIMES (Aug. 25, 2020), <https://www.nytimes.com/2020/08/25/us/politics/republicans-platform.html> [<https://perma.cc/6AAN-7WY7>].

76. See *id.*

77. See Sydney Ember, *Progressives' Wish List for Biden Starts with Warren and Sanders*, N.Y. TIMES (Nov. 11, 2020), <https://www.nytimes.com/2020/11/11/us/politics/warren-sanders-biden-cabinet.html> [<https://perma.cc/QP36-HLN7>] (reporting that “the Human Rights Campaign, one of the nation's largest advocacy organizations for L.G.B.T.Q. people,” requested that Biden “end conversion therapy”).

78. See Caitlin Ryan et al., *Parent-Initiated Sexual Orientation Change Efforts with LGBT Adolescents: Implications for Young Adult Mental Health and Adjustment*, 67 J. HOMOSEXUALITY 159, 162 (2020).

79. See Wynter K. Miller & Benjamin E. Berkman, *The Future of Physicians' First Amendment Freedom: Professional Speech in an Era of Radically Expanded Prenatal Genetic Testing*, 76 WASH. & LEE L. REV. 577, 635 (2019).

80. See *id.* (“In September 2012, Governor Jerry Brown signed Senate Bill 1172, making California the first state to ban state-licensed therapists from performing SOCE on any patient under eighteen years of age.”).

81. See CAL. BUS. & PROF. CODE § 865.1 (West 2013).

82. See Soumya Karlamangla, *New Jersey Court Ruling Another Blow to Gay Conversion Therapies*, L.A. TIMES (Nov. 10, 2013), <https://www.latimes.com/nation/nationnow/la-na-nn-gay-conversion-new-jersey-ban-20131109-story.html> (“In August, New Jersey Gov. Chris Christie signed into law a bill outlawing the controversial therapies, making the Garden State the second to do so after California.”).

83. See N.J. STAT. ANN. § 45:1–55 (West 2021).

Seven years later, the legislative tide had risen steadily higher against practicing SOCE on minor patients.⁸⁴ Specifically, in March 2020, Virginia became the twentieth state to outlaw SOCE on minors.⁸⁵ In signing that measure into law, Governor Ralph Northam denounced conversion therapy as a dangerous and harmful practice “based in discriminatory junk-science.”⁸⁶ In addition to statewide statutes, at least thirty-five municipalities by 2020 had enacted laws forbidding conversion therapy on minors.⁸⁷ Legislators targeting SOCE view the controversial practice, Professor Jane Bambauer writes, “as the worst sort of snake oil—as a promise that is destined to fail, in an attempt to treat a condition that is not even an ailment.”⁸⁸

Prior to the Eleventh Circuit’s 2020 ruling in *Otto* striking down a pair of local anti-SOCE ordinances under strict scrutiny, two other federal appellate courts had affirmed the constitutionality of bans against licensed therapists performing SOCE on minors.⁸⁹ Significantly, those courts—the Ninth Circuit in *Pickup v. Brown* in an amended opinion issued in January 2014 and the Third Circuit in *King v. Governor of New Jersey* decided later that same year—both applied tests less rigorous than strict scrutiny when considering First

84. See Joshua Bote, *Cities Are Doing More Than States, Federal Government to Protect LGBTQ Rights, Human Rights Campaign Report Finds*, USA TODAY (Dec. 3, 2020), <https://www.usatoday.com/story/news/nation/2020/12/03/hrc-cities-do-more-than-federal-government-protect-lgbtq-rights/3799252001/> [<https://perma.cc/TX57-9URB>].

85. See Sandra E. Garcia, *Virginia Is First Southern State to Ban Conversion Therapy for Minors*, N.Y. TIMES (Mar. 3, 2020), <https://www.nytimes.com/2020/03/03/us/va-conversion-therapy-ban.html> [<https://perma.cc/V9PY-2339>].

86. See *id.*

87. See Bote, *supra* note 84 (“Thirty-five municipalities have also enacted laws banning conversion therapy, an improvement of 20% from last year.”).

88. See Jane E. Bambauer, *Snake Oil Speech*, 93 WASH. L. REV. 73, 100 (2018); see also *id.* at 74–75 (defining “snake oil” as a “metaphor [that] is used for a wide range of pseudoscientific claims about products, services, lifestyles, and even socio-political theories.”); see generally Jane E. Bambauer, JAMES E. ROGERS COLL. OF L., UNIV. OF ARIZ., <https://law.arizona.edu/jane-bambauer> (last visited Sept. 9, 2021) [<https://perma.cc/2X64-27QZ>] (explaining that Bambauer “is a Professor of Law at the University of Arizona. [Professor Bambauer’s] research assesses the social costs and benefits of Big Data, and questions the wisdom of many well-intentioned privacy laws”).

89. See *supra* note 2 and accompanying text (referencing the two decisions affirming the validity of anti-SOCE statutes in New Jersey and California).

Amendment challenges to statewide laws in California and New Jersey, respectively.⁹⁰

In *Pickup*, the Ninth Circuit concluded that SOCE, as regulated by California, constituted professional conduct, not speech.⁹¹ This threshold decision proved critical to the court's ultimate holding because it rendered nugatory heightened First Amendment scrutiny.⁹² Recall here that the Eleventh Circuit in *Otto* reached the opposite conclusion on the speech-versus-conduct question—a decision that ultimately started the Eleventh Circuit down the path toward applying strict scrutiny.⁹³ In declaring that the California statute regulated only conduct, the Ninth Circuit in *Pickup* reasoned that the measure “bans a form of treatment for minors; it does nothing to prevent licensed therapists from discussing the pros and cons of SOCE with their patients.”⁹⁴ In other words, therapists could converse about SOCE as much as they wanted to; they simply could not perform it on minors.⁹⁵

Because it concluded that the California statute regulated professional conduct, the Ninth Circuit deemed it subject to “deferential review” under the rational basis standard.⁹⁶ Rational basis typically applies when laws regulate economic and social

90. See *Pickup v. Brown*, 740 F.3d 1208, 1231 (9th Cir. 2014); *King v. Governor of New Jersey*, 767 F.3d 216, 237 (3d Cir. 2014).

91. See *Pickup*, 740 F.3d at 1229. In reaching this conclusion, the Ninth Circuit considered the First Amendment speech rights of professionals along a continuum, ranging from situations “where a professional is engaged in a public dialogue” and thus is accorded full constitutional protection, to “the regulation of professional conduct, where the state’s power is great, even though such regulation may have an incidental effect on speech.” See *id.* at 1227–29. See CAL. BUS. & PROF. CODE § 865.1 (West 2013) (“Under no circumstances shall a mental health provider engage in sexual orientation change efforts with a patient under 18 years of age.”).

92. See *Pickup*, 740 F.3d at 1230 (“Because [the law] regulates a professional practice that is not inherently expressive, it does not implicate the First Amendment.”); see also *supra* note 12 and accompanying text (addressing the speech-versus-conduct dichotomy).

93. See *supra* note 12 and accompanying text (regarding the Eleventh Circuit’s determination that speech was at issue in *Otto*).

94. *Pickup*, 740 F.3d at 1229.

95. See Carl H. Coleman, *Regulating Physician Speech*, 97 N.C. L. REV. 843, 858 (2019) (“The court emphasized that physicians remained free to discuss SOCE with their patients and to express opinions about its advantages and drawbacks, as long as they did not actually perform the therapy themselves.”).

96. See *Pickup*, 740 F.3d at 1231.

welfare.⁹⁷ It merely requires the government to identify “a legitimate state interest that . . . [it] could have rationally concluded was advanced by the statute at issue.”⁹⁸

In applying this lenient test, the Ninth Circuit initially concluded that California possessed the requisite legitimate interest—namely, safeguarding minors.⁹⁹ Critically, especially when contrasted with the Eleventh Circuit’s analysis under strict scrutiny in *Otto*, the Ninth Circuit in *Pickup* stressed that, under rational basis review, California did not need to prove that SOCE actually caused harm to minors.¹⁰⁰ Instead, the state only needed to demonstrate that lawmakers’ concern for such possible harm stemming from SOCE was reasonable.¹⁰¹ The Ninth Circuit found this was the case, reasoning that while legislators in the Golden State possessed “some evidence that SOCE is safe and effective, the overwhelming consensus was that SOCE was harmful and ineffective. On this record, we have no trouble concluding that the legislature acted rationally by relying on that consensus.”¹⁰² In brief, the Ninth Circuit’s conclusion that the statute regulated conduct, not speech, allowed it to dodge the application of strict scrutiny and, in turn, to avoid *Brown v. Entertainment Merchant Ass’n*’s rigorous demand for scientific proof of harm directly caused by SOCE.¹⁰³ The result was that California’s law passed rational basis review.¹⁰⁴ A future court

97. See Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL’Y 401, 402 (2016) (asserting that “the [Supreme] 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”); Nicholas Walter, *The Utility of Rational Basis Review*, 63 VILL. L. REV. 79, 79 (2018) (remarking that rational basis scrutiny “typically [is] applied to review of economic and social regulations”).

98. Diahann DaSilva, *Playing A “Labeling Game”: Classifying Expression as Conduct as a Means of Circumventing First Amendment Analysis*, 56 B.C. L. REV. 767, 778 (2015).

99. See *Pickup*, 740 F.3d at 1231.

100. See *id.*

101. See *id.*

102. *Id.* at 1232.

103. See *supra* notes 23–29 and accompanying text and *infra* Part II (addressing *Brown*’s evidentiary standards).

104. See *Pickup*, 740 F.3d at 1232. In August 2021, U.S. District Judge Robert J. Bryan followed the Ninth Circuit’s lead in *Pickup* when he applied rational basis review to uphold, in the face of a First Amendment free speech challenge, a law banning conversion therapy on minors in the State of Washington. See *Tingley v. Ferguson*, No. 3:21-CV-05359-RJB, 2021 U.S. Dist. LEXIS 164063, at *20–21 (W.D. Wash. Aug. 30, 2021).

with judges sympathetic to LGBTQ minors thus need not follow the Eleventh Circuit's approach in *Otto*; it can escape *Brown*'s evidentiary requirements simply by recasting an anti-SOCE mandate in terms of conduct-based regulation, rather than one implicating speech and the First Amendment.

Less than one year after the Ninth Circuit issued its amended ruling in *Pickup*, the Third Circuit in *King v. Governor of New Jersey* upheld the Garden State's anti-SOCE law, but it took a very different path in arriving at that result.¹⁰⁵ In short, the court held that New Jersey's statute did, in fact, regulate speech—not merely conduct—and therefore triggered First Amendment concerns.¹⁰⁶ The Third Circuit thus differed from the Ninth Circuit in *Pickup*, which had applied rational basis review.¹⁰⁷ It also differed from the Eleventh Circuit in *Otto*, which had adopted strict scrutiny.¹⁰⁸ The Third Circuit, instead, held that “intermediate scrutiny is the applicable standard of review in this case. We must uphold [the statute] if it ‘directly advances’ the government’s interest in protecting clients from ineffective and/or harmful professional services, and is ‘not more extensive than necessary to serve that interest.’”¹⁰⁹ In brief, the Third Circuit selected a standard of review that falls somewhere in between the arduous strict scrutiny test used in *Otto* and the relaxed rational basis standard embraced in *Pickup* that the Supreme Court recently described as a “form of minimal scrutiny [that] is foreign to our free-speech jurisprudence.”¹¹⁰

The Third Circuit reached this determination on scrutiny by reasoning that when professionals—in this instance, state-licensed

105. Compare 767 F.3d 216, 246 (3d Cir. 2014), with Marc Jonathan Blitz, *Free Speech, Occupational Speech, and Psychotherapy*, 44 HOFSTRA L. REV. 681, 684 (2016), which notes that, in comparison to the Ninth Circuit in *Pickup*, “[t]he Third Circuit . . . had very different reasons for finding New Jersey’s ban on SOCE therapy constitutional in *King v. Governor of New Jersey*.”

106. See *King*, 767 F.3d at 229 (“Thus, we conclude that the verbal communications that occur during SOCE counseling are not ‘conduct,’ but rather ‘speech’ for purposes of the First Amendment.”).

107. See *supra* note 96 and accompanying text (noting the Ninth Circuit’s decision in *Pickup* to apply rational basis review).

108. See *supra* note 13 and accompanying text (noting the Third Circuit’s decision in *Otto* to apply strict scrutiny).

109. *King*, 767 F.3d at 237 (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 566 (1980)).

110. *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2465 (2018); see Dan V. Kozlowski, *Content and Viewpoint Discrimination: Malleable Terms Beget Malleable Doctrine*, 13 COMM’N. L. & POL’Y 131, 131 (2008) (describing intermediate scrutiny as “more lenient” than strict scrutiny).

counselors—speak to clients in their occupational capacities, they do not receive full First Amendment protection.¹¹¹ There are, the appellate court wrote, “special rules for the regulation of speech that occurs pursuant to the practice of a licensed profession.”¹¹² The court explained that professional speech merits closer regulation by the government partly because of the knowledge imbalance between professionals, who have expertise, and their clients, who must place their trust and health in the hands of professionals.¹¹³ The government’s police power to regulate professionals in the name of protecting clients from harm thus collides with and, in turn, restricts the First Amendment rights of professionals when they speak while rendering services to clients.¹¹⁴ In other words, the government’s “longstanding authority to protect its citizens from ineffective or harmful professional practices” takes priority over the First Amendment speech rights of professionals when they are on the job.¹¹⁵

The ramification of this logic for the Third Circuit was that while content-based laws are generally subject to strict scrutiny, that principle does not apply in professional speech scenarios such as *King* because such expression “enjoys diminished protection.”¹¹⁶ In ferreting out the appropriate level of scrutiny to apply, the Third Circuit analogized regulating professional speech to policing commercial expression.¹¹⁷ Although commercial speech is a particular type of content, the regulation of truthful commercial speech for lawful goods and services is subject only to an intermediate scrutiny standard of review.¹¹⁸ Observing that the same

111. See *King*, 767 F.3d at 232 (concluding “that a licensed professional does not enjoy the full protection of the First Amendment when speaking as part of the practice of her profession”).

112. *Id.* at 231.

113. See *id.* at 232–33.

114. See *id.*

115. *Id.* at 237.

116. *Id.* at 233; see also *Barr v. Am. Ass’n of Pol. Consultants*, 140 S. Ct. 2335, 2346 (2020) (“Content-based laws are subject to strict scrutiny.”).

117. See *King*, 767 F.3d at 233–35.

118. See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1339 (2010) (noting that the Supreme Court has held “that restrictions on nonmisleading commercial speech regarding lawful activity must withstand intermediate scrutiny”); see also Tamara R. Piety, *Market Failure in the Marketplace of Ideas: Commercial Speech and the Problem that Won’t Go Away*, 41 LOY. L.A. L. REV. 181, 182 (2007) (observing that “the commercial speech doctrine creates a category of speech subject to intermediate scrutiny under the First Amendment”).

worries regarding an imbalance of knowledge and information between advertisers and consumers exist as between professionals and their clients, the Third Circuit concluded that intermediate scrutiny was also applicable for testing the validating of regulations on professional speech.¹¹⁹

In applying intermediate scrutiny to New Jersey’s anti-SOCE statute, the Third Circuit had no problem determining that the state possessed a substantial interest in protecting minors from harm wrought by professionals.¹²⁰ Turning to the evidence of harm caused by SOCE, the Third Circuit noted that under intermediate scrutiny its role was “merely to determine whether the legislature has ‘drawn reasonable inferences based on substantial evidence.’”¹²¹ It added that “a state legislature is not constitutionally required to wait for conclusive scientific evidence before acting to protect its citizens from serious threats of harm.”¹²² This, of course, is a much more relaxed and deferential approach to the analysis of evidence than that embraced by the Supreme Court in *Brown v. Entertainment Merchants Ass’n*.¹²³ *Brown* and strict scrutiny demand a direct causal link between the regulated speech and the harm to be mitigated.¹²⁴ The Third Circuit’s methodology in *King*, however, does not.¹²⁵

Furthermore, under intermediate scrutiny, the Third Circuit afforded substantial deference to the opinions and judgments of professional organizations that the Eleventh Circuit majority in *Otto* refused to provide under strict scrutiny.¹²⁶ As the Third Circuit opined, “[l]egislatures are entitled to rely on the empirical judgments of independent professional organizations that possess specialized knowledge and experience concerning the professional practice

119. See *King*, 767 F.3d at 234–35.

120. See *id.* at 237–38.

121. *Id.* at 238 (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997)).

122. *Id.* at 239.

123. See *supra* notes 22–29 and accompanying text; *infra* Part II (addressing *Brown*’s evidentiary standards).

124. See *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 799 (2011) (referencing the need for a “direct causal link”); *United States v. Alverez*, 567 U.S. 709, 725 (2012) (referencing the need for a “direct causal link”).

125. See Craig Konnoth, *Medicalization and the New Civil Rights*, 72 STAN. L. REV. 1165, 1241–42 (2020) (“The form of First Amendment scrutiny that the [Third Circuit] applied did not require medical evidence.”).

126. Compare *King v. Governor of New Jersey*, 767 F.3d 216, 238 (3d Cir. 2014) (allowing for reliance on professional organization judgments), with *Otto v. City of Boca Raton*, 981 F.3d 854, 869 (11th Cir. 2020) (forbidding the reliance on profession organization judgments).

under review, particularly when this community has spoken with such urgency and solidarity on the subject.”¹²⁷ The court concluded that the views of multiple organizations, including the APA, about SOCE amounted to substantial evidence supporting the judgment of New Jersey lawmakers in enacting the statute.¹²⁸ The statute, in turn, survived intermediate scrutiny.¹²⁹

In summary, the appellate court opinions in *Pickup* and *King* demonstrate different legal workarounds from the application of strict scrutiny, including its demanding analysis of scientific evidence as witnessed in *Brown*, when considering First Amendment challenges to anti-SOCE statutes.¹³⁰ A major obstacle today facing these efforts to evade strict scrutiny and *Brown*, however, is the Supreme Court’s 2018 decision in *National Institute of Family & Life Advocates v. Becerra*.¹³¹ As described below, it cast substantial doubt on the notion that professional speech should be treated differently under the First Amendment.¹³² Citing both the Ninth Circuit’s ruling in *Pickup* and the Third Circuit’s decision in *King*, Justice Clarence Thomas wrote for the *Becerra* majority that “[s]ome Courts of Appeals have recognized ‘professional speech’ as a separate category of speech that is subject to different rules.”¹³³ He noted that these courts exempt professional speech from the usual principle that strict scrutiny applies to content-based laws.¹³⁴

Justice Thomas pushed back firmly against the emergence of a special professional speech doctrine that is subject to its own unique set of First Amendment principles.¹³⁵ He stressed that the Court has applied strict scrutiny when considering laws regulating the speech of professionals in several contexts.¹³⁶ The only two circumstances, in fact, when professional speech merits review under a less stringent test, Justice Thomas wrote, are when: (1) the government compels

127. *King*, 767 F.3d at 238.

128. *See id.*

129. *See id.* at 240.

130. *See id.* at 238; *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 799 (2011); *Pickup v. Brown*, 728 F.3d 1042, 1056 (9th Cir. 2013).

131. *See NIFLA v. Becerra*, 138 S. Ct. 2361, 2372–73 (2018).

132. *See id.*

133. *Id.* at 2371 (citing *Pickup*, 728 F.3d at 1227–29; *King*, 767 F.3d at 232).

134. *See id.*

135. *See id.* at 2375 (“In sum, 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. We do not foreclose the possibility that some such reason exists.”).

136. *See id.* at 2374.

“professionals to disclose factual, noncontroversial information” when they advertise their services, and (2) the speech of professionals is constrained only incidentally to the regulation of their conduct, such as an informed-consent mandate being incidental to a doctor performing a medical procedure.¹³⁷

The majority’s decision in *Becerra* casts serious doubt on the existence of a separate professional speech doctrine that is immune from strict scrutiny by calling out by name the cases of *Pickup* and *King*, thereby questioning the use of those decisions as workarounds from strict scrutiny in future anti-SOCE law litigation.¹³⁸ Indeed, the *Otto* majority cited *Becerra* in rejecting Boca Raton and Palm Beach County’s argument that their statutes should not face strict scrutiny.¹³⁹ In referencing *Becerra*, Judge Grant explained that “[t]he local governments’ characterization of their ordinances as professional regulations cannot lower that bar. The Supreme Court has consistently rejected attempts to set aside the dangers of content-based speech regulation in professional settings.”¹⁴⁰ In sum, framing *Otto* as a professional speech case failed to lessen the burden necessary to find that the ordinances passed First Amendment muster.¹⁴¹

Without citing *Pickup* by name, Judge Grant also rejected the Ninth Circuit’s decision in that case to treat SOCE as conduct rather than speech.¹⁴² Once again citing *Becerra* to buttress her stance, Judge Grant reasoned that “the Supreme Court also [has] rejected an attempt to regulate speech by recharacterizing it as professional conduct. . . . So too here. The local governments cannot rescue their ordinances by calling the plaintiffs’ speech conduct.”¹⁴³ In short, the Supreme Court’s 2018 ruling in *Becerra* now provides ample

137. See *id.* at 2372.

138. See *id.* at 2371.

139. See *Otto v. City of Boca Raton*, 981 F.3d 854, 861 (11th Cir. 2020).

140. *Id.* The *Otto* majority added that:

because [*Becerra*] directly criticized *Pickup* and *King*—cases with very close facts to this one—we do not think there is much question that, even if some type of professional speech might conceivably fall outside the First Amendment, the speech at issue here does not. But to whatever extent [*Becerra*] failed to bind us with a direct holding on that point, we now make that holding ourselves. These ordinances are content-based regulations of speech and must satisfy strict scrutiny.

Id. at 867–68.

141. See *id.* at 861.

142. See *supra* notes 90–96 and accompanying text (addressing the Ninth Circuit’s characterization of SOCE as conduct).

143. *Otto*, 981 F.3d at 861 (internal citation to *Becerra* omitted).

ammunition for lower courts to rebuff the tactics deployed by the Ninth and Third Circuits in *Pickup* and *King*, respectively, to evade the application of strict scrutiny when evaluating First Amendment challenges to anti-SOCE statutes.¹⁴⁴

With this overview of SOCE, laws targeting it, and the appellate court rulings of *Pickup* and *King* in mind, this Article next turns in greater detail to the Supreme Court's decision in *Brown* and, specifically, the consideration therein of both social science evidence and the opinions of learned professional organizations on the question of harm caused by speech.

II. *BROWN* AND THE DIRECT CAUSAL LINK STANDARD: AN IMPOSSIBLE LEVEL OF PROOF IN SOME INSTANCES?

In *Brown v. Entertainment Merchants Ass'n*, the Supreme Court, in the process of applying strict scrutiny, evaluated social science evidence regarding harm purportedly caused by playing violent video games in order to decide if California had a compelling interest in restricting minors' access to them.¹⁴⁵ Justice Scalia, delivering the Court's opinion and joined by four other Justices, created a very high hurdle for California to overcome.¹⁴⁶ He did this by: (1) stressing that California needed to prove the existence of "an

144. For example, in considering a First Amendment free-speech challenge to an anti-SOCE statute adopted by the City of Tampa, Florida, U.S. Magistrate Judge Amanda Sansone determined that *Becerra* had abrogated *King*'s holding that intermediate scrutiny should apply when considering an anti-SOCE statute. See *Vazzo v. City of Tampa*, 2019 U.S. Dist. LEXIS 35935, *7 (M.D. Fla. Jan. 30, 2019). Magistrate Sansone elaborated that *Becerra* "explicitly rejected *King*'s holding that professional speech is subject to different standards of review under the First Amendment than other speech. . . . [*Becerra*] instead held that the traditional analyses that apply to content-based laws also apply to professional speech that is neither commercial nor incidental to professional conduct." *Id.* (internal citation to *Becerra* omitted). In contrast to Magistrate Sansone's conclusion in *Vazzo*, however, U.S. District Judge Deborah Chasanow determined in *Doyle v. Hogan*, 411 F. Supp. 3d 337 (D. Md. 2019), that intermediate scrutiny—even after *Becerra*—supplied the correct standard for reviewing a challenge to Maryland's anti-SOCE statute. See *Doyle*, 411 F. Supp. 3d at 346. Judge Sansone reasoned that SOCE, as regulated by Maryland's statute, "lands on the conduct end of the sliding scale" between speech and conduct. *Id.* at 345.

145. See 564 U.S. 786, 799–800 (2011) (applying strict scrutiny and considering social science evidence).

146. See *id.* at 787 (noting that Justices Anthony Kennedy, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan joined Justice Scalia's opinion).

‘actual problem’ in need of solving,”¹⁴⁷ (2) dubbing the need to prove an actual problem “a demanding standard” for which “ambiguous proof will not suffice,”¹⁴⁸ and (3) requiring California to demonstrate “a direct causal link between violent video games and harm to minors,” not merely “some correlation” between the two.¹⁴⁹

The *Brown* majority found California’s evidence to be woefully wanting under these strictures.¹⁵⁰ Justice Scalia even dropped a footnote to somewhat snarkily mock one study which concluded “that children who had just finished playing violent video games were more likely to fill in the blank letter in “explo_e” with a “d” (so that it reads “explode”) than with an “r” (“explore”).”¹⁵¹ He wrote that preventing “this phenomenon, which might have been anticipated with common sense, is not a compelling state interest.”¹⁵²

One problem with *Brown*’s direct causal link requirement is, as the author of this Article and Professor Matthew Bunker wrote elsewhere, that it may be impossible in some scenarios even to gather empirical proof of causal harm.¹⁵³ Justice Samuel Alito, in a concurrence in *Brown* that agreed with the Court’s judgment and was joined by Chief Justice John Roberts, pointed out this problem.¹⁵⁴ Justice Alito believed that the majority’s opinion likely would be understood to require “supporting evidence that may not be realistically obtainable given the nature of the phenomenon in question.”¹⁵⁵ Justice Alito’s observation here “recognizes that there

147. *Id.* at 799 (quoting *U.S. v. Playboy Ent. Grp.*, 529 U.S. 803, 822 (2000)).

148. *Id.* at 799, 800.

149. *Id.*

150. *See id.* at 800 (calling California’s evidence “not compelling” and adding that all other courts that had considered it had also rejected it “with good reason” because it failed to “prove that violent video games *cause* minors to *act* aggressively (which would at least be a beginning)”).

151. *Id.* at 800 n.7.

152. *Id.*

153. *See* Clay Calvert & Matthew D. Bunker, *An “Actual Problem” in First Amendment Jurisprudence? Examining the Immediate Impact of Brown’s Proof-of-Causation Doctrine on Free Speech and Its Compatibility with the Marketplace Theory*, 35 HASTINGS COMM’NS & ENT. L.J. 391, 428 (2013) (“Courts might . . . ask whether the case at bar is one in which empirical causal data simply is difficult, if not impossible, to gather or generate.”).

154. *Brown*, 564 U.S. at 814–15 (Alito, J., concurring).

155. *Id.*

are limitations to social science research, such as the problem of establishing a direct causal relationship.”¹⁵⁶

Justice Scalia, ironically in light of *Brown*, acknowledged this situation in 2009 when considering whether indecent speech on the broadcast airwaves harms minors in *Federal Communications Commission v. Fox Television Stations, Inc.*¹⁵⁷ Justice Scalia explained there that:

There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency.¹⁵⁸

This observation is important in the anti-SOCE law cases. Why? Because, as noted earlier, Judge Martin in her *Otto* dissent pointed out the ethical impossibility of conducting SOCE experiments on minors to determine whether SOCE cause them harm.¹⁵⁹ Such experiments are ethically impossible because children might be hurt by taking part in them.¹⁶⁰ She explained the dangerous predicament, if not utterly intolerable conundrum, in which the *Otto* majority’s demand for unambiguous empirical proof of harm places both minors and researchers: “[O]ne implication of the majority holding is that because SOCE is too dangerous to study, children can continue to be subjected to it. The majority opinion has the result of inviting unethical research that is nowhere to be found in First Amendment jurisprudence.”¹⁶¹

Justice Stephen Breyer penned a dissenting opinion in *Brown*.¹⁶² As with the majority, he also examined the law under strict

156. Clay Calvert et al., *Social Science, Media Effects & the Supreme Court: Is Communication Research Relevant After Brown v. Entertainment Merchants Association?*, 19 UCLA ENT. L. REV. 293, 309 (2012).

157. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009).

158. *Id.*

159. See *Otto v. City of Boca Raton*, 981 F.3d 854, 877 (11th Cir. 2020) (Martin, J., dissenting) (“To be clear, the very research the majority opinion seems to demand is ‘not ethically permissible’ to conduct.”).

160. See *id.* at 876 (Martin, J., dissenting) (“The majority’s preoccupation with having additional research done ignores the harm such studies would have on children. Evaluating the impact of SOCE under controlled conditions would require exposing minors to SOCE.”).

161. *Id.* at 877.

162. *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 840–57 (2011) (Breyer, J., dissenting).

scrutiny.¹⁶³ Justice Breyer thus reasoned that California was required to demonstrate a compelling interest.¹⁶⁴ Yet, in contrast to the majority, Justice Breyer would have upheld the statute under that exacting test.¹⁶⁵

More significantly, at least for purposes of this Article and as described below, Justice Breyer's dissent offers an alternative to Justice Scalia and the majority's approach for evaluating evidence of speech-attributed harm.¹⁶⁶ Specifically, Justice Breyer was willing to defer to the judgments and opinions of learned professional organizations in interpreting the social science evidence that California lawmakers had relied on when enacting the video game statute.¹⁶⁷ Justice Breyer pointed out that some studies had, in fact, found that playing violent video games causes aggression.¹⁶⁸ He readily acknowledged, however, that other studies indicated the opposite and that all of the studies had their share of critics.¹⁶⁹ Given what thus might be considered a mixed bag of social science evidence, Justice Breyer's solution was to respectfully step back and to grant deference to the multiple esteemed professional associations that had already interpreted the data, rather than impose his own nonscientific judgment on the collective body of evidence.¹⁷⁰ He explained that:

163. See *id.* at 841 (“In determining whether the statute is unconstitutional, I would apply both this Court’s ‘vagueness’ precedents and a *strict form of First Amendment scrutiny.*”) (emphasis added).

164. See *id.* at 847 (“Like the majority, I believe that the California law must be ‘narrowly tailored’ to further a ‘*compelling interest,*’ without there being a ‘less restrictive’ alternative that would be ‘at least as effective.’”) (citing *Reno v. ACLU*, 521 U.S. 844, 874–75, 879 (1997)) (emphasis added).

165. See *id.* at 857 (Breyer, J., dissenting) (concluding that “California’s law is constitutional on its face”).

166. See *id.* at 791 (discussing the precedent that the Court follows in its harmful speech analysis).

167. See *id.* at 853, 855.

168. See *id.* at 851 (“Longitudinal studies, which measure changes over time, have found that increased exposure to violent video games causes an increase in aggression over the same period.”).

169. See *id.* at 853 (“Experts debate the conclusions of all these studies. Like many, perhaps most, studies of human behavior, each study has its critics, and some of those critics have produced studies of their own in which they reach different conclusions.”).

170. See *id.* at 855. These organizations included the American Academy of Pediatrics, the American Academy of Child & Adolescent Psychiatry, the American Psychological Association, the American Medical Association, the American Academy of Family Physicians, and the American Psychiatric Association, all of which in 2000 issued a joint statement regarding the social science evidence related

I, like most judges, lack the social science expertise to say definitively who is right. But associations of public health professionals who do possess that expertise have reviewed many of these studies and found a significant risk that violent video games, when compared with more passive media, are particularly likely to cause children harm.¹⁷¹

Justice Breyer thus rather humbly accepted the opinions and judgments of professional associations, which he deemed better qualified than his own to make sense of the data. Justice Breyer also was willing to tolerate more ambiguity, as he noted that some evidence supporting California was “controverted.”¹⁷² Additionally, he did not demand a direct causal link between the speech in question and the harm to which it allegedly gives rise.¹⁷³ Instead, the judgment of professional associations that the speech created “a significant risk” of harm was sufficient.¹⁷⁴ Furthermore, the fact that *all* of the evidence failed to support California’s statute did not doom it to an unconstitutional fate; what mattered, instead, for Justice Breyer was that there was “considerable evidence” and “substantial (though controverted) evidence” to support it.¹⁷⁵ All of this flexibility contrasts with the *Brown* majority’s stance that under strict scrutiny, “uncertainty” of evidence and “ambiguous proof will not suffice.”¹⁷⁶

Justice Breyer then added a second layer of deference to his approach—one he pointed out that the majority had failed to provide.¹⁷⁷ Namely, Justice Breyer deferred to the judgment of California lawmakers in relying on the opinions of these professional associations, rather than injecting the judiciary into an obstructive position in between lawmakers and the associations.¹⁷⁸ Justice Breyer found:

sufficient grounds in these studies and expert opinions for this Court to defer to an elected legislature’s conclusion that the video games in question are particularly likely to harm children. This Court has always thought it owed an elected legislature some degree of deference in respect

to using violent interactive entertainment products, such as video games, and the negative outcomes of doing so. *See id.* at 853. Justice Breyer also cited subsequent statements issued by professional associations. *See id.*

171. *Id.* at 853.

172. *See id.* at 858.

173. *See id.*

174. *See id.* at 853.

175. *See id.* at 850, 858.

176. *See id.* at 800 (majority opinion).

177. *See id.* at 855 (Breyer, J., dissenting) (“The majority, in reaching its own, opposite conclusion about the validity of the relevant studies, grants the legislature no deference at all.”).

178. *See id.*

to legislative facts of this kind, particularly when they involve technical matters that are beyond our competence, and even in First Amendment cases.¹⁷⁹

In summary, Justice Breyer's approach for assessing harm allegedly caused by speech involved a combination of:

- (1) citing and examining specific scientific studies, including "many . . . that support California's views;"¹⁸⁰
- (2) tolerating the fact that not all of the evidence tilted in California's favor and that numerous studies, in fact, did not help the state's position;¹⁸¹
- (3) relying on the judgments of multiple professional associations in terms of their interpretations of the scientific studies;¹⁸² and
- (4) deferring to the lawmakers' decision to rely on the judgments and "expert opinions" of those same professional associations.¹⁸³ This holistic, deferential methodology ultimately led Justice Breyer to conclude that, under strict scrutiny, California had demonstrated "a compelling interest" in "supplementing parents' efforts to prevent their children from purchasing potentially harmful violent, interactive material."¹⁸⁴

Justice Breyer's approach to scientific evidence in *Brown* thus illustrates that "he can tolerate ambiguity and, in turn, weigh the pros and cons of conflicting research results before coming down on one side, especially when multiple professional organizations possessing expertise within a field are unified in their view."¹⁸⁵ This tack offers ample support for and, in fact, closely approximates the one that

179. *Id.*

180. *Id.* at 851.

181. Justice Breyer, in fact, created two lengthy appendices that catalogued "peer-reviewed academic journal articles on the topic of psychological harm resulting from playing violent video games," devoting one to articles "supporting the hypothesis that violent video games are harmful" and the other two articles "not supporting/rejecting the hypothesis that violent video games are harmful." *See id.* at 858. He listed more than two dozen articles in the latter category that either did not support or rejected California's position that violent video games are harmful. *See also id.* at 869–72.

182. *See id.* at 853–54.

183. *See id.* at 855.

184. *See id.* at 856.

185. *See Calvert et al., supra* note 156, at 308.

Judge Martin later embraced in her *Otto* dissent supporting the anti-SOCE statutes adopted by Boca Raton and Palm Beach County.¹⁸⁶

In particular, Judge Martin openly recognized that the 2009 APA task force report—the same document the *Otto* majority relied on to reach its conclusion that there was insufficient evidence of harm caused by SOCE—had lamented the absence of recent rigorous research on the impact of SOCE.¹⁸⁷ Yet, she pointed out that the task force report, as well as statements issued by other organizations, also indicated that there are risks of harm caused by SOCE.¹⁸⁸ In other words, she was willing, as was Justice Breyer in *Brown*, to tolerate some ambiguity in the evidence.¹⁸⁹ The *Otto* majority, in contrast, required the evidence to be certain that SOCE cause harm in order for the ordinances to satisfy strict scrutiny’s demands.¹⁹⁰

Additionally, Justice Breyer and Judge Martin adopted similar thresholds for the requisite level of supporting evidence necessary to uphold the statutes under strict scrutiny.¹⁹¹ Justice Breyer, as noted earlier, used the terms “considerable” and “substantial” when describing the evidence California had mustered in support of its statute.¹⁹² Similarly, Judge Martin invoked the term “strong evidence” in her *Otto* dissent when encapsulating the evidence marshaled by Boca Raton and Palm Beach County.¹⁹³

Furthermore, and perhaps most importantly, Judge Martin, as with Justice Breyer in *Brown*, gave weight and importance to the opinions and views of professional associations regarding the scientific evidence.¹⁹⁴ Judge Martin reasoned that “[w]hen it comes to regulation of allegedly harmful medical practices, the judgment of

186. See *Otto v. City of Boca Raton*, 981 F.3d 854, 876 (11th Cir. 2020) (Martin, J., dissenting).

187. See *id.*; see also *id.* at 869 (“We focus our attention on the APA’s 2009 task force report.”).

188. See *id.* at 876.

189. See *Brown*, 564 U.S. at 858 (noting Justice Breyer’s tolerance of some studies that contradicted California’s position that playing violent video games caused harm).

190. See *Otto*, 981 F.3d at 869 n.9 (“Permitting uncertain evidence to satisfy strict scrutiny would blur the lines that separate it from lesser tiers of scrutiny—that is, intermediate scrutiny and rational basis review.”).

191. See *id.* at 872; *Brown*, 564 U.S. at 850, 858 (Breyer, J., dissenting).

192. See *Brown*, 564 U.S. at 850, 858 (using the terms considerable and substantial to describe the evidence used to survive strict scrutiny).

193. See *Otto*, 981 F.3d at 872 (Martin, J., dissenting).

194. See *supra* notes 177–181 and accompanying text (addressing Justice Breyer’s deference to the views of professional associations).

professional organizations strikes me as quite relevant.”¹⁹⁵ Government officials, in turn, should be allowed to rely on those judgments, along with the results of scientific studies, without courts demanding additional new studies that are impossible to conduct because of ethical concerns about deliberately exposing minors to SOCE.¹⁹⁶ As Judge Martin crisply summed it up, “[t]he scientific and medical communities have done their jobs, the state has done its job, and now it is for us to do our job in the simple application of the law.”¹⁹⁷ For the judiciary to require more evidence at this stage would be akin to moving the First Amendment goalposts further downfield and out of reach of Boca Raton and Palm Beach County.¹⁹⁸

In summary, the *Brown* majority’s approach to scientific evidence creates an extremely high bar for proving compelling interests in First Amendment speech cases.¹⁹⁹ The *Otto* majority’s reliance on a *Brown*-like evidentiary methodology proved crucial to its decision holding unconstitutional the local anti-SOCE statutes at issue in that case.²⁰⁰ For the *Otto* majority, scientific evidence must be unequivocal to satisfy strict scrutiny.²⁰¹ The opinions and viewpoints of professional organizations simply are no substitute for such certain, unambiguous evidence.²⁰² This Part also illustrated that: (1) Justice Breyer’s dissent in *Brown* offers a very different and more deferential, holistic strategy for evaluating scientific evidence in free speech cases;²⁰³ and (2) Judge Martin’s dissent in *Otto*—although not citing Justice Breyer’s *Brown* dissent—tracked it in several ways and led her to reach a very different conclusion, when compared with the *Otto* majority, regarding the evidence supporting Boca Raton and

195. See *Otto*, 981 F.3d at 878 (Martin, J., dissenting).

196. See *id.* at 876 (“The majority’s preoccupation with having additional research done ignores the harm such studies would have on children.”).

197. See *id.* at 879.

198. Cf. *id.* at 879 (referring to the majority’s approach as “nothing short of a moving target approach to the First Amendment”).

199. See *supra* notes 146–149 and accompanying text (addressing the ways in which *Brown* creates a high evidentiary standard).

200. See *supra* notes 31–33 and accompanying text (addressing the *Otto* majority’s interpretation of *Brown* and its reliance on it).

201. See *Otto*, 981 F.3d at 869 (“We fail to see how . . . such equivocal conclusions can satisfy strict scrutiny and overcome the strong presumption against content-based limitations on speech.”).

202. See *id.* (“Strict scrutiny cannot be satisfied by professional societies’ opposition to speech.”).

203. See *supra* notes 166–84 and accompanying text (addressing Justice Breyer’s approach to social science evidence in *Brown*).

Palm Beach County's anti-SOCE ordinances.²⁰⁴ The next Part places these observations within a more critical, macro-level context—namely, divisions among the U.S. Supreme Court's Justices in hot-button First Amendment free-speech cases and “the larger jurisprudential backdrop that is the current debate over the deregulatory use of the First Amendment in pursuit of a laissez faire, *Lochner*-style market.”²⁰⁵

III. ANOTHER STEP TOWARD WEAPONIZING THE FIRST AMENDMENT? A CRITICAL AND CONTEXTUAL ANALYSIS OF THE *OTTO* MAJORITY'S EVIDENTIARY APPROACH

As this Article suggested earlier, the three Eleventh Circuit judges in *Otto* split neatly along perceived political lines: The two appointees of former President Trump—Judges Grant and Lagoa—formed the majority and struck down the anti-SOCE ordinances, while the appointee of former President Obama—Judge Martin—dissented and declared the measures constitutional.²⁰⁶ More bluntly and perhaps provocatively, the Trump appointees ruled in favor of permitting the widely condemned practice of SOCE on minors, while the lone Obama appointee delivered an opinion against the controversial practice.²⁰⁷

This Part takes a more critical, opinionated approach than the prior Parts of this Article. It explains that this rift among the *Otto* judges mirrors the ideological cleft among the Justices on the U.S. Supreme Court in two recent First Amendment cases that involve similar, politically-charged topics—abortion and labor unions.²⁰⁸ Furthermore, this Part asserts that the *Otto* majority's use of an extremely demanding, *Brown*-like test when evaluating the scientific evidence of harm purportedly caused by SOCE falls very much in line with the deployment of heightened scrutiny by the Supreme

204. See *supra* notes 189–98 and accompanying text (comparing Judge Martin's approach to evidence in *Otto* with that of Justice Breyer's methodology in *Brown*).

205. Claudia E. Haupt, *Licensing Knowledge*, 72 VAND. L. REV. 501, 504 (2019); see also *infra* notes 257–67 and accompanying text (addressing *Lochner v. New York*, 198 U.S. 45 (1905), and the concept of First Amendment *Lochnerism*).

206. See *infra* notes 279–294 and accompanying text (identifying who appointed the three judges in *Otto* to the Eleventh Circuit).

207. See *Otto*, 981 F.3d at 872 (Martin, J., dissenting).

208. See *infra* notes 217–232 and accompanying text (addressing the political ideology split between the majority and minority justices in an abortion and labor union Supreme Court case).

Court's conservative Justices.²⁰⁹ That approach facilitates the First Amendment's use as a robust deregulatory tool for targeting and eradicating economic and social welfare legislation.²¹⁰ In contrast, Judge Martin's more flexible approach in *Otto* for considering the scientific evidence of injury allegedly caused by SOCE does more than just track Justice Breyer's approach to evidence in *Brown*, as noted earlier.²¹¹ Judge Martin's methodology also evinces a more deferential stance when it comes to reviewing legislative handiwork—a stance that is in accord with the Supreme Court's liberal Justices' call for the use of less rigorous standards of scrutiny in the contentious First Amendment cases involving abortion and labor unions addressed below.²¹²

In sum, this Part situates the Eleventh Circuit's fractured ruling in *Otto*, including its contrasting views on the evaluation of scientific evidence, squarely within the confines of other hot-button, First Amendment free-speech battles at the nation's highest court.²¹³ Adopting *Brown*'s stringent standard for evaluating scientific evidence under strict scrutiny in cases such as *Otto* thus can be viewed as adding another First Amendment arrow to the quiver of conservative jurists seeking to undo legislation that might be perceived in certain quarters as left-leaning.

As noted above, the Justices of the Supreme Court recently splintered along the lines of perceived political ideologies in First Amendment free speech cases affecting abortion and labor unions.²¹⁴

209. See *infra* notes 223, 235, 239, 214–18 (addressing the heightened scrutiny of evidence applied by Supreme Court conservative justices in recent cases).

210. See *infra* notes 247–248 (addressing the conservative Justices' heightened scrutiny test implemented as a deregulation tool).

211. See *supra* notes 189–98 and accompanying text (comparing Judge Martin's approach to evidence in *Otto* with that of Justice Breyer's methodology in *Brown*).

212. See *Otto*, 981 F.3d at 874 (Martin J., dissenting).

213. See *supra* notes 1–22, 38–44 and accompanying text (comparing the minority versus the majority holding in *Otto*).

214. In addition to the cases discussed immediately below involving abortion and labor unions, the Court divided five-to-four along the same ideological lines in *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019). See Clay Calvert, *Dissent, Disagreement and Doctrinal Disarray: Free Expression and the Roberts Court in 2020*, 28 WM. & MARY BILL OF RTS. J. 865, 867 (2020) (noting that in *Halleck*, “[a]ll five Justices in the majority—John Roberts, Clarence Thomas, Samuel Alito, Neil Gorsuch, and Brett Kavanaugh—were nominated by Republican presidents and are typically considered conservative,” while “all four Justices in the dissent—Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena

First, consider the Court's 2018 five-to-four ruling in *National Institute of Family & Life Advocates v. Becerra*.²¹⁵ This case was mentioned earlier in relation to the level of First Amendment protection extended for professional speech.²¹⁶ *Becerra* witnessed the Justices fracturing "along familiar ideological lines."²¹⁷ Specifically, it featured a five-Justice conservative majority and a four-Justice liberal dissent.²¹⁸ The majority declared likely unconstitutional two parts of a California law that compelled anti-abortion crisis pregnancy centers (CPCs) to convey certain truthful, factual information against their will.²¹⁹

Kagan—were nominated by Democratic presidents and are generally deemed liberal”).

The conservative majority in *Halleck* rejected a First Amendment challenge to the decision made by a private nonprofit corporation to deny two film producers access to a public access cable television channel in New York City based on the content of one of their films. 139 S. Ct. at 1926–27. (noting that film producers DeeDee Halleck and Jesus Papoleto Melendez claimed that Manhattan Neighborhood Network (“MNN”) “violated their First Amendment free-speech rights when MNN restricted their access to the public access channels because of the content of their film”). Writing for the majority, Justice Brett Kavanaugh reasoned that “[i]n operating the public access channels, MNN is a private actor, not a state actor, and MNN therefore is not subject to First Amendment constraints on its editorial discretion.” *Id.* at 1926. In contrast, Justice Sonia Sotomayor wrote for the four-Justice liberal dissent that MNN qualified as a state actor under its agency relationship with New York City to operate the public access channels and thus MNN was bound by the First Amendment’s strictures. *See id.* at 1934 (Sotomayor, J., dissenting).

Given this rift, as well as those in the cases of *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), and *Janus v. American Federation of State, County & Municipal Employees*, 138 S. Ct. 2448 (2018), discussed later in this Part, the author of this Article asserted elsewhere that “[a]s the Court enters the 2020s, First Amendment jurisprudence is profoundly plagued by, among other problems, ideological partisanship in cases such as *Halleck*.” Calvert, *supra* note 214, at 915.

215. *See generally* 138 S. Ct. 2361 (2018).

216. *See supra* notes 131–144 and accompanying text (addressing *Becerra*’s discussion of professional speech).

217. *See* Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights: NIFLA v. Becerra*, 94 N.Y.U. L. REV. 61, 63 (2019).

218. *See* NIFLA v. Becerra, 138 S. Ct. at 2367, 2379 (noting that the opinion of the Court was authored by Justice Clarence Thomas and was joined by Chief Justice John Roberts and Justices Anthony Kennedy, Samuel Alito and Neil Gorsuch, and noting that Justice Stephen Breyer authored a dissenting opinion that was joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan).

219. *See* *Becerra*, 138 S. Ct. at 2378 (“We hold that petitioners are likely to succeed on the merits of their claim that the FACT Act violates the First Amendment.”); *see also* Teneille R. Brown, *Crisis at the Pregnancy Center*:

Licensed CPCs, for instance, were mandated to disclose the fact to patients that California offers free and low-cost abortion services.²²⁰ That disclosure arguably dilutes the power of the CPCs' own anti-abortion position.²²¹ In other words, as I argued elsewhere, "a licensed crisis pregnancy center with an anti-abortion stance might find that its message's influence is mitigated (or at least contaminated) by transmitting a fact suggesting that one's financial status imposes no barrier to obtaining an abortion."²²² In striking down that compelled-speech obligation, the *Becerra* majority applied intermediate scrutiny rather than the more forgiving rational basis standard.²²³

In contrast, Justice Stephen Breyer penned a dissent on behalf of the Court's liberal wing, concluding the obligations imposed on CPCs were "likely constitutional."²²⁴ In doing so, Justice Breyer criticized the majority for applying what he called "heightened

Regulating Pseudo-Clinics and Reclaiming Informed Consent, 30 YALE J.L. & FEMINISM 221, 224–25 (2018) (asserting that the purpose of CPCs "is primarily to counsel against abortion," and adding that their counseling "is exclusively pro-life and 'Bible-based'"); Mark Strasser, *Deception, Professional Speech, and CPCs: On Becerra, Abortion, and the First Amendment*, 67 BUFF. L. REV. 311, 313–14 (2019) (noting that CPCs "do not provide abortions, and may seek to dissuade women from aborting their pregnancies," and adding that "[c]ritics charge that *some* of the centers use deceptive means to reduce the number of abortions performed, for example, by misrepresenting in advertisements what the centers do so that women seeking abortions will nonetheless come to the clinics") (emphasis in original) (internal citations omitted).

220. See *Becerra*, 138 S. Ct. at 2368 ("Licensed clinics must notify women that California provides free or low-cost services, including abortions, and give them a phone number to call.").

221. Justice Clarence Thomas explained for the majority that: licensed clinics must provide a government-drafted script about the availability of state-sponsored services, as well as contact information for how to obtain them. One of those services is abortion—the very practice that [the clinics] are devoted to opposing. By requiring [the clinics] to inform women how they can obtain state-subsidized abortions—at the same time [the clinics] try to dissuade women from choosing that option—the licensed notice plainly 'alters the content' of [the clinics'] speech. *Id.* at 2371.

222. Clay Calvert, *Wither Zauderer, Blossom Heightened Scrutiny? How the Supreme Court's 2018 Rulings in Becerra and Janus Exacerbate Problems with Compelled-Speech Jurisprudence*, 76 WASH. & LEE L. REV. 1395, 1408–09 (2019).

223. See *Becerra*, 138 S. Ct. at 2375 (concluding that "the licensed notice cannot survive even intermediate scrutiny"); see also *supra* notes 97–98 and accompanying text (addressing the rational basis test and when it typically applies).

224. See *Becerra*, 138 S. Ct. at 2379 (Breyer, J., dissenting).

scrutiny.”²²⁵ He also derided the majority for “suggesting that heightened scrutiny applies to much economic and social legislation.”²²⁶ Justice Breyer asserted there was “no reason” to apply heightened scrutiny to laws such as California’s that simply require medical professionals to disclose purely factual information to patients.²²⁷ Instead, the dissent contended that the Court should adopt a more “respectful approach to economic and social legislation” that implicates the First Amendment freedom of speech in cases like *Becerra*.²²⁸ As Professor William Araiza sums it up, the *Becerra* dissent voiced discomfort regarding “the Court’s use of the First Amendment as a weapon against the type of business regulation long presumed constitutional.”²²⁹

The fact that abortion was the underlying issue in *Becerra* likely drove the wedge between the majority and minority. To wit, Dean Erwin Chemerinsky and Professor Michele Goodwin assert that the majority’s decision to strike down California’s compelled-speech obligations on CPCs simply reflects “the conservative Justices’ views on abortion rights.”²³⁰ The pair’s understanding of the decision explains why, in turn, the First Amendment rights of anti-abortion CPCs triumphed over the rights of patients at those centers to receive truthful, factual information about abortion services.²³¹

The Justices also fractured five-to-four, in what has been called a “party-line vote,” in 2018 in *Janus v. American Federation of State, County & Municipal Employees*.²³² The conservative majority, in an anti-union opinion authored by Justice Samuel Alito, declared that an Illinois statute compelling non-union, public-sector employees to pay an agency fee—also known as a fair-share fee—to the union designated to represent them in collective bargaining with the State of Illinois violated those non-union members’ First

225. See *id.* at 2380.

226. See *id.* at 2382.

227. See *id.* at 2387.

228. See *id.* at 2382.

229. See William D. Araiza, *Invasion of the Content-Neutrality Rule*, 2019 *BYU L. REV.* 875, 892–93 (2019).

230. See Chemerinsky & Goodwin, *supra* note 217, at 124.

231. See Helen Norton, *Pregnancy and the First Amendment*, 87 *FORDHAM L. REV.* 2417, 2428 (2019) (“The [*Becerra*] majority’s opinion centered only on the speakers and what they did and did not want to say, entirely ignoring pregnant women’s First Amendment interests as listeners.”).

232. See 138 S. Ct. 2448 (2018); see also Aaron Tang, *Life After Janus*, 119 *COLUM. L. REV.* 677, 693 (2019) (calling it a “party-line vote”).

Amendment right of free speech.²³³ In other words, under the First Amendment, non-union members could not be compelled to subsidize, via agency fees, the speech of private entities (the unions) during collective bargaining on their behalf with the government.²³⁴ In striking down the Illinois statute, the conservative majority refused to apply the deferential rational basis standard of review that the liberal dissent deemed applicable.²³⁵ Justice Alito somewhat curtly derided rational basis review as a “form of minimal scrutiny [that] is foreign to our free-speech jurisprudence.”²³⁶ The majority, instead, applied a heightened standard of review that it called “exacting scrutiny” and concluded the statute failed to surmount it.²³⁷ In the process of doing so, the majority overruled a forty-year-old precedent that had upheld agency fees.²³⁸ The majority acknowledged the deleterious financial impact that its decision eliminating agency fees for non-union, public-sector employees might have on labor unions.²³⁹

Authoring a dissent on behalf of the Court’s liberal bloc, Justice Elena Kagan criticized the majority for not adopting the Court’s “usual deferential approach . . . to the regulation of public employee speech.”²⁴⁰ She lauded that usual approach for giving “wide berth” to the government’s decisions when it acts as an

233. See *Janus*, 138 S. Ct. at 2460 (“We conclude that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.”). An agency fee represents a percentage of regular union dues that is designated exclusively to cover costs associated with collective bargaining and cannot be used “to fund the union’s political and ideological projects.” See *id.* at 2460–61; see also Alan M. Klinger & Dina Kolker, *Public Sector Unions Can Survive Janus*, 34 A.B.A. J. LAB. & EMP. L. 267, 268 n.4 (2020) (“Fair share fees, also called agency fees, are fees charged to employees who are represented by a union but who opt not to join the union. They represent the employee’s ‘fair share’ of the cost of collective bargaining and services which the employee enjoys as a part of the bargaining unit.”).

234. As Justice Alito explained, “the compelled subsidization of private speech seriously impinges on First Amendment rights.” *Janus*, 138 S. Ct. at 2464.

235. See *id.* at 2465.

236. See *id.*

237. See *id.*; see also Tang, *supra* note 232, at 693 (noting that the *Janus* majority “proceeded to apply heightened scrutiny to the fair-share fee requirement”).

238. See *Janus*, 138 S. Ct. at 2460 (overruling *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)).

239. See *id.* at 2485–86 (“We recognize that the loss of payments from nonmembers may cause unions to experience unpleasant transition costs in the short term, and may require unions to make adjustments in order to attract and retain members.”).

240. See *id.* at 2494 (Kagan, J., dissenting).

employer.²⁴¹ Justice Kagan blasted the majority for “turning the First Amendment into a sword, and using it against workaday economic and regulatory policy.”²⁴² In brief, by adopting heightened scrutiny and not affording Illinois lawmakers deference, the majority was, in Justice Kagan’s unsparing words, “weaponizing the First Amendment.”²⁴³ In closing her dissent, she also cited *Becerra* as another opinion in which the conservative majority had “wielded the First Amendment in such an aggressive way.”²⁴⁴

Janus, as Professor Kate Andraias writes, marked “the capstone of the anti-union campaign” by both conservative Republicans and the Supreme Court’s conservative Justices.²⁴⁵ After *Janus*, it was anticipated that labor unions would be financially hamstrung, all to the benefit of private corporations.²⁴⁶

Viewed collectively, *Becerra* and *Janus* not only illustrate an ideological cleft on the Court when it comes to the First Amendment freedom of speech, but they also reveal the conservative majority’s expansive view of the protections afforded by that amendment against government regulations.²⁴⁷ In academic circles, the conservative majority’s use of heightened First Amendment scrutiny to strike down economic and social regulations such as those at issue in *Becerra* and *Janus* sometimes is called First Amendment Lochnerism.²⁴⁸ As Professor Enrique Armijo tidily explicates it, First

241. See *id.* at 2493.

242. See *id.* at 2501.

243. See *id.*

244. See *id.*

245. See Kate Andraias, *Janus’s Two Faces*, 2018 SUP. CT. REV. 21, 27.

246. See Andrew Storm, *Caught in a Vicious Cycle: A Weak Labor Movement Emboldens the Ruling Class*, 16 U. ST. THOMAS L.J. 19, 37 (2019) (“The expectation was that weakened unions would have less money to spend on politics, further entrenching the power of the corporate interests.”).

247. See Laura Portuondo, *Abortion Regulation as Compelled Speech*, 67 UCLA L. REV. 2, 4 (2020) (asserting that *Becerra* and *Janus*, along with *Masterpiece Cakeshop v. Colo. Civ. Rts. Comm’n*, 138 S. Ct. 1719 (2018), “demonstrated the Court’s increasing embrace of broad First Amendment protections,” and adding that *Becerra* “followed a recent trend of expanding First Amendment protections”).

248. This term is a reference to the U.S. Supreme Court’s decision in *Lochner v. New York*, 198 U.S. 45 (1905). The Court there declared that a state labor law limiting the number of hours to sixty a week that bakers could work violated an individual’s liberty and freedom of contract, thus taking priority over the state’s exercise of its police power in the interest of health and safety. See *id.* at 57 (“There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker.”). The so-called “*Lochner* era is conventionally (and sometimes nostalgically) associated with

Amendment Lochnerism is “the claim that the Court’s conservative majority, at the urging of commercial and other powerful interests and following its own antiregulatory agenda, has turned the constitutional protection for free speech into a tool with which to blow holes in the regulatory state.”²⁴⁹

Under this critique, Professor Genevieve Lakier writes, the First Amendment, much like the Supreme Court’s 1905 decision in *Lochner v. New York* did when it came to empowering the liberty of contract, “grants judges too much power to second-guess the economic policy decisions of democratically elected legislatures.”²⁵⁰ First Amendment Lochnerism thus, as Professor Nelson Nebbe contends, is a “trope [that] compares the Supreme Court’s contemporary speech and religion jurisprudence to its decision-making during the *Lochner* era.”²⁵¹ In deploying it, judges construe the “freedoms of speech and religion in a manner that unwinds government programs designed to ameliorate disparities of wealth, income, and other primary goods.”²⁵² In brief, Professor Erica Goldberg observes that “accusations by the political left about the political right, which detail the ‘Lochnerization’ or weaponization of the First Amendment to benefit specific classes of people or political interests, are increasingly part of the mainstream discourse surrounding current free speech doctrine.”²⁵³

Indeed, Justice Breyer cited both the *Lochner* case and the *Lochner* era in criticizing the majority’s application of heightened scrutiny in *Becerra*.²⁵⁴ Some legal scholars, in turn, contend that

notions of limited government and laissez-faire, often neatly wrapped up in the supposition that the law of the *Lochner* era is a bygone.” Mila Sohoni, *The Trump Administration and the Law of the Lochner Era*, 107 GEO. L.J. 1323, 1331 (2019). From the late 1880s to the late 1930s, “[t]he period’s best-known cases are those in which the Court struck down economic laws that restricted the employer-employee relationship, the freedom to contract, the freedom to manufacture, and the freedom to sell goods and services.” *Id.*

249. See Enrique Armijo, *Faint-Hearted First Amendment Lochnerism*, 100 B.U. L. REV. 1377, 1380 (2020).

250. See Genevieve Lakier, *The First Amendment’s Real Lochner Problem*, 87 U. CHI. L. REV. ONLINE 1241, 1243 (2020). See *supra* note 248 (discussing *Lochner v. New York*, 198 U.S. 45 (1905)).

251. See Nelson Tebbe, *A Democratic Political Economy for the First Amendment*, 105 CORNELL L. REV. 959, 960 (2020).

252. See *id.* at 959.

253. See Erica Goldberg, *First Amendment Cynicism and Redemption*, 88 U. CIN. L. REV. 959, 967 (2020).

254. See *NIFLA v. Becerra*, 138 S. Ct. 2361, 2381–82 (2018) (Breyer, J., dissenting).

Becerra “raised alarm about the Roberts Court’s use of the First Amendment as a weapon, and even a new First Amendment Lochnerism.”²⁵⁵ The same critique holds true for the majority’s decision in *Janus*, with Professor Mila Sohoni remarking that Justice Kagan’s dissent *sub silentio* accused the majority of engaging in First Amendment Lochnerism.²⁵⁶ Others have also noted the similarity between *Janus* and *Lochner*.²⁵⁷ For Justices Breyer and Kagan in *Becerra* and *Janus*, respectively, the First Amendment free speech expansionism evidenced by the majority opinions in those cases is seen as “serving conservative ends.”²⁵⁸

It is within this ideologically polarized First Amendment climate that the Eleventh Circuit’s fractured decision in *Otto* regarding legislation intended to protect minors from ostensible harms caused by SOCE should be viewed.²⁵⁹ Both the Trump-appointed judges in the majority and the Obama-appointed dissenting judge applied the same strict scrutiny test when considering the constitutionality of the local anti-SOCE ordinances at issue in the case.²⁶⁰ The case thus differs from *Becerra* and *Janus* because the key point of contention among the Eleventh Circuit

255. See *First Amendment-Physician Compelled Speech-Sixth Circuit Upholds Kentucky Law Requiring Doctors Performing Abortions to First Conduct an Ultrasound and Describe the Image-EMW Women’s Surgical Center., P.S.C. v. Beshear*, 920 F.3d 421 (6th Cir. 2019), *reh’g en banc denied*, Nos. 17-6151/6183, 2019 U.S. App. LEXIS 19623 (6th Cir. June 28, 2019), *cert. denied*, 140 S. Ct. 655 (2019), 133 HARV. L. REV. 2204, 2211 (2020).

256. See Sohoni, *supra* note 248, at 1383 (“Though she did not use this locution, Justice Kagan’s dissent argued in essence that the Court was being Lochnerist in its end-results (by constitutionally invalidating ‘workaday’ economic policy), if not in its means (because it used the First Amendment rather than substantive due process).”).

257. See, e.g., Jareb A. Gleckel & Sherry F. Colb, *The Meaning of Meat*, 26 ANIMAL L. 75, 102 (2020) (“*Janus* . . . followed in the footsteps of *Lochner*. . . . Not unlike the liberty protected in *Janus*, *Lochner* championed freedom for the individual laborer to agree to work more than 60-hours-a-week in a bakery, a freedom that humane labor laws had unconstitutionally threatened.”).

258. See Marc O. Degirolami, *The Sickness unto Death of the First Amendment*, 42 HARV. J.L. & PUB. POL’Y 751, 799 (2019).

259. See *Otto v. City of Boca Raton*, 981 F.3d 854, 859 (11th Cir. 2020) (“The City and the County both passed ordinances based on legislative findings that SOCE poses a serious health risk to minors. These findings cited various studies and the position papers of numerous medical and public health organizations.”).

260. See *id.* at 867–68 (noting the majority’s position that the “ordinances are content-based regulations of speech and must satisfy strict scrutiny.”); *id.* at 873 (Martin, J., dissenting) (noting the dissent’s “assumption that the Ordinances are content-based speech restrictions” and her conclusion that they “satisfy strict scrutiny”).

judges in *Otto* did not center on whether a heightened level of First Amendment scrutiny should apply.²⁶¹ They all agreed that strict scrutiny, “a demanding standard . . . [that] the government usually has trouble satisfying,” was applicable.²⁶² It is, in fact, the highest level of review of in First Amendment speech cases.²⁶³ Only in rare cases is it surmounted.²⁶⁴

The rift in *Otto*, instead, was over how the judges applied strict scrutiny.²⁶⁵ More specifically, it centered on how the majority and dissent differed when assessing and interpreting the scientific evidence offered by Boca Raton and Palm Beach County to prove that SOCE are sufficiently harmful to minors as to constitute the type of compelling interest in censoring speech that strict scrutiny requires.²⁶⁶ By following a strenuous evidentiary approach very similar to that articulated by Justice Antonin Scalia in *Brown v. Entertainment Merchants Ass’n*, the conservative majority in *Otto* found a way to make strict scrutiny so strict that it doomed the efforts of two governmental entities to protect the health and safety of gay minors.²⁶⁷ *Brown’s* requirement of proof of “a direct causal link” between speech and harm—one for which “ambiguous proof will not suffice”—thus can be weaponized by conservative jurists, as Justice Kagan might put it, against health and safety legislation.²⁶⁸ *Brown*, in brief, becomes a weapon within the already demanding strict scrutiny test. In contrast, the more deferential and flexible

261. See *supra* note 260 and accompanying text.

262. See Genevieve Lakier, *Reed v. Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233, 243 (2016).

263. See Matthew D. Bunker et al., *Strict in Theory, But Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM’N. L. & POL’Y 349, 350 (2011) (describing strict scrutiny as “the most searching form of judicial review in free speech cases”).

264. See *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015) (“This is . . . one of the *rare cases* in which a speech restriction withstands strict scrutiny.”) (emphasis added).

265. See *Otto v. City of Boca Raton*, 981 F.3d 854, 868–69 (11th Cir. 2020); *id.* at 878 (Martin, J., dissenting).

266. See *supra* notes 15–33, 40–44, and 186–198 and accompanying text (addressing the different approaches deployed to evaluate the evidence by the majority and dissent in *Otto*).

267. See *Otto*, 981 F.3d at 859, 868.

268. See *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 799–800 (2011). See *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (criticizing the majority for “weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy”).

evidentiary approach of the liberal-leaning Justice Breyer in *Brown*—one that Obama-appointee Judge Martin in *Otto* seemingly embraced, even without explicitly citing Breyer’s stance—blunts that weapon.²⁶⁹

Drilling deeper into the underlying political context and connecting the judicial dots, the ideological link between Judge Grant and Justice Scalia—the authors of the majority opinions in *Otto* and *Brown*, respectively—that runs through the Federalist Society is apparent.²⁷⁰ The organization’s members believe “that individual citizens can make the best choices for themselves and society.”²⁷¹ The group also subscribes to “the need to enhance individual freedom and the role of the courts in saying what the law is rather than what they wish it to be.”²⁷² Judge Grant was a former president of the Federalist Society at Stanford Law School.²⁷³ In *Otto*, she used a standard created in *Brown* by Justice Scalia, who “helped organize the University of Chicago Law School chapter of the Federalist Society” while serving as a professor there.²⁷⁴ Judge Grant deployed that Scalia-fashioned standard to facilitate a variation of First Amendment Lochnerism in deregulating constraints imposed on the use of SOCE.²⁷⁵ The Federalist Society, as the *New York*

269. See *supra* notes 166–84 and accompanying text (addressing Justice Breyer’s approach to the evidence proffered in *Brown*); see *supra* notes 187–98 and accompanying text (addressing Judge Martin’s approach to the evidence proffered in *Otto*).

270. The Federalist Society, formally known as the Federalist Society for Law and Public Policy Studies, describes itself as:

[A] group of conservatives and libertarians interested in the current state of the legal order. It is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.

About Us, FEDERALIST SOC’Y, <https://fedsoc.org/about-us#FAQ> [<https://perma.cc/9PKB-V3ZL>] (last visited Oct. 11, 2021). It believes that “[I]aw schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society.” *Id.*

271. See *id.*

272. See *id.*

273. See *Hon. Britt C. Grant*, FEDERALIST SOC’Y, <https://fedsoc.org/contributors/britt-grant> [<https://perma.cc/BR93-DKXC>] (last visited Oct. 11, 2021).

274. See *Federalist Society*, UNIV. OF CHI. L. SCH., <https://www.law.uchicago.edu/studentorgs/federalist> [<https://perma.cc/237B-UD4C>] (last visited Oct. 11, 2021).

275. See *supra* notes 248–253 and accompanying text (addressing First Amendment Lochnerism).

Times noted in a May 2020 article, “has been ascendant in Republican circles for its advocacy of strictly interpreting the Constitution according to what conservatives say was its original meaning.”²⁷⁶ The organization, the article alleged, “has been instrumental in promoting Mr. Trump’s judicial picks, many of whom spent their careers openly engaged in causes that have been important to Republicans, such as opposition to gay marriage and to government funding for abortion.”²⁷⁷ In Judge Grant’s response to the U.S. Senate Judiciary Committee’s questionnaire for judicial nominees upon her nomination to the Eleventh Circuit, she noted her affiliation with “[t]he Federalist Society for Law and Policy” as running from 2004 to the present.²⁷⁸ Thus, when skeptically viewed, Judge Grant in *Otto* simply took the *Brown* baton from Justice Scalia and used it, in the spirit of First Amendment Lochnerism, against two local governmental efforts to protect the mental health of young members of the LGBTQ community.

Just as *Becerra* and *Janus* were as much battles about abortion and labor unions as they were about First Amendment speech rights, *Otto* was just as much about a skirmish over growing cultural and legislative acceptance of homosexuality as it was free expression. The First Amendment—in particular, *Brown*’s evidentiary standard under strict scrutiny for proving speech-caused harm—simply became the doctrinal instrument for pushing back against anti-SOCE laws that accept homosexuality as normal. Judge Grant seemingly tipped her hand when she wrote that “we cannot allow a new consensus to justify restrictions on speech. Professional opinions and cultural attitudes may have changed, but the First Amendment has not.”²⁷⁹ Without direct and unambiguous scientific evidence of harm caused by SOCE, the ordinances simply represented the “majority preference,” as reflected by the views of professional mental health associations such as the APA, that SOCE are wrong.²⁸⁰ The First Amendment, Judge Grant opined while perhaps unsurprisingly quoting from Justice Scalia’s opinion in *R.A.V. v. City of St. Paul* in

276. See Rebecca R. Ruiz & Ben Protess, *Trump Nominee Is Among Judges Opposed to Banning Membership in Conservative Group*, N.Y. TIMES, (Feb. 5, 2021), <https://www.nytimes.com/2020/05/03/us/politics/judges-federalist-society.html> [https://perma.cc/578T-MRMX].

277. See *id.*

278. See U.S. SENATE COMM. ON THE JUDICIARY, BRITT CAGLE GRANT QUESTIONNAIRE FOR JUDICIAL NOMINEES at 3.

279. See *Otto v. City of Boca Raton*, 981 F.3d 854, 870 (11th Cir. 2020).

280. See *id.* at 869.

the process, stands as a formidable bulwark against allowing majoritarian viewpoints to squelch those who hold minority positions regarding topics such as homosexuality.²⁸¹

With *Brown*'s demanding evidentiary standard for strict scrutiny rendering moot both the scientific evidence and the opinions of learned organizations against SOCE, *Otto* boiled down to being, at least for the majority, a case about protecting offensive speech—namely, conversion therapy—from government censorship. Judge Grant made this exceedingly evident when she quoted the U.S. Supreme Court's decision in the flag-burning case of *Texas v. Johnson* for the proposition that “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”²⁸² The actions of Boca Raton and Palm Beach County violated that principle, Judge Grant concluded.²⁸³

The bottom line is that the *Otto* majority's *Brown*-like approach to assessing evidence plowed a path—by pushing aside scientific studies and professional associations' opinions—for making *Otto*, for the majority, a case about protecting dissenting and unpopular speech rather than a dispute about safeguarding minors from harm. Nine years after *Brown*'s evaluative methodology was established in the context of a case about shielding minors from harm supposedly wrought by playing fictional, entertainment-based videogames, *Brown*'s approach was stretched to safeguard speech that attacks gay and bisexual minors' sexual orientation.²⁸⁴ Viewed most critically and writ large, *Brown*'s formula for evaluating evidence now has become another First Amendment-based means of facilitating a deregulatory agenda by conservative-tilting jurists in the cultural and legal wars over gay rights, not simply a tool for objectively evaluating scientific evidence.

281. See *id.* (“But that is, really, just another way of arguing that majority preference can justify a speech restriction. The ‘point of the First Amendment,’ however, ‘is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.’”) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992)).

282. See *id.* at 872 (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

283. See *Otto*, 981 F.3d at 872.

284. See *id.* at 859, 868.

IV. CONCLUSION

This Article used the Eleventh Circuit's recently divided decision in *Otto v. City of Boca Raton* to explore contrasting stances about evaluating scientific evidence of harm caused by speech, as well as the level of deference that should be afforded to the opinions of learned professional associations and lawmakers. Those conflicting positions, as this Article explained, were first evinced nearly a decade earlier by Justice Scalia's majority opinion and Justice Breyer's dissent in *Brown v. Entertainment Merchants Ass'n*.²⁸⁵ This Article illustrated how the *Otto* majority's assessment of scientific evidence closely tracked that of Justice Scalia and the majority in *Brown*, while Judge Martin's logic in her *Otto* dissent more closely paralleled the holistic, deferential, and flexible methodology adopted by Justice Breyer in *Brown*.²⁸⁶ Much more, however, was at stake in *Otto* than simply the ability of minors to rent and purchase violent video games. In particular, the ability, autonomy, and dignity of gay and bisexual minors to be free from the inefficacy and alleged harms stemming from the speech-based practice of SOCE was front and center in *Otto*.²⁸⁷

This Article, in critical fashion, contextualized the friction in *Otto* between the Trump-appointed judges in the majority and the Obama-appointed judge in the dissent with similar strains among the conservative and liberal Justices on the Supreme Court when lightening rod issues such as abortion and labor unions underlie First Amendment speech cases.²⁸⁸ In the process, this Article suggested how the *Otto* majority's adoption of a rigid, highly demanding standard for evaluating evidence of speech-based harm can be understood, at least when viewed critically, as another tool for implementing First Amendment Lochnerism.²⁸⁹ Embracing a *Brown*-like analysis of the evidence, while simultaneously ignoring the

285. See *supra* Part II (discussing Justice Scalia's majority and Justice Breyer's dissent).

286. See *supra* notes 15–33 and 189–197 and accompanying text.

287. See *supra* notes 5–7 and 64–74 (regarding the alleged inefficacy and/or harmful nature of SOCE).

288. See *supra* Part III (discussing the friction in the Eleventh Circuit between the two Trump appointees, who ruled in favor of permitting the widely condemned practice of SOCE on minors, and the lone Obama appointee, who delivered an opinion against the controversial practice).

289. See *supra* Part III (discussing the *Otto* majority's use of an extremely demanding, *Brown*-like test when evaluating the scientific evidence of harm purportedly caused by SOCE).

opinions of multiple learned professional associations that SOCE may be harmful, allowed the *Otto* majority to ultimately suggest that the case was really about protecting dissenting and unpopular expression (for example, SOCE), not about protecting LGBTQ minors from injury.²⁹⁰

Regardless of the political and cultural overtones in *Otto*, however, Judge Martin's recognition of the ethical impossibility of conducting SOCE-based experimental research on minors highlights a glaring problem with *Brown*'s approach to evidence that must be addressed by the Supreme Court in the near future.²⁹¹ How, in other words, can the legal system demand the impossible? Surely greater deference is due in these instances to the opinions of learned professional associations.

The Court now has a prime opportunity to consider and resolve that issue, given the split of authority described earlier among the federal appellate courts when addressing First Amendment free speech challenges to anti-SOCE statutes and ordinances.²⁹² One suspects that if the Court were to hear *Otto* or a similar case involving an anti-SOCE law, the same ideological cleavage that permeated the cases of *National Institute of Family and Life Advocates v. Becerra* and *Janus v. American Federation of State, County and Municipal Employees* described earlier would percolate up to the surface once again.²⁹³ Although it is only speculation, of course, it also would not be too much of a legal stretch to predict that the Court's newest member, former President Trump-appointee Justice Amy Coney Barrett, would embrace Justice Scalia's approach to evaluating evidence in *Brown*, especially because she clerked for him during the 1998 term and because of her work with the Federalist Society.²⁹⁴ In brief, the specter of First Amendment

290. See *Otto*, 981 F.3d at 871.

291. See *supra* notes 43 and 159–161 and accompanying text (regarding Judge Martin's observation about this point).

292. See *supra* notes 1–2 and accompanying text (addressing the split of authority that *Otto* creates with the decisions by the Third and Ninth Circuits in upholding anti-SOCE statutes).

293. See *supra* Part III, at 18–19 (discussing the cases stated).

294. See *Current Members*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/biographies.aspx> [<https://perma.cc/E3DM-6N62>] (last visited Oct. 11, 2021) (providing that Justice Amy Coney Barrett "served as a law clerk for Judge Laurence H. Silberman of the U.S. Court of Appeals for the D.C. Circuit from 1997 to 1998, and for Justice Antonin Scalia of the Supreme Court of the United States during the 1998 Term"); see also Elizabeth Dias et al., *Rooted in Faith, Amy Coney Barrett Represents a New Conservatism*,

Lochnerism that now haunts anti-SOCE statutes after *Otto* is unlikely to disappear in the near future.

N.Y. TIMES (Mar. 4, 2021), <https://www.nytimes.com/2020/10/11/us/politics/amy-coney-barrett-life-career-family.html> [<https://perma.cc/CX8G-VNGA>] (“Raising her profile further within conservative circles, Ms. Barrett reactivated her membership in the Federalist Society’s grass-roots network of conservative lawyers, in 2014. She began delivering more and more speeches, some to the Federalist Society at college campuses like Indiana University in Bloomington, Duke and Harvard.”).