Indiana Law Journal

Volume 97 | Issue 3 Article 1

Summer 2022

Compelled Speech and Proportionality

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This Article argues for a proportional First Amendment approach to compelled speech jurisprudence. It discusses the evolution of doctrine and how it led to recent opinions finding unconstitutional consumer protection, health disclosure, and collective bargaining statutes. In place of the currently formalistic approach, the Article argues for a transparent balancing of interests to avoid litigants' opportunistic reliance on categorical First Amendment doctrines. Missing from the recent decisions that relied on the compelled speech doctrine is any systematic or contextual weighing of private and public concerns about disclosure regulations. The Roberts Court has been rather formalistic and categorical in its compelled speech decisions. It relied on the doctrine to find unconstitutional regulations on credit card surcharges, prescription privacy, collective bargaining, and health notices.

Greater context in judicial reasoning would better balance competing interests and First Amendment values. The compelled speech doctrine should be rethought with an eye to greater contextual clarity. This can be effectively captured through means-ends analysis rather than categorical and often inconsistent judicial veto of federal and state legislation.

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INTRODUCTION

The Supreme Court has increasingly relied on the First Amendment compelled speech doctrine to strike laws that require unwilling parties to inform the public of specified information. The Court has subjected public health, labor, and consumer protection laws to heightened First Amendment scrutiny.

The compelled speech doctrine has taken on a libertarian flavor that relies on exacting scrutiny or strict scrutiny to review all content-based regulations.[1] Precedents tend to place a thumb on private speech without adequately weighing countervailing policy aims. Hence, the Court has struck as unconstitutional legislative efforts to buttress economic, privacy, and collective bargaining regulations that had an incidental effect on speech. Formalistic features of those holdings fail to distinguish "speech as speech" from "ordinary social and economic legislation."[2] A pattern of aggressive First Amendment jurisprudence has produced jurocentrism inconsistent with judicial modesty.

The current pattern of cases sets rigid methodology that lacks nuanced reflection on the policies and contexts behind regulations that burden commercial, political, and medical speakers. This Article argues for greater analytical flexibility, predicated on premises behind constitutionally protected free speech. It argues for a rigorous balancing test that, in compelled speech cases, takes into account the speech interest at stake, the countervailing government interests, a means-ends analysis, alternatives for communication, and whether the State seeks to enforce ideological orthodoxy. Without taking account of countervailing and materially relevant factors—instead resorting to wooden, judicially created categories—the Justices too often dismiss

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1. This is consistent with the libertarian strand of thought to be found throughout contemporary First Amendment jurisprudence, where all content-based regulations tend to be subject to close judicial scrutiny. Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2346 (2020) ("[C]ontent-based laws are subject to strict scrutiny."); Reed v. Town of Gilbert, 135 S. Ct. 2218, 2228 (2015) ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech.") (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)).

2. NIFLA v. Becerra, 138 S. Ct. 2361, 2381 (2018) (Breyer, J., dissenting).

policy concerns on matters such as consumer privacy, healthcare information, and labor negotiation.[3] Rigorous balancing is needed to determine whether regulation is narrowly tailored to serve a substantial government concern or to constitute an intrusion against expressions about political, philosophical, historical, or artistic topics. Proportional review assesses whether mandates to divulge facts have a close "nexus between abstract law and concrete life."[4]

Instead of an automatic resort to exacting or strict scrutiny for all manner of compelled speech disclosures, greater breadth of legal and social concerns should weigh into the Court's review. Taking into account the context of statutory requirements to disclose certain information, policy predicates for their enforcement, and means chosen to achieve substantial aims would help courts to better distinguish between pure speech factors and, what Justice Kagan called, "workaday economic and regulatory policy."[5] That dichotomy involves a weighing of speech and regulatory concerns. Concisely, legal context matters.

Part I discusses the compelled speech doctrine. Part II turns to a balanced alternative, relying on multifactorial assessments rather than the Court's mono-focused analysis, which often seems to be result driven. It applies balancing to instances of compelled speech, arguing for proportional review of statutes that maintains autonomy, prevents state overreaching, and preserves regulatory functions with incidental effects on speech.

I. ANTI-ORTHODOXY FUNCTION OF COMPELLED SPEECH DOCTRINE

In early compelled speech cases, the Court relied on anti-autocratic principles, treating the Free Speech Clause as a safeguard of self-government and personal expression against state-imposed orthodoxy. Those cases involved government demands on certain persons to express state-created content. The opinions were anti-autocratic in principle. The First Amendment was understood to prevent government from imposing itself upon autonomous and civic communications.[6] In more recent times, the doctrine of compelled speech has become a means for courts to strike laws regulating economic- and health-related matters.

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3. Kathleen M. Sullivan elaborates on the definitions of rules, standards, categories, and balancing in *Forward: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57–62 (1992). For further distinctions between rules and standards, see Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Margaret Jane Radin, *Presumptive Positivism and Trivial Cases*, 14 HARV. J.L. & PUB. POL'Y 823, 828–32 (1991).

4. Wallace Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr. Frantz*, 17 VAND. L. REV. 479, 481–82 (1964).

5. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).

6. Professor Alan Chen describes four traditional uses of the compelled speech doctrine: (1) those that require ideological orthodoxy; (2) disclosure of private facts about associational liberty; (3) those that require private actors to give speakers access to their properties; and (4) requirements for professionals to disclose to the public information about services, operations, and products. *See* Alan K. Chen, *Compelled Speech and the Regulatory State*, 97 IND. L.J. 881 (2022).

The Supreme Court's earliest compelled speech case, *West Virginia State Board of Education v. Barnette*, relied on anti-authoritarian reasoning to explain why a state-created speech requirement was unconstitutional.[7] The principle informing the holding was based in America's history, dating to the ratification of the Bill of Rights.[8] In striking a law requiring school children to recite the Pledge of Allegiance and to salute the flag, the Court recognized that government by consent protects an individual's right to disagree with the State.[9] Particularly important to the principle against compelled speech was the Court's injunction in *Barnette* that, "[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[10] The right to refrain from expressing government's patriotic message, which preserves autonomy and prevents the State from imposing its views, outweighed the government interest in enforced national unity.

Recognition of the First Amendment's anti-totalitarian leaning was also manifest in *Wooley v. Maynard*, which struck a state misdemeanor law against obfuscating the state's motto on license plates, "Live Free or Die."[11] As in *Barnette*, the decision rested on the principle that government cannot force its political, cultural, or otherwise ideological message on unwilling parties.[12] The State in *Wooley* lacked authority to require unwilling drivers, some of whom were pacifists, to display a militaristic message on their private automobiles.[13] At its core, the opinion stands against government intrusion into individual autonomy and political personhood. "[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."[14] There is a balance here, where free exercise of religion outweighs government hindrance to personal autonomy. The Constitution guarantees freedom of thought against state actions, allowing persons to articulate a view or to remain silent.[15] The Court in *Wooley* recognized that governing majorities cannot impose mainstream political ideas on disfavored groups.[16] All the Justices weighed conflicting interests, even those who were in dissent and partial concurrence.[17]

In *Barnette* and *Wooley*, the Court rejected governments' efforts to compel parties to adopt viewpoints contrary to their political or religious leanings. The same principles against authoritarian intrusion would be suppression of philosophical or historical speech. These are protected against state intrusion by the First Amendment. The State lacks authority to require autonomous actors to recite official views about national loyalty and military readiness.

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7. 319 U.S. 624 (1943).
8. *See* NIFLA v. Becerra, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring).
9. *Barnette*, 319 U.S. at 641–42.
10. *Id.* at 642.
11. 430 U.S. 705, 706–07 (1977).
12. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 573 (2005) (Souter, J., dissenting).
13. *Wooley*, 430 U.S. at 713.
14. *Id.* at 717.
15. *Id.* at 714.
16. *Id.* at 715.
17. *Id.* at 718 (White, J., joining and dissenting in part).

Elsewhere, the Court found against a State's effort to require the news media to print content against its independent, journalistic choice. *Miami Herald Publishing Co. v. Tornillo* was tied to guaranteed press freedoms; therefore, the case involved competing First Amendment interests. The Court struck a statute that had required a newspaper to provide political candidates space on its pages and opportunity to rebut and reply to previous columns that criticized or attacked them. Such a law interfered with the newspaper's editorial discretion.[18] A news outlet, the Court found, can determine the format, timing, substance, and publishing needs concerning "public issues," including those dealing with "public officials."[19] Justice White, in concurrence, even more clearly explained that "the balance struck by the First Amendment with respect to the press" required society to "take the risk that occasionally debate on vital matters will not be comprehensive and that all viewpoints may not be expressed."[20] As with earlier cases, the Court was concerned about enforcement of a law that dictated core content about political subjects.

Less convincing was the reasoning behind *Riley v. National Federation of the Blind of North Carolina, Inc.* In that case, the majority relied on strict scrutiny to hold unconstitutional a state's charitable solicitation law, which had limited how much fundraisers could budget toward overhead costs.[21] This opinion balanced the state interest in preventing donor fraud against fundraisers' speech concerns. Key to the majority's holding was the finding that the State's method of eliminating fraud was not narrowly tailored.[22] The opinion relied on the free speech values of personal expression and of "free and robust debate."[23] The majority's concern was with state policies that threatened to chill charities' discussions about personal or political matters.

Riley does not, however, make clear that its holding is geared against autocratic public policy, as was the case in *Barnette* and *Wooley*. Indeed, contrary to the Court's reasoning in *Riley*, self-government, and more narrowly the donors' right to transparency,[24] might require public disclosures about how charitable contributions are to be invested.

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18. Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 254–55, 258 (1974).
19. *Id.* at 258.
20. *Id.* at 260 (White, J., concurring).
21. 487 U.S. 781 (1988).
22. *Id.* at 789.
23. *Id.*
24. And, here, I am thinking of arguments about audiences' First Amendment rights to receive information. *See* Toni M. Massaro & Helen Norton, *Siri-Ously? Free Speech Rights and Artificial Intelligence*, 110 NW. U.L. REV. 1169, 1173 (2016); ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 23 (2012) ("Within public discourse, by contrast, the First Amendment ascribes autonomy equally to speakers and to their audience, so that the rule of caveat emptor applies. . . . This contrast is quite stark, and it is the single most salient pattern of entrenched First Amendment doctrine."); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 448–450 (1996) (critiquing the audience-based approach); Ronald K.L. Collins, *Pissing in the Snow: A Cultural Approach to the First Amendment*, 45 STAN. L. REV. 783, 792 (1993) (reviewing JAMES B. TWITCHELL, CARNIVAL CULTURE: THE TRASHING OF TASTE IN AMERICA (1992) ("In today's commercial America, television represents the democratization of

The *Riley* majority was stalwart in disfavoring censorship but provided little guidance for deciding why some forms of compelled messages—including warnings on cigarette labels,[25] disclosures of securities offerings,[26] and labels on flammable children's garments[27]—raise no First Amendment concerns. Inadequate methodological guidance has led to opportunistic First Amendment lawsuits.[28] In the most recent cases, as we will shortly see, the Court invoked the compelled speech doctrine to strike regulations whose intent was to protect privacy, advance collective bargaining, and disseminate healthcare information.[29] The libertarian trend in compelled speech doctrine has become a means for the Roberts Court to hold unconstitutional laws with only an incidental effect on speech.[30]

II. CATEGORIES AS DEREGULATORY TOOLS

The Court's recent deregulatory reliance on compelled speech doctrine is ideologically consistent with other libertarian trends in First Amendment jurisprudence. Formalistic uses of judicially created categories inadequately weigh broader legal contexts of economic regulations requiring unwilling parties to display or communicate messages. This Part reviews how a wooden use of the compelled speech doctrine has failed to adequately weigh other relevant and important government policies, including medical privacy, consumer protection, and labor relations.

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discourse; it is the majoritarian medium that not only echoes, but in a real sense *is* a voice of the masses.") (emphasis in original)).

25. 15 U.S.C. §§ 1331–40; R.A.V. v. City of St. Paul, 505 U.S. 377, 422 (1992) (Stevens, J., concurring); *see* Donald W. Garner & Richard J. Whitney, *Protecting Children from Joe Camel and His Friends: A New First Amendment and Federal Preemption Analysis of Tobacco Billboard Regulation*, 46 EMORY L.J. 479, 563 (1997).

26. 15 U.S.C. § 77aa; 15 U.S.C.A. § 77g; Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976).

27. 16 C.F.R. § 1615.5; 16 C.F.R. § 1615.31(b).

28. *See* Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1624–25 (2015) (discussing opportunistic uses of free speech lawsuits to challenge antitrust, criminal solicitation, criminal conspiracy, and other laws).

29. Professor Massaro provides an invaluable list of contrasting factors for analyzing the continuum of government and speech interests. Toni M. Massaro, *Tread on Me!*, 17 UNIV. PA. J. CONST. L. 365, 415–17 (2014).

30. When viewed in context, lack of balance belies the Court's stated commitment to avoiding First Amendment findings preventing incidental burdens on speech. *Compare* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2346 (2020) (contrasting incidental regulations of speech and content-based restrictions), and *id*. at 2347 ("'the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech'") (quoting Sorrell v. IMS Health Inc., 564 U.S. 552, 567 (2011)), *with id.* at 2360 (describing restraints on speech that do not raise compelling government interests, including, "drug labels, securities forms, and tax statements") (Breyer, J., concurring and dissenting in part).

A. Anti-Regulatory Trends in Compelled Speech Doctrine

The anti-authoritarian norm of compelled speech doctrine that emerged from *Barnette*, which prevented government from imposing its political orthodoxy, has morphed into something quite different, a doctrine that business litigants rely on to make deregulatory arguments. *Pacific Gas & Electric Co. v. Public Utilities Commission* struck down a requirement that a utility company's mailings include "political editorials, feature stories on matters of public interest, tips on energy conservation, and straightforward information about utility services and bills."[31] Nowhere did the Court weigh the countervailing public concern for flora and fauna conservation, environmental information, and public utility regulation. The adoption of the highest standard of review dismissed California's and other states' explanation for why a substantial need existed in communicating with utility ratepayers. Billing envelopes were used to "inform customers of proposed rate hikes and public hearings without challenge. Public utilities have also been required to enclose important information concerning conservation programs, federal tax law, and other public service-oriented information."[32] Such notices directed at consumers were consistent with the marketplace of ideas principle that additional information tends to advance, not contract, free speech rights.

Instead of deferring to the exercise of police power to regulate a state-made energy monopoly, the Court protected the company's right to profit from greater energy consumption. With the majority characterizing the case in the speech bucket, the Public Utilities Commission's order failed to meet the almost insurmountable strict scrutiny standard. The interest of the audience in receiving environmental and consumer-oriented news from the regulatory actor plays no role in the majority's decision. Rather than identifying whether the State's interest in public welfare was substantial enough to warrant allowing for the inclusion of factual consumer information, the Court required a finding of compelling government interest and narrowly tailored means.[33] The majority treated the public utility's mailings not as commercial messages but as core free speech.

The deregulatory free speech doctrine recognizes but a few historic categories of unprotected communications that need not meet the highest burden of proof.[34] I review it first and then explain where and how it has been determinative in compelled speech jurisprudence. The categorical rule to First Amendment jurisprudence appears in cases like *United States v. Alvarez*, where the plurality rejected a balancing approach, proffering only a few low value "historic and traditional categories" of speech subject to regulation, including in this list defamation and true threats.[35] The

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31. 475 U.S. 1, 1 (1986).

32. Amicus Brief in Support of Appellees at 19–20, Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1 (1986) (No. 84-1044).

33. *Pac. Gas & Elec. Co.*, 475 U.S. at 19 ("Notwithstanding that it burdens protected speech, the Commission's order could be valid if it were a narrowly tailored means of serving a compelling state interest.").

34. *See* United States v. Stevens, 559 U.S. 460, 472 (2010) (announcing that there is no "freewheeling authority to declare new categories of speech outside the scope of the First Amendment").

35. 567 U.S. 709, 717 (2012) ("In light of the substantial and expansive threats to free

author of the concurrence to *Alvarez*, on the other hand, would have wanted greater thoroughness rather than the plurality's "strict categorical analysis."[36] Those categories, as Justice Breyer put it in a concurrence to another case, can be "outcome-determinative."[37] His approach represents a more discerning form of reasoning that is focused on public policies rather than judicially created categories.[38]

Reed v. Town of Gilbert adopted a categorical rationale rather than engaging in thorough vetting of legal concerns giving rise to a regulation affecting individual's messages. Justice Thomas for the majority wrote that strict scrutiny applies to all content-based regulations.[39] The decision's absolute-sounding statement is misleadingly opaque. The same categorical statement of content regulations being subject to strict scrutiny appears in the more recently decided *Barr v. American Association of Political Consultants*.[40] This Article argues that simple categories should be rules of thumb that must be understood contextually, weighing speech against day-to-day regulation of economic, health, safety, and labor policies. Laws with an incidental effect on speech are distinct from state-imposed, orthodox messages about political, personal, scientific, or philosophical matters.[41] Judgments should be "fully reasoned, public explanations that are subject to public and professional scrutiny."[42] Categorical rules do not accomplish that level of interpretive articulation. The *Reed* majority's expansion of the strict scrutiny doctrine to all content-based regulations[43] overlooks many content-based restrictions that raise no

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expression posed by content-based restrictions, this Court has rejected as 'startling and dangerous' a 'free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing of relative social costs and benefits.'") (alterations in original) (quoting *Stevens*, 559 U.S. at 470).

36. *Id.* at 730 (Breyer, J., concurring).

37. Iancu v. Brunetti, 139 S. Ct. 2294, 2306 (2019) (Breyer, J., concurring).

38. *Id.* at 2304 (Breyer, J., concurring) ("I would place less emphasis on trying to decide whether the statute at issue should be categorized as an example of 'viewpoint discrimination,' 'content discrimination,' 'commercial speech,' 'government speech,' or the like.").

39. Reed v. Town of Gilbert, 576 U.S. 155, 156 (2015) ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech."); *see also* Williams-Yulee v. Fla. Bar, 575 U.S. 433, 457 (2015) (relying on strict scrutiny analysis to uphold a content-based limitation on judicial candidate speech).

40. Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2346 (2020) ("Content-based laws are subject to strict scrutiny.").

41. I am adopting this list from a formulation of five Justices on the United States Supreme Court. *See* United States v. Alvarez, 567 U.S. 709, 731–32 (2012) (Breyer, J., concurring, joined by Justice Kagan) ("Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and the like raise such concerns, and in many contexts have called for strict scrutiny."); *id.* at 751 (Alito, J., dissenting, joined by Justice Scalia & Thomas) ("[T]here are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech. Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern would present such a threat.").

42. Barry Sullivan, *Law and Discretion in Supreme Court Recusals: A Response to Professor Lubet*, 47 VAL. U. L. REV. 907, 909 (2013).

43. *Reed*, 576 U.S. at 170–72.

First Amendment concerns. In a concurrence, Justice Breyer conceded that "content discrimination, as a conceptual tool, can sometimes reveal weaknesses in the government's rationale for a rule that limits speech." Breyer went on to explain that a strong presumption that strict scrutiny applies to all content-based restrictions goes too far.[44] Another concurrence, written by Justice Kagan, listed the many types of permissible signage laws that are content-based but are not subject to strict scrutiny analysis, including those marking historical sites, favoring blind crossings and hidden alley signs, and beautifying highways by limiting areas of postings.[45]

Reed's blanket statement about review of regulations that impact speakers' expressive contents became, in short order, a weapon for deregulatory,[46] anti-abortion,[47] and libertarian efforts.[48] Opportunistic reliance on the First Amendment has also become a litigation strategy in challenges to a variety of economic laws, such as the Security and Exchange Commission's financial disclosure requirements; gambling laws; therapeutic counseling; franchise agreements; hygienic, professional rules; and labor disclosures, including details on filing grievances, negotiating, and arbitrating disputes.[49]

In the area of commercial speech regulations, the Court has recently sided with advertisers whose data retention practices were challenged for divulging private patient and subscribing physician information. In *Sorrell v. IMS Health, Inc.*, the Court held that the First Amendment protects pharmaceutical manufacturers' acquisition and curation of private records of prescriptions, acquired from unwilling physicians and non-consenting patients.[50] Rather than give due weight to state concern about the harms to consumers' privacy from the marketing of such information, the Court characterized the issue as being about sharing commercial information, which elevated the review to heightened scrutiny. As in the *Lochner* era, the court used freedom of contract—as between pharmacies that mine data and

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44. *Id.* at 176 (Breyer, J., concurring).

45. *Id.* at 180 (Kagan, J., concurring).

46. *See* Janus v. Am. Fed'n of State, Cnty, & Mun. Emps., 138 S. Ct. 2448, 2501 (Kagan, J., dissenting) (accusing the majority of "weaponizing the First Amendment"); NIFLA v. Becerra, 138 S. Ct. 2361, 2382 (stating that medical professionals opposed to regulations "generally speaking" do not "have a right to use the Constitution as a weapon"); Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1393 (2017) (demonstrating that "corporations use the First Amendment as a deregulatory weapon, urging courts to strike down structural and economic regulations as violations of their speech rights").

47. Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights:* NIFLA v. Becerra, 94 N.Y.U. L. REV. 61, 119 (2019) (arguing that in recent years "the Court's all male, conservative guard" have pursued an "anti-reproductive rights agenda").

48. *See Janus*, 138 S. Ct. at 2501 (Sotomayor, J., dissenting) (expressing alarm that "the majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy").

49. *See* Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1614–15 (2015) (listing examples of how plaintiffs rely on the First Amendment in litigation challenges to social regulation); 29 U.S.C. § 158(d) (requiring that employers negotiate in "good faith"); NLRB v. Katz, 369 U.S. 736, 743 (1962).

50. 564 U.S. 552 (2011).

corporate pharmaceutical purchasers of the information—to strike consumer regulation. As Shoshana Zuboff might say, by "flying the banner of 'private property' and 'freedom of contract,' much as surveillance capitalists march under the flag of freedom of speech," the Court risks the "conflation of industry regulation with 'tyranny' and 'authoritarianism.'"[51] In order to adopt that analysis, the Court played down concerns voiced by medical societies and professionals who argued that data mining companies would use the prescription records to pressure physicians into prescribing more expensive medicines than those that were clinically indicated or simply more affordable.[52] Patients whose information was subjected to resale lacked any transparency about how their information would be used by third parties not involved in their medical care. The statute was meant to disincentivize commercial vendors from profiting on the resale of medical histories to pharmaceutical manufacturers. The *IMS Health, Inc.* majority labeled marketing strategy "speech" that warranted heightened scrutiny.

The majority's singular focus on first-order free speech concerns gives inadequate weight to second-order private and social concerns. Relying on a categorical presumption that accurate marketing information is good for consumers, the Court struck a law against acquiring data without the data subjects' consent.[53] Neither did the Court in *IMS Health, Inc.* give adequate constitutional weight to at least a limited notion of the constitutional right of privacy.[54]

Another case to review and strike commercial regulation with an incidental effect on speech, *Expressions Hair Designs v. Schneiderman*, penned by Chief Justice Roberts and joined by a mixed liberal and conservative majority, further demonstrates the dominant libertarian strain in American free speech doctrine. Merchants claimed their speech was affected by New York's prohibition against imposing a surcharge on credit card sales.[55] They asserted that the law required them to label prices contrary to their commercial interests and, hence, intruded against their free speech. The case could have been decided on the basis of precedent that found there were "material differences between disclosure requirements and outright prohibitions on speech."[56] The statute required the posting of truthful information relevant to consumers.

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51. SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM 106–07 (2019).

52. The Court discounted out of hand the state's extensive legislative record that demonstrated that "[i]f prescriber-identifying information were available . . . then detailing would be effective in promoting brand-name drugs that are more expensive and less safe than generic alternatives." *IMS Health, Inc.*, 564 U.S. at 576; *see also id.* at 597 (Breyer, J., dissenting) ("Vermont compiled a substantial legislative record to corroborate this line of reasoning.").

53. The marketplace of ideas doctrine stems from one of the most seminal of all the free speech cases, *Abrams v. United States*. *See* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). For a critique of this doctrine see Alexander Tsesis, *Balancing Free Speech*, 96 B.U. L. REV. 1, 8–11 (2016).

54. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (finding privacy is protected in the context of contraceptives used by married couples).

55. 137 S. Ct. 1144 (2017); *see* N.Y. GEN. BUS. LAW § 518 (McKinney 2021).

56. Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 650 (1985).

The law was not ideologically driven, nor did it require merchants to adopt state-sponsored views on commerce or sales. The majority nevertheless found the state's credit card swipe fee law censored protected expression, rather than simply governed commercial transactions subject to intermediate scrutiny. The Court's bright line test of content neutrality should have deferred to legislative authority over economic conduct.[57] The opinion, furthermore, failed to articulate the appropriate level of scrutiny to use on remand.

The novel conclusion that the regulation on credit card surcharges was subject to First Amendment review because it required merchants to alter how they communicate prices seems to render suspect virtually all laws on how pricing signs are displayed. The opinion is unhinged from anti-authoritarian norms in *Barnette*. The New York statute required no adoption of political, nationalistic, religious, or otherwise ideological views.[58]

The holding and reasoning in *Expressions Hair Design* threaten to upend a variety of laws compelling private party speech for various economic, social, and police power reasons. No heightened scrutiny applies to regulations that require merchants to label toilets;[59] refrigerators, air conditioners, water heaters, and other electronic consumer goods;[60] "Rx only" prescription drugs;[61] alcoholic beverages likely to cause birth defects tied to pregnant women's drinking;[62] hazardous substances to be kept out of reach of children;[63] markings on commercial vehicles;[64] pharmaceuticals;[65] tobacco cartons;[66] bank titles;[67] and Federal Deposit Insurance Corporation notifications.[68]

The difference between core free speech and commercial regulation is better identified through a balance of speech, countervailing concerns, means-ends analysis, First Amendment principles against government orthodoxy, and alternative opportunities for communication. Reasoned decision-making should thus be

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57. *See IMS Health, Inc.*, 564 U.S. at 567 (holding that "restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct").

58. GEN. BUS. § 518. The Supreme Court held section 518 to be a speech regulation. It had provided that "[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1147 (2017).

59. *See, e.g.*, § 37:98. Gender Neutral Bathrooms, Comprehensive, 1C MATTHEWS MUNICIPAL ORDINANCES § 37:98 (3d ed.); Equitable Restrooms Act, Pub. L. No. 101-0165, 410 ILL. COMP. STAT. 35/25 (2020).

60. 42 U.S.C. §§ 6292, 6294.

61. 21 U.S.C. § 353(b)(4)(A).

62. 27 U.S.C. § 215(a).

63. 15 U.S.C. § 1261(p)(1)(J)(i).

64. 49 C.F.R. § 390.21 (2020).

65. 21 C.F.R. § 201.56 (2020).

66. Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1333.

67. 18 U.S.C. § 709.

68. 12 U.S.C. § 1828(a)(1)(B) ("Each sign required under subparagraph (A) shall include a statement that insured deposits are backed by the full faith and credit of the United States Government.").

systematic, not categorically deaf to the nuanced legal values, policy priorities, and prudential constraints of regulations with incidental effects on expressive conduct.

B. Conflicting Constitutional Concerns

The Court's libertarian leanings in its free speech analyses gloss over nuanced rationales behind the enforcement of economic and regulatory compelled speech. The Court's reliance on an autonomy-based doctrine on protected speech glosses over conflicts of constitutional proportion. Dean Erwin Griswold argues that balancing is a "comprehensive" or "integral approach" that "accepts the task of the judge as one which involves the effect of all the provisions of the Constitution, not merely in a narrow literal sense, but in a living, organic sense, including the elaborate and complex governmental structure which the Constitution . . . has erected."[69]

Lack of balance leads to one-sided opinions that give inadequate weight to countervailing legal interests. The discordant issue of abortion, for example, has met a free speech doctrine now extending to healthcare regulations. That sub-doctrine of compelled speech glosses over constitutional concerns about constitutional privacy. That dignity interest has, since *Roe v. Wade*, been understood to be the basis for a woman's right to discontinue a pregnancy, especially prior to fetal viability.[70] Later cases, like *Planned Parenthood v. Casey*[71] and *Gonzales v. Carhart*,[72] have chipped away at that right, but, for now at least—with *Whole Women's Health v. Hellerstedt*[73] and *June Medical Services L.L.C. v. Russo*[74] it remains intact. The Court has also instrumentalized the compelled speech doctrine against a state effort to inform pregnant women of prenatal options.

Despite the obvious substantive due process concern for health, a majority in *National Institute for Family & Life Advocates v. Becerra* (*NIFLA*) only tangentially mentioned the constitutional privacy of deciding whether to abort. Justice Thomas, writing for the majority, relied on the First Amendment to strike a law meant to prevent unlicensed pregnancy crisis centers from misleading pregnant clients who sought prenatal advice.[75] The Court also struck the provision requiring unlicensed crisis center employees to inform clients that they lacked a medical license.[76] Here

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69. Erwin N. Griswold, *Absolute Is in the Dark—A Discussion of the Approach of the Supreme Court to Constitutional Questions*, 8 UTAH L. REV. 167, 173 (1963).

70. *See* 410 U.S. 113, 152 (1973).

71. 505 U.S. 833 (1992).

72. 550 U.S. 124 (2007).

73. 136 S. Ct. 2292 (2016).

74. 140 S. Ct. 2103 (2020).

75. 138 S. Ct. 2361 (2018); CAL. HEALTH & SAFETY CODE §§ 123471–123472. The Circuit Court had found that California passed the statute to provide information to pregnant women that they were "using the medical services of a facility that ha[d] not satisfied licensing standards set by the state" and that they "often present[ed] misleading information to women about reproductive medical services." Nat'l Inst. of Fam. & Life Advocs. v. Harris, 839 F.3d 823, 843 (9th Cir. 2016), *rev'd sub nom*. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018).

76. *NIFLA*, 138 S. Ct. at 2377–78. Prof. Caroline Mala Corbin writes of how compelled licensing disclosures "further the decisional autonomy of their audience by preventing potential deception." Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277,

again, the majority drew on the categorical rule against content regulation found in *Town of Gilbert*,[77] but after laying out the argument, the *NIFLA* majority nevertheless did not explicitly adopt strict scrutiny to review posting requirements at unlicensed pregnancy centers,[78] leaving that issue for later resolution but strongly hinting that it favored that level of review.[79] Justice Thomas perfunctorily held that intermediate scrutiny sufficed to strike the regulation.[80] The Court held unconstitutional the State of California's Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act ("FACT Act"), a legislative requirement to provide pregnant women truthful information about where to seek state services for prenatal care. The requirement to post health information counteracted unlicensed crisis centers' endeavors to dissuade and coerce women from seeking to exercise their private right to obtain an abortion.[81] Many women who sought unlicensed clinics' services were unaware of their reproductive choices and susceptible to misinformation.[82]

The majority, however, rejected use of the "lower level of scrutiny," which the Court had earlier relied on in professional speech cases, such as *Zauderer v. Office of Disciplinary Counsel*. The latter case controls when courts review regulations that require "purely factual and uncontroversial information."[83] Under this lower standard, the First Amendment prevents chilling speech against "unjustified or unduly burdensome disclosure requirements," but "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the

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1349 (2014).

77. *NIFLA*, 138 S. Ct. at 2371.

78. *Id.* at 2375.

79. *See* 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, 1409 (2019) (discussing *NIFLA*'s standard of review).

80. *NIFLA*, 138 S. Ct. at 2375–77.

81. NARAL PRO-CHOICE CAL. FOUND., UNMASKING FAKE CLINICS: AN INVESTIGATION INTO CALIFORNIA'S CRISIS PREGNANCY CENTERS (2015), https://www.prochoiceamerica.org/wp-content/uploads/2018/03/NARAL-Pro-Choice-CA-Unmasking-Fake-Clinics-2015.pdf [https://perma.cc/5XDZ-AWR8] (stating that years of investigations demonstrated that crisis pregnancy centers "only have one agenda: stop any woman from accessing abortion care, regardless of her situation").

82. *See* Chemerinsky & Goodwin, *supra* note 47, at 71.

83. Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio, 471 U.S. 626, 651 (1985); *NIFLA*, 138 S. Ct. at 2375; Shannon M. Roesler, *Evaluating Corporate Speech About Science*, 106 GEO. L.J. 447, 505 (2018) ("Many courts and commentators have treated the *Zauderer* 'reasonable relationship' test as a highly deferential test similar to rational basis review."); Lili Levi, *A "Faustian Pact"? Native Advertising and the Future of the Press*, 57 ARIZ. L. REV. 647, 681 (2015) (asserting that the test in *Zauderer* is "akin to rational basis review"); Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 883 (2015) ("Because commercial speakers retain 'minimal' First Amendment interests, *Zauderer* does not employ the specific vocabulary of 'rational basis' review, which would have suggested extreme judicial deference. It instead adopts terminology that unequivocally locates judicial review further toward the deferential end of the spectrum than the intermediate scrutiny authorized by *Central Hudson*.").

State's interest in preventing deception of consumers."[84] The Court in *Zauderer* determined that under the First Amendment the State could prohibit deception, but not advice about specific legal views.[85] The Court emphasized consumers' interest in receiving accurate information.[86] But *Zauderer* also extends to mandatory advertising disclosure requirements, such as the obligation for debt relief agencies to identify themselves, to "correct perceived abuses."[87]

Contrary to the majority's characterization in *NIFLA*, the factual disclosure requirements provided women with factual information and prevented crisis centers from giving them misleading advice. That legislative policy was consistent with the marketplace of ideas doctrine's stress on the right to disseminate and learn information. Requiring their posting was not authoritarian but communicative, and therefore consistent with free speech principles.

Those factual disclosures were critical to the social context of the FACT legislation. Crisis pregnancy centers purposefully sought to mislead women into believing they were entering a medical facility by obfuscating names, dressing staff in medical garb, mimicking the administrative operations of medical offices, and advertising in portions of telephone directories under "abortion services" and "health services."[88]

The reasoning in *NIFLA* was inconsistent with the Court's earlier holding in *Planned Parenthood of Southeast Pennsylvania v. Casey*,[89] which upheld a statute requiring "truthful, nonmisleading information about the nature of the abortion procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus."[90] In *Casey*, Justice O'Connor's joint opinion recognized that the State's mandate implicated physicians' First Amendment right not to speak. A majority of Justices nevertheless upheld the requirement to provide truthful healthcare information.[91] The Pennsylvania provision required not only informed consent but also mandated physicians to disclose a list of adoption agencies.[92]

In his dissent to *NIFLA*, Justice Breyer found unconvincing any meaningful distinction between a law "requir[ing] a doctor to tell a woman seeking an abortion about adoption services" and a statute mandating "a medical counselor to tell a

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

85. *Id.* at 638, 644, 649, 655–56.

86. *Id.* at 651 ("[W]arning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.") (quoting *In re* R.M.J., 455 U.S. 191, 201 (1982)).

87. *See* Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 231–34 (2010) (upholding disclosure requirement for "debt relief agencies" imposed by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005).

88. Corbin, *supra* note 76, at 1340–41.

89. 505 U.S. 833 (1992); *The Supreme Court — Leading Cases*, 132 HARV. L. REV. 277, 351 (2018) ("The Court fundamentally undermined its previous commercial speech doctrine, which allowed compelled disclosures in order to protect consumer interests, and advanced one side in the abortion debate by carving out a convoluted exception to its previous medical-disclosure cases.").

90. 505 U.S. at 882.

91. *See id.* at 884.

92. *Id.* at 881.

woman seeking prenatal care or other reproductive healthcare about childbirth and abortion services."[93] The majority did not satisfactorily answer Breyer's rhetorical question about the incongruity of the Court's holdings in those two cases.[94]

As often occurs in First Amendment jurisprudence, the Court invoked a convenient rule of decision to explain away an inconsistency. The contrast was stark in its divergent treatment of a law designed to sow doubt among women in California seeking to exercise their choice of privacy and obtain prenatal services.[95] Professor Frederick Schauer explains that these types of doctrinal inconsistencies and indeterminacies are based on realist considerations, rather than any semblance of purely legal analysis.[96] Categories of decision can compromise judicial subtlety, modesty, and objectivity.[97] They often appear result-oriented.

Little subtlety was on display in the ruling to *NIFLA*. California aimed to inform women who were visiting a pregnancy crisis center that no medical staff was on premises. At pregnancy centers with licensed medical staff, the state's mandated message informed indigent women of available counseling about obstetric services, including "family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women."[98] The FACT Act appeared narrowly tailored and proportional to ensure "that pregnant women in California know when they are getting medical care from licensed professionals."[99] The Act was clear that it was advancing women's knowledge of "their rights and the health care services available to them."[100] Neither licensed nor unlicensed facilities were required to counsel women on the State's message and they continued to enjoy ample alternative channels for communications. Nothing was stopping them from voicing their opposition to pregnant clients about the public notices or more generally to oppose abortion explicitly as a matter of principle.

Justice Thomas in *NIFLA* was selective in targeting laws designed to inform pregnant women of prenatal choices, including abortion. The majority ignored the many, legitimate, and uncontroversial local, state, and federal disclosure requirements with incidental effects on communications.[101] His distinction was

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93. 138 S. Ct. 2361, 2385 (2018) (Breyer, J., dissenting).

94. *See NIFLA*, 138 S. Ct. at 2361.

95. Frederick Schauer, *Not Just About License Plates:* Walker v. Sons of Confederate Veterans*, Government Speech, and Doctrinal Overlap in the First Amendment*, 2015 SUP. CT. REV. 265, 266 (2015) (demonstrating that "doctrinal multiplicity pervades the law . . . but it appears especially salient with respect to the First Amendment").

96. *Id.* at 298.

97. In *Iancu v. Brucetti*, the Court relied on the content/act dichotomy to strike a provision of the Lanham Act. By categorizing the challenged provision as speech, the Court elevated its jurisdiction to render a libertarian opinion. The "immoral" and "scandalous" provisions of the law, the majority held, constitute unconstitutional viewpoint discrimination. 139 S. Ct. 2294, 2299 (2019). Even though trademarks are entitlements that do not limit speech but only provide benefits to recipients, the Court treated them as free speech to strike that portion of law.

98. *NIFLA*, 138 S. Ct. at 2369.

99. *Id.* at 2368–70 (internal quotation marks omitted).

100. *Id.* at 2369 (quoting 2015 Cal. Legis. Serv. Ch. 700, § 2 (A.B. 775)).

101. In his dissent, Breyer pointed out that virtually any disclosure law would be unconstitutional under the majority's reasoning. *NIFLA*, 138 S. Ct. at 2380 (Breyer. J.,

content-based rather than objective. The Court's selection of the compelled speech category was fatal to the regulation. It might have done a more thorough job through contextual analysis of a law requiring a professional service to post public health information. The majority instead treated the requirement to publish information about the availability of free prenatal services as viewpoint discrimination. This went against the doctrinal grain of *Zauderer* since requirements to provide truthful professional information are ordinarily not subject to First Amendment heightened review.[102]

For all its formalistic tangle, the Court failed to balance the competing interests of the clinic's speech, the government's professional standards, and the privacy of women who accidently entered a crisis center rather than a medical facility. The Court's opinion in *NIFLA* articulates why the informational signs about prenatal care were unconstitutional, compelled speech.[103] Yet, the crisis centers were not required to adopt the State's message, nor were they prevented from counseling clients to put newborns up for adoption rather than to seek an abortion. Rather than weighing competing constitutional interests, the Court relied on a categorical version of compelled speech doctrine as a deregulatory rule of decision.[104]

C. Free Riders' Speech

In *Janus v. American Federation of State, County, & Municipal Employees*, the Court did not bother with the niceties of stare decisis, and instead relied on exacting scrutiny to overturn analogous, recent precedent.[105] The Justices reviewed an Illinois law that compelled non-unionized public employees to pay union agency fees for collective bargaining.[106] The *Janus* majority overruled *Abood v. Detroit Board of Education*, which, to the diametric contrary, had found no First Amendment violation

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dissenting). For a short list of disclosure regulations, see *supra* text accompanying notes 97–98.

102. Zauderer v. Off. Of Disciplinary Couns. of Supreme Ct. of Ohio, 471 U.S. at 626, 651 (1985).

103. *NIFLA*, 138 S. Ct. at 2371.

104. *Compare* Gitlow v. New York, 268 U.S. 652, 666 (1925) (incorporating the First Amendment of the United States), *and* Griswold v. Connecticut, 381 U.S. 479 (1965) (finding the privacy right to marital contraception), *with* Eisenstadt v. Baird, 405 U.S. 438 (1972) (defining unmarried people's contraception right of privacy), *and* Roe v. Wade, 410 U.S. 113 (1973) (protecting women's compelling privacy right to abortion services).

105. 138 S. Ct. 2448, 2465 (2018). For this premise Justice Alito relied on precedent dealing with commercial subsidization of speech. *Id.* (citing Knox v. Serv. Emps. Int'l Union, 567 U.S. 298, 310 (2012)) ("Under 'exacting' scrutiny, we noted, a compelled subsidy must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'"). The majority went through a modified analysis of stare decisis based on factors Justice O'Connor announced in *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992) (asserting that the Court determines whether to overturn precedent based on "a series of prudential and pragmatic considerations," including workability, extent of reliance, legal developments, and altered circumstances). Ultimately, Justice Alito wrote that the *Abood* decision was poorly reasoned and unworkable. *Janus*, 138 S. Ct. at 2460–79.

106. *Janus*, 138 S. Ct. 2448; 5 ILL. COMP. STAT. 315/6(e) (2021).

in a provision to a bargaining agreement that required non-unionized workers to pay dues for collective bargaining but did not subject them to fees for unrelated "ideological activities."[107] The Court found that even non-members whose views were incompatible with the union's political lobbying nevertheless shared much of the same interests in obtaining fair wages, conditions, and benefits as members of the public employee union.[108] Therefore, an exclusive bargaining representative was suitable for advancing their mutual interests.[109]

In overruling the forty-year-old *Abood* precedent, the Court found that bargaining for employee benefits was permeated with public-sector unions' expressive activities.[110] The *Janus* majority found the distinction between them, made by the earlier case, to be unworkable. This was consistent with the old adage that "the notion that economic and political concerns are separable is pre-Victorian."[111] The Court in *Janus*, therefore, applied "exacting scrutiny" standard to its review of compelled agency fees, which the Court explained was not as demanding as the strict standard of scrutiny.[112] The Court's reasoning was that, while a complete dichotomy between economics and politics was not possible, unions lobbying for political reform or in support of candidates was not the same as bargaining on behalf of workers.

The first prong of *Janus*'s exacting scrutiny test required the government to show compelling state interest. The Court presumed Illinois satisfied it by aiming to achieve conditions conducive to "labor peace."[113] Yet the Court in *Janus* did not adopt the typical "least restrictive means" applicable to strict scrutiny; rather, it held Illinois had the burden of proving that compelling interest could not be "achieved through means significantly less restrictive of associational freedoms."[114] As an example of a regulation less restrictive of associational freedoms, the Court referred to the federal statutory scheme for U.S. Postal Service employees, which relied on a unified voice on wages, hours, and other conditions of employment without requiring the assessment of agency fees from unwilling workers.[115]

In her dissent to *Janus*, Justice Kagan reframed the issue. Rather than relying on exacting scrutiny, Justice Kagan pointed out that public employers have "substantial latitude to regulate their employees' speech—especially about terms of employment" needed to effectively operate in the workplace.[116] Just as a private firm, Justice Kagan

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107. 431 U.S. 209, 236 (1977).

108. *See id.* at 229–30 ("Public employees are not basically different from private employees; on the whole, they have the same sort of skills, the same needs, and seek the same advantages.").

109. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1625 (2018) ("The NLRA provides rules for the recognition of exclusive bargaining representatives.").

110. *See Janus*, 138 S. Ct. at 2464 (asserting that collective bargaining has "powerful political and civic consequences") (quoting Knox v. Serv. Emps., 567 U.S. 298, 310–11 (2012)).

111. Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 814 (1961) (Frankfurter, J., dissenting).

112. *Janus*, 138 S. Ct. at 2465. The Court found that exacting scrutiny lies between strict scrutiny for pure speech and intermediate scrutiny for commercial speech. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 2466; *see, e.g.*, 5 U.S.C. §§ 7102, 7111, 7114.

116. *Janus*, 138 S. Ct. at 2487 (Kagan, J., dissenting).

wrote, when it acts as an employer, the government "has a wide berth" to regulation expression concerning "the terms and conditions of employment."[117] In its collective bargaining, the union was acting in its traditional role "as exclusive bargaining representative" that carried "the duty fairly and equitably to represent all employees of the craft or class, union and nonunion."[118] Agency fees had to be reviewed within the context of labor negotiations needed to exercise "workaday economic and regulatory policy,"[119] not through a less refined categorical approach, which placed collective bargaining at nearly the same level as core First Amendment expressions about politics, philosophy, social sciences, the arts, and history.[120]

Justice Kagan would have used intermediate scrutiny, applicable to other cases dealing with public employees.[121] That balancing approach, she argued, was applicable to collective bargaining because both public-sector union cases and those concerning public employees dealt with speech regulated by government employers.[122]

The First Amendment safeguards individual and public expressions, uninhibited by government orthodoxies. That principle emerged with the early cases reviewed in Part I of this Article. As in other areas of constitutional law, government is prohibited "from abusing [its] power, or employing it as an instrument of oppression."[123] Courts regard compelled speech regulations to be suspect because of their potential to distort speakers' opinions. The Court in *Janus* found that a collective bargaining mandate forces an unwilling party to adopt arguments of a state-sponsored union; in so doing, the majority adopted a categorical view of free speech that virtually ignored the countervailing government and worker interests to bringing a unified voice to the bargaining table. The Court put its thumb on the speech of free riders, to the detriment of unified labor negotiation.

The *Janus* majority found the Court's earlier distinction in *Abood* between collective bargaining and "ideological activities" to be unworkable.[124] As in other areas of free speech doctrine, the Supreme Court is guided by a libertarian strain of free speech that finds no difference between the First Amendment treatment of economic speech from quintessential forms of creative communications about

117. *Id.* at 2493 (Kagan, J., dissenting).

118. Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 761 (1961).

119. *Janus*, 138 S. Ct. at 2501–02 (Kagan, J., dissenting).

120. *See* United States v. Alvarez, 567 U.S. 709, 731–32 (2012) (Breyer, J., concurring) ("Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and the like raise such concerns, and in many contexts have called for strict scrutiny."). For an extensive discussion about core protected speech, see Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015, 1027–42 (2015).

121. The public employees' speech has evolved through *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); *Garcetti v. Ceballos*, 547 U.S. 410 (2006); and *Lane v. Franks*, 573 U.S. 228 (2014).

122. *See Janus*, 138 S. Ct. at 2493 (Kagan, J., dissenting) ("*Abood* and *Pickering* raised variants of the same basic issue: the extent of the government's authority to make employment decisions affecting expression. And in both, the Court struck the same basic balance, enabling the government to curb speech when—but only when—the regulation was designed to protect its managerial interests.").

123. Davidson v. Cannon, 474 U.S. 344, 348 (1986).

124. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 236 (1977).

ideologies, politics, theories, and tastes.[125] The majority's "exacting scrutiny" standard[126] rendered the regulation of agency dues subject to a rigid test that would have been more appropriate to the review of government employer's suppression of views, thoughts, and association prerogatives.

D. Compelled Messages and Government Spending

Constitutional issues arise when a federal subsidy is conditioned on a private party's adoption, integration, or fusion of an ideological government message, not a regulation on economic conduct or on the conditions of employment. When the First Amendment becomes a judicial trump to regulation no matter how important the legislative intent, the analysis can overlook the complexity of the various legal priorities. This Section seeks to further demonstrate that true conflicts of constitutional priorities require proportional judicial assessments, even when free speech concerns are at stake. A case study helps to illustrate the point.

In the 2013 case, *Agency for International Development v. Alliance for Open Society International, Inc. I (AOSI I)*, the Court invalidated a policy requiring recipients of federal public funding to adopt a message expressing a governmental viewpoint.[127] *AOSI I* found unconstitutional a federal law—United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act ("Leadership Act")—mandating recipients and affiliates to explicitly oppose prostitution and sex trafficking.[128] Plaintiffs were domestic recipients of grants who believed the law would undermine their outreach to provide prostitutes with legal private services.

The Court found unconstitutional the provision requiring recipients to renounce prostitution,[129] but the majority ignored the relevance of Congress's Spending Clause power to at least require recipients to renounce human trafficking. The latter portion of the statute was tied to federal policy against sexual slavery and child abduction.

The policy against human trafficking was not only connected to public spending[130] and other federal statutes[131] but also to the Thirteenth Amendment,[132] a

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125. *See* Alexander Tsesis, *Marketplace of Ideas, Privacy, and the Digital Audience*, 94 NOTRE DAME L. REV. 1585, 1597 (2019) (discussing the distinction between commercial speech and ideas, facts, philosophies, or tastes).

126. *See Janus*, 138 S. Ct. at 2465. The Court found that exacting scrutiny lies between strict scrutiny for pure speech and intermediate scrutiny for commercial speech. *See id. See also* Clay Calvert, *Is Everything a Full-Blown First Amendment Case After* Becerra *and* Janus*? Sorting Out Standards of Scrutiny and Untangling "Speech as Speech" Cases from Disputes Incidentally Affecting Expression*, MICH. ST. L. REV. 73, 127 (2019).

127. 570 U.S. 205 (2013). *Cf.* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (finding unconstitutional a flag solute requirement); Wooley v. Maynard, 430 U.S. 705, 717 (1977) (holding it unconstitutional to require people to carry a government message on personal property).

128. 570 U.S. 205, 208 (2013); *see also* 22 U.S.C. § 7601.

129. *AOSI I*, 570 U.S. at 217–19.

130. *See* U.S. CONST. Art. I, § 8, Cl. 1.

131. *See, e.g.*, 8 U.S.C. § 1232 (adopting international treaty against child abduction); 18 U.S.C. §§ 1591, 1595 (criminalizing sex trafficking).

132. Kathleen Kim, *The Thirteenth Amendment and Human Trafficking: Lessons & Limitations*, 36 GA. ST. UNIV. L. REV. 1005, 1011–12 (2020) (discussing how the "[Trafficking

matter entirely overlooked in *AOSI I*. Balancing the interests of speech and the countervailing government interest in combating modern day slavery should have come into play. Professor Akhil Amar points out that the Thirteenth Amendment shifted the constitutional paradigm, including the significance of the First Amendment.[133] The Thirteenth Amendment prohibition against slavery and involuntary servitude[134] made no appearance in the Court's opinion to *AOSI I*.[135]

Taking the matter purely from a free speech perspective, the Agency for International Development lacked constitutional basis for requiring Alliance for Open Society International to ideologically renounce prostitution. Balancing, however, should also have grappled with congressional authority found in Section 2 of the Thirteenth Amendment over human trafficking.

On the one hand, the Court's reasoning in *AOSI I* is grounded in jurisprudence that prohibits government to burden speech and impose ideological orthodoxy. That principle of free speech, which stems from the reasoning in *Barnette*, must figure in any balancing. Individuals and associations enjoy freedom in "politics, nationalism, religion, or other matters of opinion."[136] But that right is not vacuous; rather, it should be understood within the intersectional context of the Constitution. The Court in *AOSI I* overlooked the equally pressing constitutional mandate against slavery and human trafficking. Had the Court carefully weighed the Leadership Act's anti-trafficking purposes it might have connected its anti-trafficking provision to the Thirteenth Amendment's prohibition against slavery and involuntary servitude.[137]

The single-minded focus on speech appears also in the 2020 follow-up, *Agency for International Development v. Alliance for Open Society International, Inc. II* (*AOSI II*). The later case also adhered to formalism rather than contextual

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Victims Protection Act's] definition follows previous Thirteenth Amendment enforcement legislation intended to prevent perpetrators from extracting labor or services from others through unlawful means").

133. *See* Akhil Reed Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 155–60 (1992).

134. *See* Jones v. Alfred H. Mayer, 392 U.S. 409, 443–44 (1968) (holding that Section 2 of the Thirteenth Amendment grants Congress the power to rationally enforce laws against the incidents of slavery or involuntary servitude); *see also* Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009 (2020) (holding that the but-for test applies to statutory interpretation of a law passed by congressional Thirteenth Amendment powers). 42 U.S.C. § 1981.

135. *AOSI I*, 570 U.S. 205 (2013).

136. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

137. *See* Trafficking Victims Protection Act, 22 U.S.C. §§ 7101–7112; *see also* Alexander Tsesis, *Gender Discrimination and the Thirteenth Amendment*, 112 COLUM. L. REV. 1641, 1690 (2012) (discussing Congress's authority to pass the Trafficking and Violence Protection Act of 2000); Rebecca E. Zietlow, *James Ashley's Thirteenth Amendment*, 112 COLUM. L. REV. 1697, 1712 (2012) (mentioning reliance on Thirteenth Amendment to prevent "exploitation of women in the sex trafficking industry"); William M. Carter, Jr., *The Thirteenth Amendment, Interest Convergence, and the Badges and Incidents of Slavery*, 71 MD. L. REV. 21, 26 (2011) ("The most successful aspect of modern Thirteenth Amendment jurisprudence has been its extension to contemporary instances of coercion, such as human trafficking, involuntary confinement, and forced labor."); Kim, *supra* note 132, at 1006.

balancing.[138] As before, at play were federal policies against human trafficking and viewpoint discrimination. This time around, the Court held that under the U.S. Constitution, foreign organizations and citizens do not enjoy the same degree of free speech protections. As to non-U.S. entities receiving federal grants, the First Amendment does not prevent the federal government from compelling the adoption of an explicit statement against prostitution and anti-trafficking.[139] Rather than engage in the constitutional balance that would examine free speech and anti-trafficking norms as they pertain to foreign nationals and organizations,[140] the Court simply concluded that "it is long settled as a matter of American constitutional law that foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution."[141] Certainly, the Thirteenth Amendment is inapplicable in the later case because by its very terms it applies only "within the United States, or any place subject to their jurisdiction."[142] This dichotomy on *AOIS* I and *AOIS* II helps to illustrate how context matters.

III. CONTEXT, BALANCE, DOCTRINE

The Supreme Court's failure to contextualize and balance speech against countervailing values raised in *IMS Health, Inc.*, *Janus*, and *NIFLA* places hurdles, impeding privacy, labor, and health regulations. Such holdings have more to do with the Court's libertarian leanings than core speech protected under the First Amendment, which include ideas of politics, philosophy, history, and aesthetics.[143] These cases overturn regulatory policy by categorical references to a concept of speech that goes well beyond the anti-autocracy principle found within *Barnette* and *Wooley*. That anti-authoritarian framework differentiates between core speech and "workaday economic and regulatory polic[ies]."[144] The judicial check against

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138. *See* Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 140 S. Ct. 2082, 2099–2100 (2020) (Breyer, J., dissenting) (stating that the majority relied on categorical reasoning in claiming foreign citizens can be barred from constitutional protections of speech).

139. *See id.* at 2085.

140. One unanswered question, relevant in the context of a foreign entity receiving U.S. funding, is the extent to which the jurisdictional clause of the Thirteenth Amendment limits congressional power. *See* U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

141. *AOSI II*, 140 S. Ct. at 2086 (Breyer, J., dissenting). Furthermore, foreign corporations, the Court stated, have long been regarded to be separate from their U.S. affiliates, "[I]t is long settled as a matter of American corporate law that separately incorporated organizations are separate legal units with distinct legal rights and obligations." *Id.* at 2087. Justice Breyer in dissent questioned both these premises of the majority.

142. U.S. CONST. amend. XIII.

143. *See* United States v. Alvarez, 567 U.S. 709, 731–32 (2012) (Breyer, J., concurring) ("Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and the like raise such concerns, and in many contexts have called for strict scrutiny."); *see id.* at 751 (Alito, J., dissenting) ("Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern would present such a threat.").

144. *See* Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., 138 S. Ct. 2448, 2501 (2018)

government compunction to adopt its ideology remains foundational to compelled speech doctrine.

A doctrine first developed to prevent the State from interfering with private opinions, political freedoms, religious convictions, and press freedoms has morphed into a legal tool for challenging economic, health, and labor regulations.[145] Where other fundamental rights are at stake—be they privacy, equality, or association—contextual judicial analysis should balance free speech concerns, countervailing interests and objectives, alternatives for communication, fit of regulation with the stated objective and doctrine, and whether the regulation is authoritarian in repressing core communications. Formalistic free speech analysis is coarse and imprecise. It renders constitutionally suspect a range of activities from securities and antitrust laws, health warnings on labels, and signage in places of public accommodation. This Part seeks to examine how contextual reasoning could enrich compelled speech jurisprudence.

A. A Balance of Legal Interests

Any comprehensive view of speech in the United States raises heightened concerns about government intrusion into the autonomy of private and political actors. Not all content regulations, however, are subject to strict scrutiny. What's more, neither tobacco ads nor antitrust laws receive anything but rational basis scrutiny, even though they undeniably compel expressive content. Antitrust regulation favors anti-monopolism and tobacco warning regulation favors public health. These are not matters raising concerns about ideological suppression, which would give rise to the highest level of scrutiny. However, a balanced analysis should apply when communications are incidentally affected by important policies on matters of substantial government interest in the regulation of commerce and healthcare. Proportionality is more open to judicial reflection on relevant anti-authoritarian principles protected by the First Amendment, but it distinguishes protected speech of a personal and public nature from commercial regulations.[146]

Interpretation requires courts to review constitutional contexts. As Justice Sotomayor pointed out in her dissent to *Manhattan Community Access Corporation v. Halleck*, the context in which a statement is uttered should be considered along with the actual words allegedly in violation of a law.[147] Contrary to the U.S. Supreme Court's oft repeated claim, which, as we already saw, appears in cases such as *Reed v. Town of Gilbert*, not all content-based restrictions on speech require judges to

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(Kagan, J., dissenting).

145. *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004).

146. This form of judicial analysis is consistent with traditional equitable interpretation of public law dating back to the national founding. *See* Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 2, 22 (2020) (discussing public law interpretation in the late eighteenth and early nineteenth centuries meant to effectuate the purposes of constitutional principles).

147. *See* 139 S. Ct. 1921, 1936 (2019) ("When a person alleges a violation of the right to free speech, courts generally must consider not only what was said but also in what context it was said.").

engage in the highest level of review. In the words of Justice Breyer, in a partial concurrence and partial dissent to *Iancu v. Brunetti*, categorical rules of free speech doctrine are "rules of thumb." Choosing an interpretive scheme—be it "commercial speech," "government speech," or similar doctrine—rather than weighing countervailing government interests creates outcome-determinative rules. As with other doctrinal categories, those used in compelled speech analyses are necessary starting points but should not be used to obfuscate judicial reasoning.

In *NIFLA*, Justice Kennedy in concurrence regarded the public health notice to be a form of viewpoint discrimination.[148] The majority concluded more narrowly that "professional speech" is not a lesser-protected category of speech.[149] From either perspective, a woman's fundamental right to privacy did not weigh into these analyses. The challenge is to articulate an approach that is flexible enough to be contextual yet rigorous enough to provide judges with guidance on what factors are most weighty. An examination of whether words on politics, philosophy, art, social sciences, and history is important to selecting the highest standard of review.[150]

In a series of decisions, Justice Breyer offered a four-part balancing approach to smoke out issues relevant to contextual analysis.[151] He would balance interests where the regulation does not interfere with a fundamental concern. Conflicts are inevitable between the values of speech, safety, privacy, intellectual property, national security, education, and many other matters that arise during free speech litigation. An eminent free speech proponent, Alexander Meiklejohn, likewise conceived the First Amendment to be part of a broader constitutional guarantee of liberty:

> In our discussions of the Constitution, we commonly think that the clearest and most compelling expression of the "idea" of political freedom is given by the First Amendment. But in theory, and perhaps in practice, more penetrating insights are given by the Preamble's declaration that "We, the people of the United States . . . do ordain and establish this Constitution . . . ," or by the Tenth Amendment's assertion that, while we have delegated some limited governing powers to our agents, we have reserved other powers to ourselves, or, finally, by the provision of Article I, Section 2, that we have authority to exercise direct governing power in electing our representatives.[152]

Jurisprudence would do well to harken to broader constitutional principles such as those found in the Preamble to the Constitution and the Declaration of

148. 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring).

149. *Id.* at 2371–72.

150. Whether a particular judicial decision is consistent with the values of deliberative democracy should variously be judged by synthetic considerations of authoritative text, the priorities of representative government, doctrinal reflections, informational values, structural considerations, and rational applications of existing laws. Categories are useful starting points of analysis. Behind judicial categories, however, should be principles of free speech protection, especially self-government, self-expression, and the search for truth.

151. United States v. Alvarez, 567 U.S. 709, 730 (2012) (Breyer, J., concurring).

152. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 264 (1961).

Independence.[153] The Free Speech Clause is relevant to autonomous dignity, representative government, and equal rights to identify underlying constitutional principles relevant to the resolution of cases challenging regulations on compelled speech grounds. However, other constitutional principles may well present conflicting values that a court must evaluate on balance.

Justice Breyer, in his concurrence to *Alvarez*, argued for relying on factors of proportionality. His suggestion applies to cases "warrant[ing] neither near-automatic condemnation (as 'strict scrutiny' implies) nor near-automatic approval (as is implicit in 'rational basis' review)."[154] His proportionality test would apply to cases not involving core protections, which rely on the highest level of scrutiny—including, self-government and aesthetics. Nor is the test pertinent to the review of purely economic regulation, but to expressive harms with an incidental effect on constitutionally relevant speech. He would "examine the fit between statutory ends and means."[155] This would uncover "speech-related harms, justifications, and potential alternatives."[156] Justice Breyer found the Court "has taken account of the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision's countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so."[157]

Breyer's proposed test allows for nuance, context, and balancing. Professor Alexander Aleinikoff calls this the "age of balancing," as the "predominant method of constitutional interpretation."[158] In the compelled speech area, following *Barnette* and *Wooley*, a court should be particularly suspect of regulations requiring private parties to adopt ideological messages. Health, consumer protection, and safety regulations should be treated differently, however. Those three are areas that governmental police powers typically provide discretion to advance the general welfare on local, state, and federal levels. General welfare is a constitutional norm mandated in the Preamble to the United States Constitution.

The First Amendment guarantees humans entitlement to exercise the innate right to articulate personal, civic, or descriptive thoughts. The right to express ideas freely, therefore, is not a grant from government. It is rather an inborn right, call it innate and unenumerated. The First Amendment mandates the maintenance of safeguards against arbitrary government compunction that interferes with self-expression.

The core aims of the First Amendment are to protect open assertion, discourse, and debate. But the Roberts Court's reliance on compelled speech doctrine perceives all expressions, except a few low-value categories, as monolithic categories,[159] which

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153. *See* ALEXANDER TSESIS, CONSTITUTIONAL ETHOS 34–85 (2018) (writing of how the Declaration of Independence and Preamble have affected U.S. constitutionalism).

154. 567 U.S. at 730–31 (Breyer, J., concurring).

155. *Id.* at 730.

156. *Id.*

157. *Id.*

158. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 944 n.2 (1987); *see also* Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 160 (2008) (arguing that proportionality is regarded to be "a foundational element of global constitutionalism").

159. Alexander Tsesis, *The Categorical Free Speech Doctrine and Contextualization*, 65

led libertarian-leaning majorities to strike a public health disclosure law in *NIFLA*, a collective bargaining law in *Janus,* and a consumer protection statute in *Expressions Hair Design*. This categorical doctrine, which subjects to heighted review laws with incidental effects on speech, leads to judicial deregulation from the bench. The Court found unconstitutional laws that compel disclosure of retail charges,[160] professional information,[161] and labor negotiations.[162] The plasticity of compelled speech doctrine has shifted from government imposition of ideological views to government imposition of rules on matters within the legitimate and traditional functions of government.

B. Primary and Secondary Concerns

When a judge selects what line of precedents fit a case, he or she is neither engaged in a straightforward, obvious, nor particularly transparent endeavor that the text of the First Amendment can obviously answer.[163] Even where the First Amendment is of primary judicial concern, considerations of secondary relevance often have an important role to play in adjudication. These concerns of secondary relevance are what, in a different context, Justices O'Connor, Kennedy, and Souter called, "a series of prudential and pragmatic considerations."[164] As Frederick Schauer has pointed out, judges routinely (and sometimes, I would add, calculatingly) select doctrinal frameworks—be they public forum, designated public forum, limited public forum, unconstitutional conditions, or some other doctrine—to justify contingent judgments and make them appear obvious, objective, and straightforward.[165] In order to give first-order free speech decisions the appearance of content neutrality, the Supreme Court often fails to flesh out second-order issues pertinent to the resolution of a case.

I am here relying on Joseph Raz's distinction between first-order and second-order judgments.[166] The former help resolve disputes intrinsic to a case, such as those involving free speech concerns, while the latter provide more general reasoning for judicial outcomes. His definition differs somewhat from mine, perhaps because his

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EMORY L.J. 495, 506 (2015).

160. Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1152 (2017).

161. *See generally* NIFLA v. Becerra, 138 S. Ct. 2361 (2018).

162. *See* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., 138 S. Ct. 2448, 2486 (2018).

163. The Court has

> reject[ed] the view that freedom of speech and association, as protected by the First and Fourteenth Amendments, are 'absolutes,' not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment.

Konigsberg v. State Bar of Cal., 366 U.S. 36, 49 (1961) (citation omitted).

164. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992).

165. Frederick Schauer, *Not Just About License Plates: Walker v. Sons of Confederate Veterans, Government Speech, and Doctrinal Overlap in the First Amendment*, 2015 SUP. CT. REV. 265, 265–66.

166. JOSEPH RAZ, PRACTICAL REASONS AND NORMS 39–40, 46–47 (Princeton Univ. Press 1990) (1975) (discussing first-order and second-order reasons).

work emerges from the British legal system with its scattered constitutional provisions, rather than a unified, written constitution as in the United States. By "second-order judgments," I refer to general constitutional structure or enumerated provisions and implicit powers that arise in cases directly or indirectly implicating speech.

Second-order rules provide broad proportional insights relevant to the resolution of a dispute involving expressive conduct. This was true in *Virginia v. Black*, where the Court discussed the meanings of the burning cross to the Ku Klux Klan. This helped to contextualize the plurality's reliance on the true threats doctrine.[167] Similarly, *Barnette* eloquently drew on historical examples—of Roman repression of Christianity, Inquisition extremes to stamp out dissent, and the Soviet Union repression to maintain totalitarianism—to highlight humanity's grave knowledge of oppressive censorship and political orthodoxy.[168]

Recent compelled speech decisions, to the contrary, have relied on a categorical, fairly outcome determinative, method of interpretation. Factors of historical, structural, normative, and prudential significance are often lost in the forward march of libertarian doctrine. Lack of transparency is evident also in other areas of the First Amendment. For instance, the Court's reliance on the government speech doctrine in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.* stands on shaky ground.[169] As Professor Mary-Rose Papandrea points out, the decision has dangerous implications in a variety of other areas of free speech jurisprudence.[170] In that case, the Court calls private logos on license plates state speech.[171] Consequently, the state can choose what viewpoint to place on license plates.[172] But behind the opinion is a second-order consideration, one that should have been communicated: a state need not accept applications to display a badge of oppression, such as the Confederate battle flag.[173]

Elsewhere, the categorical reading of the First Amendment held unconstitutional the Animal Crush Video Act without engaging in second-order reasoning in *United States v. Stevens*.[174] In this case, the Court elevated speech above the second-order value against animal cruelty, which all fifty states and the District of Columbia

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167. *See* Virginia v. Black, 538 U.S. 343, 359–60 (2003).

168. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943).

169. 576 U.S. 200 (2015).

170. *See* Mary-Rose Papandrea, *The Government Brand*, 110 NW. U. L. REV. 1195, 1198 (2016) (dissecting *Walker* and examining its dangerous implications to matters "from student speech rights to government employees to advertisements on public transportation").

171. *Walker*, 576 U.S. at 214.

172. *Id.* at 207 ("When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.").

173. For an extensive discussion of confederate symbols and monuments as badges of slavery under the Thirteenth Amendment, see Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539 (2002); Alexander Tsesis, *Confederate Monuments as Badges of Slavery*, 108 KY. L.J. 695 (2019).

174. 559 U.S. 460, 468 (2010) (relying on a judicially created scheme of low value speech categories). For a critique of the *Stevens* majority's analytical framework, see Alexander Tsesis, *Multifactoral Free Speech*, 110 NW. U. L. REV. 1017, 1021–24 (2016); Alexander Tsesis, *The Categorical Free Speech Doctrine and Contextualization*, 65 EMORY L.J. 495, 506–14 (2015).

adopted into their policies.[175] The case was decided exclusively on the basis of free speech principles against viewpoint discrimination without giving any weight to the obvious national commitment to stop sadistic violence perpetrated against animals. A lone dissenter gave any serious attention to animal welfare.[176]

The Court often cites *Reed v. Town of Gilbert* for the doctrine that strict scrutiny applies to content-based laws,[177] and then, after finding a law to be content based, applies that rigorous analysis without adequately assessing the primary speech and secondary policies at stake.[178] The Court has relied on the *Reed* strict scrutiny standard in a variety of free speech cases—including the compelled speech area of First Amendment law—to strike regulations without looking at second-order values.[179] As Part II argued, greater balance should have been consequential in review of women's privacy in *NIFLA*, associational rights in *Janus*, and business fraud law in *Expressions Hair Design*.

Relying on strict scrutiny whenever a regulation requires businesses, employers, and even employees to adopt norms of professional speech dismisses legitimate incidental second-order legal concerns. In addition, the Roberts Court's formalism in the compelled speech area treats economic and professional regulations as if they were core First Amendment values.[180] The First Amendment's Free Speech Clause "gives each citizen an equal right to self-expression and to participation in self-government."[181] But it has become an arrow in the quiver of opportunistic litigation strategies designed to challenge economic and workaday regulations.[182]

IV. CONCLUDING THOUGHTS: PROPORTIONALITY BEYOND COMPELLED SPEECH

The categorical application of rules to all forms of compelled disclosure regulations risks oversimplifying complex legal disputes. Discourse about "political, social, and other public issues," as then Justice Rehnquist put it, have a greater First Amendment value "than the decision of a particular individual as to whether to

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175. *Stevens*, 559 U.S. at 491 (Alito, J., dissenting) ("All 50 States and the District of Columbia have enacted statutes prohibiting animal cruelty.").

176. *Id.* at 491–99 (Alito, J., dissenting).

177. 576 U.S. 155, 163–64. The rigidity of *Reed*'s algorithmic analysis of content regulations was determinative in a plurality relying on its absolute holding that judges should rely on strict scrutiny whenever reviewing content regulations. *See* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335 (2020).

178. *See* NIFLA v. Becerra, 138 S. Ct. 2361, 2371 (2018)

179. *See, e.g.*, *id.* (striking a compelled speech law); *Barr*, 140 S. Ct. at 2346–47 (relying on strict scrutiny to strike the "debt-collection" provision of the Telephone Consumer Protection Act); Matal v. Tam, 137 S. Ct. 1744, 1765 (2017) (plurality opinion) (finding unconstitutional the "disparaging" clause of the Lanham Act).

180. *See generally*, Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015 (2015) (discussing leading theories of First Amendment interpretation).

181. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 783 (1985) (Brennan, J., dissenting).

182. Examples of this legal strategy opportunistically relying on the First Amendment are found in Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1619–20 (2015).

purchase one or another kind of shampoo."[183] Openly weighing private and public interests, means-ends analysis, constitutional norms against ideological orthodoxy, and alternative speech assessment of how to achieve legitimate regulatory policy is critical to judicial transparency, public scrutiny, and predictability of free speech jurisprudence.[184]

It should be readily acknowledged that balancing is not without its own risks. As with categorical reasoning, proportionality can be oversimplified and exploited for ideological purposes. Justices on the right and left of the ideological spectrum agree that the First Amendment primarily protects expressions of self-government, self-expression, and edification. These constitutionally recognized forms of core free speech differ from commercial communications, which may be important to audiences but lack the same compelling First Amendment interests. Regulations on areas of law that have traditionally been left to states—including healthcare, consumer protection, labor, and safety regulations—should not be treated on a par with speech guaranteed under the Free Speech Clause.

Categories are essential rules of thumb,[185] but they should not be substitutes for judicial reasoning. Each case, as Justice Brennan wrote, requires "careful consideration of the actual circumstances surrounding such expression."[186] Context is essential to fair adjudication of cases. Instead of weighing relevant interests, the Roberts Court discounted regulatory interests in *Expressions Hair Designs*, *NIFLA*, and *Janus*. The laws struck in those cases did not require merchants, pregnancy crisis centers, or unions to adopt the government's social or political ideologies.

The contextual method this Article calls for is by no means novel. Professor Vicki Jackson concludes that proportionality offers "some hope for more careful, and open, reasoning about constitutional values."[187] Balanced analysis of constitutional values is the staple of interpretation throughout the world. European countries, including Germany and Estonia, and distant countries as diverse as Canada, New Zealand, South Africa, Israel, and Switzerland rely on proportionate analysis.[188]

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183. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 787 (1976) (Rehnquist, J., dissenting).

184. For example, the Court has said that free speech adjudication depends on a careful balance "between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 568 (1968). Furthermore, *Cohen v. California*, 403 U.S. 15 (1971), established a classic test for protecting speech through balancing of factors. The Court has also relied on balancing in symbolic speech cases, among others. *See* United States v. O'Brien, 391 U.S. 367, 376–77 (1968).

185. Iancu v. Brunetti, 139 S. Ct. 2294, 2304 (2019) (Breyer, J., concurring and dissenting in part) ("I believe we would do better to treat this Court's speech-related categories not as outcome-determinative rules, but instead as rules of thumb.").

186. Texas v. Johnson, 491 U.S. 397, 409 (1989) (finding unconstitutional a flag burning statute).

187. Vicki C. Jackson, *Being Proportional About Proportionality*, 21 CONST. COMMENT. 803, 834 (2004) (book review).

188. Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 74 (2008); Carlos Bernal Pulido, *The Migration of Proportionality Across Europe*, 11 N.Z. J. PUB. & INT'L L. 483, 499 (2013).

Balanced adjudication examines the fit of a statute to private and public interests at stake in a case. Proportionality recognizes analytic particularity based on the specific regulation and its effect on communication. Judicial reasoning in the compelled speech area should be transparent where conflicting legal interests are at play, not based on the perfunctory absolute statement of *Reed* on speech and content neutrality. The highest scrutiny should be reserved for open debate, personal expression, and the quest for knowledge. Free speech principles should be analyzed on balance, however, with policies for apprising consumers about accurate product costs, directing patients to state available medical assistance, and bargaining for terms of public employment.

Judges in European Union countries rely on proportionality as an adjudicatory principle meant to establish reasonable constitutional limits.